

# CONSUMER STANDING FOR ANTITRUST VIOLATIONS: THE KENNEDY PROPOSAL

On July 15, 1977, Senator Edward M. Kennedy, as Chairman of the Senate Judiciary Subcommittee on Antitrust and Monopoly, introduced a bill (S. 1874)<sup>1</sup> designed to restore fair and effective enforcement of the antitrust laws.<sup>2</sup> S. 1874 was the legislative response to the Supreme Court's opinion, issued only six days earlier, in the case of *Illinois Brick Company v. Illinois*.<sup>3</sup> In *Illinois Brick* the majority of the Court held that the "overcharged direct purchaser and not others in the chain of manufacture or distribution is the party 'injured in his business or property',"<sup>4</sup> within the meaning of section 4 of the Clayton Act.<sup>5</sup> Thus with only a few exceptions, only persons who have dealt directly with an antitrust violator can recover damages for injuries suffered as a result of that violation.<sup>6</sup> S. 1874, as reported from the Senate Judiciary Committee to the full Senate,<sup>7</sup> sought to amend section 4 of the Clayton Act by giving consumers, businesses, and governments injured by antitrust violations the right to recover damages regardless of any privity relationship with the antitrust violator. This proposed legislation died in the 95th Congress<sup>8</sup> but has been reintroduced as S. 300 in the 96th Congress

1. S. 1874, 95th Cong., 1st Sess., 123 Cong. Rec. S. 12019. This bill would have amended the Clayton Act by providing a new section 4I which read: (1) In any action under section 4, 4A, or 4C of the Clayton Act, the fact that a person or the U.S. has not dealt directly with the defendant shall not bar or otherwise limit recovery. (2) In any action under section 4 of the Clayton Act the defendant shall be entitled to prove as a partial or complete defense to a damage claim, that the plaintiff has passed-on to others, who are themselves entitled to recover under Section 4, 4a, or 4C of this Act, some or all of what would otherwise constitute plaintiff's damage.
2. S. Rep. No. 934, 95th Cong., 2d Sess. 30 (1978).
3. 431 U.S. 720 (1977). In *Illinois Brick*, the state of Illinois, on behalf of itself and local governmental entities, brought an antitrust treble damage action under § 4 of the Clayton Act, alleging that petitioners had engaged in a combination and conspiracy to fix prices in violation of § 1 of the Sherman Act. Petitioners were manufacturers and distributors of concrete blocks in the greater Chicago area, who sold the blocks primarily to masonry contractors who in turn submitted bids to general contractors for the masonry portions of construction projects. The general contractor then submitted bids to customers such as respondents. Respondents were thus indirect purchasers of concrete block which passed through two separate levels in the chain of distribution before reaching them. The only way in which the antitrust violation alleged could have injured respondents is if all or part of the overcharge was passed-on by the masonry and general contractors to respondents, rather than being absorbed at the first two levels of distribution. The district court granted petitioner manufacturer's motion for partial summary judgment against all indirect purchasers of concrete blocks from petitioner. The court of appeals reversed, holding that indirect purchasers can recover treble damages for an illegal overcharge, if they prove that the overcharge was passed-on to them through intervening links in the distribution chain. See *Illinois v. Ampress Brick Co.*, 536 F. 2d 1163 (7th Cir. 1976). The Supreme Court granted certiorari and reversed, declining to give indirect purchasers a right of recovery.
4. *Id.* at 729.
5. Clayton Act, § 4, 15 U.S.C. § 15 (1914) provides:  
"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust law may sue therefor in any district court of the United States in the district in which the defendant resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."
6. 431 U.S. at 735-36. The Court referred to *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), where the same Court rejected, as a matter of law, the defense that indirect rather than direct purchasers were the parties injured by the antitrust violation. The *Hanover Shoe* Court held that, except in certain limited circumstances, a direct purchaser suing for treble damages under § 4 of the Clayton Act is injured within the meaning of § 4 by the full amount of the overcharge paid by it, and that the antitrust defendant is not permitted to introduce evidence that indirect purchasers were injured, in fact, by the illegal overcharge. The Court cited, as an example of such a limited circumstance, the situation where "an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged." *Id.* at 494.
7. S. 1874, *supra* note 1.
8. Telephone conversation with Terry Lytle, Counsel for the Senate Judiciary Subcommittee on Antitrust and Monopoly (Oct. 24, 1978).

under the direction of Senator Kennedy, who is now the Chairman of the Senate Judiciary Committee.<sup>9</sup>

This note examines the reasons why such legislation is necessary to overturn the *Illinois Brick* decision and restore fair and effective antitrust enforcement in light of current antitrust policy and Congressional intent as expressed in past antitrust legislation. This note specifically analyzes S. 300 and S. 1874 and the state of antitrust law in the absence of this remedial legislation.

### THE DUAL FUNCTION OF ANTITRUST POLICY

Both the Congress, in legislation,<sup>10</sup> and the Supreme Court, by interpretation,<sup>11</sup> have recognized a dual purpose of the antitrust treble damages provision.<sup>12</sup> Treble damages are rewarded not only to compensate the antitrust victim,<sup>13</sup> but also to serve as a deterrent to future violations.<sup>14</sup> The intended beneficiaries of the antitrust laws have always been consumers; the overall purpose of the antitrust laws, emphasized by both Congress and the courts, has been to provide consumers with better products and lower prices that competition offers.<sup>15</sup> Price fixing and other antitrust violations have been conservatively estimated to cost American consumers more than 150 billion dollars a year.<sup>16</sup> Consequently, both the courts and Congress have long recognized that consumers must be able to recover for antitrust violations that injure them because the doctrine of fundamental fairness requires that those who are injured by antitrust violations should be compensated, and the threat of such suits deters future violations.

Under *Illinois Brick*, consumers are unable to recover any damages for the higher prices they pay due to price fixing and other antitrust violations, since they ordinarily purchase goods through retailers or "middlemen." Businesses, farmers, state governments and many federal agencies which also often purchase their goods and services from wholesalers or retailers, are also precluded from recovery in these instances. Ironically, while the rule of the *Illinois Brick* majority opinion bars any recovery by consumers and others who do not deal directly with antitrust violators, the rule permits persons who do deal directly with antitrust violators to recover huge windfall damages even if they have not been injured at all. This stems from the Court's holding that a direct purchaser may recover the entire amount of any overcharge even if that purchaser has passed some or all of that overcharge on to consumers.<sup>17</sup>

The majority itself recognized some of the serious problems raised by its decision, but felt that in the absence of Congressional action<sup>18</sup> it was locked into the *Illinois Brick* result by the Court's earlier opinion in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*<sup>19</sup> In the *Hanover Shoe* case, the

9. S. 300, 96th Cong., 1st Sess. (1979).

10. Treble damage antitrust actions were first authorized in the Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) (current version at 15 U.S.C. § 15 (1973)). Senate debate on the bill reflected the dual purpose intended. 21 Cong. Rec. 1767, 3147 (1890) (remarks of Sen. Sherman), 2612 (remarks of Senators Teller and Reagan) and 2615 (remarks of Sen. Coke).

11. *United States v. Borden Co.*, 347 U.S. 514 (1954).

12. Clayton Act, § 4, 15 U.S.C. § 15 (1914).

13. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).

14. *Perma Mufflers v. Int'l Parts Co.*, 392 U.S. 134 (1968).

15. *Hearings on S. 1874 before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, 95th Cong., 1st Sess. 1 (1977) (statement of Senator Edward Kennedy).

16. *Id.*

17. 431 U.S. at 724.

18. *Id.*

19. 392 U.S. 481 (1968).

Supreme Court had refused to allow the defendant to show as a defense to an antitrust action that the plaintiff had "passed-on" the illegal overcharges to its customers<sup>20</sup> and thus had not been injured in its business or property.<sup>21</sup> In *Illinois Brick*, the Court encountered the plaintiff's claim that an illegal overcharge had been "passed-on" to him. The Court was worried that allowing "offensive use"<sup>22</sup> but not "defensive use"<sup>23</sup> of "pass-on" would give rise to multiple liability. It was afraid that a direct purchaser under *Hanover Shoe* could collect the full amount of the overcharge while indirect purchasers could later recover for their damages as well. Thus, the Court decided that whatever rule was adopted regarding proof of "pass-on" had to be applied equally to both plaintiffs and defendants.<sup>24</sup>

The Court declined, however, to permit the use of "pass-on" by either plaintiffs or defendants. The Court was concerned with the complexity-of-damage proof if pass-on were an issue, and secondly, it felt that in the absence of Congressional action *stare decisis* dictated that it adhere to the *Hanover Shoe* decision barring the use of pass-on as a defense.<sup>25</sup>

The *Illinois Brick* rule, in addition to being fundamentally unfair to those who are truly injured, will also result in a weakening of the important function of antitrust damage suits as a supplement to public enforcement of the antitrust laws. The majority opinion in *Illinois Brick* recognized the importance of effective private enforcement of these laws. It stated, however, that its rule would facilitate private enforcement by eliminating the necessity for apportioning damages between "direct" and "indirect" purchasers.<sup>26</sup> Lack of precision in apportioning damages between direct and indirect purchasers is not a convincing reason for denying indirect purchasers an opportunity to prove their injuries and damages.<sup>27</sup> From the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation.<sup>28</sup> As Justice Brennan stated in the dissent in *Illinois Brick*: "[a]ntitrust violators are equally deterred whether the judgment against them is in favor of direct or indirect purchasers."<sup>29</sup>

Also, the majority in *Illinois Brick* did not accord sufficient weight to the fact that barring indirect purchaser suits, in some cases, results in no private enforcement at all. Direct purchasers or middlemen frequently are reluctant to sue their supplier for a variety of reasons. First, direct purchasers will not always be damaged or, if damaged, not to the full extent of the overcharge.<sup>30</sup> In some cases, the direct purchaser may profit from the overcharge, making this class of plaintiffs even less of a viable deterrent.<sup>31</sup> Moreover, the risks of litigation coupled with its expense and time-consuming nature are hurdles enough when a party is truly damaged and must seek compensation. In the Justice Department's view, "those persons actually injured by a violation

20. *Id.* at 482.

21. Clayton Act, § 4, 15 U.S.C. § 15 (1974).

22. S. Rep. *supra* note 2, at 4, n.2.

23. *Id.* n.3.

24. 431 U.S. at 728.

25. *Id.* at 736.

26. *Id.* at 745.

27. *Id.* at 759, 760 (Justice Brennan dissenting).

28. *Id.* at 760.

29. *Id.*

30. S. Rep. *supra* note 2, at 22.

31. *Id.*

rather than those merely seeking a windfall are more likely to further the remedial purposes of section 4 of the Clayton Act."<sup>32</sup> A second reason direct purchasers should not be exclusively relied on as an effective deterrent is that frequently they are very dependent on only one or two suppliers for their existence.<sup>33</sup> Especially in shortage situations, direct purchasers have to be wary of retaliation by their suppliers. Closely akin to this is reluctance to sue for fear of disrupting profitable relations. A third reason why direct purchasers may be discouraged from suing is that filing an antitrust suit can result in the direct purchaser having to comply with extensive discovery requests.<sup>34</sup>

Since the task of enforcement of this nation's antitrust laws is shared between private damage actions and public enforcement actions, the *Illinois Brick* rule, contrary to Justice White's view, results in less effective enforcement of the antitrust laws. The barring of suits by indirect purchasers will mean that a heavier burden of enforcement will fall upon the Justice Department and the Federal Trade Commission. The Antitrust Division of the Justice Department can bring a civil or a criminal action. The kinds of sanctions (fines and jail sentences) associated with public enforcement are simply not enough, however, to deter conduct which can potentially reap millions of dollars. As one businessman said:

When you're doing \$30 million a year and stand to gain \$3 million by fixing prices, a \$30,000 fine doesn't mean much. Face it, most of us would be willing to spend 30 days in jail to make a few extra million dollars.<sup>35</sup>

A successful damage action, on the other hand, can result in a trebling of the actual damage. The risk of such substantial liability and its direct relationship to the illegal profits of the wrongful conduct make a businessman think long and hard before initiating or participating in a course of conduct violative of the antitrust laws.<sup>36</sup>

In addition to the substantial liability of treble damage actions, there is a greater chance that these types of actions will be filed than there is of government prosecution. Prior to *Illinois Brick*, private damage actions exceeded government enforcement action by more than tenfold.<sup>37</sup> Justice Department actions are insufficient because of resource limitations, lack of firsthand knowledge, and prosecution under the criminal law is more difficult, due to a higher standard of proof.<sup>38</sup>

32. *Hearings, supra* note 15, at 21. (statement of Assistant Attorney General John Shenefield).

33. *S. Rep. supra* note 2, at 23.

34. *Id.*

35. *Business Week*, June 2, 1976 at 28.

36. *Hearings, supra* note 15, at 18. (statement of Assistant Attorney General John Shenefield). The head of the Antitrust Division of the Justice Dept., John Shenefield, testified that "as a former antitrust lawyer, I am personally familiar with the fact that private treble damage liability is taken very seriously indeed by businesses . . . sometimes more seriously even than the possibility of prosecution."

37. Posner, *A Statistical Study of Antitrust Enforcement*, 13 *Journal of Law and Economics* 365, 370-4 (1970).

38. *Hearings, supra* note 15, at 21 (statement of Assistant Attorney General John Shenefield). In response to a question by Senator Kennedy, Assistant Attorney General John Shenefield explained why the Justice Department actions were not sufficient:

First of all, we, in the Department of Justice do not always know first hand when the situations arise. Nobody is more likely to know about antitrust violations than firms in the industry in the distribution chain. Second, if you prosecute under the criminal law, you are faced with a much higher standard of proof. Skillful lawyers, even against our good staff, sometimes are able to pull rabbits out of hats and beat us. Third, I think it is more likely than not that we will always have some resource limitations. We can be busily filing cases when there are price-fixing situations and still leave a large number of situations unattended.

Not reversing the *Illinois Brick* decision will mean greater reliance on the Federal antitrust agencies or failing that, create a necessity for additional federal regulation if the marketplace cannot be kept competitive.<sup>39</sup> By saying that all parties other than the direct purchaser are not injured within the meaning of section 4 of the Clayton Act, the decision eliminates many potential plaintiffs who could prove that they were damaged. The majority in *Illinois Brick* improperly elevated its concern with judicial administration over the basic goal of providing fair compensation to those persons actually injured. Also, contrary to the claims of the majority, *Illinois Brick* lessens the deterrent effect of private damage actions and the overall effective enforcement of the antitrust laws.

### JUDICIAL PRECEDENT

The decision of the United States Supreme Court in *Illinois Brick* is a flat rejection of the view taken by all but one of the federal courts of appeals who have dealt with indirect purchaser suits<sup>40</sup> and contradicts the Supreme Court's previously consistent philosophy in construing section 4 of the Clayton Act.<sup>41</sup> Most courts considering the issue of indirect purchaser suits prior to *Illinois Brick* held that where indirect purchasers sued, the overcharge should be apportioned among direct and indirect purchasers in accordance with the actual damage suffered.<sup>42</sup> On this basis, indirect purchasers—including the state and federal government—who acquired drugs, highway materials, books, hardware and many other price-fixed items received hundreds of millions of dollars in antitrust damages between the *Hanover Shoe* and *Illinois Brick* decisions.<sup>43</sup>

In facing the issue presented in *Illinois Brick*, the Supreme Court could have limited the *Hanover Shoe* decision to those situations where indirect purchasers would not be able to sue. In *Hanover Shoe*, where a shoe manufacturer (Hanover) sued the manufacturer of its shoemaking equipment (United), the Court observed that the buyers of shoes had suffered only a nominal loss on each purchase and that none of them had brought suit.<sup>44</sup> In addition, the Court observed that if these plaintiffs sued they would have difficulty proving that an overcharge on capital equipment resulted in a determinate amount of damage on each shoe that was produced from the machinery.<sup>45</sup> The Court noted that this made it unlikely that shoe purchasers

39. *Hearings, supra* note 15, at 87 (testimony of Senator Danforth).

40. The Courts of Appeals for the Second, Fifth, Seventh, Ninth and the District of Columbia Circuits have either explicitly or implicitly allowed indirect purchasers to prove their damages. *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971); *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1347-1375, n.27, (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Illinois v. Ampress Brick Co.*, 536 F.2d 1163 (7th Cir. 1976); *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *Illinois v. Bristol-Myers Co.*, 470 F.2d 1276, 1278, n.4 (D.C. Cir. 1972).

41. Prior to *Illinois Brick*, the Supreme Court consistently indicated that section 4 of Clayton served the two vital purposes of providing deterrence to future violations and of compensating persons injured by violations that occur. *Perma Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968). *See also Mandeville Island Farms, Inc., v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *Radovich v. Nat. Football League*, 352 U.S. 445, 454 (1957); and *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-66 (1945).

42. *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974). District courts have also allowed indirect purchasers' claims in such cases. *Boshes v. General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973); *In re Master Key Antitrust Litigation*, 1973-2 CCH Trade Cases P74, 680 (D. Conn. 1973); and *Carnivale Bag Co., v. Slide-Rite Mfg. Corp.*, 395 F. Supp. 287 (S.D.N.Y. 1975).

43. *See supra* note 40.

44. 392 U.S. at 494.

45. *Id.*

would or could successfully sue United for overcharges on its machines, whether or not Hanover had passed some or all of those overcharges on to purchasers of shoes.<sup>46</sup> The Court, therefore, concluded that deterrence would be severely undermined if Hanover was not allowed to recover.<sup>47</sup> It reasoned that, if Hanover's claim could be defeated by proving it passed-on the overcharge to purchasers of shoes, no one would be able to recover for United's overcharges and United would be able to keep the illegal profits it had obtained.<sup>48</sup> A decision in *Illinois Brick* limiting *Hanover Shoe* to those situations where indirect purchasers would not be able to sue would have been consistent with the latter decision's pro-enforcement reasoning and with subsequent holdings.<sup>49</sup>

The majority in *Illinois Brick*, nevertheless, extended the *Hanover* decision to cases where indirect purchasers were willing and able to sue, stating that multiple recovery would result if indirect purchasers could also sue.<sup>50</sup> In support of that conclusion, the Court pointed to the difficulty that would result from proof of damage by indirect purchasers. It is true that damage proof by indirect purchasers in some cases may well be difficult. Proof of damages is the plaintiff's burden, however, and if a plaintiff fails to prove both the fact and amount of its damage, it simply will not recover. Moreover, where an indirect purchaser's injury is remote or tenuous, recovery can be barred by conventional theories of proximate cause and target area doctrines which S. 300 would explicitly leave in force.<sup>51</sup>

The fundamental problem with the majority opinion in *Illinois Brick* is that it converts a problem of proof in particular cases into a general rigid rule that precludes recovery by anyone who has not dealt directly with the defendant. The fact that such oversimplification is unnecessary is best shown by the numerous court decisions prior to *Illinois Brick* in which damages were awarded to indirect purchasers.<sup>52</sup>

## ANTITRUST LEGISLATION

### Sherman and Clayton Acts

The history of the antitrust laws including section 4 of the Clayton Act clearly shows that the purpose of the antitrust laws in general and of the right to sue for treble damages in particular is to protect consumers.<sup>53</sup> Section 4 of the Clayton Act was the successor of section 7 of the Sherman Act and merely reenacted its provisions.<sup>54</sup> Thus, the legislative history of section 7 of the Sherman Act is relevant to understanding section 4 of the Clayton Act. The legislators who drafted section 7 were clearly of the view that it afforded all consumers a right of action against an outlawed combination.<sup>55</sup> According to Senator Sherman, the object of this section was "to give private parties a

46. *Id.*

47. *Id.*

48. *Id.*

49. See *supra* notes 40 and 42.

50. 431 U.S. at 730.

51. S. 300, *supra* note 9.

52. See *Supra* notes 40 and 42.

53. See 51 Cong. Rec. 16, 319 (1914) (remarks of Representative Floyd); 51 Cong. Rec. 15, 938 (1914) (remarks of Senator Nelson) in the final House and Senate debates on section 4.

54. See *supra* note 10.

55. See 21 Cong. Rec. 1767, 1768 (1890) (remarks of Senator George) and 21 Cong. Rec. 2456 (1890) (remarks of Senator Sherman).

remedy for personal injury caused by such a combination."<sup>56</sup> Senator George amplified these remarks as follows: "The consumer therefore, paying all the increased price advanced by the middleman and profits on the same, is the party necessarily damnified or injured."<sup>57</sup>

Paradoxically, in a unanimous decision just six months before the *Illinois Brick* decision,<sup>58</sup> the Supreme Court examined the legislative history of section 4 of the Clayton Act and its predecessor statute in weighing the issue of "antitrust injury." In a footnote to its opinion,<sup>59</sup> the Court acknowledged Senate floor discussions which indicate that treble damage antitrust actions were intended primarily as a consumer remedy. It also stated that when Congress enacted the Clayton Act in 1914 it "extended the remedy under section 7 of the Sherman Act to persons injured by virtue of any antitrust violation."<sup>60</sup>

### Hart-Scott-Rodino Antitrust Improvements Act

Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976<sup>61</sup> amends the Clayton Act by permitting state attorneys general to bring private treble damage actions for violations of the Sherman Act to secure redress for damage done to natural persons (consumers) residing in their states. Title III is intended to provide compensation for the victims of antitrust offenses, prevent antitrust violators from retaining the fruits of their illegal activities, and deter antitrust violations.<sup>62</sup> The majority opinion in *Illinois Brick*, while not directly addressing the substance of "parens patriae" amendments to the Clayton Act,<sup>63</sup> clearly suggests that even a parens patriae action could only be brought on behalf of individuals who have purchased directly from an antitrust violator, a result that virtually negates the entire purpose of the parens patriae amendment.

In its efforts to dismiss as irrelevant the most recent Congressional views on section 4, the majority opinion said that the parens patriae amendments "simply created a new procedural device . . . to enforce existing rights of recovery under section 4."<sup>64</sup> It follows that if indirect purchasers have no existing rights and if parens patriae actions only allow state attorneys general to enforce existing rights of consumers, then the *Illinois Brick* decision effectively limits parens patriae suits to those relatively few cases where consumers deal directly with the antitrust violator. Such direct purchaser cases represent only a fraction of the situations originally contemplated at the time Congress authorized parens patriae actions. Indeed, the primary beneficiaries of parens patriae actions were intended by Congress to be consumers who were indirect purchasers.<sup>65</sup>

The Senate Report on the bill (S. 1284) stated specifically that the parens patriae provision was the "legislative response to the restrictive judicial interpretation of the notice and manageability provisions of Rule 23 of the

56. 21 Cong. Rec. 2456 (1890) (remarks of Senator Sherman).

57. 21 Cong. Rec. 1767, 1768 (1890) (remarks of Senator George).

58. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

59. *Id.* at 486, n.10.

60. *Id.* See also H.R. Rep. No. 627, 63d Cong., 2d Sess. 14 (1914).

61. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15(c) - 15(g) (Supp. 1978).

62. S. Rep. No. 803, 94th Cong., 2d Sess. 5 (1976).

63. 15 U.S.C. §§ 15(c) - 15(g) (Supp. 1978).

64. 431 U.S. at 733, n.14.

65. *Hearings, supra* note 15, at 7 (testimony of Senator Scott).

Federal Rules of Civil Procedure and the rights of consumers and states to recover damages under section 4 of the Clayton Act."<sup>66</sup> The Senate Judiciary Committee then went on to explicitly disapprove of decisions interpreting section 4 to bar recovery by anyone other than the direct purchaser.<sup>67</sup> The Committee Report also emphasized its support of cases interpreting section 4 as allowing recovery by purchasers not in privity with the defendants.<sup>68</sup> The House report also indicated that section 4 permits recovery by "any person including any consumer, who can prove he was injured by price-fixing or any other antitrust violation."<sup>69</sup>

Despite these recent and clear indications of how Congress views the meaning of section 4, the majority in *Illinois Brick* has interpreted section 4 to bar recovery for any party other than the immediate purchaser. Justice Brennan's strongly worded dissent in *Illinois Brick* expressed his frustration with the majority's disregard of Congressional intent as follows:

It is difficult to see how Congress could have expressed itself more clearly. Even if the question whether indirect purchasers could recover for damages passed-on to them was open before passage of the 1976 Act and I do not believe that it was, Congress' interpretation of section 4 in enacting the *parens patriae* provision should resolve it in favor of their authority to sue. Indeed, the House Report accompanying the bill actually referred to the opinion of the District Court in this case, as an example of the correct answer. The Court's tortuous efforts to impose a 'consistency' upon this area of the law that Congress has so clearly rejected is a return to the 'legal somersaults and twisting and turnings' of the Court's earlier opinions that ultimately led to the passage of the Clayton Act in 1914 to salvage the ailing Sherman Act.<sup>70</sup>

As discussed above, the *Illinois Brick* opinion effectively precludes most *parens patriae* actions. Prior to this legislation, businessmen were able to evade serious penalties for antitrust violations. Those who sold relatively low-priced goods to a large number of people could price-fix with the only deterrent being Justice Department prosecution and the prospect of high profits often overcame concern for such prosecution. Damage liability was not feared because the injury was in small amounts to millions of individuals. No one individual had a sufficient economic stake to bear the litigation burden necessary to maintain a private suit for recovery under section 4. Restrictive judicial interpretation of the notice and manageability provisions of F.R.C.P. 23 and proof of individual damages has made consumer class actions rare.<sup>71</sup>

66. S. Rep., *supra* note 62, at 6.

67. *Id.* at 40, n.2.

68. *Id.* at 40.

69. H.R. Rep. No. 499, 94th Cong., 1st Sess. 6 (1976).

70. 431 U.S. at 758 (Justice Brennan dissenting). See 51 Cong. Rec. 9086 (1914) (remarks of Rep. Kelly).

71. (Letter from former Assistant Attorney General Thomas Kauper to the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee (Sept. 25, 1975)). Writing in support of the need for *parens patriae* he stated: "Although it was once thought that the 1966 liberalization of Federal Rule of Civil Procedure 23 might provide a satisfactory mechanism for effectuating the deterrent objective of section 4, the class action device is apparently of limited utility in securing relief for large classes of individual consumers." See *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974) in which the Supreme Court ruled that the notice requirements for class action under F.R.C.P. 23 mean actual notice. See also *City of Philadelphia v. American Oil Company*, 1971 CCH Trade Cases P73, 625 (D.N.J. 1971), in which the court said, "By any reasonable standard it is difficult for this court to believe that Rule 23, as presently written, was intended to reach the overly broad non-governmental class sought to be represented . . . in the pending actions."



Congress enacted *parens patriae* legislation because of its awareness that even an overcharge of just one dollar on a consumer item that had sales of fifty million could result in manufacturers reaping a \$50 million windfall. Yet, even before the effectiveness of *parens patriae* has been shown the majority opinion in *Illinois Brick* has emasculated it. Presently by the expedient of selling goods through middlemen, a manufacturer or other business can avoid the mechanism of *parens patriae*. *Illinois Brick* has made antitrust enforcement even less effective than it was before the *parens patriae* legislation was passed. Prior to the enactment of this legislation, indirect purchasers could bring an individual action and in appropriate cases a class action.<sup>72</sup> Currently, the indirect parties have no remedy whatsoever. However, S. 300 contains a provision which would facilitate class action suits by those injured since damages need only be proven on a classwide basis.<sup>73</sup>

#### THE LEGISLATIVE TEXTS OF S. 300 AND S. 1874

Basically, S. 300, as introduced by Senator Kennedy in the 96th Congress has two sections relevant to this discussion:<sup>74</sup> "Clayton Act Amendment;" and "Applicability of Amendments." S. 300 adds a new subsection 4I to the Clayton Act.<sup>75</sup> Subsection 4I(1) specifically overrules the holding in *Illinois Brick* by removing the artificial prerequisite of privity between the plaintiff and defendant in an antitrust action.<sup>76</sup> The proposed Subsection 4I(1) also declares that any purchaser or seller, "upon proof of payment or receipt of all or any part of any overcharge or underpayment for such goods or services," shall be deemed to be injured within the meaning of the Clayton Act. The proposed Subsection 4I(1) of S. 1874 did not state that a purchaser or seller is "deemed to be injured" regardless of privity with the defendant. S. 1874 only contained language which removed the requirement of privity between a plaintiff and a defendant in an antitrust suit. The new bill (S. 300) contains the language that a person "is deemed to be injured" in order to preclude the courts from avoiding the intent of the legislation by ruling that one not in privity with the defendant is not injured within the meaning of the Clayton Act. Thus, S. 300 manifests an intent that the Court is not to rely upon a mechanical test of whether a plaintiff did or did not deal directly with the antitrust violator. The provision does not, however, automatically grant standing to individuals often considered too remote to recover for antitrust violations.<sup>77</sup> It invokes traditional principles of standing, remoteness, and proximate causation to limit the number of claimants seeking recovery. It invokes longstanding doctrines of joinder, statutory impleader, and informal coordination to minimize the number of separate actions for a single offense. It invokes existing standards of *res judicata* and collateral estoppel to prevent defendants from avoiding liability by shifting their identification of the party injured.

72. Such an action, though not totally effective as discussed *supra* at note 71, at least existed.

73. S. 300, § 2, 96th Cong., 1st Sess. (1978) reads as follows:

In any action brought under section 4 or 4C of the Act by or on behalf of a class of purchasers or sellers, the fact of injury and the amount of damages sustained by or passed-on to or by the members of the class may be proven on a classwide basis, without requiring proof of such matters by each individual member of the class. The percentage of total damages attributable to a member of such class shall be the same as the ratio of such member's purchases or sales to the purchases or sales of the class as a whole.

74. S. 300, *supra* note 9.

75. S. 300, § 2, *supra* note 9.

76. *Id.*

77. *Id.*

Subsection 4I(2) of S. 300 authorizes the use of defensive pass-on by permitting defendants to prove that the plaintiff has passed-on all or part of any overcharge or underpayment to another purchaser or seller in the chain of distribution.<sup>78</sup> Defensive pass-on may be used to avoid duplicative liability “in the discretion of the court.” This language would give the courts more leeway than would have existed under the language of its predecessor (S. 1874). Under the latter bill, the defendant could have only availed himself of the pass-on defense where the persons to whom the overcharge (or underpayment) was passed-on, were, at that time “persons who are themselves entitled to recover.”<sup>79</sup>

S. 300 is legislation consistent with past and present Congressional policy goals and it addresses some of the majority Court’s concerns in *Illinois Brick*. The Court was worried that multiple recovery would result by allowing indirect purchasers to recover for damages passed-on to them as well as permitting the direct purchaser to recover the full amount of the overcharge as *Hanover* dictated.<sup>80</sup> This concern is overcome by allowing a defendant to prove that a particular plaintiff has passed-on all or some of the overcharge to other purchasers or sellers in the chain of distribution. Since this bill would permit the courts to entertain the pass-on defense in their discretion in order to avoid duplicative liability, it is difficult at this time to determine what, if any limitations or requirements may be employed by the courts with respect to the defense.

There remains the legitimate concern that under S. 300 defendants would be able to play a shell game thereby avoiding all liability. In S. 1874 this result was precluded by the phrase in Subsection 4I(2): “to others who are themselves entitled to recover.”<sup>81</sup> The pass-on defense could not have been used where the overcharge has been passed-on to persons who themselves would be denied recovery under the doctrines of proximate causation, target area, the applicable statute of limitations, or other legal bars to recovery. It appears that under S. 300 the courts are given the authority to fashion judicial reasoning to achieve the same result that would have been attained under the language of S. 1874.

The Court in *Illinois Brick* was also concerned with the complexity-of-damages issue. The Senate Judiciary Committee, in analyzing S. 1874, agreed that in some cases the tracing of damages may well be difficult.<sup>82</sup> Proof of damages is the plaintiff’s burden, however, and he must prove both the fact and amount with reasonable certainty in order to recover. The defendant bears a similar burden of proof regarding the affirmative defense of pass-on. There is no provision in S. 300 – except with regard to apportionment of damages in a class action suit<sup>83</sup> – detailing the procedure for the allocation of damages. The legislative history of S. 1874 reveals that “the important substantive rights addressed in S. 1874 should be considered on their merits apart from procedural and judicial management problems.”<sup>84</sup> Moreover, the

78. *Id.*

79. S. 1874, § 3, *supra* note 1.

80. 431 U.S. at 730.

81. S. 1874, § 3, *supra* note 1.

82. 431 U.S. at 730.

83. S. 300, *supra* note 73.

84. (Letter from Daniel Meador, Assistant Attorney General, Justice Department Office for Improvements in the Administration of Justice, to the Chairman of the Antitrust Subcommittee, *cited in* S. Rep., *supra* note 2, at 7.

courts were able to effectively apportion damages during the nine year period between the *Hanover Shoe* and *Illinois Brick* decisions in the absence of any special legislative provision.

Section 4 of S. 300 deals with the application of the 4I Amendment to the Clayton Act.<sup>85</sup> This section attempts to make the bill applicable to cases pending on or after the date of its enactment. The purpose is to alleviate the misallocation and denial of recovery invited by the *Illinois Brick* decision. As discussed above, the view predominately followed by the federal Courts of Appeal was precisely to the contrary of that adopted in *Illinois Brick*.<sup>86</sup> The *Illinois Brick* decision itself represented a retroactive redistribution of claims.<sup>87</sup> Assistant Attorney General John Shenefield testified before the Antitrust and Monopoly Subcommittee that S. 1874, which would have made the Clayton Act amendment applicable to cases pending at the time of the Court's decision, in his opinion, clearly met the constitutional requirement of due process.<sup>88</sup>

### THE ILLINOIS BRICK VACUUM

With the failure of the 95th Congress to respond to the Supreme Court's ruling in *Illinois Brick*, antitrust litigants must look for ways to circumvent the Court's restrictions. The sweeping pronouncements in *Illinois Brick* appear to give the indirect purchaser (usually the consumer) little breathing room in the absence of some legislative action.

The Court in *Illinois Brick* implied that where a defendant-supplier owns or controls the intermediary in a vertical chain of distribution, an indirect purchaser may sue the supplier.<sup>89</sup> If, for example, a direct purchaser is a wholly-owned subsidiary of the supplier, the exception would apply.<sup>90</sup> In cases involving only part interests, however, courts will have to determine what degree of ownership suffices to bring this situation under the purview of the exception. To the extent a supplier holds an equity interest in a direct purchaser who successfully sues for overcharges, the supplier will recoup his own loss through the direct purchaser's gain. Regardless of its size, this recoupment undercuts the deterrent function of the treble damage provision, and courts should liberally apply the ownership exception. Furthermore, a potential antitrust defendant with control over a direct purchaser can prevent the filing of a suit.<sup>91</sup> Thus, courts should invoke the control exception to ensure that sellers do not insulate themselves from suit by creating clever distribution systems or

85. S. 300 provides that "The amendments made by this Act shall apply to any action under sections 4, 4A or 4C of the Clayton Act which is pending on the date of enactment of this Act or which is commenced on or after such date of enactment."

86. See *supra* note 40 and accompanying text.

87. S. Rep., *supra* note 2, at 28, n.14.

88. *Hearings, supra* note 15, at 23 (statement of Assistant Attorney General John Shenefield).

89. 431 U.S. at 736, n.16.

90. *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969). The Court held that the plaintiff's right to recover the losses he suffered due to Standard Oil's wrongdoing was not impeded simply because the product in question passed through a formal arrangement of subsidiaries before reaching the level of Perkins' actual competitor.

91. Franchisors frequently maintain a strong grip over their franchises by dictating product lines, quality standards and hours of operation. In addition, they often make other policy decisions normally committed to independent management. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 97 S.Ct. 2549 (1977). In view of widespread franchisor control, persons purchasing from franchisees should be able to recover damages resulting from franchisor's anticompetitive acts.

by using strong-arm methods to prevent direct purchasers from bringing suit. In addition, courts should permit indirect purchasers to sue if the direct-purchaser plaintiff is not vigorously pursuing his cause of action (a likely result where the wrongdoer controls the direct-purchaser plaintiff).

The rule of *Illinois Brick* does not apply where an indirect purchaser buys a pre-determined quantity of price-fixed goods under a cost-plus contract. Difficulties of proof disappear where the direct purchaser in setting his price automatically adds a contractually predetermined sum to the price he paid the initial seller. Accordingly, in this instance, *Illinois Brick* permits the indirect purchaser to sue.<sup>92</sup> The cost-plus contract exception was devised in *Hanover Shoe*,<sup>93</sup> but courts that noted the exception in permitting indirect-purchaser suits never based their decision solely on the presence of a cost-plus contract.<sup>94</sup> In *Illinois Brick*, the Court's recognition of this exception at least evidenced some willingness to allow recovery absent difficulties of proof. It would seem that in the absence of remedial legislation courts might permit suits brought by indirect purchasers capable of demonstrating the functional equivalent of a cost-plus contract.

These two limited exceptions which have survived the *Illinois Brick* ban are a far cry from the state of the law as visualized by Senators Sherman and George in 1890. The initial House debate concerning provisions related to private damage actions reveals that these actions were conceived primarily for "opening the door of justice to every man, whenever he may be injured by those who violate the antitrust laws,"<sup>95</sup> and giving the injured party appropriate damages for the wrong suffered. Certainly, this limited avenue open to the indirect purchaser is not what the sponsors of the Hart-Scott-Rodino Antitrust Improvements Act had in mind. The legislative history of S. 1874 (which is applicable to S. 300) indicates that it creates "no new substantive liability" and operates only where citizens of the state would otherwise have a cause of action under section 4.<sup>96</sup> The state of Illinois could not, for example, amend its complaint to allege a *parens patriae* action on behalf of its citizens as ultimate consumers. In many cases, however, a state could move to assert claims of direct purchasers who have not sued because of delicate business relationships with suppliers. In such a case, *parens patriae* presents no problems of apportionment because the state, if successful, will recover the full amount of the initial overcharge.<sup>97</sup>

92. 431 U.S. 732, n.12.

93. 392 U.S. at 494.

94. See *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *Boshes v. General Motors Corp.*, 59 F.R.D. 589 (N.D.Ill.1973); *In re Master Key Antitrust Litigation*, 1973-2 CCH Trade Cases P74, 680 (D.Conn.1973); *West Virginia v. Chas Pfizer & Co.*, 440 F.2d 1079 (2d Cir.1971), *cert. denied*, 404 U.S. 871 (1971).

95. 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb).

96. S. Rep., *supra* note 62, at 6.

97. 431 U.S. at 735. A recovery on behalf of direct purchasers is "automatic". The state will recover if it proves that an overcharge occurred and that direct purchasers passed-on all or part of the overcharges.

## CONCLUSION

The Court in *Illinois Brick* established that the phrase "any person who shall be injured" in Section 4 of the Clayton Act includes, as a matter of law, only direct purchasers. In doing so, the Court "has flouted the will and purpose of Congress in a most crass fashion."<sup>98</sup> The majority opinion recognized the importance of effective private enforcement of the antitrust laws as a deterrent to antitrust violations. Despite this belief, the majority allowed considerations of stare decisis to hamper its view when it stated that its rule would facilitate private enforcement by eliminating the necessity for apportioning damages between direct and indirect purchasers. 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 contrary to notions of equity and justice; more importantly, it cannot effectuate compensation and deterrence, the dual purposes of the antitrust laws.

In addition, the *Illinois Brick* reasoning blatantly ignores the clear legislative history of the Sherman, Clayton, and particularly, the Hart-Scott-Rodino Act. The Court sidestepped this latter Act despite its stated Congressional intent for reasons of judicial economy and administration, at the expense of substantive rights. The majority relied upon stare decisis and invited Congress, if it disagreed, to provide "clear directions to the contrary."<sup>99</sup> The Senate Judiciary Committee responded, in the 95th Congress, with S. 1874. As reported, the bill had the necessary provisions to overturn *Illinois Brick* and restore fair and effective enforcement of the antitrust laws. S. 300, introduced in the 96th Congress by Senator Kennedy, would restore fair and effective enforcement of the antitrust laws. The consumer, who bears the economic burden of most antitrust violations in the form of higher prices and services, must be given back his remedy - which Congress intended him to have and which *Illinois Brick* took away. The 96th Congress has the task of painting a brighter picture again for the Court. As Mr. Justice Blackmun admonished: "[O]ne regrets that it takes so long and so much repetitious effort to achieve, and to have this Court recognize the obvious congressional aim."<sup>100</sup>

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98. *Hearings*, *supra* note 15, at 17 (remarks of Sen. Hugh Scott).

99. 431 U.S. at 736.

100. 431 U.S. at 766 (Justice Blackmun dissenting).