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Part 1



# ACQUISITIONS

# THE ANTITRUST ENFORCEMENT ACT OF 1978

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## REPORT

OF THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

TOGETHER WITH

## MINORITY AND ADDITIONAL VIEWS

TO ACCOMPANY

## S. 1874

## PART 1

JUNE 14 (legislative day, MAY 17), 1978.—Ordered to be printed

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95TH CONGRESS } SENATE { Rept. 95-934
2d Session } { Part 1

# THE ANTITRUST ENFORCEMENT ACT OF 1978

JUNE 14 (legislative day, MAY 17), 1978.—Ordered to be printed

Mr. KENNEDY, from the Committee on the Judiciary, submitted the following

## REPORT

together with

## MINORITY AND ADDITIONAL VIEWS

[To accompany S. 1874]

The Committee on the Judiciary, to which was referred the bill (S. 1874) to amend section 4 of the Clayton Act to permit consumers, businesses, and governments injured by antitrust violations to recover whether or not they have dealt directly with the antitrust violator, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

### I. PURPOSE AND SUMMARY

On June 9, 1977, the Supreme Court issued an opinion in the case of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), that has serious implications for the fair and effective enforcement of this Nation's antitrust laws. The majority 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' within the meaning of section 4 of the Clayton Act. 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 a violation.

The majority opinion, from which three justices strongly dissented, was based on the Court's interpretation of section 4 of the Clayton Act and its underlying legislative purposes. The majority invited the Congress, if it disagreed with the result in the case, to provide "clear directions * * * to the contrary." S. 1874 is the committee's response.

Since consumers ordinarily purchase goods through retailers or other "middlemen," consumers, under the *Illinois Brick* opinion, are now un-

able to recover any damages for the higher prices they pay due to price-fixing and other antitrust violations. Businesses, farmers, State governments, and many Federal agencies—which also often purchase their goods and services from wholesalers, retailers, or other middlemen—are also barred from any recovery in these instances.

As discussed more fully in section II(A)(2) below, the committee believes that such a bar to these actions is flatly contrary to the express intent of Congress in passing the original Sherman Act in 1890 and the Clayton Act in 1914, as well as the recent Hart-Scott-Rodino Act enacted last Congress. That individual consumers were the focal point of the right to sue for damages was made very explicit as early as 1890, when Senator George stated:

> The right of action against the persons in the combination is given to the party damnified.
>
> * * * * *
>
> The consumer, therefore, paying all the increased price advanced by the middlemen and profits on the same is the party necessarily damnified or injured. [21 Congressional Record 1767.]

A bar to other than direct purchasers is also contrary to the rule applied by a majority of Federal courts prior to the unexpected *Illinois Brick* decision. If the *Illinois Brick* decision had been the law, consumers, State governments, and many agencies of the Federal Government who in the last several years recovered millions of dollars for the higher prices they paid for price-fixed drugs, highway materials, hardware products, and other items purchased through middlemen would have been barred from any recovery. As the courts have properly held, the purpose of the antitrust laws is to serve consumers by insuring that consumers are offered the better products and lower prices that competition offers. Yet the *Illinois Brick* decision inevitably results in depriving most consumers of any remedy at all.

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, that 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 is because the court held that a "direct" purchaser may recover the entire amount of any overcharge even if that purchaser—in most cases a middleman—has passed some or even all of the higher price on to consumers.

For example, drug manufacturers may agree among themselves to fix the price of an antibiotic at a price higher than its value in a competitive market. Their customers, the wholesalers or pharmacies, then pay the higher price but will usually pass all or most of the illegal overcharge on to their customers. Since drug wholesalers and pharmacists usually operate on the basis of a constant percentage markup, they are frequently better off because of the manufacturers' higher price. The consumers are the real party injured. Yet under the *Illinois Brick* decision the consumer is wholly barred from any recovery, while the wholesaler or pharmacist, if he does sue, can collect three times the overcharge even though he may have passed on the full amount of the overcharge.

The *Illinois Brick* rule, in addition to being contrary to the purpose and intent of the antitrust laws and 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. This is because direct purchasers or middlemen frequently are reluctant to sue their supplier for fear of disrupting existing profitable relations, for fear of opening their files to the broad discovery typical of antitrust cases, or because they really are not damaged as a result of the antitrust violations. In such cases, barring suits by "indirect" purchasers and seller will mean that no party, other than possibly the Justice Department, will sue.

Eliminating an entire category of truly damaged plaintiffs including State attorneys general suing in their proprietary capacity or under *parens patriae*, because of the happenstance that the goods have been bought through middlemen, will greatly lessen the deterrence value of treble-damage suits. The Justice Department simply cannot be relied upon to bring every price-fixing case. As the Assistant Attorney General for Antitrust, John Shenefield, stated:

> We do have resource limitations in the Justice Department. We do the best we can.
>
> While the material resources of the Justice Department to investigate antitrust violations have grown somewhat and the criminal sanctions for such violations have been increased, treble damage actions remain a vitally important part of the antitrust arsenal.[1]

Even when the Justice Department does bring a case, the inability of indirect purchasers to subsequently sue for treble damages lessens the deterrent value of these actions.

The Justice Department currently has over 100 grand juries in operation, with most of them investigating price fixing. Price fixing is endemic in the United States, and antitrust enforcement must be improved and not weakened. The loss of private damage actions on behalf of indirect purchasers has an intolerable impact upon antitrust enforcement, and the *Illinois Brick* decision must either be reversed or will have to be countered by a major increase in Federal enforcement or regulation.

The majority opinion in *Illinois Brick* recognized the importance of effective private enforcement of the antitrust laws. However, it stated that its rule would facilitate private enforcement by eliminating the necessity for "apportioning" damages between "direct" and "indirect" purchasers. This reasoning—in addition to ignoring the clear legislative history of the Hart-Scott-Rodino Act—ignores three important facts:

1. For the reasons mentioned above, in some cases barring "indirect" purchaser suits means that there will be no private enforcement at all.

2. The fact that courts prior to the *Illinois Brick* decision were able effectively to handle such apportionment issues indicates that such issues are no more complex than many other problems (e.g.

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[1] Hearings on S. 1874 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 95th Cong., 2d sess. at 18 (1977) [hereinafter cited as "Hearings"].

patents, securities fraud, bankruptcy, and admiralty cases) the Federal courts regularly handle.

3. The result is fundamentally unfair because it deprives consumers of any recovery for actual injury while giving middlemen windfall recoveries even where the middlemen have suffered no injury themselves.

The majority opinion itself recognized some of the serious problems raised by its decision; but the majority felt that in the absence of congressional action it was locked into the *Illinois Brick* result by the Court's earlier opinion in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

In the *Hanover Shoe* case the 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 and had thus not been injured in its business or property. The case, however, did not say what would happen if a party other than a first purchaser sued, claiming that an illegal overcharge had been passed on to it. The majority of the courts of appeals subsequently held that *Hanover Shoe* should not prevent those other than the first purchased from recovering if they could prove they were actually damaged.

When the Supreme Court, almost a decade later in *Illinois Brick*, finally addressed this question it rejected the views of 50 States, the U.S. Attorney General and many lower courts and ruled that only the overcharged direct purchaser—and not other parties in the chain of manufacture and distribution—is "injured in his business or property" within the meaning of Clayton section 4. The Court was worried that allowing "offensive use" [2] but not "defensive use" [3] of pass-on could give rise to multiple liability. It was afraid that a direct purchaser under *Hanover* could collect the full amount of the overcharge while indirect purchasers could later recover for their damages as well. Because of this problem the Court indicated that whatever rule was adopted regarding proof of pass-on had to be applied equally to both plaintiffs and defendants.

Once having decided that the rule had to be applied equally, the Court felt it had two choices: Ban both offensive and defensive use of pass-on or allow both. The Court chose the former because of its concern with complexity of damage proof if pass-on were an issue and because it felt that in the absence of congressional action it should adhere to the *Hanover Shoe* decision barring the use of pass-on as a defense.

S. 1874, the committee's answer to this decision, is a fair and well-balanced response which has been the subject of 8 days of hearings involving a total of 55 witnesses. The bill is supported by the administration, all 50 State attorneys general, and groups as diverse as the National Association of Home Builders, Paralyzed Veterans of America, Common Cause, MCI Communications Corp., the International

[2] Permitting plaintiffs who have not dealt directly with an antitrust violator to recover if they can prove that a portion of the illegal overcharge was "passed on" to them is often referred to as permitting "offensive use" of passing on.

[3] Permitting a defendant to prove as a partial or complete affirmative defense that a plaintiff has passed on to others some or all of the illegal overcharge, and hence that the plaintiff is not entitled to recover for so much of the overcharge as has been passed on, is often referred to as permitting "defensive on.

Association of Machinists, Congress Watch, and the Computer and Communications Industry Association.

S. 1874 adds a new subsection "4I" to the Clayton Act. Subsection 4I(1) explicitly overrules the rule of *Illinois Brick* by removing the artificial prerequisite of "privity" between the plaintiff and the defendant in an antitrust action. This tells the courts that they cannot rely upon a mechanical test of whether or not a plaintiff dealt directly with the antitrust violator. Instead, the course should use more factually oriented and flexible tests which reflect the policy goals of the antitrust laws. The provision does not, however, explicitly grant standing to those often considered too remote to recover for antitrust violations perpetrated, for example, on their lessees or employers. As finding B(6) explicitly states, "except as made necessary by this act," the purpose of S. 1874 is "to reserve to the courts the applications and revision of existing principles of remoteness, target area, and proximate causation which have been applied to limit the persons who can recover for antitrust violations." In general, the law of standing was thought to be better left to the courts for development and revision on a case-by-case basis, through analysis based on the compensatory and deterrent purposes of the private antitrust action.

Subsection 4I(2) allows the use of defensive passing-on by allowing defendants to prove that the plaintiff has passed on the overcharge to others who themselves are entitled to recover for that violation. The committee intends, however, for the courts to interpret this provision permitting defensive use of pass-on in a manner that will not materially restrict the ability of direct purchasers to sue for injuries sustained by reason of antitrust violations, including interpretations that will permit full use of class actions and other remedies available under existing law.

The committee does not lightly recommend the overruling of a Supreme Court decision. However, when the Court enunciates a rule which the committee firmly believes is directly counter to its and the entire Congress' oft-repeated policy judgments, it is left with no real choice.

Consistent with its policy goals, however, the committee has attempted to meet some of the Court's concerns. The Court was concerned that multiple recovery could result by allowing indirect purchasers to recover for damages passed on to them as well as allowing the direct purchaser to recover the full amount of the overcharge as *Hanover Shoe* dictated. The committee agrees, and in this legislation has allowed a defendant to prove that a particular plaintiff has passed on some or all of the overcharge to other plaintiffs who are themselves entitled to recover. In this way, there is virtually no chance of multiple recovery because when there are various categories of plaintiffs suing, each will only receive their own damages.

As the 5 days of hearings at the full committee level amply demonstrated, this limited overruling of *Hanover Shoe* could have the potential of weakening antitrust enforcement if it is interpreted in a way so that there is a hiatus in enforcement. Many individuals and groups, including a coalition of plaintiffs' lawyers, and public interest groups, urged the committee in these final 5 days of hearings not to allow the defendant to prove that a particular plaintiff had passed on the overcharge.

For example, a plaintiffs' antitrust lawyer, Perry Goldberg, testified on April 21 that at least under *Hanover Shoe* and *Illinois Brick* the direct purchaser, if he does sue, will probably recover even though he was not damaged:

> I have to say that the important thing to me is *Hanover Shoe*. *Illinois Brick* is something that appeals to my heart in the sense that I am opposed to *Illinois Brick* because there is something wrong with not allowing a person who has been hurt to collect in the courts.
>
> But if I have to choose between my heart and my head, in this case, I will take my head. My head is *Hanover Shoe*. *Hanover Shoe* says: "We are going to get antitrust enforcement." *Illinois Brick says*: "The wrong guy may collect." That is unfortunate. [Transcript of Apr. 21, 1978, committee hearings at 52.]

Goldberg and other plaintiffs' lawyers want *Illinois Brick* reversed but not *Hanover Shoe* because they fear that in some instances the defendant will avoid all liability by proving that each particular plaintiff had passed on the overcharge to someone else. Apparently if the only choice presented was overruling *Illinois Brick* and *Hanover Shoe* or not doing anything, this faction of the plaintiffs' bar would have Congress do nothing.

There is a good deal of merit in the plaintiffs' attorneys' ideal solution of just overruling *Illinois Brick* and not *Hanover Shoe*, since in the time period when both indirects and directs were allowed to sue—post-*Hanover* and prior to *Illinois Brick*—there has been no situation involving such multiple recovery. However, it was the committee's considered belief that the fairer approach, and one that would best meet the Court's concern with multiple recovery, is to allow defendants to prove that a particular plaintiff passed on to other eligible plaintiffs some or all of the overcharge. There still remains the legitimate concern of the plaintiffs' bar that defendants will be allowed to play a shell game avoiding liability totally. The committee emphasizes, however, that this result is precluded by the phrase in 4I(2): "to others who are themselves entitled to recover." The defendant must not only prove that a particular plaintiff passed on the overcharge, it must also prove that he passed it on to persons "entitled to recover." Thus, the pass-on defense cannot be used where the overcharge was passed on to persons who themselves would be denied recovery under either the doctrines of proximate cause or target area, the applicable statute of limitations, or legal bars to recovery. The pass-on defense is thus to be allowed only where it does not inhibit the private enforcement of the antitrust laws or create a hiatus in enforcement.

As to the alleged complexities of tracing damages, the committee agrees that this kind of proof, in some cases, may well be difficult. However, proof of damages is the plaintiff's burden; if a plaintiff fails to prove both the fact and amount of its damage with reasonable precision, it simply will not recover—nor should it. With respect to proof of the affirmative defense of pass-on, that is the defendant's burden. If the defendant is unable to prove with reasonable precision

the fact and amount of pass-on by one plaintiff to others who are themselves able to sue, such defendant will not get the benefit of defensive pass-on—nor should it.

Unfortunately, the majority opinion in *Illinois Brick* converts this problem of proof in particular cases into a general, rigid rule that precludes recovery by anyone who has not dealt directly with the defendant. To be sure, simplicity may be served by such a rule; but the cost of this simplicity in loss of fundamental fairness and in diminution of effective private enforcement of the antitrust laws is intolerable.

Daniel Meador, the Assistant Attorney General in charge of the Justice Department's Office for Improvements in the Administration of Justice, addressed this complexity issue in a letter to the chairman of the Antiturst Subcommittee. In his opinion, sacrificing important substantive rights in the name of simplicity is not warranted because existing procedures can handle these problems:

> The important substantive rights addressed in S. 1874 should be considered on their merits apart from procedural and judicial management problems. The latter can be dealt with effectively by the courts either through existing procedures or through separate legislation now being developed by this Office.

The fact that such a rigid rule is unnecessary is also shown by the numerous court decisions prior to *Illinois Brick* in which damages were awarded to indirect purchasers. These cases are discussed more fully in the next section.

Thus the bill will once again allow consumers, businesses, and Federal and State Governments at least to attempt to recover damages for antitrust violations. As a representative of a group of cattle ranchers stated:

> These people, of course, do not ask that you make the decision that price fixing exists. They want only a chance to prove their case in a court of law. [Hearings at 31.]

If it is not enacted soon, millions of dollars of damages just in pending cases will be lost forever. State governments alone stand to lose close to $500 million if the bill is not enacted speedily.

## II. Background and Need

### *A. Judicial Precedent and Legislative History Do Not Support Illinois Brick Rule*

The decision of the U.S. Supreme Court in the case of *Illinois Brick Co.* v. *Illinois*, supra, is a flat rejection of the view taken by all but one of the Federal courts of appeals to face the problem and contradicts the Supreme Court's previously consistent philosophy in construing section 4 of the Clayton Act. It also totally disregards and is in direct conflict with the legislative intent of the 1890 Sherman Act, the Clayton Act, and the *parens patriae* section of the Hart-Scott-Rodino Act signed into law only 8 months earlier.

1. JUDICIAL PRECEDENT RUNS COUNTER TO THE "ILLINOIS BRICK" CONCLUSION

Section 4 states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble damages for their loss. Prior to *Illinois Brick*, the Supreme Court had indicated again and again that section 4 served the two vital purposes of providing deterrence to future violations and of compensating persons injured by violations that do occur. For example, in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139 (1968), the Court emphasized the deterrent policy of section 4. The *Perma Life* Court held that this policy was so important that damages should be awarded even when the plaintiff was "no less morally reprehensible than the defendant."

The Court's concern with the policy of compensating victims of antitrust violations likewise pervades many of its pre-*Illinois Brick* antitrust opinions. In *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948), the Court interpreted section 4 by saying:

> The 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.

In *Radovich* v. *National Football League*, 352 U.S. 445, 454 (1957) the Court pointed out that courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in the antitrust laws." Similarly in *Bigelow* v. *RKO Radio Pictures Inc.*, 327 U.S. 251, 265–6 (1946), the Supreme Court had said:

> [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 for a proven invasion of the plaintiff's rights.

Given this general awareness by the Court of the broad thrust of section 4, it is hard to ascertain what brought about the *Illinois Brick* opinion. The present Court's interpretation of *Hanover Shoe* provides some insight.

The *Hanover* case presented the Supreme Court with an unusual situation in which there was no strong issue facing the Court that involved compensation of victims. Under the situation presented, the true victims would probably not be fully compensated no matter how the Court ruled. Thus the primary policy concerns were those of deterrence and ease of enforcement.

A shoe manufacturer (Hanover) sued the manufacturer of its shoemaking equipment (United). United had previously been found guilty of various monopolistic practices, including their refusal to sell their shoemaking equipment. Hanover sued United for the difference between the amount it had paid to lease the equipment and the amount it would have paid if Hanover had been able to buy the equipment outright. United defended by saying that Hanover had not been injured

because it had passed on to the buyers of Hanover's shoes any illegal overcharges on the price of shoe machinery.

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.* In addition, the Court observed that if these plaintiffs ever did sue, they would have a very difficult burden to prove that an overcharge on capital equipment resulted in a determinate amount of damage on each shoe that was produced from the machinery. The Court said that this made it unlikely that shoe purchasers 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. The Court therefore concluded that deterrence would be severely undermined if Hanover was not allowed to recover, since 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.

The reasoning of the *Hanover Shoe* decision did not directly apply to cases where "indirect" purchasers did in fact sue. For this reason, most courts considering the issue subsequent to *Hanover Shoe* (and before *Illinois Brick*) held that where indirect purchasers did in fact sue, the overcharge should be apportioned among direct and indirect purchasers in accordance with their actual damage suffered, e.g., *In re Western Liquid Asphalt cases*, 487 F. 2d 191, *cert. denied* 415 U.S. 919 (1974). On this basis, indirect purchasers—including the State and Federal Governments—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—and had hundreds of millions of dollars of additional damage claims on these and other commodities pending when the Supreme Court issued its *Illinois Brick* opinion.

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. Such a decision would have been consistent with the original pro-enforcement reasoning of the *Hanover Shoe* decision and with subsequent precedent. In fact, in the committee's view such a decision should have been compelled by the clear legislative intent of the antitrust statutes.

Instead, the majority opinion in *Illinois Brick* extended the *Hanover Shoe* decision to cases where indirect purchasers were in fact willing and able to sue and then held that since the *Hanover Shoe* rule applied to such a case—giving the first of "direct" purchaser recovery of the entire overcharge even if it had been passed on—multiple recovery would result if indirect purchasers could also sue. In support of that conclusion the *Illinois Brick* majority opinion also pointed to the difficulties that would result from proof of damage to indirect purchasers.

It is, of course, true that this kind of proof in some cases may well be difficult. However, proof of damages is the plaintiff's burden; if a plaintiff fails to prove both the fact and amount of its damage, it simply will not recover.

Moreover, where the relationship of an indirect purchaser's injury is remote or tenuous, recovery can be barred by conventional doctrines

of proximate cause and target area—doctrines which the bill explicitly leaves in force.

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. To be sure, simplicity may be served by such a rule; but the cost of this simplicity in loss of fundamental fairness and in diminution of effective private enforcement of the antitrust laws is intolerable.

The fact that such oversimplification is not necessary is perhaps best shown by the numerous court decisions prior to *Illinois Brick* in which damages were awarded to indirect purchasers.

In fact, every Court of Appeals except one that considered the question prior to the *Illinois Brick* decision held that neither *Hanover Shoe* nor any policy of the antitrust laws should prevent indirect purchasers from proving injury where they are in fact able to do so.

The Courts of Appeals in the Second, Fifth, Seventh, Ninth, and the District of Columbia Circuits have either explicitly or implicitly allowed indirect purchasers to prove their damages. For example in *West Virginia* v. *Charles Pfizer & Co. Inc.*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971), the court rejected an argument by direct purchasers that indirect purchasers be excluded from a settlement fund. The Court of Appeals for the District of Columbia Circuit ruled the same way by implication in *Illinois* v. *Bristol-Myers Co.*, 470 F.2d 1276, 1278 n.4 (D.C. Cir. 1972). In the fifth circuit, the court in dicta approved allowing indirect purchasers to prove their claims [*Yoder Bros., Inc.* v. *California—Florida Plant Corp.*, 537 F. 2d 1347, 1374–1375 and n.27, 1976, *cert. denied*, 429 U.S. 1094 (1977)]. The circuit court's decision in the *Illinois Brick* case itself allowed indirect purchasers to prove their injury. [*Illinois* v. *Ampress Brick Co., Inc.*, 536 F.2d 1163 (7th Cir. 1976)].

One of the most persuasive opinions is from the ninth circuit: *In re Western Liquid Asphalt* cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974). In this case the ninth circuit interpreted *Hanover Shoe* as a proenforcement decision by the Supreme Court stating:

> Clearly the [Supreme] Court's purpose was to preserve the private antitrust suit and promote compensation to those injured. This purpose could not be achieved with the hinderance of a defense, the proof of which it felt would normally present "insuperable difficulty," but the mere allegation of which would often lengthen antitrust litigation beyond reasonable bounds. [487 F.2d at 196.]

The ninth circuit viewed the history of judicial interpretation of section 4 as requiring a liberal interpretation of the section.

> The antitrust laws are to be construed so as to achieve the broad goals which Congress intended to effectuate. *One such policy goal is that there be no hiatus in the enforcement of these laws. Each individual who is injured may sue.* Thus, while we should not impose multiple liability upon defendants, nor give recovery to uninjured plaintiffs, *neither should we bar recovery to those who can demonstrate that they bore*

*the burden of the violation.* 487 F.2d at 200 [citations omitted and emphasis supplied.]

The ninth circuit went on to find that the plaintiffs before it were in the so-called "target area":

> We have recently held that standing in antitrust cases involves a two-step analysis: "identification of the affected area of the economy and then the ascertainment of whether the claimed injury occurred within that area".
>
> We think that appellants here are clearly within the area of the economy which appellees reasonably could have or did foresee would be endangered by the breakdown of competitive conditions. We have previously refused to defeat a cause of action for antitrust violations merely because the violator chose to deal through intermediaries. The broad social object of the antitrust statutes is to end anticompetitive acts in the most comprehensive way. Where the operations and effect of anticompetitive practices was upon the market in which appellants dealt—the "target area"—we found liability. [487 F.2d at 199.] [Citations omitted and emphasis supplied.]

District Courts have also allowed indirect purchaser claims in such cases as:

> *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill.)
>
> *In re Master Key Antitrust Litigation*, 1973-2 CCH Trade Cases P74, 680 (D. Conn. 1973).
>
> *Carnivale Bag Co., Inc.* v. *Slide-Rite Mfg. Corp.*, 395 F. Supp. 287 (S.D., N.Y. 1975).

The only exception at the Court of Appeals level is *Mangano* v. *American Radiator and Standard Sanitary Corp.* 438 F.2d 1187 (3d Cir. 1971), a one page per curiam opinion. In this case, however, the price-fixed goods, plumbing fixtures, were a very insubstantial portion of the total product (houses) purchased by the class of plaintiffs whose claim was dismissed. The plaintiffs were homeowners who were seeking to prove that they were damaged by the overcharge on fixtures. In order to do this, they had to prove that the overcharge was passed on down to them through the wholesalers, plumbing contractors, builders and prior owners of the houses. The *Mangano* opinion, however, accepted that certain indirect purchasers could recover.

Given the facts involved in *Mangano*, it is hard to question the result. However, we do not interpret *Mangano* as announcing a rule of law that denies recovery merely because a price-fixed item has been transformed into another product. In any event, such a rule would be another overly mechanical and unnecessary approach to a problem of proof which can best be met on a flexible, policy-oriented, case-by-case approach. Such a mechanical rule is rejected by this legislation.

### 2. THE ILLINOIS BRICK RULE IS DIRECTLY CONTRARY TO LEGISLATIVE HISTORY OF THE SHERMAN, CLAYTON, AND HART-SCOTT-RODINO ACTS

#### *a. The Sherman and Clayton Acts*

The history of the antitrust laws, including section 4, 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. The predecessor to section 4 of the Clayton Act was section 7 of the Sherman Act. When the Clayton Act was enacted in 1914, section 4 merely reenacted section 7. This is clear throughout the Clayton Act's legislative history.[4] In 1955, section 7 was repealed as superfluous.

Thus, legislative history of section 7 of the 1890 Sherman Act is relevant to understanding section 4 of the 1914 Clayton Act. The legislators who drafted the antitrust statute in 1890 and reenacted it in 1914 were unanimously of the view that it afforded *all* consumers a right of action. The only dissent in the legislative history focused on the effectiveness or practicality of the remedy, not upon its existence.

By March of 1890, the bill originally introduced in the Senate by Senator Sherman on August 4, 1888, was in the draft form upon which the week-long Senate debate focused.

There was no doubt in the minds of the Senators considering the bill in March of 1890 that individual consumers were among those accorded a right of action against the outlawed combination. In Senator Sherman's words:

> The second section of the bill provides that any person or corporation injured or damnified by such a combination may sue for and recover in any court of the United States of competent jurisdiction, of any person or corporation a party to such a combination, all damages sustained by him. [Emphasis supplied.] [21 Congressional Record 2456. (1890)]

According to Senator Sherman, the object of this section was "to give to private parties a remedy for personal injury caused by such a combination." [21 Congressional Record 2456.] [Emphasis supplied.]

That individual consumers were the focal point of the right to sue for damages was made explicit by Senator George:

> The right of action against the persons in the combination is given to the party damnified. Who is this party injured, when, as prescribed in the bill, there has been an advance in the price by the combination? The answer is found in the bill itself in the words, "intended to advance the cost to the consumer of any such articles." The consumer is the party "damnified or injured".
>
> * * * * *
>
> Who are the consumers? The people of the United States as individuals; whatever each individual consumes, or his family, marks the amount of his interest in the price advanced by the combination. [21 Congressional Record 1767, 1768.] [Emphasis supplied.]

The fact that the right to sue for damages was intended to benefit consumers and not middlemen or others was expressly addressed by Senator George as follows:

> This is the express provision of the bill, as I think is clear from the last clause of the first section. But even if it were

[4] For example, see remarks of Representative Floyd, 51 *Congressional Record* 16,319 [1914] and Senator Nelson, 51 *Congressional Record* 15938 [1914], in the final House and Senate debates on the ultimately enacted version of section 4.

not the express language of the bill, it so results as a logical necessity. An advance in price to the middlemen is not mentioned in the bill, for the obvious reason that no such advance would damnify them; it would rather be a benefit, as it would increase the value of the goods he has on hand. He buys to sell again. He buys only for profit on a subsequent sale. So whatever he pays he receives when he sells, together with a profit on his investment; and so all of them including the last, who sells directly to the consumer. The consumer, therefore, paying all the increased price advanced by the middlemen and profits on the same, is the party necessarily damnified or injured. [21 Congressional Record 1767.]

Paradoxically, in a unanimous decision just 6 months before the *Illinois Brick* decision, 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." The Supreme Court's analysis is contained in footnote 10 to its opinion in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). It states:

> Treble damage antitrust actions were first authorized by section 7 of the Sherman Act, 26 Stat. 210 (1890). *The discussions of this section on the floor of the Senate indicate that it was conceived of primarily as a remedy for "[t]he people of the United States as individuals," especially consumers.* 21 Congressional Record 1767 (1890) (remarks of Senator George); see *id.*, at 2612 (Senators Teller and Reagan), 2615 (Senator Coke), 3146–3149. Treble damages were provided in part for punitive purposes, *id.*, at 3147 (Senator George), but also to make the remedy meaningful by counterbalancing 'the difficulty of maintaining a private suit against a combination such as is described' in the Act. Id. at 2456. [Senator Sherman.]
>
> When Congress enacted the Clayton Act in 1914, it "extend[ed] the remedy under section 7 of the Sherman Act" to persons injured by virtue of any antitrust violation. H.R. Rep. No. 627, 63d Cong., 2d Session, 14 (1914). The initial House debates concerning provisions related to private damage actions reveal that these actions were conceived primarily as "*open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered.*" 51 Congressional Record 9073 (1914) [remarks of Rep. Webb]; see, *e.g.*, *id.*, at 9079 [Rep. Volstead], 9270 [Rep. Carlin]; 9414–9417, 1466–1467, 9487–9595. The House debates following the conference committee report, however, indicate that the sponsors of the bill also saw treble damage suits as an important means of enforcing the law. *Id.*, at 16247–16275 [Rep. Webb], 16317–16319 [Rep. Floyd]. In the Senate there was virtually no discussion of the enforcement value of private actions, even though the bill was attacked as lacking meaningful sanctions, *e.g.; id.*, at 15818–15821 [Senator Reed], 16042–16046 [Senator Norris]. [429 U.S. at 486.] [Emphasis supplied.]

Just 6 months later the majority in the *Illinois Brick* decision appears to have lost sight of the fact that the treble-damage remedy "was conceived of primarily as a remedy for the people of the United States as individuals, especially consumers."

*b. Hart-Scott-Rodino Antitrust Improvements Act of 1976*

The most recent congressional pronouncements on the meaning of section 4 is contained in the legislative history and statutory provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Public Law 94–435, 90 Stat., 1383, 1394–1395, 15 U.S.C. sec. 1311). The majority opinion's interpretation of section 4 in the *Illinois Brick* decision is directly inconsistent with Congress' stated interpretation of section 4 contained in the legislative history of the act. In addition, the majority opinion, while not directly addressing the substance of *parens patriae* amendments to the Clayton Act, 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* amendments.

The Senate report on the bill, written by this committee, specifically stated that this bill was "the legislative response to the restrictive judicial interpretations of * * * the rights of consumers and states to recover damages under Section 4." [5] This committee then went on to explicitly disapprove of decisions interpreting section 4 to bar recovery by anyone other than the direct purchaser.[6]

The Committee report then explicitly approved of cases interpreting section 4 as allowing recovery by purchasers not in privity with defendants such as *In re Western Liquid Asphalt* cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974), and *In re Master Key Litigation*, 1973–2 CCH Trade Cases 74, 680 (D. Conn.).

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." [7] In a footnote, the House report noted that some courts had initially interpreted the *Hanover Shoe* case as barring other than first purchasers, but that more recently the pro-enforcement rationale of *Hanover* had become evident and:

> plaintiffs at lower levels of the chain of distribution may attempt to prove that illegal overcharges were in fact passed on to them. See, e.g., *In re Western Liquid Asphalt* cases, 487 F.2d 191 [9th Cir. 1973].[8]

As discussed above, both the Senate and the House reports explicitly rejected interpretations of section 4 that did not allow anyone but the first purchaser to recover. The entire purpose of the *parens patriae* amendments was to provide an effective remedy for consumers, and consumers rarely deal directly with antitrust violators. Chairman Rodino of the House Judiciary Committee, one of the sponsors of the Act, stated just prior to final passage of the act:

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[5] S. Rept. No. 94–803, 94th Cong., 2d sess., 40.
[6] Id., at 40, n. 2.
[7] H.R. Rept. No. 94–499, 94th Cong., 1st sess. at 6.
[8] Id. at 6.

> First, if this bill means anything, it means that the State may recover damages for purchasers of price-fixed bread, potato chips, and the like. To argue that consumers must be direct purchasers from the price fixer is to deny recovery in these cases—for the consumer rarely if ever buys potato chips directly from the manufacturer, or bread directly from the bakery. In these cases, the manufacturer invariably sells through wholesalers and retailers—grocery stores, drug stores, and the like, and if the intervening presence of such a middleman is to prevent recovery, the bill will be utterly meaningless.
>
> * * * * *
>
> The technical and procedural argument that consumers have no standing whenever they are not 'in privity' with the price fixer, and have not purchased directly from him, is rejected by the compromise bill. Opinions relying on this procedural technicality . . . are squarely rejected by the compromise bill. [16 Congressional Record H10295 (daily ed.) Sept. 16, 1976.]

Despite these very recent and very clear indications of how Congress views the meaning of section 4, the majority opinion in *Illinois Brick* has interpreted section 4 to bar recovery for any purchasers other than the first. If the plain meaning in section 4 of, "any person injured" was ever in serious doubt, and the legislative history of the Sherman and Clayton Acts leaves little room for doubt, then it would appear to this committee that the legislative history of this most recent act should have resolved all doubts. The strongly worded and well-reasoned dissent in the *Illinois Brick* case expressed this same frustration:

> 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 twistings 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.

Senator Hugh Scott, one of the chief sponsors of the Act, indicated his belief that the *Illinois Brick* decision "flouted the will and purpose of Congress in a most crass fashion." [Hearings at 17.] In his view, the purpose of *parens patriae* was to protect consumers:

> The purpose of the Act is to protect those on whom the blow falls. We viewed the remedy as a consumer remedy,

> not a middleman windfall. We were acting to close a gaping hole in the coverage of the antitrust laws. Experience had shown that middlemen are ordinarily reluctant to use their suppliers.
>
> Thus, we were guided by two basic concerns: first, a genuine concern for the ultimate victims, to allow cash payments to the small consumer who previously had no meaningful remedy; and, second, a desire to deter the widespread practice of price fixing in small consumer items by exposing the price-fixers to potentially ruinous liability. [Hearings at 7.]

Notwithstanding the clearly expressed interpretation of section 4 as recently as last Congress, the majority opinion justifies its refusal to allow indirect purchasers to sue by saying:

> In considering whether to cut back or abandon the *Hanover Shoe rule*, we must bear in mind that considerations of *state decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.

This is a clear invitation to Congress, and it is to this invitation that the present bill responds. It is also abundantly clear from the legislative history of this most recent act, that prior to *Illinois Brick* Congress was of the firm belief that indirect purchasers were not precluded from suing.

### 3. THE "ILLINOIS BRICK" RULE HAS LED TO A VIRTUAL NULLIFICATION OF PARENS PATRIAE

In the previous section, the Hart-Scott-Rodino Act and its legislative history were used to illustrate Congress' interpretation of section 4 and how it differed radically from the court's interpretation of section 4 contained in *Illinois Brick*. Although *Illinois Brick* did not directly involve the *parens* section and certainly did not invalidate *parens* suits as such, the majority opinion indicated that in the majority's view *parens patriae* suits could not be brought in the vast majority of the cases (i.e., where consumers are indirect purchasers from a violator) contemplated by Congress.

Thus, in its effort 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." The Court also held, of course, that only the first purchaser is injured within the meaning of section 4 and that in the Court's view indirect purchasers had no right to recover. It would seem to follow that if indirect purchasers have no existing rights and that if *parens* only allows State Attorneys General to enforce existing rights of consumers that the *Illinois Brick* decision effectively limits *parens* 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* actions were intended by Congress to be consumers who were indirect purchasers.

Notwithstanding the clear language of the *Illinois Brick* opinion, several witnesses who testified in opposition to S. 1874 sought to minimize the effect of that decision on *parens patriae* actions.[9] For example, Mr. Ross Young, representing the National Association of Manufacturers stated that the *Illinois Brick* opinion "presented no frontal attack on *parens patriae*." [Hearings at 163.] Under questioning, however, Mr. Young acknowledged that the *Illinois Brick* opinion meant that *parens* actions could not be brought on behalf of customers who were indirect purchasers. He also acknowledged that the majority of consumers are indirect purchasers:

> Mr. BOIES. Let me cover one other area. You mentioned the *parens patriae* legislation. I believe you said that in your view the *Illinois Brick* decision had a minimal effect on the *parens patriae* statute?
>
> Mr. YOUNG. Yes. The decision knocks out the indirect purchaser.
>
> Mr. BOIES. You said *Illinois Brick* would knock out the *parens* suits where the consumers were indirect purchasers.
>
> Mr. YOUNG. That is my understanding. I could be wrong. I read the case four or five times. It is rather complicated.
>
> Mr. BOIES. I think that is fair reasoning. Do you have a judgment as to whether ultimate consumers would usually be indirect purchasers? In other words, is it not a fact that in most cases the ultimate consumer is an indirect purchaser; that is, he does not purchase directly from the manufacturer?
>
> Mr. YOUNG. I would think so. It sounds like commonsense to me.
>
> Mr. BOIES. So that would mean that in most cases, where the ultimate consumer is an indirect purchaser, the *Illinois Brick* case would prevent a *parens* suit on behalf of those ultimate consumers.
>
> Mr. YOUNG. Yes. That is the law of the case as we said in law school.
>
> Ms. YOUNG. Under *parens patriae?*
>
> Mr. BOIES. Yes.
>
> Mr. YOUNG. Yes. That is the law of the case as we said in law school.

Similarly, Mr. Samuel Murphy, Esq., who testified in opposition to the bill on behalf of American Cyanamid Co., conceded:

> Mr. BOIES. At least where you have violations by original manufacturers, ordinarily the consumers would not be purchasing directly from the manufacturer, and consequently parens suits on behalf of those consumers would be barred by *Illinois Brick.*
>
> Mr. MURPHY. That would be my view; yes, sir. [Hearings at 178.]

[9] E.g., see testimony of Harold Tyler, Esq. [Reporter's Transcript of Apr. 17, 1978, hearings at 5–6.]

*B. The "Illinois Brick" Rule Will Lead to Unfair and Less Effective Antitrust Enforcement*

As the Supreme Court recognized in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, supra, the primary purpose of private antitrust actions is to compensate persons injured by violations. The majority opinion in *Illinois Brick* improperly elevates its concern with judicial administration over the basic goal of providing fair compensation to those persons actually injured. Moreover, despite the majority opinion's claims to the contrary, this committee believes that the *Illinois Brick* decision results in less effective rather than more effective, private enforcement of the antitrust laws.

The task of enforcement of this Nation's antitrust laws is of course shared between private damage actions, and public enforcement actions by the Justice Department and the Federal Trade Commission. The Antitrust Division can bring a civil or criminal action. Sanctions in these type of cases include jail sentences, fines, and injunctions. However, fines and jail sentences, even the substantially increased ones now in effect, are simply not enough to deter conduct which can potentially reap millions upon 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. [*Business Week*, June 2, 1976.]

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 makes a businessman think long and hard before initiating or participating in a course of conduct possibly violative of the antitrust laws. The head of the Antitrust Division, John Shenefield, testified that:

> As a former private 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. [Hearings at 18.]

In addition to the substantial liability of damage actions, there is more of a chance that these types of actions will be filed than there is of government prosecution. The resources of the Justice Department and the FTC are, after all, miniscule compared to the earnings of many of the companies they litigate against and of course the Justice Department and the FTC can't be everywhere at once. In fact, before *Illinois Brick*, private damage actions exceeded government enforcement actions by more than ten fold.[10]

In response to a question by Senator Kennedy, Assistant Attorney General John Shenefield explained why the Justice Department actions were not sufficient:

[10] See, Poser, "A Statistical Study of Antitrust Enforcement," 13 *Journal of Law and Economics* 365, 370–4 (1970). Also 1975 "Annual Report of U.S. Courts," 212.

> First of all, we, in the Department of Justice do not always know it 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. [Hearings at 21.]

Many legal commentators actually believe that private enforcement of the antitrust laws has been more innovative and effective than Federal enforcement.[11] The States, too, acting under section 4 of the Clayton Act, have been very effective and innovative enforcers. A representative of California's antitrust office testified concerning the States' role in antitrust enforcement under section 4:

> The *Western Liquid Asphalt* case—which the Supreme Court in *Illinois Brick* has effectively undermined—was brought by the State of California after a 2-year investigation. We were then joined by other Western States. The net result was approximately a $30 million recovery for the States. We had no assistance from the U.S. Department of Justice in this action. They did convene a grand jury at one point, but that lapsed. [Hearings at 109.]

Not reversing *Illinois Brick* will mean greater reliance on the Federal antitrust agencies or failing that, it will create a necessity for additional Federal regulation if the marketplace cannot be kept competitive. Senator Danforth, one of the sponsors of S. 1874 testified concerning this point:

> The effect of *Illinois Brick* is that the role of private lawsuits and the role of State Attorneys General in enforcing the antitrust statutes has become greatly diminished. Therefore, it seems to me, we have a vacuum which, if not filled by overruling by statute *Illinois Brick*, will have to be filled some other way. It will be either by the Justice Department getting more deeply involved in antitrust cases and therefore hiring additional personnel for additional Federal supervision of these cases or, in the alternative, some new regulatory scheme promoted by Washington to insure fair competition. [Hearings at 87.]

By saying that all parties other than the direct purchaser are not "injured" within the meaning of section 4, the decision eliminates many potential plaintiffs who could prove that they were damaged. In the past, parties other than the first purchaser have been involved in many damage actions. A recent survey of price-fixing cases since 1960

[11] See Hearings before the Subcommittee on Antitrust and Monopoly on Oversight of Antitrust Enforcement, 95th Cong., 1st sess. 1977.

revealed that almost ⅔ of the private cases brought under section 4 involved indirect purchasers, with over 25 percent of the total number of antitrust private damage actions involving *only* indirect purchasers. The latter types of cases would be totally eliminated if the *Illinois Brick* rule remained the law. It is also probable that many of the suits involving both direct and indirect parties would not have been filed if the indirect purchasers had been eliminated.

In the tetracycline litigation, for example, the private case was initially brought by purchasers who had not dealt directly with tetracycline manufacturers; wholesalers and retailers who bought tetracycline directly from the manufacturer in order to resell it came into the lawsuit quite late, and after settlement had been proposed. In the *Illinois Brick* case itself, both direct and indirect purchasers were involved, yet the direct purchasers settled very early on terms favorable to the defendant and at amounts far below even the amount of the alleged overcharge.

In many cases, the party or class suing had purchased both directly from the manufacturer and indirectly through intermediaries. It is possible that some lawsuits would not even have been initiated without the damage component represented by indirect purchases. In his prepared testimony, California Attorney General Evelle Younger stated:

> Unless Congress reverses the *Illinois Brick* decision, the ability of States such as California to recover antitrust damages will be emasculated. In most of these cases, a substantial portion of the damages sought by the Attorneys General are attributable to indirect purchases by consumers and State and local governmental agencies. In the case of California alone, damage claims of well over $100 million in pending cases, have been substantially reduced or seriously jeopardized.
>
> Although claims for direct purchasers remain, the amount of money involved in direct purchasing is so small that it will not justify the substantial investment of resources heretofore committed to these cases by the States. The taxpayers and citizens in every State of the Union will absorb the amplified impact of reduced antitrust enforcement: citizens will be deprived of recovering overcharges claimed in current cases; deterrence will suffer, resulting in more illegal activities; and criminal or injunctive enforcement will require a substantially greater expenditure of tax dollars to fill in for the loss of revenues from damage recoveries. [Hearing at 127.]

As discussed in the previous section, the *Illinois Brick* opinion effectively precludes most *parens patriae* actions. The *parens patriae* amendments were made necessary because businessmen were able to evade serious penalties for antitrust violations. Those who sold relatively low priced goods to a high 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 to thousands or millions of people in a small amount each. No one individual had sufficient damage to file suit, and restrictive judicial interpretation of the notice and manageability provision of rule 23 and proof of

individual consumers damages made class actions very rare. In a September 25, 1975, letter, the then Assistant Attorney General Thomas Kauper wrote in support of the need for *parens patriae* by saying:

> Antitrust violations that result in relatively small economic damage to each of a large number of people are very troublesome: the economic incentives for such conduct are made more alluring by the realization that no single consumer has a sufficient economic stake to bear the litigation burden necessary to maintain a private suit for recovery under section 4. 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 objectives 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 & Jacquelin*, 417 U.S. 156 (1974).
>
> The *parens patriae* concept, as embodied in [title IV] is both desirable and useful from the perspective of better antitrust enforcement. Such a provision is also consistent with the enforcement goals of the Clayton Act.

Congress enacted *parens patriae* because of its awareness that even an overcharge of just $1 on a consumer item that had sales of 50 million could result in manufacturers reaping $50 million in illegal overcharges. This committee and the Congress were persuaded that a remedy had to be enacted. In the 1972 *New York Law Journal*, U.S. District Judge Weinstein said:

> There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods to the public.
>
> When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct.

Last year, this committee specifically found, after years of hearings and deliberations. that: "The economic burden of most antitrust violations is borne by the consumer in the form of higher prices for goods and services." Yet even before effectiveness of *parens* or lack of it could be shown, the majority opinion in *Illinois Brick* has emasculated *parens patriae.*

Now by the expedient of selling goods through middlemen, a manufacturer or other business can avoid the mechanism of *parens*. Actually, *Illinois Brick* has made antitrust enforcement even less effective than it was before the *parens* amendments were passed. Even before *parens* was enacted, indirect purchasers could at least bring an individual action and, in appropriate cases, a class action. Now the indirect parties have no remedy whatsoever.

The argument is frequently made that antitrust enforcement will not suffer under *Illinois Brick* because direct purchasers will sue. Cer-

tainly some direct purchasers have sued in the past and some will sue in the future. There are, however, many reasons why vesting sole responsibility on direct purchasers is unwise.

First, direct purchasers will not always be damaged or, if damaged, not to the full extent of the overcharge. 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, rather than those merely seeking a windfall are * * * more likely to further the remedial purposes of section 4 of the Clayton Act." [Hearings at 21.] When a party has a right of action but is only hurt theoretically because of a Supreme Court irrebuttable presumption, these hurdles may deter many meritorious suits. If a law suit is in fact initiated, quick settlements on defendants' terms may often become the norm, due to fears of supplier retaliation, reluctance to open one's files to discovery, or because of the lack of any real damages.

In some cases the direct purchaser may in fact *profit* from the overcharge, making this class of plaintiffs even less of a viable deterrent. In the tetracycline litigation, for example, after it looked like a settlement was forthcoming, a direct purchaser class submitted their claims. the court stated:

> Without attemping to decide the matter, it appears at first glance to be highly doubtful whether wholesalers or retailers suffered any damage whatever. Defendants sold only in dosage form; this means that the wholesaler then sold in the original packages (at a markup of 16⅔ percent or more over cost) and that—if the retail druggist did not always sell in the original packages but repackaged in varying quantities—at least the retail druggist sold the dosage form just as received from the wholesaler or from a defendant and without any addition, subtraction or combination. To the consumer, antibiotics are sold only by prescription. In some instances the retail druggist may charge his cost, plus a flat professional fee. According to affidavits of experts in the field, however, the overwhelming majority of drug stores in the period 1953–66 charged for prescription drugs a uniform markup of 66⅔ percent over cost. If so, this would mean that any overcharge by defendants in violation of the antitrust laws was passed on to the end use purchaser. *The result is that wholesalers and retailers, far from sustaining damages, made substantial profits from any antitrust violations.*
>
> It is suggested that the wholesalers and retailers lost sales because of the alleged high prices and that thus they suffered damage. No decision can be made on this record whether in fact the suggestion is true or not. There is persuasive evidence in the Commission proceeding and at the criminal trial that the suggestion is not true. The reason is that doctors prescribe antibiotics and doctors look to the health of the patient rather than to the price of the needed drug. *West Virginia* v. *Charles Pfizer and Co.*, 314 F. Supp. 710, 714 S.D. NY 1970]. [Emphasis supplied]

A second reason direct purchasers should not be exclusively relied on as an effective deterrent is that fequently they are very dependent on only one or two suppliers for their existence. Especially in shortage situations, direct purchasers have to be wary of retaliation by their supplier. The same holds true of franchises and exclusive dealerships.

A third reason why directs may be discouraged from suing is that filing an antitrust suit can result in the direct purchaser having to comply with extensive discovery requests. There are a variety of reasons why a party may not want to comply with these discovery requests including possible antitrust liability. For example, direct purchasers will in many cases be contractors who have themselves been the subject of many antitrust actions for collusion and bid-rigging.

Many of the witnesses at the subcommittee's hearing expressed these same misgivings concerning the wisdom of only allowing direct purchasers to sue. A noted plaintiffs' attorney, notwithstanding the fact that he represents more direct purchasers than indirect, stated:

> There will still be litigation. There will still be litigation by direct purchasers. But, it does, I think detract from the enforceability of the antitrust laws by confining enforcement, at least in one major section, to people who are part of the club. It is pretty hard to sue somebody who has just taken you down to Georgia on a shooting trip, for example. If you are a little removed away from them, you may bring a suit where he will not bring suit. So, I do think you have that. [Hearings at 52, testimony of Harold Kohn].

The Assistant Attorney General for Antitrust in the State of Colorado summarized the State attorneys general's point of view when he said:

> I think it is beyond question that the direct purchaser, for a variety of reasons, is the least likely person in the chain, in many instances, to bring the case. He may himself have profited from the practice. He may have been involved in the practice. He may have other nefarious practices going on that he does not want to reveal in the course of litigation and discovery. Moreover, as we know, our major source of complainants is businessmen who are forced to deal with one, two, or three sources of supply. That is absolutely essential to the continuing existence of their business. People in that situation simply cannot afford to bring such litigation. If they bring such litigation, I think the vigor with which they bring it is often affected by those same factors. [Hearings at 112.]

## III. Explanation

### *A. Section 2—Findings and Purposes*

The "Findings and Purposes" section of S. 1874 provides the Court with an express declaration of the intent of Congress in enacting the bill. In *Illinois Brick*, the majority opinion largely ignored the floor debates of the 1890 Congress which, as previously demonstrated, run completely counter to the Court's holding. Similarly, the majority opinion largely ignored the committee reports and floor debates of

the 94th Congress in connection with *parens patriae* legislation. The majority opinion appears to have considered the legislative intent expressed in floor debates and committee reports as unclear or inconclusive. It therefore seemed both practical and necessary to provide a clear expression of legislative intent in the actual text of this legislation.

The thrust of the "Findings and Purposes" section is to emphasize the interest of Congress that the antitrust laws be enforced by and on behalf of those damaged by antitrust violations. The mechanical test of whether or not a plaintiff dealt directly with the violator is rejected by these "Findings and Purposes." Consumers, producers, businesses, and governments injured by antitrust violations should be able to recover their damages whether or not they have dealt directly with the violator.

As section 2(b)(6) explicitly states, however, courts still can apply principles such as remoteness, target area, and proximate causation to place a limit on who can recover as long as this is consistent with the policy goals of compensation and deterrance.

For instance, plaintiffs may, in particular cases, be denied recovery if they are lessors suing for an antitrust violation perpetrated on their lessee. The bill, however, is not intended to deny recovery merely because a price-fixed item has been transformed into another product.

Some courts have interpreted *Illinois Brick* as applying to sellers as well. The "Findings and Purposes" explicitly reject such interpretations. The bill is intended to do away with the requirement of dealing directly in sale as well as purchase situations.

### *B. Section 3—Clayton Act Amendment*

Section 3 adds subsection 4I to the Clayton Act. Subsection 4I(1) explicitly overrules the rule of *Illinois Brick Co.* v. *Illinois* by removing the artificial prerequisite of "privity" between the plaintiff and the defendant in an antitrust action. Under this provision, the courts would not rely upon a mechanical test of directness versus indirectness, but instead would return to the more familiar doctrines of standing and proximate cause. Other than the rejection of the mechanical test of directness versus indirectness, no attempt is made to address comprehensively the concept of "standing to sue" in private antitrust actions. In general, the law of standing was thought to be better left to the courts for development and revision on a case-by-case basis, through analysis based on the compensatory and deterrent purposes of the private antitrust action.

The bill does, however, explicitly reject any rule of law—whether based on standing or otherwise—which would deny recovery based on a test of whether the plaintiff has dealt directly with (or is "in privity") with the defendant. In this sense the legislation goes beyond the stated holding in *Illinois Brick*—which in footnote 7 the Court expressly said was not based on consideration of standing—to provide that whatever labels are used, recovery shall not be denied an antitrust plaintiff because the plaintiff has not dealt directly with the defendant. Thus, a consumer plaintiff in an antitrust pricefixing case could not automatically be denied "standing to sue" for the violation on the basis that he had purchased the price-fixed product through a middleman

rather than directly from the defendant. Nor, of course, could the court say that a plaintiff had not been "injured in his business or property" within the meaning of section 4 of the Clayton Act simply because the plaintiff had not dealt directly with the defendant.

Subsection 4I(2), while seeking to retain the commendable pro-enforcement thrust of *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.*, overrules the broader language of that opinion, particularly as it has been subsequently interpreted in the *Illinois Brick* opinion. Under subsection 4I(2) the defendant in an antitrust action would under defined circumstances be able to reduce his liability to a plaintiff or group of plaintiffs, or avoid it altogether, by showing that the plaintiff had been able to pass on all or part of the cost of his injury to third parties who themselves are able to sue.

Of course, the defendant may only avail himself of the pass-on defense where the persons to whom the overcharge (or underpayment) was passed on are, because of considerations of standing, the applicable statute of limitations, or other limitations, at that time "persons who are themselves entitled to recover." The pass-on defense is thus to be allowed only where it does not inhibit the private enforcement of the antitrust laws or create a hiatus in enforcement.

### *C. Section 4—Applicability of Amendment*

Section 4 of the bill makes the bill applicable to cases pending on or after June 9, 1977. This section is necessary to alleviate as much as possible the misallocation and denial of recovery invited by the *Illinois Brick* decision. As discussed above, the view predominantly followed by the Federal courts of appeals was precisely to the contrary of that adopted in *Illinois Brick*. Thus, hundreds of thousands of dollars have been invested by consumers and government entities in lawsuits that will now have to be dismissed if the decision to overrule *Illinois Brick* legislatively is not made applicable to all cases pending on or after the date of the *Illinois Brick* decision. The *Illinois Brick* decision itself represented a retroactive redistribution of claims; in order to prevent the unfairness that would result from such redistribution, it is necessary to make this bill applicable to all cases affected by the *Illinois Brick* decision.

It is also true that in many instances the indirect purchaser suits that have been dismissed or are threatened to be dismissed are the *only* actions that have been filed alleging antitrust violations by particular defendants. As mentioned above, a recent survey showed that over 20 percent of the actions filed since 1960 involved only indirect purchasers. Dismissal in these instances means there will be no parties left to prosecute the particular action.

Although there are many examples, the late Senator Hubert Humphrey brought to the committee's attention one particular instance of the disruption and injustice which would result if this legislation were not made applicable to pending cases by indirect purchasers.

The Office of the Minnesota Attorney General, prior to the *Illinois Brick* decision, had expended over 3,000 hours and many thousands of dollars in preparing for the prosecution of the *Sugar Antitrust Litigation*. Dismissal in this case would mean that there will be no parties available to recover the alleged damages flowing from the alleged

price fixing. The counsel for the State of Minnesota in this action summarized this situation by stating

> Numerous litigants in scores of pending cases across the country who have been expending substantial amounts of time, effort, and money in the pretrial preparation of their cases, like those in the *Sugar* cases, should not now be left caught in the middle by a startling Supreme Court decision which is manifestly contrary to the intent of Congress. On behalf of the State of Minnesota, I therefore urge prompt passage of the "Bill to Restore Effective Enforcement of the Antitrust Law," S. 1874, and specifically urge that section 4 of the Bill, which applies the amendment to all pending cases *not* be compromised away but instead be retained in the Bill in order that the parties to long-pending but unadjudicated antitrust cases not be barred from attempting to prove that they suffered injury from the antitrust offense by the Supreme Court's decision in the *Illinois Brick* case. [Hearings at 262–263.]

The issue of whether the bill should be applicable to cases pending on or after the date of the *Illinois Brick* decision was debated fully at the full committee level and attempts to change the effective date were defeated. The committee is firmly of the view that the national policy represented by the antitrust laws can best be effectuated by making this bill applicable to pending cases.

There is no serious constitutional objection to making the legislation applicable to pending cases. As Assistant Attorney General John Shenefield testified before the Antitrust and Monopoly Subcommittee:

> Senator KENNEDY. What about provisions in legislation that make applications of S. 1874 applicable to pending cases? What is your view about the constitutionality of that provision?
>
> Mr. SHENEFIELD. I think it is fully constitutional. As I recall it, retroactive legislation can be examined under the due process clause or the contracts clause, or under ex post facto clause of the constitution. The last two probably do not apply here, inasmuch as respectively they apply only to State legislation and criminal or penal forfeiture legislation. You would then be looking at the due process clause.
>
> Curative legislation is judged under the due process clause if it is reasonable under all circumstances. The standards that the courts have used are: First, the importance of the right said to be modified or ruled out by the new enactment; second, the extent to which it is modified and ruled out; and third, the important public policy that the new enactment serves. So you have three ready-at-hand standards to judge this enactment by.
>
> If I applied those standards to this situation, I would come to the conclusion that, number one, the public policy served by this legislation is a very important one indeed. It is a fundamental national economic policy. Second, the right said to be modified is, in fact, not really modified. We are

> not talking so much about taking more money away from defendants. We are talking about giving it to different people. So, it seems to me that we really do not have a modified right so much as we have a redistribution of claims that, already are in existence. [Hearings at 23.]

Nevertheless, several of the witnesses during the last 5 days of hearings at the full committee level indicated their belief that the applicability of this amendment to cases pending on or after the date of the *Illinois Brick* decision was unconstitutional. These witnesses relied primarily on the due process clause of the fifth amendment. For instance, a representative of Bristol-Myers, Mr. Philip Lacovara, stated:

> Legislation that, considering its retroactivity, is arbitrary or unreasonable or harsh and oppressive, constitutes a denial of due process. [April 21, 1978, prepared statement of Philip A. Lacovara at 5.]

The legislation the committee recommends does not prohibit any party from recovering their actual damages. The committee is of the view that there is nothing arbitrary or unreasonable in requiring that a party prove its damages.

In fact, exactly the same so-called retroactivity question posed by S. 1874 has been decided in favor of constitutionality by a unanimous Supreme Court. In *United States* v. *Jefferson Electric Manufacturing Co.*, 291 U.S. 386 (1934), the company brought suit against the United States to recover certain taxes paid by the company. Under the law in effect when the tax was paid, "there accrued to the taxpayer when he paid the tax a right to have it refunded without any showing as to whether he bore the burden of the tax or shifted it to the purchasers." [12] After the tax was paid a new statute was passed which required the company to demonstrate that it alone had borne the burden of the tax and had not passed it on. The company contended that application of the new law to their situation would violate the due process clause of the fifth amendment to the Constitution because it would destroy their accrued rights under the prior law. In rejecting this claim, the Court declared:

> * * * it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money go to the one who has been the actual sufferer and therefore is the real party in interest.
>
> We do not perceive in the restriction any infringement of due process of law. If the taxpayer has borne the burden of the tax, he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing. If he has shifted the burden to the purchasers, they and not he have been the actual sufferers and are the real parties in interest; and in such a situation there is nothing arbitrary in requiring, as a condition to refunding the tax to him, that he give

[12] 291 U.S. at 401.

> a bond to use the refunded money in reimbursing them. Statutes made applicable to existing claims or causes of action and requiring that suits be brought by the real rather than the nominal party in interest have been uniformly sustained when challenged as infringing the contract and due process clauses of the Constitution.[13]

Nevertheless, an argument can be made that the legislation should not be made applicable to cases which have been finally disposed of between the date of the *Illinois Brick* decision and the date of the enactment of this legislation. The committee believes there is no doubt that the legislation should be applicable to cases pending at the date the legislation is enacted. It is less clear as a matter of policy that cases finally disposed of should be revived.[14] This is particularly true if the legislation is enacted this session before a significant number of cases have been dismissed under the *Illinois Brick* rule.

### *D. Section 5—Forcign Sovereigns*

The committee, during consideration of S. 1874, adopted an amendment, with second-degree amendments, offered by Senator Eastland providing for certain limitations on foreign sovereign governments to bring suits in U.S. courts for antitrust violations. The amendment was added as a new section 5.

Briefly, the amendment would do the following: 1. Limit foreign sovereign governments suing under section 4 of the Clayton Act to actual damages; 2. Require certification by the Attorney General of the United States or a finding by the court that the foreign sovereign allowed the United States to sue on its own behalf on a civil claim in the courts of such foreign sovereign and that such foreign sovereign by its laws prohibits restrictive trade practices; and 3. Apply to any action pending on the date of enactment or commenced on or after such date of enactment.

On January 11, 1978, the Supreme Court decided the case *Government of India* v. *Pfizer, Inc.*, which held that foreign governments would have standing to sue for treble damages under section 4 of the Clayton Act. The Court concluded in a 5 to 3 decision that absent any legislative intent to the contrary, foreign governments should be included within the term "persons" in section 4 of the Clayton Act.

The majority opinion stated that since there was no mention during the legislative debates on the Sherman and Clayton Acts of an intent to restrict the definition of "persons" to exclude foreign governments, the Sherman and Clayton Acts should be available to such foreign sovereigns. Furthermore, the majority argued, the law's expansive remedial purposes appear to extend to anyone subjected to antitrust violations. Thus, to deny foreign sovereigns the remedies available

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[13] Id. at 402. [Emphasis supplied] Accord, *Anniston Mfg. Co.* v *Davis*, 301 U.S. 337 (1937).

[14] The *Illinois Brick* decision was applicable to cases pending at the time it was announced (whether on appeal or otherwise) even though it overruled prior precedents; it was not, however, applicable to cases finally disposed of prior to the date of decision. To prevent an unjust "gap" in recovery, it is necessary that legislation overruling *Illinois Brick* be likewise applicable to cases pending (whether on appeal or otherwise) on the date the legislation is enacted. To be consistent with the applicability of the *Illinois Brick* decision, this legislation would be applicable only to those pending cases but not to cases finally disposed of in the period between the *Illinois Brick* decision and the enactment of this legislation.

under the Sherman and Clayton Acts would undermine the general purposes of our antitrust laws.

The dissenting opinions filed in the case also took the position that the question whether foreign governments were to be included in the term "persons" had never been considered at the time the Sherman and Clayton Acts were enacted. But those dissenting reached a different conclusion with respect to the silence of the Congress. In the words of Chief Justice Burger, the Court's decision on that question was an "undisguised exercise of legislative power" by the Court.

Following the decision in *Pfizer*, several bills were introduced in the Senate to overturn the result reached in that case. Senator Thurmond, along with 15 cosponsors, introduced S. 2395, which dealt only with the question of "actual damages." This bill, although not raising a complete bar to foreign sovereigns' suing for antitrust violations, would have limited any recovery to actual damages rather than treble damages which would have been allowed under *Pfizer*.

Senator DeConcini also introduced a bill, S. 2486, which would add to section 4 of the Clayton Act certain conditions that were intended to establish reciprocity between American and foreign countries with regard to antitrust enforcement. In other words, the United States must be entitled to sue in its own name and in its own behalf on a civil claim in the courts of a foreign sovereign; and that the foreign sovereign have laws prohibiting restrictive trade practices.

The amendment offered by Chairman Eastland in committee incorporated both of the points addressed by the bills introduced by Senators Thurmond and DeConcini. The amendment also provided a procedure for certification by the Attorney General of the United States of those countries seeking to sue in U.S. courts based on the conditions of the amendment. In order to avoid any undue hardship because of the inability of the Attorney General to act in a fair and expeditious manner, the relevant court may find on its own that a plaintiff country is permitted standing to sue the United States under the limitations of the amendment.

The purpose of the amendment is to assert the prerogative of the Congress as recognized by both the majority and the dissents in the *Pfizer* case, and to clarify and otherwise define the term "persons" as used in the Sherman and Clayton Acts. A close reading of *both* the majority and dissenting opinions supports the contention that where the Congress has previously failed to make its intent clear, it is for the legislature and not the judiciary to do so. Therefore, it is the belief of the majority of the Committee that the amendment offered by Senator Eastland is justified and proper and in accord with the Supreme Court's decision in the *Pfizer* case.

While the amendment does overturn the *Pfizer* decision, it does so only in part. The amendment recognizes the importance of allowing foreign sovereigns access to our courts for alleged antitrust violations, but at the same time places certain restrictions on such access.

The United States should not be unfairly exposed to suits for treble damages by foreign sovereigns where the United States and U.S. entities do not enjoy the same access to foreign courts. As a matter of national policy it appears wholly inequitable to allow foreign governments who do not allow suits by the United States in its courts un-

fettered access to U.S. courts and with the possible reward of treble damages. The amendment adopted by the committee, although permitting access to our courts, does so with the limitations that certain conditions for standing be met and that if successful suit is brought only actual damages will be allowed.

In the opinion of the majority of the committee, the *Pfizer* decision expands section 4 of the Clayton Act beyond its original legislative intent. While it is true that our antitrust laws are designed to ultimately protect American consumers, there is doubtful evidence that extending full and unrestricted access to foreign governments to U.S. courts under section 4 of the Clayton Act will mean any less protection to American consumers.

Moreover, the amendment reflects the original purposes of the Sherman and Clayton Acts with respect to treble damages by making such a punitive remedy available only where U.S. entities are antitrust violators and American consumers are harmed. The impact of the *Pfizer* decision would have taken the intent of the Sherman and Clayton Acts far beyond those objectives of antitrust enforcement. Thus, the committee believes that the amendment adopted is consistent with the original intent of the Congress in the enactment of the Sherman and Clayton Acts.

Finally, the amendment contains a provision that would make the conditions of the amendment applicable to any action pending before enactment or commenced on or after the date of enactment of S. 1874.

## IV. History of Bill

On July 15, 1977, Chairman Edward M. Kennedy and Senators Morgan and Danforth introduced S. 1874. The Antitrust and Monopoly Subcommittee held hearings on July 21 and 22, 1977. At the request of Senator Thurmond, an additional day of hearings was held on September 9, 1977.

On November 4, 1977, the Antitrust and Monopoly Subcommittee met in open executive session, at which time the bill was reported without recommendation to the full Committee on the Judiciary with an amendment in the nature of a substitute.

On March 8, 1978, the full committee met and agreed to have 2 more days of hearings on the bill, with a final vote on the bill no later than May 5, 1978.

Five additional days of hearings were held by the committee on April 7, 17, 21, 24, and 26. This brought the total to 8 days of hearings with a total of 55 witnesses.

On May 25, 1978, the Committee on the Judiciary met in open executive session and S. 1874 was ordered favorably reported to the full Senate with amendments.

## V. Record Votes in Committee

### *A. Subcommittee on Antitrust and Monopoly*

On November 4, 1977, the Antitrust and Monopoly Subcommittee met in open executive session at which time the subcommittee adopted an amendment in the nature of a substitute offered by Chairman Ken-

nedy and reported it to the full committee without recommendation. On a motion to report the bill to the full Committee on the Judiciary:

YEAS

| | | |
|---|---|---|
| Kennedy | Metzenbaum | Mathias |
| Bayh | Laxalt | |

*B. Committee on the Judiciary*

On May 25, 1978, the Committee on the Judiciary met in open executive session at which time:

1. The committee accepted an amendment by Senator Howard Metzenbaum striking the last sentence of section 4. Senator Thurmond recorded his opposition.

2. The committee adopted an amendment offered by committee Chairman Eastland, as modified by committee deliberation, which adds a new section 5 to S. 1874. Section 5 amends section 4 of the Clayton Act by providing that foreign governments, agents, and instrumentalities subject to a prerequisite of reciprocity can recover actual damages instead of treble damages. On a motion to adopt the amendment as modified:

| YEAS | NAYS |
|---|---|
| Eastland | Kennedy |
| Allen | Culver |
| Biden | Abourezk |
| DeConcini | Metzenbaum |
| Paul Hatfield | |
| Thurmond | |
| Scott | |
| Hatch | |

3. The committee ordered S. 1874, as amended, favorably reported. On a motion to report the bill to the full Senate:

| YEAS | NAYS |
|---|---|
| Kennedy | Eastland |
| Bayh | Allen |
| Abourezk | Thurmond |
| Biden | Scott |
| Culver | Hatch |
| Metzenbaum | |
| DeConcini | |
| Paul Hatfield | |
| Mathias | |

## VI. Estimated Costs

In accordance with section 252(a) of the Legislative Reorganization Act, (2 U.S.C. *sec.* 190(j)) the committee estimates that there will be no added costs due to this act. On May 26, 1978, the following opinion was received from the Director of the Congressional Budget Office:

Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1874, a bill to restore effective enforcement of the antitrust laws, as ordered reported by the Senate Committee on the Judiciary, May 25, 1978.

Based on this review, it appears that no additional cost to the Government would be incurred as a result of enactment of this bill.

## VII. Regulatory Impact Statement

Implementation of the bill, as reported, will not result in any increased Federal regulation. It is the committee's belief that the more effective antitrust enforcement which will result from this bill will result in less Federal regulation.

## VIII. Executive Communications

U.S. Department of Justice,
*Washington, D.C., March 3, 1978.*

Hon. James O. Eastland,
*Chairman, Committee on the Judiciary,*
*U.S. Senate, Washington, D.C.*

Dear Mr. Chairman: On July 21, 1977, I testified before the Subcommittee on Antitrust and Monopoly on S. 1874, a bill to restore effective antitrust enforcement by permitting persons who did not purchase directly from an antitrust violator to recover for their injuries under the Clayton Act. At that time I expressed my very strong support for this legislation.

It was and continues to be my view that S. 1874 represents an appropriate solution to the unfortunate result created by the *Illinois Brick Co.* v. *Illinois* decision. The bill is narrowly designed to permit indirect purchasers to recover from an antitrust violator if they can prove to the satisfaction of a court that the injury resulting from the violation was passed to them. To avoid the possibility of subjecting defendants to a serious risk of multiple liability, the bill would also quite properly permit defendants to employ passing-on defensively where they can prove the antitrust injury was passed to a customer or supplier itself entitled to recover under the Clayton Act for that injury. The bill is expressly limited to these *Illinois Brick* issues and does not seek to alter existing law in other ways. S. 1874 is simple and straightforward in approach, and I strongly believe that such an approach provides the best legislative solution to this matter. Since my testimony of last July, S. 1874 has been redrafted and improved in a few important technical respects. My staff and I have reviewed those changes and approve of them.

We urge your committee to give speedy consideration to this legislation. In the view of the Antitrust Division, this legislation should be given a very high priority, since we view damage actions by indirect purchasers as vital to effective and fair antitrust enforcement. Moreover, the various states and the Federal Government have pending cases involving millions of dollars of overcharges on indirect purchases that will soon be adversely terminated if corrective legislation is not forthcoming.

We would be happy to provide any assistance that you or the Judiciary Committee may desire in the deliberations on this legislation.

Sincerely yours,

JOHN H. SHENEFIELD,
*Assistant Attorney General,*
*Antitrust Division.*

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U.S. DEPARTMENT OF JUSTICE,
OFFICE FOR IMPROVEMENTS IN THE
ADMINISTRATION OF JUSTICE,
*Washington, D.C., May 18, 1978.*

Re S. 1874.

Senator EDWARD M. KENNEDY,
*Chairman, Senate Subcommittee on Antitrust and Monopoly, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: The purpose of this letter is to present some views concerning one aspect of S. 1874, which the Department of Justice supports. These views derive from work in the Office for Improvements in the Administration of Justice over the past year on procedural problems in class damage litigation. The important substantive rights addressed in S. 1874 should be considered on their merits apart from procedural and judicial management problems. The latter can be dealt with effectively by the courts either through existing procedures or through separate legislation now being developed by this Office.

To a great extent the tools are now available to allocate properly damages to the injured wherever they are in the chain of distribution. Rules 19 (compulsory joinder), 20 (permissive joinder), 22 (interpleader), and 24 (intervention), Federal Rules of Civil Procedure, and 28 U.S.C. 1335 (interpleader) are adequate tools, which, if used creatively by court and counsel, can protect defendants from overlapping or duplicative recoveries. It is likely that all suits arising out of the same transaction will overlap in time and be subject to consolidation of joinder.[1] Rules 23(c)(4) (subclassing; class treatment of individual issues), 42 (separate trials), and 28 U.S.C. 1407(c), (h) transfer and consolidation), allow sufficient flexibility to enable the court to try damage issues as a unit or separately.

The Magistrate Act of 1978, S. 1613, cosponsored by Senators Byrd and DeConcini, is likely to be enacted this Congress. Its provisions pertinent to magistrate competency offer a singular opportunity to assure, when the bulk of full-time magistrates are reappointed next year, that only those sophisticated in the application of these tools are reappointed in the major commercial judicial districts.

Further, this Office is now preparing comprehensive legislation to revise rules 23 (b)(3), 23(c)(2), Federal Rules of Civil Procedure, which will include several innovative management techniques. Special attention in this proposed legislation is given to the mass small-claim actions which have proved troublesome in the indirect purchaser situations. In these actions, the primary concern is not with the small,

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[1] Fair and Effective Enforcement of the Antitrust Laws, S. 1874: Hearings before the Senate Subcommittee on Antitrust and Monopoly, 95th Cong., 1st sess. 20, 264 (1977) (testimony of Assistant Attorney General Shenefield; data on number of joint direct-indirect purchaser suits).

individual amounts of damage, but rather with preventing the unjust enrichment of those who unlawfully harm thousands of persons in small amounts each.

In this context, our proposed bill attempts to streamline the calculation of damages in several ways. It would do away with much of the cross-claim, counterclaim, and pendent claim practice. The latter tends to unnecessarily complicate calculation of indirect purchaser claims and undermine vital civil deterrent policy. Special attention is also given in the proposed bill to lawyer dilatory practice which tends to complicate and obfuscate damage calculations, practices which enhance the possibility of overlapping recoveries.

Finally, thought is being given to mandating better phased-management of class damage litigation. Common issues of statutory violation can be tried first. If a defendant is adjudged liable in this first phase, it is anticipated that the parties in a high percentage of actions will elect to settle, rather than try remaining damage issues. Under close judicial scrutiny, settlement accommodation can be made to protect the claims of direct and indirect purchasers and the rights of the defendant.

In short, there are effective procedural alternatives through which substantive rights can be fairly and fully enforced as to all parties.

Sincerely,

DANIEL J. MEADOR,
*Assistant Attorney General.*

## IX. CHANGES IN EXISTING LAW

In compliance with subsecton (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, S. 1874 as reported, are shown as follows (S. 1874 does not omit any portion of existing law, new matter is printed in italic and existing law in which no changes are made or proposed is shown in roman):

### CLAYTON ACT

SEC. 4 (15 U.S.C. Sec. 15):

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws 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; *provided, however, that suits under this section brought by foreign sovereign governments, departments or agencies thereof, shall be limited to actual damages; and, provded further, that no foreign sovereign may maintain an action in any court of the United States under the authority of this section unless the Attorney General of the United States, within 120 days after the commencement of the action, has certified to the relevant court or a relevant court otherwise finds that—*

*(1) the United States is entitled to sue in its own name and on its own behalf on a civil claim in the courts of such foreign sovereign; and*

*(2) such foreign sovereign by its laws prohibits restrictive practices.*

Section 4I (new section):

*SEC. 4I (1) In any action under section 4, 4A, or 4C of the Clayton Act, the fact that a person or the United States 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 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.*

## X. TEXT OF BILL AS REPORTED

[S. 1874, 95th Cong., 2d Sess.]

[As reported out of Committee on the Judiciary, May 25, 1978]

A BILL To amend section 4 of the Clayton Act to permit consumers, businesses and governments injured by antitrust violations to recover whether or not they have dealt directly with the antitrust violator

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Antitrust Enforcement Act of 1978".

### FINDINGS AND PURPOSES

SEC. 2. (a) The Congress finds and declares that—

(1) the antitrust laws are intended to protect the right of consumers to receive the better products and lower prices that competition produces;

(2) in order to achieve that purpose it is essential that ultimate consumers be able to recover damages for antitrust violations whether or not they have dealt directly with an antitrust violator;

(3) by depriving consumers who are indirect purchasers of the right to sue, the Supreme Court's decision in *Illinois Brick Co. v. Illinois* frustrates effective antitrust enforcement and deprives many consumers of a just remedy for their injury;

(4) there are indications that the Courts might construe *Illinois Brick Co. v. Illinois* as depriving producers who are indirect sellers of the right to sue; such construction would frustrate effective antitrust enforcement and deprive many producers of a just remedy for their injury; and

(5) if the first or "direct" purchaser from an antitrust violator is permitted to recovery the entire amount of an overcharge even though he has passed most or all of such overcharge on to others, that first or "direct" purchaser receives an undeserved windfall at the expense of ultimate consumers.

(b) It is the purpose of this Act—

(1) to permit consumers, producers, businesses and governments injured by antitrust violations to recover whether or not they have dealt directly with the antitrust violator;

(2) to minimize windfall recoveries by limiting the recovery of a middleman to the damage incurred and to minimize recovery by the middleman for damage passed on by the middleman to others rightfully entitled to recover on their own behalf;

(3) to make clear that consumers and the Attorneys General of the several States on behalf of the consumers of their respective States can recover for antitrust violations which injure such consumers whether or not such consumers have dealt directly with the antitrust violator;

(4) to preserve the method of proving and calculating damages provided in sections 4D and 4E of the Clayton Act for actions pursuant to section 4C of such Act;

(5) to make clear that producers can recover damages for antitrust violations irrespective of whether such producers have dealt directly with the antitrust violator; and

(6) except as made necessary by this Act, to reserve to the courts the applications and revision of existing principles of remoteness, target area and proximate causation which have been applied to limit the persons who can recover for antitrust violations.

CLAYTON ACT AMENDMENTS

SEC. 3. The Clayton Act is amended by inserting immediately after section 4H the following new section:

SEC. 4I. (1) In any action under sections 4, 4A, or 4C of the Clayton Act, the fact that a person or the United States 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 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.

APPLICABILITY OF AMENDMENT

SEC. 4. The amendment made by this Act shall apply to any action commenced under sections 4, 4A, or 4C(a)(1) of the Clayton Act which was pending on June 9, 1977, or filed thereafter.

FOREIGN SOVEREIGNS

SEC. 5. Section 4 of the Clayton Act is amended by adding at the end of that section the following new language:

*Provided, however*, That suits under this section brought by foreign sovereign governments, departments or agencies thereof, shall be limited to actual damages; and, *provided further*, that no foreign sovereign may maintain an action in

any court of the United States under the authority of this section unless the Attorney General of the United States, within 120 days after the commencement of the action, has certified to the relevant court or a relevant court otherwise finds that—

(1) the United States is entitled to sue in its own name and on its own behalf on a civil claim in the courts of such foreign sovereign; and

(2) such foreign sovereign by its laws prohibits restrictive trade practices.

The amendment made by this section shall apply to any action which is pending on the date of enactment of this act or which is commenced on or after such date of enactment.

## XI. ADDITIONAL VIEWS OF SENATOR EDWARD M. KENNEDY ON SECTION 5, JOINED BY SENATORS BAYH, ABOUREZK AND METZENBAUM

I strongly disagree with the decision of the majority of the Committee to add to S. 1874 the section which overrules the Supreme Court's decision in *Pfizer, Inc.* v. *Government of India.*

At best, the proposal is only superficially related to the subject of *Illinois Brick Co.* v. *State of Illinois.* The reasons for enabling indirect purchases to recover antitrust damages are not only irrelevant to those supporting a limitation to single damages of foreign governments suing antitrust violators; in many ways the principles underlying these two matters are in direct conflict.

Thus, there is no valid reason for our forcing consideration of these two subjects at the same time. The principal proposal—the overruling of the *Illinois Brick* case—has been debated since the case was decided on June 9 of last year and has been before the Congress since I introduced the original draft of S. 1874 on July 15, 1977. Even though many of the *Illinois Brick* issues had been thoroughly considered during months of debate on Hart-Scott-Rodino, three days of hearings were held before the Antitrust and Monopoly Subcommittee and the language was painstakingly redrafted to meet numerous helpful suggestions.

After the bill was before the full Judiciary Committee, five additional days of hearings were held. Altogether, 55 witnesses presented their views on the question of overruling the *Illinois Brick* decision. Still, when the bill was finally considered by the committee it was suggested that the measure was being given hasty consideration.

The case of *Pfizer, Inc.* v. *Government of India* was decided on January 11, 1978, with the Supreme Court holding that a foreign sovereign was a "person" within the meaning of section 4 of the Clayton Act and thus entitled to sue for treble damages for antitrust injuries. Unlike the *Illinois Brick* decision, the issue of *Pfizer* came to the Supreme Court with very little previous court experience and no judicial analysis. In fact the case was one of first impression in the court of appeals, *Pfizer, Inc.* v. *Government of India,* 550 F.2d 396, 397, (8th Cir. 1976).

In response to the *Pfizer* decision, three separate bills were introduced in the Senate, reflecting three distinct approaches to the *Pfizer* issue. To date hearings have not been held on these bills. None of the witnesses called before the Committee this spring spoke on the proposals, though some written questions were submitted to witnesses after the hearings by Senator Thurmond.

The issues raised by the proposals to overrule *Pfizer* are serious and far-reaching. Admittedly, they do warrant the attention of the Congress. But that attention should be careful and undivided, especially in light of the potential impact of the proposals on international relations.

Several foreign governments with whom our country has a close relationship have expressed great concern regarding efforts to overrule the *Pfizer* case. The State Department and Justice have not had the opportunity to appear in person before either House of Congress to offer their counsel on the impact of these proposals. Nor have economists, lawyers, or businessmen been given an opportunity to testify regarding the implications of *Pfizer*.

Admittedly the *Pfizer* case seems to produce an anomalous situation in that the United States can recover only actual damages while foreign sovereigns are permitted to recover treble damages. The anomaly is superficial, however. The reasons for limiting the United States to actual damages have no applicability to foreign sovereigns.

Section 4A of the Clayton Act, which provides that the United States may recover actual damages for an antitrust violation, was created by the 84th Congress as a response to the Supreme Court's decision in *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), holding that the United States was not a "person" within the meaning of section 4 of the Clayton Act and therefore could not recover damages at all in a civil antitrust action. In the Senate report, the following reason was offered for allowing the United States to only recover actual damages:

> This difference in treatment is a recognition of the difference in the position of the United States and of "persons" in this connection. Both may recover their actual damages. The damages of "persons" are trebled so that private persons will be encouraged to bring actions which, though brought to enforce a private claim, will nonetheless serve the public interest in the enforcement of the antitrust laws. The United States is, of course, charged by law with the enforcement of the antitrust laws and it would be wholly improper to write into the statute a provision whose chief purpose is to promote the institution of proceedings. The United States is, of course, amply equipped with the criminal and civil process with which to enforce the antitrust laws. [S. Rept. 619, 84th Cong., 1st sess. 3 (1955).]

Clearly foreign governments are not charged with the enforcement of the antitrust laws of the United States. Nor are they "amply equipped with the criminal and civil process with which to enforce the antitrust laws."

It may well be that the reasons for limiting the United States to actual damages are invalid and that it is really section 4A of the Clayton Act that is out of line. Perhaps Congress should take action to put the United States on the same footing as foreign governments by allowing the United States to recover treble damages. In any event, however, the justifications for limiting the United States to actual damages have no application to foreign sovereigns.

In addition there are some strong policy reasons for allowing foreign sovereigns to recover treble damages. In *Pfizer, Inc.* v. *Government of India*, 98 S. Ct. 584 (1978), the Supreme Court observed:

> Treble-damage suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers.

> The Court has noted that section 4 has two purposes: to deter violators and deprive them of "the fruits of their illegality," and "to compensate victims of antitrust violations for their injuries." * * * To deny a foreign plaintiff injured by an antitrust violation the right to sue would defeat these purposes. It would permit a price fixer or a monopolist to escape full liability for his illegal actions and would deny compensation to certain of his victims, merely because he happens to deal with foreign customers.
>
> Moreover, an exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages. . . . If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators. (Footnote omitted ) [98 S. Ct. at 588–89.]

The Court also pointed out:

> It has been suggested that depriving foreign plaintiffs of a treble-damage remedy and thus encouraging illegal conspiracies in other ways as well: by raising worldwide prices and thus contributing to American inflation; by discouraging foreign entrants who might undercut monopoly prices in this country; and by allowing violators to accumulate a "war chest" of monopoly profits to police domestic cartels and defend them from illegal attacks. Velvel "Antitrust Suits by Foreign Nations," 25 Cath. U. L. Rev. 1, 7–8 (1975) [98 S. Ct. at 589 n.14.]

At this time, there remain a number of unanswered but answerable questions raised by the issues involved in *Pfizer*. We should find out the volume of business done by U.S. companies in sales to foreign governments, whether these sales comprise a discrete market that companies could single out for price-fixing without also raising prices to American consumers, and what means of purchase are used by most foreign governments.

We should know whether the higher prices that result from price-fixing conspiracies may actually cause reduced sales of American products abroad. Particularly, will foreign governments be discouraged from trading with the United States companies?

Also, we should assess the possible deterrence value of treble-damage suits by foreign governments by actually identifying whether there are a number of meritorious antitrust suits that could not be brought unless the foreign governments can hope to recover treble damages. Before seeking to impose reciprocity, we should study the various methods of antitrust enforcement used by other countries and we should try to determine what other remedies they might have to protect themselves from price-fixing by U.S. companies.

By limiting foreign governments to actual damages we are actually encouraging our companies to commit antitrust violations abroad. They will have nothing to lose since their liability will never exceed their ill-gotten gains. Thus, we can expect not only price-fixing, but division of markets by American companies who should be vigorously competing with each other.

Furthermore, I have not seen to date any evidence that American corporations that enter into conspiracies to fix prices to foreign sovereigns will be able to resist the temptation to extend their conspiracy to domestic markets. Yet, the collusive behavior will go undeterred and unpunished as long as it goes undetected in the domestic market.

We do not know what the foreign policy implications may be of overruling the *Pfizer* case. I would like to examine more closely the proposal to require reciprocity on the part of foreign governments. I question the wisdom of attempting to dictate to other nations the manner in which they regulate their economy. While other nations may well already offer protection or benefits to our citizens as well as their own, we would clearly resent and resist any attempt of foreign countries to condition rights of the United States upon enactment of certain laws here.

Even if we could resolve these important questions of policy, we still must address some very perplexing technical problems. The language to express the policies must be chosen with great care.

It is not possible to identify all of the difficulties with the language of the amendment as approved for the simple reason that the language has not been given extensive scrutiny nor subjected to public comment. Some problems are immediately perceived, however. The terms "departments or agencies thereof," in reference to foreign sovereigns, are far too open-ended.

It is not clear, in fact, that any rational line can be drawn that would distinguish agents of foreign sovereigns from many multinational corporations. For example, do we wish to deny Renault the protection of the antitrust laws? What about Sohio (controlled by British Petroleum)?

Is it really desirable to give the Attorney General the power to insulate our private corporations from antitrust liability? There are enough difficulties with allowing him to settle suits on behalf of our own government.

Finally, I cannot agree with those portions of the Committee Report that suggest that overruling the Pfizer case is consistent with the legislative and judicial history of the Clayton Act. While *Pfizer* was the first Supreme Court decision allowing foreign governments to sue under section 4 of the Clayton Act, there was no judicial precedent disallowing such actions. Nor is there any legislative history showing a congressional intent to deny standing to foreign governments.

EDWARD M. KENNEDY.
BIRCH BAYH.
JAMES ABOUREZK.
HOWARD M. METZENBAUM.

## ADDITIONAL VIEWS OF JAMES B. ALLEN

Never to my knowledge has the Judiciary Committee—or any Senate committee for that matter—ever reported out a bill as soundly denounced as S. 1874 by all sides to the issues in controversy. As is described in full in the minority report, this bill has received seething criticism from the business community and the defendants' bar, from the academic community, from judges, from the leading antitrust consumer advocate, from the plaintiffs' bar, from small businesses, and from economists of diverse perspective.

The reason why S. 1874 has encountered such massive opposition is that, simply put, it is likely to nullify effective private antitrust enforcement—including most of the pending private treble damage actions. The bill would overrule the unanimous Warren Court decision in *Hanover Shoe* that has worked well for a decade to promote private antitrust enforcement by denying antitrust violators the right to use defenses that would otherwise permit them to escape liability.

That decision held that a defendant cannot argue that a plaintiff suing him for recovery of an illegal overcharge is entitled only to that portion of the overcharge not "passed on" to lower levels in the chain of distribution. The Supreme Court adopted this rule to insure that plaintiffs have adequate incentives to sue—that is, to eliminate the obstacles of having to overcome the complexities of the pass-on defense and to protect plaintiffs from having to share their potential recovery with remote persons who would jump on the lawsuit bandwagon for a free ride.

The *Illinois Brick* case did no more than affirm this established policy of eliminating the impossible pass-on issues from already overly complex antitrust actions. It held simply that, like the defendants, indirect purchasers cannot themselves embroil the direct plaintiffs in these pass-on issues and thereby either detract from their recovery, or subject defendants to possibly unconstitutional double recovery (or both). As the Supreme Court noted in *Illinois Brick*, 431 U.S. at 732–33:

> [T]he evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser *are multiplied in the offensive use of pass-on by a plaintiff* several steps removed from the defendant in the chain of distribution. The demonstration of how much of the overcharge was passed-on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff. [Emphasis added.]

The majority report simply ignores the compelling reasoning of these cases and ignores the hearing record of S. 1874 which establishes that the bill would in the long term create insuperable obstacles to effective antitrust enforcement and would in the short term immedi-

ately jeopardize most current cases by retroactively permitting defendants to raise pass-on defenses against their direct purchaser plaintiffs. One cannot find in the majority report even the slightest recognition of these obstacles, let alone a reasoned explanation of how they can be overcome. All that is found instead in both the bill's preamble and the majority report is a two-point theme that direct purchasers do not sue, and that S. 1874 is therefore necessary in the interests of antitrust enforcement to permit indirect suits by consumers.

But this argument is simply demolished by the facts. As noted in the minority report, the hearing record demonstrates conclusively that direct purchaser suits constitute the vast majority of current private enforcement actions, and that private antitrust enforcement, unless derailed by the pending legislation, will continue to increase. As for the second part of the argument, everyone—from the Supreme Court to leading consumer antitrust advocates—knows that consumers by and large do not and cannot ever effectively recover and that they are best protected by an effective enforcement scheme which deters the commission of violations at the outset. In the words of a leading consumer antitrust advocate, Beverly C. Moore, Jr. (who testified in opposition to S. 1874):

> the empirical evidence is indisputable that many absent class members, not infrequently a majority of them, do not avail themselves of the opportunity to recover any damages they might have suffered. 5 C.A.R. 1, 4 [Jan.-Feb. 1978].

None of this, of course, should come as any surprise to the committee or to the Senate. The difficulty of providing consumer enforcement and relief in those rare instances when it may be appropriate for violations occurring low in the distribution chain) was precisely the stated motive for enacting the parens patriae legislation 2 years ago, so that the States would be able to sue on behalf of consumers and keep the unclaimed recoveries as a penalty. While I voted against that legislation and am still opposed to it, leading scholarly opinion, including Judge Harold Tyler and the Columbia and Harvard Law Reviews, is to the effect that *Illinois Brick* does not adversely affect indirect parens patriae antitrust enforcement tools and remedies. So why the rush to enact this new even more ill-advised antitrust legislation?

The parens patriae legislation, of course, regardless of its merit or demerit is highly significant for what it did not do as much as for what it did. The Congress did not reverse the *Hanover Shoe* decision for non-parens patriae cases, finding instead that because of the incentives provided by that case and other resources of business plaintiffs,

> [t]he result has been relatively effective antitrust enforcement where the violation has occurred high up in the chain of distribution, and where the impact has been upon other business entities. [H.R. Rept. No. 499, 94th Cong., 1st sess. 7 (1975).]

That first purchasers provide effective antitrust enforcement—a state of affairs which S. 1874 would end—should therefore come as no surprise. The only surprise is the singleminded determination of the bill's proponents to ignore the facts and to overturn this "relatively

effective antitrust enforcement" that Congress found and approved less than 2 years ago.

It is thus difficult to ascertain any basis for the legislation. To be sure, there are some indications that the proponents feel that indirect small business purchasers and sellers should be denied recovery. But the plaintiffs' bar has left no doubt where small businesses rest on this issue—they would much prefer to preserve their present rights as direct purchasers than to give up those rights for the uncertain recoveries and certain complexities that would result from opening wide the door to remote indirect suits. The stakes are fairly large. According to the evidence at the hearings, more than two-thirds of the pending cases are direct purchaser actions brought by small business—these pending cases will be destroyed by the retroactive provisions of S. 1874.

There is an additional point to be made here. Contrary to the implications of S. 1874 and the majority report, the *Illinois Brick* decision does not in fact prohibit all indirect suits. Footnote 16 and the accompanying text of that decision have left some rather large exceptions to the rule of that case—large "loopholes," if you will—that the lower courts have barely had an opportunity to construe. These exceptions would, for example, appear to permit indirect small business and consumer recoveries in cases involving integrated industries, cost-plus contracts, or other conditions demonstrating the absence of ordinary market forces at various levels, in the chain of distribution. Moreover, it is clear that many indirect purchasers, including particularly State purchasing agencies, can legally obtain, assignments to sue in place of direct purchasers who themselves do not care to exercise their rights. These exceptions and devices offer a far greater promise of rational antitrust enforcement because they do not raise the overwhelming complexities of S. 1874.

Why, then, is this legislation even being considered? My best answer, admittedly speculative, is that the bill is being advanced by a small but highly vocal special group of indirect plaintiffs with pending cases who so far have successfully exercised the power to preserve their cases at the expense of the far greater number of pending direct purchaser cases. These special interest groups consist principally of the States who could have, but did not, obtain assignments to sue with respect to their pending indirect claims. The dollar value of whose claims, although significant, is a mere fraction of the dollar value of the claims this legislation will torpedo. For better or for worse, the State attorneys general are apparently a better organized and more visible lobby than the Federal judiciary, small business, the legal profession, the academic community, and the economics profession.

This would obviously not be the first nor the last time that special interests masquerading as the public interest would play havoc with the law in a manner that would harm more than benefit the general public. But the process by which S. 1874 was reported out is a particularly troublesome example of special interest influence. Some history is therefore appropriate.

The Subcommittee on Antitrust and Monopoly could reach no consensus on how to solve the problems created by S. 1874 and accordingly voted out the bill without recommendation so that the full committee could have an opportunity to address the difficulties on a de novo basis.

New hearings were then scheduled so that we could hear from economists, the plaintiffs' bar, Judge Tyler, certain academicians, and others who had not had an opportunity to testify earlier. It should be added here that, in partial recognition of the difficulties inherent in this proposed legislation, there was widespread support for the ABA's appointment of a joint plaintiffs' and defendants' attorneys task force to formulate a careful and technically acceptable draft bill for the use of the committee.

The special ABA task force completed its study in early April, at which time the Antitrust Council determined that there was no apparent solution to the problems raised by S. 1874. Accordingly, it adopted the following resolution:

> The reports of the Task Force do not provide a workable solution to the considerations of judicial administration which we believe caused the Supreme Court to decide Illinois Brick in the way it did, and the efforts of the Task Force demonstrate that such a workable solution is not apparent.

At about the same time, the hearings before the full committee produced the same basic message with the additional stern warning that S. 1874 was not only unworkable, but was indeed completely destructive. As the witness for the plaintiffs' bar testified, S. 1874 and the companion House bill "are poorly drafted, technically deficient, and they are probably the worst bills that I have seen proposed in a long time. * * * I think that this bill is so poorly drafted that if I were defending, I would have no difficulty in tying up any case for at least 10 years." [1]

Despite this type of criticism, the bill's proponents in the full committee engaged in no real discussion of the legislation and permitted votes on only two of a number of substantive amendments designed to improve and clarify the drafting and to address some of the many problems the bill creates in its current form. I think it is also fair to say that the committee gave no consideration to the report of the special ABA task force which had been appointed in part as a result of the misgivings of the committee with respect to the legislation.

I believe this brief history of both the substantive defects in the bill and the cursory attention given to it in committee recommend its defeat by the full Senate. While I will therefore vote against it, I also believe it is imperative that the full Senate have an opportunity to try to minimize the damage S. 1874 will do by considering both the amendments that were not permitted to be considered in the full committee, as well as the two proposals that were briefly discussed and rejected by less than a majority of the full committee.

I am well aware that these amendments, which are based in part on the ABA task force reports and in part on the hearings, are subject to the criticism—voiced by the subcommittee chairman himself at the full markup session—that they do not provide a completely workable solution to the problems created by S. 1874. It would certainly be strange reasoning, however, to reject constructive provisions designed to minimize a catastrophe on the grounds that they do not in fact pre-

[1] Testimony of Perry Goldbery, "Preliminary Transcript of Hearings on S. 1874 Before the Senate Committee on the Judiciary," 95th Cong., 2d sess. 48, 50–51 (Apr. 21, 1978) [hereinafter cited as "Preliminary Transcript of 1978 Senate Hearings"].

vent the catastrophe altogether. We can easily avoid the catastrophe by rejecting the bill in its entirety, and I do intend to vote against it even if some or all of the amendments are successful. But since I believe that should the bill come to a vote in the Senate then I am likely to be in the minority, the Senate has a clear duty before that time to respond, at least in some manner, to the nearly unanimous criticism of a bill that received virtually no drafting attention in committee and that was effectively bucked by the committee without any real recommendation to the full Senate for its consideration on the floor.

Accordingly, I plan to offer on the floor a number of amendments, which are discussed below under headings describing generally the particular defects in S. 1874 to which these amendments are addressed.

### Avoiding Duplicative Damages

The majority report agrees that the risk of multiple recoveries from overruling *Illinois Brick* is sufficiently serious to require overruling *Hanover Shoe* as well. However, as the minority report points out, merely overruling *Hanover Shoe* along with *Illinois Brick* does not completely protect defendants from multiple recoveries.[2] A defendant would still be subject to multiple damage awards under S. 1874 because the present bill makes no effort to insure the consolidation of all claims arising out of a particular antitrust offense. Thus, a direct purchaser suing first could convince a jury that he was entitled to three times the overcharge because he had not passed it on. Yet, an indirect purchaser, who would not be bound by the earlier ruling, could subsequently convince another court that pass on did occur, thus subjecting the defendant to treble damages twice for the same illegal price increase.

Because of the difficulty of ascertaining the amount of pass on it is virtually certain that no two juries would apportion damages among the injured parties in the same way. For this reason, the majority and minority reports of the ABA task force on legislative alternatives to *Illinois Brick* realized that duplicative awards could only be avoided by consolidating all potential plaintiffs in one action.[3] The ABA Antitrust Section Council, which appointed the task force, felt that such a consolidated trial would create considerable procedural problems and therefore concluded that no workable solution to *Illinois Brick* was apparent. I agree. But if indirect purchasers and sellers are allowed to sue, they must be brought into one action.

The objection has been raised that such consolidation would force plaintiffs to present their claims before they are ready. Yet, rule 19 of the Federal Rules of Civil Procedure already requires the compulsory joinder of parties needed for a just adjudication. The drafters of this provision concluded long ago that inconvenience to potential claimants is outweighed by the need for consolidation of conflicting

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[2] The chairman of the Subcommittee on Antitrust and Monopoly apparently conceded that S. 1874 does not provide a complete solution when he stated at the full committee markup in opposition to my amendment that "we felt that with the overruling of both *Illinois Brick* and *Hanover Shoe* that the questions of multiple recoveries were *virtually* resolved. That was the conclusion of the Justice Department as well." [Emphasis added.]

[3] *See* the concurring views of Professor Areeda, "Hearings on H.R. 8359, Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary," 95th Cong., 1st sess. 78 (1977) [hereinafter cited as 1977 House hearings]; and Samuel Murphy, Jr., 1977 House hearings at 176.

claims. Of course, neither rule 19 in itself, nor any other existing procedural device, is sufficient to solve the problems raised by this bill since they cannot force a potential plaintiff to litigate in a forum which does not have personal jurisdiction over him.[4] Thus, this bill must be amended to require all potential plaintiffs to join their claims within a reasonable time after suit by any one of them is initiated.

It has also been argued that, as a practical matter, duplicative awards would be avoided because of the 4-year statute of limitations on antitrust actions. That limitation period has been effectively eviscerated, however, by decisions which have held that the period does not begin to run until the date when damages become "ascertainable," and that the period is tolled for all members of a putative class once a class action is commenced. In addition, the period for all private antitrust actions "based in whole or in part on a matter complained of" in a government antitrust action is extended until 1 year after the termination of that government action.[5] When taken together, these exceptions to the statute of limitations guarantee that some defendants will be subject to multiple suits.

### Eliminating Retroactive Application

The final section of the bill would make its various changes in the law retroactively applicable to any case that was "pending" on June 9, 1977—the date the *Illinois Brick* case was decided—or was filed thereafter. Thus, the bill would apply not only to cases filed after enactment involving preenactment conduct, but even to cases previously filed and pending on the date the Supreme Court decided *Illinois Brick*. The testimony before the committee of respected constitutional and antitrust experts[6] made clear that there are at least two fundamental constitutional objections to this retroactivity provision and that retroactivity is an unwise policy choice in these circumstances in any event. The Senate cannot countenance either of these serious objections without abdicating its traditional role as defender of constitutional rights against the demands of special interest groups.[7]

First, in the absence of some compelling necessity, legislation that retroactively creates a new liability or impairs a vested claim for

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[4] It has been suggested that statutory interpleader, which allows nationwide service of process, be used to insure that all the interested parties are before the court. David Foster, chairman of the ABA Civil Practice and Procedure Committee, explained in the House hearings why such a procedure was inappropriate: "Statutory interpleader requires that the defendant pay the treble damage award into court or put up a bond in that amount. The sheer magnitude o. many treble damage claims makes it financially impossible for antitrust defendants to deposit such sums into court or to obtain bonds for such large amounts of money. Indeed, the difficulty of quantifying the amount to be bonded reveals the inappropriateness of the interpleader concept." 1977 House hearings at 123 (footnotes omitted).

[5] See 15 U.S.C. 16(i) (1976).

[6] See the testimony of Philip Lacavora, "Preliminary Transcript of 1978 Senate Hearings" at 4–12 (Apr. 21, 1978); Milton Handler, id. at 26–28 (Apr. 7, 1978), "Hearings on S. 1874 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee of the Judiciary," 95th Cong., 1st sess. 71 (1977) [hereinafter cited as 1977 Senate hearings]; Samuel Murphy, id. at 173; Julian Von Kalinowski, "Preliminary Transcript of 1978 Senate Hearings" at 45–46 (Apr. 24, 1978).

[7] From the founding of the Republic, the Congress has properly abhorred retroactive legislation. James Madison in the Federalist No. 44 referred to retroactive laws as "contrary to the first principles of the social compact and to every principle of sound legislation." Madison further reflected: "The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community." Id.

relief constitutes a denial of due process.[8] In reliance on the 10-year-old decision in *Hanover Shoe*, which was reaffirmed in *Illinois Brick*, direct-purchaser antitrust plaintiffs have filed suits in the reasonable expectation that if successful in showing an antitrust violation they would recover the full amount of any overcharge they paid because of the defendants' antitrust violations. Other direct purchasers who have not yet filed suit have the legal right to do so under the law as it now exists. By retroactively overruling *Hanover Shoe* to create the new pass-on defense, the bill thus impairs the assertion of these vested rights and indeed may reduce the plaintiffs' claims to zero. Legislative abrogations of vested causes of action have frequently been struck down by the Supreme Court on constitutional grounds.[9] Only last year the Supreme Court interpreted the 1974 repeal of the military's variable reenlistment bonus program to apply only prospectively, because retroactive application would present "serious constitutional questions." *United States* v. *Larionoff*, 431 U.S. 864, 879 (1977).

Like plaintiffs, antitrust defendants will also be denied due process of law through the after-the-fact application of S. 1874. Under existing law, as noted above, the defendant has had no defense of "pass on"; if he was adjudged liable to a direct-purchaser plaintiff after June 9, 1977, he would have paid damages consisting of the entire overcharge trebled. If now a non-direct-purchaser plaintiff could exercise a newly created right to sue the defendant and recover the amount of the overpricing that was arguably "passed on" to him, the antitrust defendant would be held liable for duplicative (sextupled) damages.[10]

Moreover, despite the assurances of the bill's proponents, S. 1874 would in fact alter the amount of damages for which defendants would be liable. Proponents have assumed that antitrust violators are liable only for their illegal overcharges, and the Department of Justice has therefore argued that S. 1874 would not increase defendant's liability, but would merely reallocate the illegal overcharges among different plaintiffs.[11] As the Department of Justice has acknowledged in contradicting itself, however, antitrust violators are liable not only for the overcharges but also for any so-called "consequential" damages suffered by plaintiffs—including lost profits, diminished asset value, and impaired going-concern value. *For example*, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, supra, 392 U.S. 481, 489 (1960).[12] Thus, an expansion of the number and functional type of plaintiffs who are permitted to sue would also result in an increase in the amount of

[8] See, e.g., *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974); *Railroad Retirement Board* v. *Alton Railroad*, 295 U.S. 330 (1935); *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398 (1934).

[9] See, e.g., *Coombes* v. *Getz*, 285 U.S. 434 (1932); *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338 (1922); *Ettor* v. *City of Tacoma*, 228 U.S. 148 (1913).

[10] Alternatively, the defendant would insist on reopening the judgment to assert the new pass-on defense and demand a refund from the direct-purchaser plaintiff. If there had been a suit by an indirect purchaser that was dismissed during this period on the ground he had not suffered any legally recognized injury, he too would be authorized by the bill to reopen the judgment. Presumably, this attempt to rewrite history would even apply to the *Illinois Brick* case itself. Any of these results would be contrary to settled notions of res judicata and due process of law.

[11] See the testimony of the Assistant Attorney General, John Shenefield: "We are not talking so much about taking more money away from the defendants. We are talking about giving it to different people. So, it seems to me that we really do not have a modified right so much as we have a redistribution of claims that already are in existence." 1977 Senate hearings at 23.

[12] "[W]e do not read the bill as in any way limiting recoverable damages to the amount of the overcharge." Id. at 17.

consequential damages for which antitrust defendants may be liable, since there is no necessary correlation between the amount of an illegal overcharge and the amount of consequential damages.

Second, the unequivocal intent of the pending bill—to compel the Federal judiciary to disregard the holdings of the Supreme Court in actions that were pending when *Illinois Brick* was decided—raises an additional constitutional question under the separation of powers doctrine. In deciding *Illinois Brick* and *Hanover Shoe*, the Supreme Court was interpreting the Clayton Act in the course of exercising "the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). It is, of course, the province of Congress to decide what the law should be for future conduct; that is the nature of the lawmaking function. S. 1874, however, seeks to replace the Supreme Court's statement of what the law has been and is with the views of a subsequent Congress as to what it feels the laws should have been. This is an encroachment upon the essential function of the judiciary under the doctrine of separation of powers.

Over a century ago, in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), the Supreme Court forcefully enunciated and applied the separation of powers doctrine to condemn an act of Congress that attempted to "prescribe rules of decision to the Judicial Department of the Government in cases pending before it." The Court held the statute unconstitutional on the ground that "Congress has inadvertently passed the limit which separates the legislative from the judicial power." Id. at 145–46. Like the statute condemned in *Klein*, this bill would purposefully overrule two prior Supreme Court decisions and prescribe different rules of substantive law to be followed in pending cases. Thus, like the statute in *Klein*, it would unconstitutionally encroach upon the exclusive authority of the Federal judiciary.

There is also an independent, broader question of public policy: Retroactivity here is an inappropriate exercise of legislative power. In harmony with the traditional aversion to retroactive laws, Congress has wisely chosen to make all other changes in the antitrust laws prospective only. The procedural entanglements and judicial waste that retroactivity of S. 1874 would cause cannot be justified by any conceivable benefits.[13]

Because retroactive statutes are, by definition, unsettling, Congress has traditionally shown great reluctance to enact such legislation, just as the courts have been reluctant to construe legislation to apply retro-

[13] As presently drafted, S. 1874 would apply to any action that was pending on June 9, 1977. In the year that has elapsed since then, dozens of the antitrust cases that were pending on that date have been dismissed or settled in reliance upon *Hanover Shoe* and *Illinois Brick*. Each of those resolved cases will be subject to reopening or attack on the authority of S. 1874, if it is enacted. Moreover, the validity of the retrocativity itself will likely be challenged in virtually every case on the authority of *Hanover Shoe* and *Illinois Brick*.

Even those cases that were pending on last June 9, but that have not been settled prior to passage of S. 1874 would be disrupted by retroactive application of the act. Initially, of course, motions challenging the constitutionality of retroactivity will have to be filed and acted upon. Lawyers for plaintiffs and defendants have conducted antitrusts procedure in accordance with the principles of *Hanover Shoe* and *Illinois Brick*. Decisions relating to the scope of discovery, which may last months and even years in antitrust litigation, would have to be reconsidered. Retroactive application of the "passing on" defense to cases pending on June 9 would require, for example, the reopening of pleadings and discovery to take account of the newly created defense. The planned course of trials and even the management of complex multidistrict litigation would also have to be altered to take account of the claims brought by the newly authorized, non-direct-purchaser plaintiffs.

actively.[14] Congress has acted to alter substantive rights retroactively only when some transcending emergency has admitted of no other solution. Thus, it is no coincidence that many of the cases dealing with retroactive legislation arose during the Great Depression when chaos threatened to destroy the American economic system.

An examination of prior antitrust legislation, moreover, demonstrates the unprecedented nature of the proposal to alter substantive rights and liabilities retroactively. For example, section 304 of the parens patriae title of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which, like S. 1874, expanded the number of plaintiffs who could sue antitrust defendants, rendered that title inapplicable "to any injury sustained prior to the date of enactment" of the Act (Public Law No. 94–435, 90 Stat. 1396). Indeed, Congress rejected an earlier draft of the legislation, S. 1284 94th Congress, 1st session, which would have authorized the retroactive application of the title to actions "pending on the date of enactment" of that bill. Similarly, when Congress added section 4A to the Clayton Act authorizing the United States to sue for damages in its proprietary capacity, it gave the new law only prospective effect. Section 4 of the amending legislation, chapter 283, 69 Stat. 282 (1955), provided that it was to become effective "6 months after its enactment."

Finally, it is worth noting that the primary pressure to have this legislation made retroactive comes from disappointed plaintiffs who want to win in the Congress what they have lost in the courts—at the expense of other and far more numerous but less organized plaintiffs who will suffer from retroactivity. It is unseemly for the Senate to yield to pressure to rescue unsuccessful litigants by passing what amounts to a private relief bill and retroactively creating rights the Supreme Court has said they do not have.

For these reasons, I intend to propose an amendment making this act inapplicable to any action for injury occurring before its enactment.

### Limitation of Recovery to Three-Times Original Overcharge

The proponents of the bill have operated under the simplistic assumption that overruling *Illinois Brick* would merely result in a reallocation of the damage award among potential plaintiffs. The discussion above demonstrates that this assumption is erroneous. As Peter Standish, chairman of the Committee on Trade Regulation of the New York City Bar, and Dr. Betty Bock, adjunct member of that committee, both cautioned the committee the proposed legislation may force a defendant to pay many times more than his original overcharge (aside from trebling) because various indirect purchasers may price their goods based on a percentage markup of their costs. Thus, an original 10-cent overcharge may result in a $1.50 price increase farther down the line. Although each consumer's individual cost increase may be trifling, the cumulative damages assessed against the defendant could easily exceed its total assets.[15]

[14] See, e.g., *Greene* v. *United States*, 376 U.S. 149, 160 (1964); *Union Pacific Railroad* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913).

[15] "Prelimnary Transcript of 1978 Senate Hearings" at 26, 33–36 (Apr. 17, 1978).

Along with this "multiplier effect" is the inclusion of other consequential damages in the damage award. Under the current law, as noted above, a direct purchaser may not only recover for the amount of an illegal overcharge, but may also recover for the other incidental damages to his business attributable to the price-fixing or other illegal practice. Thus, each indirect purchaser, except the ultimate consumer, can not only claim damages "from the portion of the overcharge it absorbs but also from the portion it passes on, which causes a reduction in sales volume under less than perfectly inelastic demand conditions." [16] If each intermediate purchaser is allowed to claim such damages, the potential award would be limitless. For this reason, David Foster, chairman of the ABA Civil Practice and Procedure Committee, suggested that any legislation limit libility to the same amount that would have been recovered by those purchasing directly from the defendant.[17]

I intend therefore to propose an amendment limiting the defendant's liability to three times the damages sustained by persons who purchased directly from the defendant.

### Maintaining Current Rules of Standing

Phillip Areeda, professor of law at Harvard, stated the court should be allowed to bar suits by indirect purchasers and sellers whose injury is so remote that damages simply cannot be calculated. As an example, he explained that the second purchaser of a home should not be allowed to sue for the illegal price-fixing of the manufacturer of plumbing fixtures which were placed in the home when originally constructed.[18] The language of this bill is not sufficiently clear, however, to insure that courts will apply this remoteness test to those who dealt indirectly with the defendant. Thus, as one witness testified, the overruling of *Illinois Brick* could "institutionalize" the very situation Professor Areeda described.[19] Moreover, the granting of standing to indirect purchasers or sellers may be misinterpreted as granting standing to those who currently do not have standing because they are not in the "target area" and are indirectly injured.[20] I therefore believe that we should adopt Professor Areeda's suggestion,[21] and place language in the substantive portion of the bill (Section 3) which would insure that the courts continue to apply the traditional rules of standing to indirect purchaser and seller suits. I intend therefore to propose that section 3 be amended to read that any indirect purchaser or seller shall not be barred from recovery *for the pass-on of illegal overcharges or undercharges so long as that person's damages are not so remote as to be speculative.*

### Burden of Proof of Pass-On

The bill as currently drafted allows the defendant "to prove as partial or complete defense to a damage claim, that the plaintiff has passed on to others, who are themselves entitled to recover under sec-

[16] *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 743 n.27 (1977).
[17] 1977 House hearings at 126.
[18] 1977 House hearings at 82.
[19] David Foster, id. at 120.
[20] Id. at 125.
[21] Id. at 85.

tion 4, 4A or 4C of this act, some or all of what would otherwise constitute plaintiff's damage." There are three serious flaws in this provision.

First, the phrase "who are themselves entitled to recover under * * * this act" is ambiguous; it could be interpreted to mean that a defendant cannot raise the defense if the individual purchasers he contends absorbed the loss are barred by the statute of limitations. This provision could thus unfairly penalize a defendant for a plaintiff's delay or inaction. Moreover, if the claims of all plaintiffs are not consolidated, different courts could reach different conclusions as to (*a*) whether or not another plaintiff is indeed barred by the statute of limitations, and (*b*) whether or not the absent plaintiffs actually absorbed some or all of the loss.

Second, this provision places the burden of proving pass-on on the defendant. As noted by the numerous witnesses cited in the minority report, it is virtually impossible to prove pass-on in the real world of supply and demand. The problem would be compounded by requiring the *defendant* to prove pass-on from the plaintiff to parties which were not even before the court, and who therefore would not be subject to the rules of discovery. In addition, placing the burden on the defendant creates for him a real dilemma. In a suit by direct purchasers, the defendant would be forced to either accept their claim that they absorbed all the loss, or to argue the case for indirect purchasers, thereby establishing admissions which may be used against him in subsequent suits.[22]

Third, the provision allows the defendant to prove that the plaintiff passed on the overcharge to others, but does not allow him to prove that the overcharge was absorbed by others *before reaching* the *plaintiff*.[23]

As already noted, I plan to propose an amendment requiring all potential claims to be consolidated. This amendment would ease some of the problems created by this provision.[24] Nonetheless, we should adopt the suggestion of antitrust expert Julian Von Kalinowski, and clearly place the burden of proving pass-on on each plaintiff.[25] Thus, I intend also to propose an amendment which would require the plaintiff to show that he suffered damages from the antitrust violation and that these damages were not absorbed, by, or passed on to, others.

### Liability of Small Businesses

In his testimony before the committee, Prof. Dorsey Ellis, Jr., of the University of Iowa College of Law, explained that the majority of defendants in price-fixing cases brought by the Government are small- and medium-sized firms. He further explained that from a competitive standpoint it would be undesirable to drive these firms out of business by litigation costs and huge damage awards.[26]

Because these firms are jointly and severally liable for all injuries caused by an antitrust conspiracy, each firm could be subject to huge

[22] See "Testimony of David Foster," 1977 House hearings at 122–123.
[23] Id. at 122.
[24] Id. at 123.
[25] Preliminary transcript of 1978 Senate hearings at 45 (Apr. 24, 1978).
[26] Id. at 34.

damage claims despite the fact that their role in the conspiracy was minimal, and the resultant injuries caused by them were small. Plaintiffs' lawyers in large antitrust class actions are aware of the vulnerability of these small firms and have not hesitated to coerce settlements from them under the threat of being joined in a lawsuit.[27] These attorneys realize that such small firms can either risk the potential of a large damage award nor pay the costs of litigating large, multiparty suits.

In order to reduce the ability of such attorneys to extort settlements from small businesses, I believe the Senate should follow the suggestion of Antitrust Attorney Francis Kirkham,[28] and adopt a further amendment which would stipulate that a defendant in an antitrust action is not liable jointly with any other defendant. This amendment would insure that each defendant is held liable for only the damages he causes.

### Limiting Indirect Suits to Price-Fixing Cases

The proponents of this bill apparently wish to insure that hard-core price fixers are disgorged of their illgotten gains. Witnesses testifying in favor of the bill have consistently portrayed antitrust defendants as willful violators of the law. But as antitrust scholar Frederick Rowe points out, this bill is not limited to price fixing; it opens the door to massive pass-on litigation in areas where substantive antitrust law is not at all clear.[29] Professor Ellis explained that the antitrust laws not only impose punitive treble damages on willful price fixers, but also on those who are pursuing practices they believe to be procompetitive, but which a jury may later find to have violated Sherman Act's "rule of reason."[30] It is likely that these good faith defendants will be exposed to even greater liability under this bill. Most complex pass-on cases will inevitably result in settlement, and such settlement awards will have to accommodate all levels of direct and indirect plaintiffs.[31] Professor Ellis concludes that allowing pass-on to be litigated in non-price-fixing cases "would compound the existing injustice of the system and would further chill desirable competitive aggressiveness in situations where the law is murky."[32]

I intend therefore to introduce an amendment to this bill which would limit the pass-on recovery to pricefixing cases.[33]

### Limiting Indirect Suits to Cases Where the Price-Fixed Item is Resold Without Physical Modification

Much has been said about the impossibility of tracing the pass-on of an illegal overcharge where numerous wholesalers, distributors, and

[27] See the testimony of Robert Anders, president of the Food Marketing Institute, at 70-71.
[28] Id. at 20, 23.
[29] 1977 Senate hearings at 81.
[30] Preliminary transcript 1978 Senate hearings at 35 (Apr. 24, 1978).
[31] An example of this rough justice is *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710, 745 (S.D.N.Y. 1970), aff'd 440 F.2d 1079 (2d Cir.), cert. denied 404 U.S. 871 (1971), where the drug retailers received $3 million in "nuisance" settlement, despite the fact that it was apparent to the court that the retailers had passed-on the entire illegal overcharge.
[32] Preliminary transcript of 1978 Senate hearings at 35-36 (Apr. 24, 1978).
[33] See "Testimony of Julian Von Kalinowski," id. at 44; and Milton Handler, id. at 17 (Apr. 7, 1978).

retailers are involved, each making independent pricing decisions and each buying and selling with different people in other levels in the chain of distribution. These problems are magnified when the price-fixed item becomes a component of another product which in turn is passed through another chain of distribution. For this reason, antitrust experts have urged that the indirect purchasers and sellers only be allowed to sue for damages where they purchased the price-fixed item, not a product which is made from that item.[34] Indeed, as Professor Handler points out, both the plaintiffs in *Illinois Brick*, and the proponents of this legislation seek merely to shift recovery from the "middleman" to the ultimate consumer of the price-fixed item.[35] A shoe manufacturer who buys price-fixed shoemaking equipment and a dress manufacturer who ships his dresses in price-fixed boxes are not middlemen,[36] and allowing their customers to sue would not only upset well-established laws of standing, but would turn antitrust suits into unmanageable three-ring circuses. Indeed, as Representative Rodino explained, allowing suits in such cases was not even intended by the *parens patriae* addition to the Clayton Act.[37]

I intend therefore to propose to the Senate an amendment which would limit the application of this bill to the situation it is apparently designed to deal with: where the price-fixed good is resold in the same form by indirect sellers, or to indirect purchasers.

### Prohibiting Indirect Consumer Class Actions

This bill was amended in committee to include a provision in section 4 which would prevent class actions on behalf of natural persons who have not dealt directly with the defendant. There were two sound reasons for the provision. First, natural persons would be protected by the *parens patriae* suits allowed by section 4C of the Clayton Act. That section was added after long debate because it presumably would give consumers an effective means of redressing antitrust grievances without the abuses such class actions have brought in the past.[38] Second, the class action prohibition was designed to minimize the grave procedural problems raised by this bill and to prevent the bringing of extortionate strike suits by self-seeking attorneys. Beverly Moore explained that many members of these class actions never actually receive their recoveries,[39] and David Foster noted that most of the settlements are eaten up in attorneys fees.[40] Moreover, because of the complexities raised by traditional class action suits, not one such antitrust actin has ever proceeded to actual trial, or liability and damages.[41]

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[34] Milton Handler, id. at 13–18; 1977 Senate hearings at 69–70; Francis Kirkham, preliminary transcript 1978 Senate hearings at 23 (Apr. 24, 1978); Julian Von Kalinowski, id. at 44.

[35] Id. at 14–16 (Apr. 7, 1978).

[36] Id. at 14.

[37] 122 Congressional Record H10295 (daily ed. Sept. 16, 1976).

[38] Representative Rodino, a sponsor of the *parens patriae* provisions, explained that such actions were a "superior alternative," to class actions, representing "the legislative conclusion that the State's attorney general is the best representative conceivable for the State's consumers. . . . *Id.*

[39] Preliminary transcript of 1978 Senate hearings at 44 (Apr. 16, 1976).

[40] 1977 House hearings at 119.

[41] Testimony of Samuel Murphy, Jr., id. at 175. See also the testimony of Francis Kirkham, preliminary transcript of 1978 Senate hearings at 18–20 (Apr. 24, 1978).

This provision was omitted from the bill reported out of the committee because some members believed that the whole issue of class actions deserved further study. I believe, along with numerous witnesses, that the entire issue of private antitrust enforcement needs further study and that passage of this bill should await such study. But if we pass this bill now, we cannot blindly ignore the problems it will raise by saying that "we'll look at those problems in the future."

Since consumers already have an adequate remedy in the *parens patriae* provisions, if the bill is brought up for consideration, I plan to offer an amendment reinstating the ban on consumer class actions for indirect purchasers.

### Allowing Indirect Actions Only Where Market Forces Have Been Superseded

If market forces are operating with respect to each level in the chain of distribution, each indirect plaintiff will have been damaged, if at all, in amounts that vary widely and that can never be proved. Thus, some direct purchasers in highly competitive markets may have no ability to pass-on illegal price increases at all, while others may face such high inelastic demand that their price has already been driven up by the market above what the overcharge would have caused in a market of slack demand. As an example, David Foster [42] pointed to the General Motors price-fixing case [43] where the court concluded that it would be impossible to prove how much each of 30 to 40 million indirect purchasers were overcharged, even assuming illegal profits by GM, since the retail automobile business "is notorious for its haggling and buyers 'shop around' to get the best price." [44]

To avoid such an exercise in futility, the Senate should adopt an amendment which would allow an action by indirect purchasers only if the plaintiff can prove that market forces have been superseded in the chain of distribution.

### Disallowing Indirect Actions Where the Indirect Purchaser Could Have Legally Obtained an Assignment of a Claim From a Direct Purchaser

It makes absolutely no sense to burden the courts, small business middlemen and the defendant with litigation of pass-on if the indirect plaintiff—especially a State—could have received an assignment of the cause of action against the defendant from the direct purchaser. Such assignments are valid as a matter of Federal law.[45] Moreover, Prof. Neil Bernstein of Washington University explained that nothing in *Illinois Brick* prevents an indirect purchaser from obtaining such an assignment, and Bernstein suggests "that knowledgeable lawyers in this area are going to add that as boilerplate to their contracts." [46]

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[42] 1977 House hearings at 121.
[43] *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973).
[44] 1977 House hearings at 121.
[45] See, e.g., *United States Copper Securities Co.* v. *Amalgamated Copper Co.*, 232 F. 574 (2d Cir. 1916); *Isidor Weinstein Investment Co.* v. *Hearst Corp.*, 303 F. Supp. 646 (N.D. Cal. 1969); see generally for common law requirements 6A C.J.S. *Assignments* §§ 43–71 (1975).
[46] 1977 Senate hearings at 191.

### Prohibiting Treble Damage Actions by Citizens of Foreign Countries

The Supreme Court recently held [47] that foreign governments have standing in American courts to recover treble damages for violation of the antitrust laws. The decision created an anomalous situation of allowing nations which sanction, support or actively engage in a wide variety of monopolistic and price-fixing practices to recover punitive damages against American firms for engaging in those very same practices in the international marketplace. The Committee therefore adopted an amendment to the bill barring foreign governments from bringing such actions.

It is equally unfair, however, to allow foreign corporations and consumers to sue American firms for violation of the antitrust laws, when Americans have no similar remedies in the countries where these foreign plaintiffs operate. It affronts basic notions of justice to allow foreign companies, which often operate in an atmosphere of official encouragement of carterization and territorial allocation, to recover treble damages against American firms which may have violated strict American standards of competition. There can be no dispute that the primary purpose of our antitrust laws is to insure a competitive domestic marketplace and to compensate American citizens for any damage to that competitive framework. We view that goal as so important that we are willing thereby to place our corporations at a disadvantage in the world marketplace. But we need not bludgeon them with the added club of foreign treble damage actions.

I intend therefore to propose also an amendment which would include foreign citizens in the ban on suits now applicable only to foreign sovereign governments, departments, agencies, and trading companies thereof. This prohibition would apply unless the government of the foreign citizen allows American corporations to sue in its courts for damages arising from violations of antitrust laws similar to our own.

James B. Allen.

## XIII. Minority and Additional Views—See Part II

[47] *Pfizer, Inc. v. Government of India*, 98 S. Ct. 584 (1978).

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