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Neal Steven Schelberg

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ILLINOIS BRICK AND CONSUMER ACTIONS:
THE PASSING OVER OF THE PASSING-ON DOCTRINE

The Supreme Court has frequently construed Congress' intent in enacting the antitrust laws in favor of a policy of broad enforcement. Indeed, the Court has asserted that "[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress." In effectuating this policy of enforcement, Congress has promulgated a seemingly broad statute. Section 4 of the Clayton Act (section 4) provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The language of this statute is sufficiently comprehensive to achieve its dual goal of (1) compensation to victims of antitrust violations and (2) deterrence of future violations. The Court has


One commentator has noted the argument that the purpose of the antitrust laws is to increase consumer wealth. Posner, Antitrust Policy and the Consumer Interest, 15 ANTITRUST BULL. 361, 361 n.3 (1970) (citing Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (pt. 1), 74 YALE L.J. 775 (1965)). This argument may be an overstatement, because it announces a result rather than expresses the congressional intent. However, to the extent that a price-fixing conspiracy results in an inflated price to the consumer either directly, for example, when the consumer purchases from the manufacturer, or indirectly, for example, when the consumer purchases through one or more middlemen, a greater expense is incurred. By effective enforcement of the antitrust laws, the theory is that there will be a concomitant promotion of competition which will result in lower prices. See generally Comment, Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws, 43 S. CAL. L. REV. 570, 571 (1969) [hereinafter cited as Comment, 43 S. CAL. L. REV.].


noted that "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."5

Section 4, however, does not entitle all classes of persons harmed by violation of the antitrust laws to recover damages. The statutory language itself imposes limitation by requiring that a person be "injured in his business or property" and that the damages occur as a result "of anything forbidden in the antitrust laws."6 But given the objectives of the statute and the policies it seeks to implement, "the constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done."7

The Supreme Court in Illinois Brick Co. v. Illinois,8 however, has construed section 4 to mean that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property.'"9 By so holding, the Court has effectively removed from the purview of section 4 an entire class of consumers who do not purchase directly from the manufacturer.10

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9. Id. at 2081.
10. Consumers may be classified into three categories: (1) immediate consumers or direct purchasers who normally act as middlemen, reselling either the same goods or a refined product to another consumer, see, e.g., Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968): "But § 4 has another purpose in addition to deterring violators and depriving them of 'the fruits of their illegality' . . . . [I]t is also designed to compensate victims of antitrust violations for their injuries." Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2081 (1977).

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The impact of this decision is far-reaching. It establishes a rule whereby direct purchasers who have not suffered any injury because they have “passed-on” the illegal overcharge to their customers, that is, indirect consumers,\textsuperscript{11} can recover. At the same time, the Court has denied a remedy to the persons who in many instances bear the “brunt of the antitrust injuries.”\textsuperscript{12} This inequitable situation, which often presents a direct purchaser with a windfall profit,\textsuperscript{13} was defended by the Court on policy grounds\textsuperscript{14} and on


The distinction among the three classes is useful in determining consumer standing issues. See notes 60 \& 61 infra and accompanying text. However, because the Court in \textit{Illinois Brick} did “not address the standing issue,” Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2066 n.7 (1977), the analysis of the various classes of consumers insofar as it relates to standing will not be adopted in this note.

\textsuperscript{11} The amount of overcharge that can be passed-on to a direct purchaser is a function of the relative elasticity or inelasticity of demand in the relevant market. If the market is perfectly inelastic, the burden of the increase will fall wholly upon the buyer because the demand for the product will not diminish as a function of increased price. In an elastic market, however, the demand will decrease as the price of the product is increased. As a result, a direct consumer will either have to absorb the increased cost or decrease his volume. See R. Posner, \textit{Antitrust Cases, Economic Notes and Other Materials} 147-49 (1974). Although a direct purchaser will probably never be able to pass on the entire increase, it is equally improbable that he will have to absorb the entire increase. Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2076-77 (1977) (Brennan, J., dissenting) (citing R. Posner, supra at 147-49).

One commentator has asserted that an overcharge imposed by a monopolist or price-fixer can be characterized as a tax. Consequently, tax incidence theory can be employed to determine when and to what extent a direct purchaser can transfer the burden of the overcharge to his own customers by charging a higher price. Schaeffer, \textit{Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis}, 16 WM. & MARY L. REV. 893, 887 (1975).

\textsuperscript{12} Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2076 (1977) (Brennan, J., dissenting). The House of Representatives reported:

The economic burden of many antitrust violations is borne in large measure by the consumer in the form of higher prices for his goods and services. This is especially true of such common and widespread practices as price-fixing, which usually result in higher prices for the consumer, regardless of the level in the chain of distribution at which the violation occurs.


\textsuperscript{13} It has been argued that if a windfall profit is to be realized, it is better that the innocent purchasers should receive it rather than defendants, the antitrust violators. See Atlantic City Elec. Co. v. General Elec. Co., 226 F. Supp. 59, 70 (S.D.N.Y. 1964). See generally Comment, 72 COLUM. L. REV., supra note 10, at 411 n.103. However, the court in Atlantic City Elec. Co. v. General Elec. Co., 226 F. Supp. 59 (S.D.N.Y. 1964), noted: “Were the consumers a proper party in these proceedings, it
grounds of stare decisis.\textsuperscript{15}

The Court’s decision is irreconcilable with its expressed desire to maintain the viability of the private antitrust suit as both a deterrent to violations and as an aid to governmental policing of the antitrust laws.\textsuperscript{16} The decision must also be viewed critically in light of the recent Hart-Scott-Rodino Antitrust Improvements Act of

 might be urged by defendants that the Court should equitably distribute the damages between the utilities and the consumers . . . .” \textit{Id.} at 70. Yet the court here cited a subsequent footnote, footnote 41, in which cases were cited which held that ultimate consumers of electricity have no standing to sue the electrical equipment manufacturers. \textit{Id.} But these cases were all decided in 1962 or 1963; the prevailing law, as stated in Illinois v. Ampress Brick Co., 536 F.2d 1163, 1164-65 (7th Cir. 1976), rev’d sub nom. Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 (1977), is that “ultimate consumers may recover for violations of the Sherman Act.” \textit{Id.} at 1165.

Moreover, in some instances a direct purchaser may actually collude with the manufacturer and benefit economically from the illegal overcharge. See Note, The Effect of Hanover Shoe on the Offensive Use of the Passing-on Doctrine, 46 S. CAL. L. REV. 98, 112 (1972) [hereinafter cited as Note, 46 S. CAL. L. REV.]. Thus, to permit a direct purchaser to recoup his losses, if any, sustained as a result of an illegal overcharge, and to further permit this class of purchasers to receive a windfall profit while denying truly injured consumers any form of relief, is a wholly inequitable result which Congress did not intend.

14. The Court in Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 (1977), expressed two important policy considerations in denying offensive passing-on: (1) the preservation of the effectiveness of the antitrust treble-damage action, \textit{id.} at 2069; and (2) the desire to insulate an antitrust violator from being exposed to the risk of multiple liability, \textit{id.} at 2067.

15. “In considering whether to cut back or abandon the \textit{Hanover Shoe} rule, we must bear in mind that considerations of \textit{stare decisis} weigh heavily in the area of statutory construction where Congress is free to change this Court’s interpretation of its legislation.” \textit{Id.} at 2070 (citations omitted). However, Mr. Justice Blackmun in dissent chided the majority for its “wooden approach,” asserting that “it is entirely inadequate when considered in the light of the Sherman and Clayton Acts.” \textit{Id.} at 2085 (Blackmun, J., dissenting). See text accompanying note 179 infra.

16. In discussing congressional policies in this area, the Court has stated:

It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney’s fee.

Bruce Juices, Inc. v. American Can Co., 330 U.S. 743, 751-52 (1947). \textit{See also} United States v. Borden Co., 347 U.S. 514, 518-19 (1954): “These private [injunction or treble damage actions under \textsection{4}] and public actions [government enforcement] were designed to be cumulative, not mutually exclusive.” Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203, 208 (7th Cir. 1964) (citation omitted): “Section 4 of the Clayton Act was designed not only to vindicate private wrongs but to aid enforcement of the antitrust laws. . . . The deterrent effect inherent in private treble damage actions would be destroyed if the non-liability rule for which defendants contend were recognized.” \textit{See generally} Hawaii v. Standard Oil Co., 405 U.S. 251, 252 (1972). \textit{Cf.} FTC v. Cement Inst., 333 U.S. 683, 694-95 (1948) (Sherman
This note will examine the rationales of the majority and the dissent with particular emphasis on the "passing-on" defense. The thesis of this note is that the Court has, in its search for consistency, departed from the principles articulated by congressional legislation and by the Court's prior decisions which have supported the private treble-damage remedy.

Hanover Shoe and the Defensive Use of the Passing-on Doctrine

Hanover Shoe

An analysis of Hanover Shoe, Inc. v. United Shoe Machinery Corp. is fundamental to an understanding of Illinois Brick and of the doctrine of passing-on. In Hanover Shoe a private treble-damage suit was brought by Hanover Shoe, a manufacturer and distributor of shoes, against United Shoe Machinery Corp. (United), a manufacturer of machinery needed for the manufacture of shoes. The complaint alleged that United had engaged in an unlawful monopolization of the shoe machinery industry in violation of section 2 of the Sherman Antitrust Act. In defense, United claimed...
that "the plaintiff [Hanover] had not been injured in its business as required by § 4 because it had passed on the claimed illegal overcharge to those who bought shoes from it."22 By contending that the proper party to sue was not the direct purchaser but rather the indirect purchaser, the defendant asserted, in effect, that the direct purchaser had suffered no legal injury for which it could recover under the antitrust laws.23 That is, "[t]he illegal overcharge was absorbed by the plaintiff's customers."24 The Court rejected the proffered defense25 as a matter of law subject to certain limited exceptions.26 Mr. Justice White writing for the majority flatly denounced the passing-on defense:


25. Prior to Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968), the only Supreme Court decision to deal with passing-on in an antitrust context was Keogh v. Chicago & Nw. Ry., 260 U.S. 156 (1922).
26. The Court in Hanover Shoe recognized two exceptions; however, the exception pertinent to discussion here is the preexisting cost-plus contract. (The other exception was price discrimination under the Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13, 13a, 13b, 21a (1970)). The Court's rationale in carving out these exceptions was that in either of these two situations, the problems of proving that a pass-on had occurred and the problems inherent in the ascertainment of the amount of the pass-on would not be present. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

A cost-plus contract is one in which the customer agrees to pay for the product plus a specified profit. If the increased costs are passed on to the direct purchaser's customer, it is readily apparent that the direct purchaser is not injured. See Pollack, Automatic Treble Damages and the Passing-On Defense: The Hanover Shoe Decision, 13 ANTITRUST BULL. 1183, 1188 (1968). See also Note, 46 S. CAL. L. REV., supra note 13, at 98, 108. For cases involving cost-plus contracts or analogous fixed markup arrangements, see Twin Ports Oil Co. v. Pure Oil Co., 119 F.2d 747 (8th Cir.), cert. denied, 314 U.S. 644 (1941); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971); Clark Oil Co. v. Phillips Petroleum Oil Co., 56 F. Supp. 569 (D. Minn. 1944), aff'd, 148 F.2d 580 (8th Cir.), cert. denied, 326 U.S. 734 (1945).
If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher. It is also clear that if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level, he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.27

_Judicial Economy_

The Court in _Hanover Shoe_ was concerned with the efficacy of the antitrust suit and the burden on the judicial system that this complex litigation inevitably causes. Mr. Justice White’s reasoning was based on the questionable assertion that the complexity of proof needed to prove passing-on would be “insurmountable.”28 Despite the evidentiary complexities inherent in the passing-on defense, Justice White reasoned that if this defense were available

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28. Justice White stated:
A wide range of factors influence a company’s pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist’s hypothetical model, is what effect a change in a company’s price will have on its total sales. Finally, costs per unit for a different volume of sales are hard to estimate. Even it if could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.

_Id._ at 492-93 (footnote omitted).
"defendants [would] frequently seek to establish its applicability." 29

The strain on the judicial system that would necessarily result when litigants sought to establish the defense was the ground for its rejection. The Court hypothesized that civil antitrust treble-damage actions would "often require additional long and complicated proceedings involving massive evidence and complicated theories." 30

In some instances, however, the direct purchaser's burden of proof in establishing an overcharge would be as difficult to establish as the burden on an antitrust defendant in proving a passing-on defense; 31 since in Hanover Shoe the plaintiff was able to meet his burden of proof on the damages issue without justifying the majority's fears of judicially overburdensome suits, it seems that the Court's concern was more hypothetical than real.

Moreover, as one commentator has suggested, 32 by viewing the overcharge as a tax, economic tax incidence theory 33 may be employed to determine "when and to what extent" a direct purchaser can pass-on the overcharge to its customers in the form of higher prices. 34 Economic tax incidence theory and other statistical and sampling methods 35 are tools that have been used to prove passing-on and other complex concepts. 36 Despite these sophisticated techniques for proving and measuring passing-on, there is

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29. Id. at 493.
30. Id. Yet such complicated proceedings would not necessarily be caused by the passing-on defense. "[T]his [inevitable complexity] may be said of almost all antitrust cases." Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2081 (1977). See also Comment, Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On, 123 U. PA. L. REV. 976, 983 (1975) [hereinafter cited as Comment, 123 U. PA. L. REV.]. For cases in which there were complex proof issues that did not prove insurmountable, see Reynolds Metals Co. v. FTC, 309 F.2d 223 (D. Cir. 1962); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954).
31. The task characterized as insurmountable by Mr. Justice White is "generally no more difficult or complex than the plaintiff's [the direct purchaser's] task of proving an overcharge in the first instance." Pollack, supra note 26, at 1210. A plaintiff (direct purchaser) in a treble-damage antitrust suit normally receives in damages the difference between what he paid and what he would have paid absent the antitrust violation. See Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 487 (1968).
32. Schaeffer, supra note 11, at 883, 887.
33. See note 11 supra.
34. Schaeffer, supra note 11, at 887.
still little doubt that an antitrust treble-damage suit will necessarily involve "long and complicated proceedings involving massive evidence and complicated theories." Yet the complexity of antitrust proceedings, especially in light of a trial judge's discretion to bar highly speculative or conjectural evidence, should not prevent an antitrust defendant from having an opportunity to rebut on the issues of injury and damages.38

39. See also note 1 supra and accompanying text.
41. It has been argued by one commentator that the two considerations relevant to this argument, that is, the insurmountability of proving a passing-on defense and the desire to prevent antitrust defendants from retaining the "fruits of their illegality," are inconsistent: "If the task would normally prove insurmountable, then obviously none of those defendants 'would retain the fruits of their illegality.'” Pollack, supra note 26, at 1208-09.
42. See Wheeler, supra note 38, at 1330-34.
left to indirect consumers. As a result of this concern, the Court rejected the passing-on defense as a matter of law. Thus, the Court implicitly elevated the direct purchaser to the “preferred position” for enforcing private antitrust suits. However, a number of factors militate against a direct purchaser suing the manufacturer who, it must be remembered, is also the direct purchaser’s supplier. This relationship often effectively precludes the direct purchaser from taking any action.

43. It is the indirect purchaser, bearing the financial impact of a price-fixing conspiracy “who benefits from the proper functioning of our free enterprise system.” H.R. REP. No. 499, 94th Cong., 2d Sess. 8 (1975), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572, 2577. See text accompanying note 1 supra. As a result of this tangible loss an indirect purchaser has a greater incentive to sue an antitrust defendant than a direct purchaser who, in most instances, wants to maintain good relations with the manufacturer. See also text accompanying note 45 infra. From a pure deterrence standpoint, it makes no difference who sues and obtains the judgment against the antitrust defendant. Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2083 (1977). “Antitrust violators are equally deterred whether the judgments against them are in favor of direct or indirect purchasers.” Id. However, from a compensation point of view, the person actually injured by the overcharge should be the party who receives the damage award. See text accompanying note 13 supra.

The House committee has asserted that “adequate enforcement mechanisms simply do not exist” for consumers. H.R. REP. No. 499, 94th Cong., 2d Sess. 8 (1975), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572, 2577. Thus, the House committee recognized that the indirect purchaser has an interest in bringing suit against antitrust defendants whose illegal activity causes them to pay an increased price for the products they purchase. As a result of this consumer need, Congress devised a procedural mechanism tailored to meet the interests of a large number of plaintiffs suing in one action. Although the House report noted that indirect purchasers, consumers, usually have the greatest interest in suing an antitrust defendant because they are subjected to the major impact of the violation, other parties frequently may also have an interest in suing an antitrust defendant:

A single antitrust violation, it must be noted, may cause multiple injuries, and each individual or business which is injured in its business or property has a right to recover damages. A violation occurring at the retail level may, in addition to raising consumer prices, injure other retailers who compete with the violators.


45. Professor Wheeler has stated:

During the two years which I worked as one of the myriad plaintiffs’ counsel in the plumbing fixture cases [Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), aff’d sub nom. Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971)], I received several calls from members of the various alleged classes of plaintiffs (consumers, contractors, plumbing contractors, building-owners, for example) asking about the nature of the litigation and concluding that the risks to their relationships with their suppliers did not warrant joining the fray.” Wheeler, supra note 38, at 1332 n.57 (emphasis added).
In addition, many direct purchasers are hesitant to sue for fear of becoming embroiled in protracted litigation involving substantial cash outlays and expenditures of time and effort. Furthermore, even if a direct purchaser is willing to risk being cut off by his supplier and is willing to make the necessary expenditures of time and money, he must still prove that the violation injured him and must prove the amount of the injury. Inherent in this task are formidable problems of proof. These factors militating against direct purchasers suing and further complicating the already complex litigation, with the inevitably long delay between the date of injury and the time suit is brought, indicate that the Court’s objective of establishing the direct purchaser as the best party to assure the enforcement of the antitrust laws will go unfulfilled.

46. According to information furnished by the Administrative Office of the U.S. Courts, the average duration of antitrust cases disposed of since 1964 was 21.5 months; of those terminated in 1969, the average duration was 25.8 months. However, these figures are misleading because only a small percentage of private antitrust cases go to judgment. Of those cases in which there was a judgment, the average duration was 37.4 months for cases disposed of in 1964 and 46.7 months for cases disposed of in 1969. See Posner, A Statistical Study of Antitrust Enforcement, 13 J.L. & ECON. 365, 381 (1970).

47. The cost to plaintiff of an antitrust suit will be “an absolute minimum of $5000 in the smallest of cases and to considerable thousands beyond that in the larger cases.” Alioto, The Economics of a Treble Damage Case, 32 ABA ANTITRUST L.J. 87, 93 (1966). See Wheeler, supra note 38, at 1330-31. In West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff’d, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971), notice to all class members alone cost approximately $130,000. Id. at 724-25.

48. The plumbing fixture litigation, Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), aff’d sub nom. Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971) is the most massive multidistrict litigation—over 200 separate actions . . . . New actions are being filed almost every day. In the past 90 days, 59 new actions have been filed and transferred to the Eastern District of Pennsylvania. It is of course necessary to integrate such newly filed actions into the discovery program underway in the transferee court.


50. See text accompanying notes 28-31 supra.

51. Time gaps between the start of the illegal combination and institution of suit by the government have in some instances run 35 years (powder), 17 years (tobacco), 12 years (shoe machinery), 11 years (glucose), 10 years (steel), 10 years (farm machinery), and 16 years (anthracite coal). See Comment, Fifty Years of Sherman Act Enforcement, 49 YALE L.J. 284, 292 n.49 (1939), quoted in Wheeler, supra note 38, at 1339 n.94.

52. During this long time lapse, witnesses may die or otherwise become unavailable, important documents and records may be lost, and witnesses’ memories may dull.
The Limited Scope of Hanover Shoe

The Court's holding in Hanover Shoe with respect to the passing-on defense was that Hanover Shoe proved injury and the amount of its damages within the meaning of section 4 of the Clayton Act when it showed that United had overcharged during the damage period and when it proved the amount of the overcharge.\(^5\) In so holding, the Court denied United the opportunity to assert a passing-on defense. Despite this relatively limited holding, the case has been misinterpreted by various federal courts.\(^4\)

\(\text{\textsuperscript{4}}\) For example, Illinois Brick is instructive in documenting the problems various courts have had in applying the Hanover Shoe decision. The district court in Illinois v. Ampress Brick Co., Inc., 67 F.R.D. 461 (N.D. Ill. 1975), rev'd, 536 F.2d 1163 (7th Cir. 1976), rev'd sub nom. Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 (1977), stated, after an analysis of Hanover Shoe: "This Court does not believe that in Hanover the Supreme Court intended to foreclose standing to all plaintiffs not immediate purchasers from alleged antitrust violators." Id. at 466 (emphasis added). The court later stated: "This Court therefore holds that, as to ultimate consumers, their injuries are too remote and consequential to provide legal standing to sue against the alleged antitrust violator." Id. at 468. The Seventh Circuit, on appeal from the summary judgment motion granted to defendants, Illinois v. Ampress Brick Co., Inc., 536 F.2d 1163 (7th Cir. 1976), rev'd sub nom. Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 (1977), stated: "The district court held that plaintiff's interests as ultimate consumers were not protected by the antitrust laws. We disagree and therefore reverse." Id. at 1165. The court later stated: "To the extent that the district court held that these plaintiffs, as opposed to ultimate consumers in general, lack standing, we disagree." Id. at 1167. The Supreme Court in Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 (1977), stated in a footnote:

Because we find Hanover Shoe dispositive here, we do not address the standing issue, except to note . . . that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4.

Id. at 2066 n.7.

Thus, two federal courts have read Hanover Shoe to involve a standing issue when in reality the Court in Hanover Shoe never mentioned standing. Mr. Justice White's opinion did not even address the standing issue in Illinois Brick. Moreover, Justice White, in note 7, cites Handler & Blechman, Antitrust and the Consumer Interests: The Fallacy of Parens Patriae and A Suggested New Approach, 85 YALE L.J. 626 (1976). This article uses the plumbing fixtures litigation, Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), aff'd sub nom. Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971) as an illustrative case. The authors state: "However, the disallowance of the homeowner's claim in Plumbing Fixtures had nothing more to do with standing than did the Supreme Court's refusal to recognize the pass-on defense in Hanover Shoe." Handler & Blechman, supra at 644-45 (footnote omitted).

Even the briefs of counsel reflect confusion as to the meaning of Hanover Shoe.
Hanover Shoe was not antagonistic to antitrust litigation, nor did it portend the end of consumer suits. To the contrary, Hanover Shoe was consistent with a long line of cases\(^5\) that have eased the burden for private antitrust plaintiffs to bring suit.\(^6\) However, to understand properly the scope of the Court's decision in Hanover Shoe, the case must be strictly confined to its peculiar fact situation.\(^5\)

Hanover Shoe denied a defense which was offered after plaintiffs had put in their proof near the end of a long and complex antitrust trial.\(^5\) It did not prevent a plaintiff from seeking to prove

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\(^5\) In Hanover Shoe the courts confronted a corporation which maintained a network of contracts with approximately 90% of all shoe factories. It supplied 75% of the demand for shoe machinery in the United States. It did so on a leasing basis which permitted each manufacturer of shoes to approximate the cost of every other manufacturer using the same machinery. In short, the shoe machinery market was a controlled market in which a uniformly high price was maintained. United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 297 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954).

\(^5\) In addition, there had already been a judgment rendered against defendant
his damages; nor did it erect a privity barrier as a test for legal standing to stop antitrust plaintiffs at the courtroom doors. Thus, in analyzing the breadth of Hanover Shoe, one should remember the context in which the decision was rendered and the policy the Court was attempting to further.

**Illinois Brick and the Offensive Use of the Passing-on Doctrine**

**Illinois Brick**

In Illinois Brick Co. v. Illinois, the Supreme Court once again confronted the issue of passing-on; however, this time the suit was presented in a new context. In 1973, the United States indicted defendant, Illinois Brick Co., and filed a companion civil

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62. "In its rejection of passing-on defense, Hanover Shoe's basic aim was to protect the treble-damage remedy." Comment, 123 U. Pa. L. Rev., supra note 30, at 993.

63. 97 S. Ct. 2061 (1977).

64. Mr. Justice White framed the issue:

   In this case we once again confront the question whether the overcharged direct purchaser should be deemed for purposes of § 4 to have suffered the full injury from the overcharge; but the issue is presented in the context of a suit in which the plaintiff, an indirect purchaser, seeks to show its injury by establishing pass-on by the direct purchaser and in which the antitrust defendants rely on Hanover Shoe's rejection of the pass-on theory.

Id. at 2065.

65. In 1973, an indictment was filed in the United States District Court for the Northern District of Illinois. See Brief for United States as amicus curiae, supra note 54, at 3 n.2.
action charging that Illinois Brick Co. had violated section 1 of the Sherman Antitrust Act\(^6^6\) in that it had conspired to restrain trade by unlawfully fixing the price\(^6^7\) of concrete blocks. Pleas of *nolo contendere* were accepted in the criminal case and a consent decree\(^6^8\) was entered in the civil suit.\(^6^9\) Simultaneously with the filing of the government suit, private treble-damage actions were filed by masonry contractors, general contractors, private builders, and the State of Illinois for itself and for various governmental entities in the greater Chicago area.\(^7^0\)

The governmental plaintiffs asserted that defendant, a concrete block manufacturer, had sold large quantities of its product to masonry and general contractors. These concrete blocks were then incorporated into buildings and structures which were purchased by the State of Illinois and other governmental entities. The plaintiffs further asserted that they had paid an inflated price for these buildings and structures because the manufacturers of the concrete blocks had engaged in a price-fixing conspiracy; moreover, they as-

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66. 15 U.S.C. § 1 (1970). This section provides in pertinent part: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .” *Id.*

67. Generally, “[t]he object of a price-fixing agreement . . . is not to exclude competitors. Rather, the object is to raise prices for the benefit of all ostensible competitors who participate in the agreement, and to inflict the overcharge on immediate purchasers and on their customers if the overcharge is passed on.” *Carnivale Bag Co. v. Slide-Rite Mfg. Corp.*, 395 F. Supp. 287, 293 (S.D.N.Y. 1975).

68. A consent decree is:

[o]ne entered by consent of the parties: it is not properly a judicial sentence, but is in the nature of a solemn contract or agreement of the parties, made under the sanction of the court, and in effect an admission by them that the decree is a just determination of their rights upon the real facts of the case, if such facts had been proved. *BLACK'S LAW DICTIONARY* 499 (4th rev. ed. 1968) (citations omitted).

69. Potential civil litigants in treble-damage actions filed after the plea of *nolo contendere* and the consent judgment had been entered could not invoke 15 U.S.C. § 16(a) (Supp. V 1975), to use the prior criminal or civil proceedings as prima facie evidence of their claims, *see* text accompanying note 21 *supra*, because § 16(a) specifically excludes from its purview “consent judgments or decrees entered before any testimony has been taken or . . . judgments or decrees entered in actions under section 15a of this title.” 15 U.S.C. § 16(a) (Supp. V 1975). This exclusion covers pleas of *nolo contendere*, as well as consent judgments, because a plea of *nolo contendere* is not a final judgment or decree under § 16(a). *See* Pflotzer v. Aqua Syss., Inc., 162 F.2d 779, 784 (2d Cir. 1947); Simco Sales Serv., Inc. v. Air Reduction Co., Inc., 213 F. Supp. 505, 506-07 (E.D. Pa. 1963).

70. All of these actions except that brought by the State of Illinois were settled with the payment of agreed sums of money without prejudice to Illinois's suit. Illinois v. Ampress Brick Co., 536 F.2d 1163, 1164 (7th Cir. 1976), rev'd *sub nom.* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 (1977).
serted that increased cost was passed on to them through the intervening links in the distribution chain.\footnote{71}

The language of plaintiffs' complaint reflected these factual allegations: "By reason of defendants' illegal conduct such plaintiffs [various governmental entities] were compelled to pay and have paid substantially higher prices for such concrete blocks than they would have paid had defendants' combination and conspiracy not existed or occurred."\footnote{72} The complaint further alleged that the cost of the buildings was $3 million higher because of this price-fixing conspiracy.\footnote{73}

Defendant manufacturers moved for partial summary judgment against all plaintiffs who were not direct purchasers of concrete blocks.\footnote{74} They contended that as a matter of law, only direct purchasers of concrete blocks have standing to sue the manufacturers for alleged violation of the antitrust laws.\footnote{75} The district court, citing \textit{Hanover Shoe} and other cases which have construed \textit{Hanover Shoe},\footnote{76} saw the issue solely as one of standing and granted defendants' motion.\footnote{77}

The Court of Appeals for the Seventh Circuit reversed the lower court, holding that ultimate consumers may recover treble-
damages for an illegal overcharge if they can prove the increase was passed-on to them.\textsuperscript{78} Thus, the Seventh Circuit, in deciding that indirect purchasers could sue for overcharges passed on to them through the intervening links in the chain of distribution, decided two distinct issues: (1) that indirect purchasers have standing to sue;\textsuperscript{79} and (2) that Hanover Shoe means that indirect consumers are not foreclosed from the attempt to prove their damages.\textsuperscript{80}

\textit{The Majority's Approach: The "Equal Application" Argument}

Mr. Justice White, writing for the majority, stated:

\textquote[We conclude that whatever rule is to be adopted regarding pass-on in antitrust damage actions, it must apply equally to plaintiffs and defendants. Because Hanover Shoe would bar petitioners [Illinois Brick Co.] from using respondent's [Illinois's] pass-on theory as a defense to a treble-damage suit by the direct purchasers (the masonry contractors), we are faced with the choice of overruling (or narrowly limiting) Hanover Shoe or of applying it to bar respondents' attempt to use this pass-on theory offensively.\textsuperscript{81}]

The Court declined to abandon its construction of section 4 in Hanover Shoe that only direct purchasers and not others in the distribution chain constitute the party injured in his business or property, in the absence of "convincing demonstration that the Court was wrong in Hanover Shoe to think that the effectiveness of the antitrust treble-damage action would be substantially reduced by adopting a rule that any party in the chain may sue to recover the fraction of the overcharge allegedly absorbed by it."\textsuperscript{82} Thus, the majority expressed an intention to promote enforcement of the antitrust laws. However, the Court's assumption that this policy of effective enforcement would be substantially furthered rather than hindered by barring the passing-on doctrine both as a defensive


\textsuperscript{79} \textit{Id.} at 1165. This standing question was the narrow issue that was appealed by the plaintiffs; on this issue, the Seventh Circuit reversed the lower court.

\textsuperscript{80} \textit{Id.} at 1165-67. The district court and court of appeals did not disagree as to the damages issue. Both courts read Hanover Shoe to allow indirect purchasers an opportunity to prove their damages. On this point, the Supreme Court disagreed, reversing the lower courts. \textit{See} Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2065-66 & 2066 n.7 (1977).

\textsuperscript{81} Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2066 (1977). Cf. text accompanying notes 88 & 89 \textit{infra} (limiting Hanover Shoe bar to situations in which direct and indirect purchasers are not parties in same action).

\textsuperscript{82} Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2066 (1977).
shield and as an offensive weapon is questionable. At this juncture, it is sufficient to note that the Court had not lost sight of the dual objectives—compensation and deterrence—of the antitrust laws. But the Court attempted to balance these two objectives, with the deterrence goal reigning supreme. Had the Court been more farsighted, the majority would have seen, as did the dissent, “the clear directions from Congress” in the form of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

83. See text accompanying note 4 supra.
85. Pub. L. No. 94-435, 90 Stat. 1383. See text accompanying note 17 supra and text accompanying notes 162-177 infra. The majority attempted to sidestep the evident legislative intent of the Act. Mr. Justice White pointed to the legislation’s remedial nature and noted that the Act does not alter the meaning of § 4; the Court quoted the House report, H.R. REP. No. 499, 94th Cong., 2d Sess. 9 (1975), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572, 2578:

[T]he parens patriae provision ‘creates no new substantive liability’; the relevant language of the newly enacted § 4C(a) of the Clayton Act tracks that of existing § 4, showing that it was intended only as ‘an alternative means for the vindication of substantive claims’. . . . The establishment of an alternative remedy does not increase any defendant’s liability.

Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2068 n.14 (1977) (citation omitted). However, the relevant language omitted by Mr. Justice White indicates that Congress intended that both direct and indirect purchasers were already included within § 4: “Each person on whose behalf the State attorney general is empowered to sue already has his own cause of action under section 4 of the Clayton Act, even if, for practical reasons, the right to sue is not likely to be exercised.” H.R. REP. No. 499, 94th Cong., 2d Sess. 9 (1975), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572, 2578. (emphasis added).

Thus, viewed in this context, the intent demonstrated by the House report, that the legislation establishes an “alternative remedy” and that the legislation “does not increase any defendant’s liability,” id., [1976] U.S. CODE CONG. & AD. NEWS at 2579, indicates that Congress intended § 4 to cover indirect purchasers; Congress was merely increasing “[t]he likelihood of a financial recovery against an antitrust violator,” id., by creating this remedy. Viewed in any other way, the intent expressed in the House report makes little practical sense. One wonders why Congress would have created a remedy “where none had existed before” if the only person who could profit from such remedy were not covered by the Act which the remedy was created to effectuate.

Further evidence of congressional intent may be gleaned from California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), cert. denied, 412 U.S. 908 (1973). In Frito-Lay California sued on behalf of 20 million purchasers of snack foods alleging that they had been overcharged by virtue of a price-fixing conspiracy. The Court of Appeals for the Ninth Circuit held that California could not maintain such a parens patriae action for its injured and legally helpless citizens. The court acknowledged the state’s “imaginative” approach, but stated:

If the State is to be empowered to act in the fashion here sought we feel that authority must come not through judicial improvisation but by legislation and rule making, where careful consideration can be given to the conditions and procedures that will suffice to meet the many problems posed by one’s assertion of power to deal with another’s property and to commit him to actions taken in his behalf.
The Dissenter's Approach: The "Unequal Application" Argument

Mr. Justice Brennan dissented, despite what he termed the "superficial appeal" of the majority's "equal application" argument.86 "The interests at stake in the 'offensive' passing-on cases, where the indirect purchasers sue for damages for their injuries, are simply not the same as the interests at stake in the Hanover Shoe, or 'defensive passing-on' situation."87 The dissent argued that the Hanover Shoe bar to the passing-on defense should only be allowed where direct and indirect purchasers are not parties in the same action.88 Mr. Justice Brennan, in singling out the situation in which only one action by either of the two purchasers is brought against the antitrust defendant, reasoned that this was the only possible situation in which an antitrust defendant might escape liability.89 As a consequence, the dissenting Justice asserted that the effectiveness of the treble-damage action would be severely weakened.

Justice Brennan's "unequal application" argument was rooted in the decision of Judge Blumfeld in In re Master Key Antitrust Litigation.90 In that case, consolidated under the multidistrict procedures for pretrial proceedings,91 indirect governmental purchasers, as well as direct purchasers, had sued manufacturers of hardware for unlawful conspiracy to fix the prices of their products.92 The defendants moved for summary judgment against the indirect purchasers. The Connecticut district court denied the defendants'
motion for summary judgment. Mr. Justice Brennan adopted the Connecticut district court's language in his dissenting opinion in *Illinois Brick*: "The attempt to transform a rejection of a defense because it unduly hampers antitrust enforcement into a reason for a complete refusal to entertain the claims of a certain class of plaintiffs seems an ingenious attempt to turn the decision [in *Hanover Shoe*] and its underlying rationale on its head."  

THE POLICY ARGUMENTS  

Multiple Liability  

The majority argued that permitting offensive passing-on while barring defensive passing-on would "create a serious risk of multiple liability for defendants." Notwithstanding that at least one commentator as well as some courts have argued that this risk is merely hypothetical and illusory, there are a number of procedural devices that greatly reduce the likelihood of this occurrence. Before examining these devices, it is important to posit the situations in which the "specter" of multiple liability can occur. For purposes of this analysis we will assume, as the dissent urged, that: (1) indirect consumers are able to prove passing-on and thus can sue a manufacturer for injury that resulted thereby; and (2) the assertion of the passing-on defense is limited to defensive situations in which both direct and indirect purchasers are joined together in the same suit against the manufacturer.

The risk of multiple liability is predicated on the assumption that an antitrust defendant, if not permitted to defend by showing


passing-on by the direct purchaser, would be sued in two distinct treble-damage suits arising from the same violation of the antitrust laws: first, by the direct purchaser, and second, by the indirect purchaser.\textsuperscript{100} Moreover, the specter of multiple liability for the defendants, according to the Supreme Court, is even further enhanced by a one-sided “presumption”:\textsuperscript{101} “that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff.”\textsuperscript{102}

The majority hypothesized a situation in which a direct purchaser sued an antitrust defendant manufacturer and recovered treble-damages. Thereafter, within the four-year statute of limitations,\textsuperscript{103} an indirect purchaser also sued the manufacturer and also recovered treble-damages. In this instance, the majority argued, the defendant would be exposed to sixfold liability. For each additional plaintiff, the defendant’s liability could potentially be increased threefold. However, as previously asserted, many direct purchasers are reluctant to sue their suppliers.\textsuperscript{104} Moreover, if such reluctance does not exist, there are still various procedural devices that can reduce the possibility of duplicative recoveries.\textsuperscript{105}

The potential for duplicative recoveries only exists when direct and indirect purchasers are suing separately in two distinct actions.\textsuperscript{106} But if both plaintiffs, direct and indirect purchasers, are joined in one suit, the possibility of multiple liability for the defen-

\textsuperscript{100} Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2067 (1977).

\textsuperscript{101} See McGuire, The Passing-On Defense and the Right of Remote Purchasers to Recover Treble Damages Under Hanover Shoe, 33 U. Pitt. L. Rev. 177, 188-89 (1971). In Hanover Shoe the Court conclusively presumed from the fact of the overcharge that the direct purchaser was injured in the full amount of the overcharge. Hanover Shoe, Inc. v. United Shoe Mach. Co., 392 U.S. 481, 494 (1968). However, Professor McGuire argues that “a conclusive presumption will not be established unless it is nearly certain that the assumed fact follows from the proven fact. In the context of passing-on, there is no certainty that the buyer will be damaged in the amount of the overcharge.” McGuire, supra at 188-89 (footnote omitted).

\textsuperscript{102} Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2067 (1977).

\textsuperscript{103} See text accompanying note 116 infra.

\textsuperscript{104} See text accompanying note 45 supra. See also In re Western Liquid Asphalt Cases, 487 F.2d 191, 198 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974).

\textsuperscript{105} The Supreme Court has recognized the argument that “it is better for the defendant to pay six-fold or more damages than for an injured party to go uncompensated.” Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2067 n.11 (1977) (citing Comment, 72 Colum. L. Rev., supra note 10, at 411).

\textsuperscript{106} Cf. Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2067 & n.11 (1977) (unequal application of Hanover Shoe rule increases risk of duplicative recoveries even more substantially than if defendant is sued in two different lawsuits).
dant is greatly diminished. Moreover, it has been suggested that once all parties to an antitrust action are joined in one suit, the defendant manufacturer need only litigate the liability issue, because once a violation has been established, the issue of damages and the possibility of a pass-on need only be litigated between the various consumers of the product. Bifurcated trials of this type, and of the more traditional type in which liability and damages are litigated by the same parties but at distinct trials, have been used with great success in antitrust and nonantitrust litigation.

Some of the devices that have been suggested to hedge against multiple liability by the institution of one lawsuit in which all parties are joined are: (1) intervention; (2) statutory interpleader; (3) collateral estoppel; (4) consolidation; (5) multidistrict transfer provisions; and (6) the short four-year statute of limitations. Even assuming that the parties cannot avail themselves of any of these devices, one commentator has suggested that a theory akin to the one for the imposition of an "equitable lien" or a "constructive trust," or a requirement that the litigating plaintiff post a bond in the amount of the judgment, would allow either the direct or indirect purchaser to sue without joining the other party.

107. One commentator has argued that by utilizing an "apportionment-type" approach in which direct and indirect purchasers are party plaintiffs in one suit against the manufacturer, the possibility of multiple liability is not only diminished but is actually reduced to the point where it "presents no risk" of multiple liability. McGuire, supra note 101, at 194-97.

108. Id. at 194.


110. See In re Master Key Antitrust Litigation, 528 F.2d 5, 12 n.11 (2d Cir. 1975) (antitrust suit); Green v. Wolf, 406 F.2d 291, 301 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969) (securities suit).

111. See FED. R. CIV. P. 24.


118. Id. "A constructive trust arises when a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." Id. (quoting 5 A. SCOTT, LAW OF TRUSTS § 462 (3d ed. 1967)).

119. Id. at 199.
In the event of recovery against the defendant antitrust violator, the successful plaintiff would hold the amount recovered in escrow until the statute of limitations had run. In this way, the party not joined in the suit could be assured that the successful party will not be judgment proof in the event of a subsequent suit.\footnote{120} Admittedly, these devices are not perfect;\footnote{121} however, their application would be a positive attempt to further the "'result orientation' trend in which the Court has approached the whole area of private treble-damage litigation."\footnote{122}

**Complex Litigation Revisited**

The Court conceded that the multiple liability potential may be dealt with by using the devices noted above.\footnote{123} However, Mr. Justice White, as he had done in *Hanover Shoe*, asserted that the effective enforcement of the antitrust laws will not be furthered by permitting the offensive use of passing-on because the judicial system would be overburdened. In the Court's words:

> The Court's concern in *Hanover Shoe* to avoid weighing down treble-damage actions with the 'massive evidence and complicated theories' . . . involved in attempting to establish a pass-on defense against a direct purchaser applies *a fortiori* to the attempt to trace the effect of the overcharge through each step in the distribution chain from the direct purchaser to the ultimate consumer. We are no more inclined than we were in *Hanover*

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\footnote{120}{See id.}

\footnote{121}{For example, to invoke the collateral estoppel doctrine, both purchasers must be parties in the initial suit because anyone not a party to that suit could not be bound by the first court's judgment in a subsequent suit. Blonder-Tongue Labs., Inc. v. University of Ill. Foundation, 403 U.S. 313, 329 (1971).}

\footnote{122}{West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1087 (2d Cir.), cert. denied, 404 U.S. 871 (1971).}

\footnote{123}{The procedural devices that the Court mentions are: Multidistrict Litigation Act, 28 U.S.C. § 1407 (1970), and Federal Statutory Interpleader, 28 U.S.C. 1335 (1970). Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2067 n.11 (1977). The Court asserted that "'[t]hese procedural devices cannot protect against multiple liability where the direct purchasers have already recovered by obtaining a judgment or by settling, as is more likely (and as occurred here . . .)." Id. (citation omitted). However, this occurrence would be the optimal situation to utilize the "constructive trust" theory with the escrow provision. See text accompanying notes 118-120 supra. Additionally, it should be remembered that when defendants settled their claims with all parties other than Illinois, it was stipulated that the settlement was without prejudice to the claims of Illinois. See note 70 supra. Therefore, although the risk of multiple liability was still present, the defendants could have protected themselves by stipulating that in the event the indirect purchasers recovered, their recovery would be apportioned from the settlement fund.}
Shoe to ignore the burdens that such an attempt would impose on the effective enforcement of the antitrust laws.\(^{124}\)

Although the litigation of the direct purchaser's injury may be more complex than the indirect purchaser's injury in one respect,\(^{125}\) and while economic and statistical theories have facilitated the proof of injury,\(^{126}\) there is still little doubt that antitrust trials will continue to present complex evidentiary issues. However, the mere possibility of judicially burdensome trials cannot, on balance, outweigh the importance of the private antitrust treble-damage remedy.\(^{127}\) Indeed, the Supreme Court has reiterated on numerous occasions that "[t]he constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery."\(^{128}\)

*West Virginia v. Chas. Pfizer & Co.*\(^{129}\) is an example of an antitrust suit which, upon first analysis, a court might be prompted to dismiss for putatively insurmountable proof problems which would greatly burden the judicial process. However, all claims between wholesalers, retailers, and consumers were settled\(^{130}\) and the compromise settlement was affirmed.\(^{131}\) This case thus indicates

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125. The majority noted that in the defensive passing-on case, even if the defendant could prove that the direct purchaser had passed-on the full amount of the overcharge, it was still possible that the direct purchaser was injured within the terms of § 4 of the Clayton Act, 15 U.S.C. § 15 (1970), because of a reduction in its volume of sales caused by its increased price which was necessitated by the overcharge. The Court stated in this regard: "This additional element of injury from reduced volume is not present in the suit by the final purchaser of the overcharged goods, where the issue regarding injury will be whether the defendant's overcharge caused the plaintiff to pay a higher price for whatever it purchased." *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061, 2068 n.13 (1977). However, the majority noted that on balance, the indirect purchaser's burden is still greater than the direct purchaser's burden, even given the simplicity created by obviating the litigation of the reduced volume issue. *Id.*

126. See text accompanying notes 32-36 *supra*.

127. See text accompanying notes 1-3 *supra*.


that an absolute presumption that passing-on "would add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness" is unjustified and should not be the basis for preclusion of the action.

*Chas. Pfizer* involved sixty-six civil actions, twenty-six of which were commenced in the southern district of New York and forty of which were transferred to that district by the Judicial Panel on Multidistrict Litigation "for coordinated or consolidated pre-trial proceedings." Plaintiffs alleged that defendants violated sections 1 and 2 of the Sherman Antitrust Act in the sale of antibiotics. Plaintiffs thus sought treble-damages under section 4 of the Clayton Act. In addition to the private civil actions filed, charges were also lodged against defendants by the Federal Trade Commission (FTC). A Senate subcommittee also investigated questionable industry practices which included defendants' activities. Evidence was taken before a FTC Hearing Examiner for approximately one month. The FTC ordered the defendants to "cease and desist" from any and all forms of price-fixing. Upon a second review by the Second Circuit after an initial review and a remand, the Commission's order was affirmed. Prior to the filing of the

135. Id. § 15.
136. The Federal Trade Commission (FTC) was created in 1914 to prevent unfair methods of competition. The FTC has the power to issue "cease and desist" orders to the offending party. After these orders become final, the FTC may levy a maximum penalty of $5000 for each violation of the FTC order. 15 U.S.C. §§ 41-58 (1970). See also 15 St. Louis U.L.J. 311, 312 (1970) [hereinafter cited as Note, 15 St. Louis U.L.J.].
138. There was testimony by witnesses which spanned a period of 86 days. The Commission called 13 witnesses; the defendants called 45 witnesses; and three witnesses were considered as called by the hearing examiner. The testimony ran to 9000 pages in the stenographic transcript. The documentary exhibits were massive in number and extent; they occupy at least 12 printed volumes and consist of 8000 pages. See West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 715 (S.D.N.Y. 1970), aff’d, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971).
139. Id. at 716.
civil actions, defendants were indicted, charged with three counts of conspiracy in violation of sections 1 and 2 of the Sherman Antitrust Act. The jury found defendants guilty on all three counts. These convictions, however, were reversed upon appeal for errors in the judge’s charge to the jury.  

It would be difficult to find a more complicated and judicially burdensome litigation than the Chas. Pfizer litigation. However, despite the vast number of actions and the numerous parties therein, the district court refused to dismiss this judicially-taxing litigation. Indeed, the court in its discretion maintained tight control over the class action to the end that the proposed compromise settlement was approved and affirmed by the Second Circuit. The empirical evidence provided by the Chas. Pfizer suits militates against an assumption that allowing all parties injured by an overcharge to join in one suit overburdens the judicial system and seriously undermines the effectiveness of the private antitrust remedy. As one court has observed: “It has never been thought that an antitrust violation is irremediable because done on a grand scale.” The decision in Illinois Brick would deprive indirect purchasers of their remedy solely because of the “grand scale” of the antitrust violation.

**CONGRESSIONAL INTENT:**  
**THE EFFICACY OF CONSUMER SUITS**

**Problems Inherent in Class Actions**

The legislative history of the original Sherman Antitrust Act, particularly that provision which eventually became a part of the Clayton Act and which deals with the private treble-damage remedy, demonstrates that the Sherman Antitrust Act was intended to provide a remedy to the party ultimately damaged.

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142. Actions were commenced not only by states, but by Puerto Rico, the District of Columbia, numerous cities, and many townships. Many of these governmental entities were intervenor plaintiffs in actions that had already been instituted by other parties.
146. See Note, The Defense of “Passing-On” in Treble Damage Suits Under the Antitrust Laws, 70 YALE L.J. 469, 477 nn.58 & 59 (citing 21 CONG. REC. 1767 (1890))
The intentions of the Congressmen who promulgated that legislation, however, have never been truly realized.\textsuperscript{147} Most antitrust suits involving consumer injury result in nominal harm to many individuals.\textsuperscript{148} As a result, consumers seldom sue. In fact, consumers have fared so poorly under the antitrust laws that Representative Peter Rodino of New Jersey\textsuperscript{149} has remarked that "an individual suit by an injured consumer is, as a practical matter, out of the question."\textsuperscript{150}

The maxim that "there is strength in numbers" is applicable to the class action device. But equally applicable is the notion that "too much of a good thing" is undesirable. Federal Rule of Civil Procedure 23\textsuperscript{151} and the case law that has interpreted the rule have used both of these notions. Section (a) requires four prerequisites for a member to sue or be sued as a representative party on behalf of the class: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (4) the representative parties must be able fairly and adequately to protect the interests of the class.\textsuperscript{152} In addition, the action must fall into one of the subsections of section (b) entitled "Class Actions Maintainable."\textsuperscript{153} The primary requirement of section (b) is subsection (3): "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."\textsuperscript{154} As to the first part of subsection


\textsuperscript{147} The expense to an individual consumer only nominally injured of bringing an antitrust suit is much greater than any damages he could possibly recover. See Note, 15 ST. LOUIS U.L.J., supra note 136, at 312-13; Comment, 43 S. CAL. L. REV. supra note 1, at 572.

\textsuperscript{148} Comment, 43 S. CAL. L. REV., supra note 1, at 570-71.

\textsuperscript{149} Chairman, Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary.


\textsuperscript{151} FED. R. CV. P. 23 (as amended 1966).

\textsuperscript{152} Id. 23(a).

\textsuperscript{153} Id. 23(b)(1)-(3).

\textsuperscript{154} Id. 23(b)(3). See generally Comment, 43 S. CAL. L. REV., supra note 1, at 580.
(3), the test that the courts have applied is not as strict as the actual language of the subsection might require. Generally, the courts have been satisfied with a showing of "common question."155 The second part of the subsection is also not a difficult requirement for the prospective consumer to meet, because often a class action is the only realistic method of bringing the suit.

The problem created by amended rule 23, especially for consumer suits, is the hurdle imposed by the notice requirement of section (c)(2).156 Even if the representative of the class could bear the initial burden of the action,157 the suit might still be dismissed by the trial court because of insurmountable problems of "manageability in the conduct of the litigation."158 Moreover, even if the class is certified by the court159 and an injury and damages are proven, problems of distribution of the damages are also a ground upon which a court may dismiss the suit as inherently unmanageable or impractical.160 Given the constraints imposed by rule 23,


156. See, e.g., Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), in which the district court, Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966), rev'd, 479 F.2d 1005 (2d Cir. 1973), dismissed the action because plaintiff representative of the class could not bear the financial burden of approximately $400,000 which was the cost of proper notice to the 6,000,000 plaintiffs in the class. The Second Circuit remanded for an evidentiary hearing. Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968). Upon remand, the district court held that the action was maintainable as a class action and required defendants to bear 90% of the cost of giving notice to the class members. Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565 (S.D.N.Y. 1972); Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971). Upon appeal, the Second Circuit held that the action was not maintainable as a class action because the "costs of administration of the action would exceed the amount due to the few members of the class who filed claims and the individual members of the class would get nothing." Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973).


160. See, e.g., Boshes v. General Motors Corp., 59 F.R.D. 589, 600-02 (N.D. Ill. 1973); Philadelphia v. American Oil Co., 53 F.R.D. 45, 73 (D.N.J. 1971). Some courts have argued for a "fluid recovery" approach in which the class would recover the total damage to the class. If individual members of the class do not file enough claims against the fund to deplete it entirely, the excess is distributed to some "fluid class," for example, future purchasers of a product from defendants. For a court that rejected this "fluid class" notion, see Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973). See generally Wheeler, supra note 38, at 1341. See also Bechick v. Public Util. Comm'n, 318 F.2d 187, 203-04 (D.C. Cir.), cert. den[d], 373 U.S. 913 (1963).
and given the additional problem of consumers' lack of time, interest, or knowledge of a violation so that they can sue a manufacturer who has illegally fixed his price, it is not surprising that one commentator has noted: "Very briefly, a class action approach to protect the public seems inadequate and unrealistic."\textsuperscript{161}

**Parens Patriae Suits**

*Parens patriae* suits are derivatives of the rule 23 action. The court in *Eisen v. Carlisle & Jacquelin*,\textsuperscript{162} where a class action was employed, stated:

From our extensive study of the whole situation in working on this *Eisen* case it would seem that amended Rule 23 provides an excellent and workable procedure in cases where the number of members of the class is not too large. It seems doubtful that further amendments to Rule 23 can be expected to be effective where there are millions of members of the class, without some infringement of constitutional requirements. The problem is really one for solution by the Congress. Numerous administrative agencies protect consumers in various ways. It should, we think, be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer. If penalties are to be imposed upon wrongdoers, at least let the Congress decide how the money is to be spent.\textsuperscript{163}

A similar judicial invitation was extended to Congress in *California v. Frito-Lay, Inc.*\textsuperscript{164} as a result, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976.\textsuperscript{165}

The concept of *parens patriae*, literally "father of his country," is rooted in English common law.\textsuperscript{166} Borrowing this notion, Congress has created an effective mechanism which permits "a State attorney general to bring parens patriae actions for treble damages 'on behalf of natural persons residing in such State injured by any violation of the antitrust laws.'"\textsuperscript{167} In so providing, Congress over-

\textsuperscript{161} Note, 15 ST. LOUIS U.L.J., supra note 136, at 313.
\textsuperscript{162} 479 F.2d 1005 (2d Cir. 1973).
\textsuperscript{163} Id. at 1019. Amended rule 23 utilizes the "best notice practicable" test. FED. R. CIV. P. 23 (as amended 1966).
\textsuperscript{164} 474 F.2d 774, 777 (9th Cir.), cert. denied, 412 U.S. 908 (1973).
\textsuperscript{166} The concept originally referred to the power of the state over infants, incompetents, and charities. See 3 W. BLACKSTONE, COMMENTARIES* 426-27, quoted in Note, 15 ST. LOUIS U.L.J., supra note 136, at 321.
\textsuperscript{167} H.R REP. No. 499, 94th Cong., 2d Sess. 9 (1975), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572, 2578. The House report referred to the provision for
ruled the Supreme Court's earlier holding in *Hawaii v. Standard Oil Co.*,\(^{168}\) which prevented a state from recovering for injury to its general economy for violations of the Clayton Act.\(^ {169}\)

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 is designed to protect the constitutional due process rights of litigants, while at the same time avoiding the notice requirements of rule 23. The legislation adopts the "all that is practicable under the circumstances test" of amended rule 23.\(^ {170}\) However, Congress has taken an additional step by recognizing that circumstances vary; therefore, the court is empowered to determine what constitutes proper notice under the circumstances.\(^ {171}\) The new Act also deals with the problems inherent in the distribution\(^ {172}\) and computation of damages,\(^ {173}\) for it sanctions fluid recoveries and aggregation of damages. Additionally, the new Act protects the res judicata rights of potential defendants, thus ensuring that antitrust defendants are not exposed to multiple liability.\(^ {174}\) Finally, the Act seeks to promote federal-state cooperation and coordination of antitrust enforcement.\(^ {175}\)

Thus, Congress has created a device by which injured consumers, previously without a practical remedy for an antitrust violation, can now prevent antitrust violators from retaining the fruits of their illegality through the vehicle of the state attorney general. The Act deals effectively with the problems inherent in the rule

\(^ {168}\) 405 U.S. 251 (1972).


\(^ {170}\) Amended rule 23(c) provides in part: "The court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Fed. R. Civ. P.* 23 (as amended 1966).


\(^ {172}\) See note 160 *supra* and accompanying text. The Act allows for "fluid recoveries" of damages which was rejected in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973). See also Handler & Blechman, *supra* note 54, at 633.


\(^ {174}\) See text accompanying notes 99-104 *supra*.

23 class action and mitigates to a large degree the possibility of multiple liability. Most importantly, however, it enhances the effectiveness of the private treble-damage action for enforcing the antitrust laws. In sum, the Act supported the dissent's advocacy of the "unequal application" of the passing-on doctrine.

CONCLUSION

The majority and the dissent in Illinois Brick concurred on the essential point that "[t]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." Despite this belief, the majority allowed considerations of stare decisis to hamper its view unduly. The unfortunate result is that those who bear the burden of an illegal overcharge have no remedy, while those who are uninjured may receive a windfall profit. This result is repugnant to notions of equity and justice; more importantly, it cannot be reconciled with the dual purposes—compensation and deterrence—of the antitrust laws. The Court in Illinois Brick has established that the phrase "any person who shall be injured" of section 4 of the Clayton Act includes, as a matter of law, only direct purchasers.

Mr. Justice Blackmun, in dissent, articulated the illogic of the majority's reasoning:

I think the plaintiffs-respondents in this case [Illinois], which they now have lost, are the victims of an unhappy chronology. If Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) had not preceded this case, and were it not "on the

176. But see Handler & Blechman, supra note 54, at 648. These commentators argue that the underlying assumption upon which the parens patriae legislation is based, that consumers have viable treble-damage claims, is erroneous. This thesis is based on the assertion that the amount of damage to consumers is usually quite small in comparison to the problems of proof. Moreover, these commentators suggest that the danger of parens patriae suits and fluid recoveries is that many defendants are not large corporations but are individual businessmen and practitioners who may lose their livelihoods because of these suits. Id. at 661. Whether the activities of these defendants are grossly illegal or marginally illegal is not the issue. If a balancing test is to be used, equity mandates that the innocent consumer should prevail even if it means "economic extinction" for some of the marginally illegal antitrust defendants. The interests of innocent consumers and the policy to be served by effective enforcement of the antitrust laws should take precedence over the interests of any antitrust defendants.


178. Id. at 2080 (Brennan, J., dissenting) (quoting Perma Life Mufflers, Inc. v. International Parts Co., 392 U.S. 134, 139 (1968)).
books,” I am positive that the Court today would be affirming, perhaps unanimously, the judgment of the Court of Appeals [reversing the district court and allowing indirect consumers to prove their damages.] The policy behind the Antitrust Acts and all the signs point in that direction, and a conclusion in favor of indirect purchasers who could demonstrate injury would almost be compelled.

But Hanover Shoe is on the books, and the Court feels that it must be “consistent” in its application of pass-on. That, for me, is a wooden approach, and it is entirely inadequate when considered in the light of the objectives of the Sherman and Clayton Acts. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 tells us all that is needed as to Congress’ present understanding of the Acts. Nevertheless, we must now await still another statute which . . . the Congress may adopt.179

The policies that prompted the Court in Hanover Shoe to reject defensive passing-on should not control in Illinois Brick because the interests at stake are different in offensive passing-on situations. In Hanover Shoe the Court was concerned that defendant would escape liability if a passing-on defense were permitted; however, escape from liability was not a viable possibility in Illinois Brick. Therefore the dissent’s approach of limiting the defensive use of passing-on to Hanover Shoe-like situations, instead of taking the illogical leap of barring all use of passing-on, is the preferable approach. Finally, the Court’s sidestepping of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, especially in light of congressional intent behind this legislation, was inconsistent because the Court was concerned with judicial economy. As Mr. Justice Blackmun admonished: “One regrets that it takes so long and so much repetitious effort to achieve, and have this Court recognize, the obvious congressional aim.”180

Neal Steven Schelberg

179. Id. at 2085 (Blackmun, J., dissenting) (citation omitted).
180. Id. (Blackmun, J., dissenting).