2-1-1978

Antitrust Law -- Private Actions: The Supreme Court Bars Treble-Damage Suits by Indirect Purchasers

Martha Johnston McDonald

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol56/iss2/8

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
NOTES

Antitrust Law—Private Actions: The Supreme Court Bars Treble-Damage Suits by Indirect Purchasers

In section four of the Clayton Act\(^1\) Congress provided that parties injured as a result of a violation of the antitrust laws could bring a private action for treble damages against an antitrust violator.\(^2\) When the violation involves price-fixing,\(^3\) the consumer\(^4\) of the product is often the one who bears the additional cost resulting from the overcharge. Because of the multilevel distribution system employed for the sale of most products in the United States, however, the higher price resulting from a price-fixing violation is commonly passed on by intervening purchasers before it reaches the ultimate consumer. Since 1968, when the Supreme Court held that defendants in treble-damage actions could not assert in defense that a direct purchaser-plaintiff had passed on any overcharge to its customers and thus had not been damaged by the alleged violation,\(^5\) the courts have disagreed\(^6\) on whether that decision should be extended to bar a claim of pass-on\(^7\) by a

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore 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.

2. The provision for recovery of treble damages was seen as both a remedial provision and as an incentive to private suits, and thereby an aid to enforcement of the antitrust laws. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) (Marshall, J.).

3. See Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach*, 85 Yale L.J. 626 (1976). Of the 346 civil and criminal actions initiated during 1971-1976 by the Department of Justice, 192 involved horizontal price-fixing (agreements among competitors), and 4 concerned vertical price-fixing, or resale price maintenance. Id. at 536, 555 (citing TRADE REG. REP. (CCH) for the five year period). Since treble-damage actions are frequently commenced after a government prosecution for the same violation, these figures are also a relatively accurate indication of the trend in private actions. Id. at 634 n.42.

4. The word “consumer” as used in this Note refers to any individual or business entity buying a product primarily for use rather than for resale. The term “ultimate consumer” or “final purchaser” refers to the last buyer of a product that has passed through several other hands—commonly those of the wholesaler and retailer. “Indirect purchaser” refers to anyone who buys a product from someone other than the manufacturer.


7. “Pass-on” refers to the theory that an overcharge added to the cost of a product at one level of the chain of distribution, rather than being absorbed by the buyer at that level, is added
plaintiff in a treble-damage suit. Contrary to the predictions of most commentators and many lower courts, the Supreme Court in Illinois Brick Co. v. Illinois has answered that question in the affirmative. Since any prospective plaintiff except the first purchaser of a product must rely on the pass-on theory to allege an injury from an illegal overcharge, Illinois Brick appears to have barred treble-damage suits by all indirect purchasers.

The State of Illinois and 700 other governmental entities brought suit against defendant brick manufacturers, alleging violations of section one of the Sherman Act. Plaintiffs claimed that the arbitrarily high price for concrete blocks illegally fixed by the manufacturers had been passed on by the masonry contractors to the general contractors and again by the general contractors to plaintiffs. Defendant manufacturers moved for summary judgment against all indirect purchasers of the concrete block. The district court granted the motion, holding that plaintiffs lacked standing, but the Court of Appeals for the Seventh Circuit reversed. The Supreme Court, on to the price paid by the next buyer in the chain. Assertion of the theory by a plaintiff in a treble-damage suit is labelled "offensive use of pass-on"; when invoked by a defendant it is a "defensive use of pass-on." See, e.g., Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2064-65 (1977).


11. Section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. V 1975), provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . ."

12. 97 S. Ct. at 2065. Defendants' blocks were bought primarily by masonry contractors, who built masonry structures under contract to general contractors, who then incorporated those structures into entire buildings that were sold to plaintiffs. Plaintiffs claimed $3 million in actual damages, producing a treble-damage claim of $9 million.

13. Illinois v. Ampress Brick Co., 67 F.R.D. 461 (N.D. Ill. 1975). The district court ruled that plaintiffs were too remote from the alleged violation to have standing to sue under § 4 of the Clayton Act because they were indirect purchasers of a product that, after being sold with the illegal overcharge by the manufacturer, had been incorporated into another product and sold in a different form. Id. at 468. The court distinguished between "final" consumers, who buy goods indirectly but in the same condition as when they were originally made and sold, from "ultimate" consumers, who buy the finished product from a middleman who has altered or added to the goods. Id. at 467-68. Final consumers, the court noted, were usually granted standing, ultimate ones only rarely. Id. at 466.

certiorari, did not reach the standing question, but held that *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* was dispositive of the case. Justice White, writing for the Court, rejected both the argument that plaintiffs should be permitted to use a pass-on theory and the contention that *Hanover Shoe* should be read narrowly to bar the pass-on defense only in its own factual context of overcharges for capital goods. Instead, he enunciated a per se rule against the use of pass-on theory by any indirect purchaser.

In *Hanover Shoe*, the most significant prior case dealing with the use of pass-on theory, the Supreme Court was confronted with the question whether a defendant in a treble-damage action should be allowed to escape liability to a direct purchaser by proving that the alleged illegal overcharge had been passed along to the purchaser’s customers. The Court, pointing...
to the "insurmountable" problems of proving pass-on in most situations and noting the added complications to treble-damage actions such problems would entail, held that the pass-on defense was barred as a matter of law. The Court also emphasized the need to preserve the effectiveness of the treble-damage action as an enforcement and deterrence mechanism: if a violator could defend against a first purchaser by asserting pass-on, it would escape liability altogether, since often ultimate consumers would have only a small stake in any lawsuit that could be brought against a violator and, accordingly, little incentive to sue.

The Hanover Shoe opinion offered little insight into the Court's views on the use of pass-on by plaintiffs. This question divided the lower courts for several years. One group of cases, led by Mangano v. American Radiator & Standard Sanitary Corp., read Hanover Shoe as barring indirect purchasers from asserting injury through pass-on. In support of its ruling, the lower court in Mangano pointed to the Hanover Court's concern with the difficulties of proving pass-on. Plaintiffs in Mangano claimed that the overcharge had passed through as many as five levels from the manufacturer of plumbing fixtures to the wholesaler, to the plumbing contractor, to the builder, to the first homeowner, and often to a subsequent homeowner. Noting the difficulty of proving that a builder selling a $20,000-$30,000 house had raised his price to reflect a $10-$20 overcharge for plumbing fixtures, the court dismissed the indirect purchasers' complaint. Other courts that rejected claims by ultimate consumers, rather than basing their ruling on Hanover Shoe, viewed the issue as one of standing. Those who sought to show an injury several levels removed from the alleged violation were held to be too remote to have a sufficient interest to sue under section four.

Competitive conditions. United contended that Hanover had suffered no actual injury from the overcharge because it was fully reflected in the price of the shoes sold to its customers. 392 U.S. at 487.

23. Id. at 493.
24. Id. at 494.
27. Id. at 26. Defendants' motion to dismiss was based on plaintiffs' failure to file answers to its interrogatories. The motion was granted on this ground, but the district court stated in addition that Hanover Shoe required dismissal because it had barred the use of pass-on by all parties. Id. at 30. The court of appeals affirmed on both grounds. 438 F.2d at 1188.
28. See, e.g., Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975) (residential subscribers claimed they paid higher rates as a result of anticompetitive practices in the
In another line of cases, lower courts concluded that *Hanover Shoe* was not intended to bar suits by ultimate consumers. These courts emphasized the policy underlying that decision and maintained that barring plaintiffs’ claims either under *Hanover Shoe* or on the basis of a strict rule of standing would subvert the purpose of the section four treble-damage action. In the leading case in this area, *In re Western Liquid Asphalt Cases*, plaintiffs were governmental entities claiming that asphalt producers had illegally raised and maintained the price of liquid asphalt used in the construction of public roads. The asphalt was bought from defendants by contractors, who combined it with other ingredients in building the roads. The Court of Appeals for the Ninth Circuit found that the consumers in that case had a substantial interest in the suit, since three million tons of asphalt and thirty-seven thousand contracts were involved. Furthermore, few of the contractors involved had come forward to assert their own claim against the supplier. Nor were they likely to do so, the court reasoned, because of their dependence upon the supplier and the apparent financial control that it exerted over many of its contractors. The court noted that “[t]he day is long past when courts, particularly federal courts, will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages.”

In *Illinois Brick*, however, it was the *Hanover Shoe* Court’s resolve to control the complexities of antitrust litigation that determined the outcome of the case. The other principles espoused in *Hanover Shoe*—ensuring enforcement and punishing violators of the antitrust laws—were de-emphasized. Rejecting the argument that offensive use of a pass-on theory should

---

32. *Id.* at 194.
33. *Id.* at 198.
34. *Id.*
35. *Id.* at 201. See also West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied sub nom.* Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971) (approving a settlement plan involving 66 civil antitrust actions and apportioning damages between direct and indirect purchasers).
be permitted, Justice White first asserted that in order to promote consisten-
cy in adjudications the Hanover Shoe rule must apply equally to plaintiffs
and defendants.36 He then cited two more practical concerns that impelled
the outcome in Illinois Brick. First, he expressed the fear that if indirect as
well as direct purchasers were allowed to recover, defendants would be
exposed to a "serious risk of multiple liability."37 Second, Justice White
reiterated the Hanover Shoe Court's apprehension that the attempt to prove
pass-on would "greatly complicate and reduce the effectiveness of already
protracted treble-damage proceedings."38

The Court attributed its reluctance to abandon the Hanover Shoe rule
or apply it only to instances of overcharges for capital goods, as plaintiffs
proposed, both to stare decisis considerations and to its unchanged belief
that the Hanover Shoe construction of section four would provide the most
effective enforcement mechanism for the antitrust laws.39 Moreover, al-
though the risk to defendants of multiple liability would not be present under
this application of Hanover Shoe,40 the Court foresaw additional complica-
tions that would arise if all potential plaintiffs were permitted to assert
claims based upon a single overcharge.41

In a strongly worded dissent, Justice Brennan42 argued that the majority
had overemphasized the importance of efficiency in the resolution of anti-
trust litigation, since the underlying rationale of the Hanover Shoe deci-
sion—the need to promote the treble-damage action as a deterrent to anti-
trust violators43—called for permitting plaintiffs to assert pass-on. The
ensuing procedural and evidentiary complications and the risk of multiple
liability, Brennan argued, could be adequately resolved by means of pro-
cedural devices, whereas prohibiting offensive use of pass-on would frus-
trate Congress' purpose in passing the Clayton Act, by reducing the ability
of injured parties to obtain compensation.44

36. 97 S. Ct. at 2067.
37. Id.
38. Id. at 2068.
39. Id. at 2070.
40. Compare text accompanying note 37 supra. When a defendant is allowed to assert
pass-on by the intervening purchasers and is able to prove it, the defendant will be liable only to
the final purchaser.
41. 97 S. Ct. at 2070. The existence of several potential claimants against the defendant,
and the necessity of apportioning any recovery among them, would require compulsory joinder
of all the claimants in a single action. See Fed. R. Civ. P. 19. This joinder requirement, the
Court feared, "would transform treble-damage actions into massive multiparty litigations
involving many levels of distribution and including large classes of ultimate consumers remote
from the defendant." 97 S. Ct. at 2072.
42. Justice Brennan's dissenting opinion was joined by Justices Marshall and Blackmun.
97 S. Ct. at 2076.
43. See text accompanying note 24 supra.
44. 97 S. Ct. at 2083-84 (dissenting opinion).
In this respect the primary purposes of section four of the Clayton Act are of critical importance in guiding any evaluation of the *Illinois Brick* result. The first objective of the Act is to provide compensation: "Any person who shall be injured . . . by reason of anything forbidden in the antitrust laws" may sue to recover his damages.\(^{45}\) The fact that a claimant may recover *treble* damages, however, indicates a second purpose of the Act—the punishment of violators and the deterrence of future violations. Finally, efficiency in administration may be regarded as an inherent goal of the Act; presumably Congress intended that its two substantive goals would be implemented swiftly and economically, as well as justly.

In *Illinois Brick*, the Court appeared chiefly concerned that antitrust litigation be conducted as efficiently as possible, citing this rationale as the dispositive principle of the *Hanover Shoe* decision. Justice White maintained that its importance was evident from the fact that the Court had recognized an exception to the general *Hanover Shoe* rule for suits based on pre-existing cost-plus contracts, contracts that make it "'easy to prove'" that the direct purchaser has not been damaged by an antitrust violation.\(^{46}\) It is also true, however, that when there is a cost-plus contract, the direct purchaser has the least incentive to sue, while the indirect consumer's injury is obvious and he is more likely to assert a claim. Thus the exception also furthers the enforcement objective of the Act. Moreover, if ease of proof was the reason for allowing the cost-plus exception, one might expect that the *Illinois Brick* Court would have allowed other exceptions for situations in which the "difficulties and uncertainties" of proving pass-on would be comparatively slight. Justice White, however, specifically rejected other, proposed exceptions\(^{47}\) on the grounds that some difficulty of proof might


\(^{46}\) 97 S. Ct. at 2068 n.12 (quoting Hanover Shoe, 392 U.S. at 494) (emphasis added by the *Illinois Brick* Court).

\(^{47}\) Plaintiffs argued that exceptions should be allowed when middlemen resell goods without altering them and when contractors add a fixed percentage markup to their costs in submitting bids. Exceptions were also urged for other situations in which most of the overcharge would logically be passed on—specifically, when "a price-fixed good is a small but vital input into a much larger product, making the demand for the price-fixed good highly inelastic." *Id.* at 2074.

At least two of these exceptions deserved further consideration by the Court. When contractors, or retailers, add a fixed percentage markup to their costs, any overcharge incurred is promptly passed on. Though the extent of the markup may vary with demand conditions, demand is likely to be inelastic where such a pricing system is being employed; otherwise profits would decline. Furthermore, expert testimony may be employed to provide estimates of the elasticity of demand. See Schaeffer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883, 905, 916 (1975). Proof of pass-on would be simplified in that once the amount of the overcharge is proved, and the percentage markup being employed by the middleman is established, the price change that is due to the overcharge can be determined. The fact that this pricing system, if the percentage
remain and that "the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility to proof in a judicial forum would entail the very problems that the Hanover Shoe rule was meant to avoid." 48

The only additional exception acknowledged by Justice White, however, could create as many problems of classification as those he rejected. After explaining the rationale for the cost-plus exception, he noted:

Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer. Cf. Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969); In re Western Liquid Asphalt Cases, 487 F.2d 191, 197, 199 (1973), cert. denied, 415 U.S. 919 (1974). 49

The exception as stated is somewhat ambiguous; although it concerns control of a direct purchaser by its customer, the cases cited describe situations in which a purchaser is controlled by its supplier. 50 Since the fact that free "market forces have been superseded" in some manner appears to have supplied the rationale for the exception, perhaps Justice White intended to distinguish situations in which control is exerted over a direct purchaser by either its customer or its supplier. 51 However it is interpreted, the markup is fixed, results in greater profits for a middleman when an overcharge has been imposed provides an additional rationale for allowing ultimate consumers to sue the violator, since the middleman in this situation has no incentive to do so.

The exception for a price-fixed good that is a small but vital component of a final product also has merit because of the likelihood that an overcharge on that component will be passed on to the ultimate consumer. The relatively small price increase in the final product resulting from an overcharge on a small, irreplaceable part will have little effect on the demand for the product; therefore pass-on of the overcharge on the component part would be unlikely to reduce profits. See id. at 921-25. The difficulty of tracing the overcharge through several market levels would be reduced if a strong presumption of pass-on were allowed on the basis of expert testimony, rebuttable by a showing of alternative reasons for the price increase by the intermediate purchasers.

The exception for middlemen who resell price-fixed goods without altering them has less merit, though initially it appears that proof of pass-on would be simpler in such a situation. This distinction has been criticized for focusing on a fact (extent of alteration of the product) that has no economic significance, and thus no influence over a middleman's ability to pass on an overcharge. See, e.g., id. at 928-30. Other factors, such as costs and elasticity of demand, that influence the extent of pass-on might vary widely within this category, and present difficulties of proof in some situations.

48. 97 S. Ct. at 2074.
49. Id. at 2070 n.16.
50. In In re Western Liquid Asphalt Cases, 487 F.2d at 198, the contractors who constructed roads for the indirect-purchaser plaintiffs were controlled by their asphalt supplier, who was charged with a price-fixing violation. In Perkins v. Standard Oil Co., 395 U.S. 642, 647 (1969), the wholesaler-direct purchaser exerted control over the retailer and the dealer who bought from it.
51. In response to several inquiries, the Reporter of Decisions' Office first indicated that the footnote would be changed to read "supplier." However, Justice White then reconsidered that proposed change. Telephone conversation with Henry C. Lind, Ass't. Reporter of Deci-
exception is certain to provoke frequent, time-consuming litigation on the issue of whether control is present in a given distribution relationship, and if so, how much is required to bring the case within the exception to the Illinois Brick holding.\textsuperscript{52} The resolution of such issues will require extensive discovery; indeed, it appears that a motion to dismiss against an indirect-purchaser plaintiff based on Illinois Brick would be premature unless the plaintiff has been allowed, when it so moved, to proceed with discovery on the issue of control. When this lengthy process is completed, and if some elements of control are found to be present, the court must then decide whether there is enough control to invoke the exception. Thus the trial court will encounter the very problems of classification that the Illinois Brick Court sought to avoid when it rejected other exceptions to its holding.\textsuperscript{53} Finally, and ironically, the proof of pass-on would not necessarily be any easier in many of the situations in which some form of control might be present than it would be in situations in which no such control existed.\textsuperscript{54}

\textsuperscript{52} For example, in In re Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), cert. denied sub nom. Standard Oil Co. v. Alaska, 415 U.S. 919 (1974), cited by Justice White, 97 S. Ct. at 2068 n.7, the supplier controlled its direct customers through "acquisition of stock, or indirectly through various financial arrangements, including credit." 487 F.2d at 195. Certainly when a majority of the stock of the direct purchaser is owned by the manufacturer-supplier, use of pass-on theory must be permitted the indirect purchaser, since manufacturer and purchaser are virtually the same corporation. Other types of control through stock, however, may not be as well-defined, such as ownership of a substantial minority of the stock of one corporation by another, or the "affiliation" situation, in which a corporation with many of the same shareholders as the manufacturer buys out the direct purchaser. Furthermore, a manufacturer who wished to insulate himself from treble-damage actions might try to take advantage of the Illinois Brick rule by setting up a distributor that it could control indirectly. Though outright ownership of a distributor would certainly invoke the control exception, if the distributor were "owned" by a relative or debtor of the manufacturer's majority shareholder, the control is not as readily identifiable.

Less direct types of control would include certain franchise arrangements, in which there may be territorial and supply restrictions. In other situations the manufacturer may establish or influence the retail price of its product. Finally, credit arrangements, as mentioned by the Western Liquid Asphalt court, id. at 195, are not uncommon in distribution relationships and could provide frequent instances in which an indirect purchaser might claim that control was exerted on a direct purchaser by its supplier.

One decision invoking footnote 16 has already been reported. In re Toilet Seat Antitrust Litigation, 1977-2 Trade Cas. ¶ 61,601 (E.D. Mich. Aug. 24, 1977). Plaintiff lumber company bought its toilet seats from defendant manufacturer through a purchasing company. The court concluded that the purchaser acted as an agent controlled by plaintiff because it purchased materials, for a fee unrelated to the quantity of goods purchased, at a price approved by plaintiff. The court held that these indirect-purchaser plaintiffs could assert a pass-on theory. Id. ¶ 61,601, at 72,496-97.

\textsuperscript{53} See text accompanying note 48 supra.

\textsuperscript{54} Unless the relationship is one of actual ownership, or unless the manufacturer actually sets the retail price, see note 52 supra, the difficulty of proving pass-on would still depend primarily on external market factors. See note 47 supra. Of course, the exception is still
In response to the majority's concern that proving pass-on would create new dimensions of complexity in treble-damage actions, Justice Brennan pointed out that nearly all antitrust cases necessarily involve "massive evidence and complicated theories." Indeed, initially proving an overcharge is often just as difficult and complex as is the subsequent burden of proving it was passed on. Nor does the specter of "massive multiparty litigations" cited by the majority pose so immediate and ominous a threat to the capability of litigants and courts that indirect purchasers should be denied any opportunity to prove their injuries and damages. As Brennan noted, ultimate consumers who are so remote that their damages would be speculative may be barred from court by application of the liberal, "target area" test of standing. Moreover, some imprecision in assessing damages has always been tolerated in antitrust cases.

In discussing Illinois Brick in the context of the punishment purpose of the statute, the majority opinion focused first on the concern that violators would be excessively punished: if plaintiffs are allowed to assert pass-on while defendants are not, both direct and indirect purchasers would be able to recover the full amount of the overcharge, assuming pass-on could be proved. Although recognizing that those advocating offensive use of pass-on would also allow its defensive use when both direct and indirect purchasers attempt to recover in the same lawsuit, and that various procedural devices could be used to join them in one action, White nevertheless maintained that there would be no protection against multiple liability when one claimant had already recovered from the violator by means of a judgment or settlement. He failed to consider alternative methods of dealing

supported by the rationale that since the direct purchaser is unlikely to bring a treble-damage claim against a supplier that has any amount of control over the purchaser, the indirect purchaser should be allowed to assert pass-on in those situations.

55. 97 S. Ct. at 2081 (dissenting opinion).
56. Id. See also Pollock, Automatic Treble Damages and the Passing-On Defense: The Hanover Shoe Decision, 13 ANTITRUST BULL. 1183, 1210 (1968).
57. 97 S. Ct. at 2072.
58. Id. at 2082 (dissenting opinion). See also note 84 and accompanying text infra.
60. 97 S. Ct. at 2067.
61. Id. at 2067 n.11.
63. One court has suggested an apportionment scheme to be used in consolidated actions. The direct purchaser would recover the amount of the overcharge not passed on, and any lost profits; the ultimate consumers would recover the remainder of the overcharge, if any, and any other damages proximately caused. In re Western Liquid Asphalt Cases, 487 F.2d at 201; see 97 S. Ct. at 2067 n.11. Justice Brennan, in his dissent, argued that this possibility is largely
with this situation, such as barring a later suit by plaintiffs who had failed to intervene in an action by another class of purchasers, or requiring the plaintiff who wins a judgment or agrees to a settlement to post bond with the court or pay the settlement into escrow until the statute of limitations has run, in the event additional claimants should come forward. The Court’s excessive concern that defendants be protected from a double recovery thus results in the denial of any recovery for many injured parties.

The Court also maintained that assuring a direct purchaser that he can recover treble the amount of the entire overcharge—if he can prove a violation—would provide the most effective enforcement mechanism for the private antitrust action. It is true that the first purchaser, often a large wholesaler or “middleman,” is usually in a better financial position to litigate than are the generally smaller and scattered ultimate consumers. Even though such a middleman may have been able to pass on most of an overcharge and thus may not have an incentive to bring an action on account of actual injury, he may be sufficiently attracted by the prospect of a full treble-damage recovery to undertake the considerable burden of antitrust litigation. Balanced against this tantalizing reward, however, is the danger the middleman faces of impairing relations with his supplier. Even when the supplier does not exert actual financial control over the first purchaser, there

---

64. See McGuire, supra note 8, at 198-200.
65. Justice White expressly rejected the argument that “it is better for the defendant to pay six-fold or more damages than for an injured party to go uncompensated.” 97 S. Ct. at 2067 n.11. Yet several commentators have noted that treble damages are unlikely to equal a defendant’s wrongful profits, largely because the violator has typically enjoyed interest-free use of his ill-gotten gains for several years before a judgment is rendered against him, and antitrust plaintiffs are denied prejudgment interest on their recoveries. See, e.g., Schaeffer, supra note 47, at 911-12.
66. 97 S. Ct. at 2070, 2074-75.
67. The majority contended that because the first purchaser operates in an imperfectly competitive market, he would be forced to absorb some, and “often most” of the overcharge. Id. at 2073, 2075. Economic theory suggests the contrary, however—that an overcharge would generally be passed on at least in part, in all types of competitive structures, resulting in higher retail prices. See e.g., J. BAIN, PRICE THEORY 141, 145, 198 (2d ed. 1960).

When demand for a product is inelastic, a middleman’s profits will be unaffected if he passes on the overcharge to his customers. Though elasticity of demand will of course vary throughout the market, price-fixing violations are more likely to occur when an intermediate purchaser can pass on the overcharge to his customers. In that event the intermediate purchaser would have less incentive to expend his resources in detecting the violation, and the profit accruing to the price-fixer would be greater when demand is inelastic, since any drop in the quantity sold as a result of the overcharge would be relatively small. Schaeffer, supra note 47, at 897-900.
is often a comfortable business relationship between the two, beneficial to a buyer, that he would be reluctant to jeopardize.68

In addition, the Court was concerned that requiring apportionment of any prospective recovery, in the event subsequent purchasers join the middleman in suing his supplier, would further reduce the latter's incentive to sue, and thus further impair enforcement.69 The present uncertainty as to whether a middleman will sue at all, however, appears to be at least as great a risk to enforcement prospects—especially since the likely alternative, under the Illinois Brick holding, is that no purchaser, direct or indirect, will bring a suit and the violator will go unpunished.70 Allowing both direct and indirect purchasers to attempt to prove their damages would at least encourage enforcement of the antitrust laws by the party who is often the one most seriously injured by an overcharge, the ultimate consumer, and thus has the greatest incentive to assert a claim against the violator. Middlemen who have suffered a substantial loss would still have the lure of a substantial recovery, and their problems of proof would not be compounded by the addition as parties to the suit of indirect purchasers, who would have the burden of proving pass-on before recovering.

The Illinois Brick opinion indicates that the compensation objective of the treble damage action was of minimal concern to the Court. Justice White recognized that the majority's rule denies recovery to indirect purchasers who may have been actually injured by antitrust violations,71 but apparently

68. See, e.g., In re Western Liquid Asphalt Cases, 487 F.2d at 198; Wheeler, Antitrust Treble-Damage Actions: Do They Work?, 61 CALIF. L. REV. 1319, 1325, 1330-32 (1973). Some direct purchasers may actually have benefited from the overcharge. See Schaeffer, supra note 47, at 914.

69. 97 S. Ct. at 2074-75.

70. One commentator asserts that even when pass-on is not explicitly invoked, it is an implicit factor in the calculation of damages in almost every damage action. Pollock, supra note 56, at 1189. This was borne out in an ironic conclusion to the "Plumbing Fixtures" litigation, Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971), in which indirect purchasers were barred from asserting pass-on. A subsequent settlement between the manufacturers and some direct purchasers was appealed by the direct purchasers, who claimed that the district court had not considered their data on overcharges, quantities and prices. The Court of Appeals for the Third Circuit conceded that the relevant data had not been considered, but noted, "[W]e cannot say that such proof would have been too significant here. . . . [A]mong the numerous factors dictating approval was the fact that the claims of this class were minimized by the probability that overcharges made upon them were passed on to their customers." Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971). Thus, the defendants not only managed to escape liability altogether to the ultimate purchasers, but were also liable for merely reduced damages to the direct purchasers on the theory that the legally injured parties passed on their losses to the same ultimate purchasers. If this is a representative case with respect to proof of damages in such a situation, a middleman who can demonstrate no actual damages will be at a substantial disadvantage in settlement negotiations of a private antitrust suit.

71. 97 S. Ct. at 2075.
felt that this was an unavoidable consequence of emphasizing the efficiency and deterrence objectives of the Clayton Act. It may be true that, as he stated, "Hanover Shoe does further the goal of compensation to the extent that the direct purchaser absorbs at least some and often most of the overcharge"; economic reality suggests that that extent will be small indeed. It is more likely that "[t]he economic burden of most antitrust violations is borne by the consumers in the form of higher prices for goods and services." Regardless of which is the better view, it is apparent that the dissent has accurately interpreted the intent of Congress in giving priority to the goal of compensating the injured. The recently enacted Hart-Scott-Rodino Antitrust Improvements Act of 1976 clearly indicates Congress' intention to emphasize compensation for injured consumers by authorizing state attorneys general to sue as parens patriae on behalf of the states' citizens against antitrust violators. Of more direct significance for Illinois Brick, a new bill has been introduced in both houses of Congress that would amend the Clayton Act to expressly overrule Illinois Brick and thus provide a remedy for indirect purchasers.

The Supreme Court in Illinois Brick elevated the goal of efficiency in treble-damage litigation, to the resulting detriment of the compensation objective, in pursuit of a punishment-deterrence approach that is of dubious merit. Rather than providing for some flexibility in determining which plaintiffs might have a substantial and deserving claim, the majority formulated a rigid, per se rule that bars virtually all ultimate-consumer plaintiffs from attempting to prove an injury.

72. Id.
73. See note 67 supra.
75. This discussion will be limited to Congress' intentions as illustrated in the Antitrust Improvements Act of 1976, 15 U.S.C.A. §§ 15(b)-(h), 16, 18(a), 26, 1311, 1407 (West Supp. 1977), and in legislation now being considered by Congress. The true intention of the Congress that passed the Sherman Act in 1890 and the Clayton Act in 1914 with regard to the compensation of injured consumers is less clear. See, e.g., 97 S. Ct. at 2068, 2069 n.14 (majority); id. at 2079-80 (dissent).
77. See, e.g., 97 S. Ct. at 2080, 2081 (dissent). Since the great majority of consumers are indirect purchasers, the Illinois Brick decision seriously undermines the purpose of this legislation.
78. S. 1874 & H.R. 8359, 95th Cong., 1st Sess., 123 CONG. REC. S 12309 (daily ed. July 15, 1977). This bill is sponsored by Senator Kennedy and Representative Rodino. That the measure is directed specifically at this decision is obvious by virtue of a provision that it be retroactive to June 9, 1977—the day the Illinois Brick opinion was handed down. Id. This provision was included at the suggestion of Senator Hugh Scott, who explained, "The Court deserves to have its attention respectfully recalled to the will of the Congress." Proposed Amendments to the Clayton Act: Hearings on S. 1874 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on Judiciary, 95th Cong., 1st Sess. (1977-1978), quoted in TRADE REG. REP. (CCH), July 25, 1977, at 2.
The *Illinois Brick* holding not only denies compensation to large groups of parties injured by antitrust violations, it also fails to achieve the desired efficiency in antitrust litigation. By recognizing an exception to its holding for situations in which control is exerted over one party in a distribution relationship,\(^\text{79}\) the Court has created a gap in the *Illinois Brick* rule that is potentially as broad as the rule itself. Plaintiffs that would otherwise be barred at the outset of a treble-damage suit against a manufacturer may be encouraged by the exception to move for discovery and litigate the control issue, thus consuming much of the court time that was gained by barring all other indirect purchasers. Moreover, the vague definition of the exception provides trial courts with great latitude in making the determination of "control"\(^\text{80}\) and thereby invites inconsistent decisions.

Furthermore, the ruling may have effects on the organization of the economy that are undesirable in terms of the goals of the antitrust laws. Manufacturers who engage in price fixing might be encouraged by the *Illinois Brick* holding to attempt to insulate themselves from any treble-damage action by setting up a direct purchaser that the manufacturer actually controls in some indirect manner, hoping to avoid the sweep of the control exception. Retailers, to preserve their claim in the event of a price-fixing violation by a manufacturer, might seek to employ a common purchasing agent, rather than obtaining goods through an independent middleman. To that extent the *Illinois Brick* holding, read in light of the control exception, appears to foster both vertical integration and horizontal collaboration in the economy.

The difficulties of proof, problems of apportionment and risk of multiple liability that the Court foresaw would indeed present obstacles to the resolution of treble-damage suits by indirect purchasers. But if compensation of the injured is acknowledged as a priority of the Clayton Act, as the language of the Act itself suggests,\(^\text{81}\) the Court should have attempted to resolve these problems in a manner that would entail less drastic repercussions for injured consumers. The risk of multiple liability for defendants is not great as a practical matter and could generally be prevented through procedural safeguards.\(^\text{82}\) In any event, the protection of antitrust violators should not take precedence over the compensation of those they have injured. Neither does the difficulty of apportioning damages among different claimants justify barring all except one class of plaintiffs from bringing a

---

79. See notes 50-52 and text accompanying notes 49-51 *supra*.
80. See note 52 *supra*.
81. See note 1 *supra*.
82. See text accompanying note 64 *supra*. 
treble-damage action. The task of apportionment could be simplified somewhat if a bifurcated trial system is used; gross liability could be determined in one trial, and the recovery could be apportioned among plaintiffs in a second proceeding, in which defendants would not be required to take part.

Moreover, both apportionment problems and difficulties of proof could be alleviated somewhat by the use of the requirement of standing under section four to eliminate the most remote plaintiffs.83 Lower courts, aware of the need to place some limits on the statute’s broad wording, have employed standing tests in a generally equitable, pragmatic manner, inquiring whether prospective plaintiffs have been injured to a sufficiently direct, foreseeable and substantial extent before permitting them to put on their proof.84 There will be many treble-damage actions in which the interests of

83. The Illinois Brick Court stated that it would not reach the question of standing, but noted that “the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4.” 97 S. Ct. at 2066 n.7. Assuming the validity of this statement, the Court’s determination of “which persons have been injured,” made in the interest of expediency rather than accuracy, nevertheless has the same effect as denial of standing to a plaintiff, but is more damaging because it does so for the wrong reasons. Standing concerns the ability to allege injury to an interest protected by the statute, not to prove such injury. Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969); Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1148-51 (6th Cir. 1975); In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 129 n.11 (9th Cir. 1973); In re Master Key Antitrust Litigation, 1973-2 Trade Cas. ¶74, 680, at 94,978-79 (D. Conn. 1973); Boshes v. General Motors Corp., 59 F.R.D. 589, 594, 597 (N.D. Ill. 1973).

84. Two distinguishable approaches have generally been used by the courts to determine whether a plaintiff is one injured “by reason of” an antitrust violation. The “direct injury” approach focuses on the relationship between the plaintiff and defendant, and requires privity between the two as an element of standing. Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910). The “target area” approach is the more modern and widely followed method today. Courts employing this approach in effect inquire whether the plaintiff is “within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry.” Conference of Studio Unions v. Loew’s Inc., 193 F.2d 51, 54-55 (9th Cir. 1951). For a thorough discussion of the two approaches and the cases employing them, see In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 126-29 (9th Cir. 1973).

The target area approach is the most promising as a tool for eliminating plaintiffs whose claims would be virtually impossible to prove and would thus needlessly waste the courts’ time. As one district court judge explained, “The target area test is essentially a measure of remoteness of injury resulting from antitrust violations. In most cases it serves to eliminate those plaintiffs whose business relationship with defendants is so attenuated as to render the alleged injury negligible or highly speculative.” Reiter v. Sonotone Corp., 1977-1 Trade Cas. ¶ 61,360, at 71,268 (D. Minn. Mar. 31, 1977), appeal docketed, No. 77-1474 (8th Cir. June 20, 1977). For instances in which some variation of the target area test was employed to eliminate remote plaintiffs, see cases cited in note 29 supra. For circumstances in which the test has been the basis for finding plaintiffs had standing, see In re Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), cert. denied sub nom. Standard Oil Co. v. Alaska, 415 U.S. 919 (1974) (defendant asphalt producers sold asphalt to contractors for use in building highways on contract to plaintiff); Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967) (State bought corrugated culverts made by defendant from contractors who built highways); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), cert. denied, 385 U.S. 934 (1966) (milk producers sued wholesale and retail grocers for selling milk from their
large, multi-level groups of consumers and middlemen will be implicated and in which the problems of proving pass-on may be insurmountable. There will, however, be others in which ultimate consumers will be the most seriously injured parties, will have suffered appreciable damages and will be well prepared to meet their burden of proof. An initial standing threshold would permit such plaintiffs to press their claims, without burdening the courts with frivolous or unnecessarily complex suits. When the standing requirement would not bar a class of plaintiffs so large as to be unmanageable, a court could refuse to certify the suit as a class action. These procedural bars, though perhaps not as simple to implement as the Illinois Brick rule, would permit the courts to promote all the objectives fostered by the treble-damage suit as the circumstances of each case require.

MARTHA JOHNSTON MCDONALD


In 1972, Congress amended the Civil Rights Act of 1964 to include a requirement that an employer “reasonably accommodate” his employees’ religious practices or observances unless doing so would cause an “undue


85. One such case, Reiter v. Sonotone Corp., 1977-1 Trade Cas. ¶61,360 (D. Minn. Mar. 31, 1977), appeal docketed, No. 77-1474 (8th Cir. June 20, 1977), was recently decided in a federal district court. A purchaser of a hearing aid brought a class action suit against the manufacturer for resale price maintenance, alleging that defendants sold hearing aids to selected retail dealers for approximately $100 and set the price to consumers at about $350. Brief for Appellee at 18. If footnote 16 of Illinois Brick, 97 S. Ct. at 2070 n.16, is interpreted to include control by a supplier, this case should be one of the exceptions to the Illinois Brick rule. See notes 51 & 52 and accompanying text supra. Resale price maintenance, if proved, would surely be recognized as “control” of a retailer by a manufacturer. If the footnote is read to include only “customer” control of a direct purchaser, however, the broad language of the decision might bar the consumer plaintiffs in this case despite their success in establishing their standing in the district court, simply because they are “indirect purchasers.” Because this situation, if plaintiff can prove her allegations of resale price maintenance, does not require the use of pass-on theory, it seems particularly unfair to bar the plaintiff under the Illinois Brick rule, before any proof may be offered.

86. See, e.g., Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973) (retail consumers of automobiles had standing to sue for alleged overcharges but proposed class of 30 to 40 million car buyers rejected as unmanageable).