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Congressional Authorization of Indirect Purchaser Treble Damage Claims: The Illinois Brick Wall Crumbles

Andrew Tureff

COMMENT

CONGRESSIONAL AUTHORIZATION OF INDIRECT PURCHASER TREBLE DAMAGE CLAIMS: THE *ILLINOIS BRICK* WALL CRUMBLES

INTRODUCTION

Both judicial and legislative attention have recently focused upon the question of which parties have the right to assert private treble damage claims under section 4 of the Clayton Act.[1] The question arises when a manufacturer in a chain of distribution imposes an illegal overcharge pursuant to a price-fixing scheme. Although in such a situation damages will be incurred by both direct and indirect purchasers, in *Illinois Brick Co. v. Illinois,*[2] the Supreme Court held that the direct purchasers have the exclusive right to bring private damage actions under section 4.

The Supreme Court refused to allow indirect purchaser suits because it would not accept the offensive use of pass-on evidence.[3] Offensive use of pass-on evidence would enable an indirect purchaser to prove that it was an injured party by establishing that a direct purchaser had passed on all or part of an illegal overcharge to it.[4] The Supreme Court previously dealt with pass-on evidence in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[5] The *Hanover Shoe* Court held that an antitrust defendant could not assert defensively that a direct purchaser did not suffer a cognizable injury because it had passed on the illegal overcharge to its customers in the lower level of the distribution chain.[6] Although several federal courts had allowed indirect purchaser suits despite the decision in *Hanover Shoe,*[7] the *Illinois Brick*

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1. Section 4 provides: "Any person who shall be injured in his business of 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." 15 U.S.C. § 15 (1976).

2. 431 U.S. 720 (1977).

3. *Id.* at 728.

4. McGuire, *The Passing-On Defense and the Right of Remote Purchasers To Recover Treble Damages Under Hanover Shoe,* 33 U. Pitt. L. Rev. 177 (1971); Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis,* 16 Wm. & Mary L. Rev. 883 (1975); Note, *The Effect of Hanover Shoe on the Offensive Use of the Passing-On Doctrine,* 46 S. Cal. L. Rev. 98 (1972) [hereinafter cited as *Offensive Use*]; Comment, *Standing To Sue in Antitrust Cases: The Offensive Use of Passing-On,* 123 U. Pa. L. Rev. 976 (1975) [hereinafter cited as *Offensive Passing-On*].

5. 392 U.S. 481 (1968).

6. *Id.* at 487-88.

7. *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 200 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); Carnivale Bag Co. v. Slide-Rite Mfg. Corp., [1975] Trade Cas. (CCH) ¶ 60,370, at 66,612 (S.D.N.Y. 1975); Bray v. Safeway Stores, Inc., [1975] 1 Trade Cas. (CCH) ¶ 60,193, at 65,665 (N.D. Cal. 1975); Boshes v. General Motors Corp., 59 F.R.D. 589, 596 (N.D. Ill. 1973); Southern Gen. Builders, Inc. v. Maule Indus. Inc., [1972] 1 Trade Cas. (CCH) ¶ 74,484, at 94,152 (S.D. Fla. 1972). *But see* Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13, 29 (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971).

Court determined that rejection of a defendant's use of pass-on evidence compelled a similar rejection of a plaintiff's offensive use of such evidence.[8]

The Court's rejection of indirect purchaser actions eliminates an entire class of potential antitrust plaintiffs. Congress, finding that such a result is inappropriate, has drafted legislation designed to overrule *Illinois Brick* and limit *Hanover Shoe*.[9] This legislation is likely to pass within the next year.[10] Although the subject of indirect purchaser actions has attracted much scholarly attention in the past,[11] a detailed analysis of the most recent proposed legislation has not yet been presented.

This Comment will analyze the current congressional proposal in light of the policy considerations involved in the recognition of indirect purchaser damage claims. It will contend that *Illinois Brick* misconstrued these considerations thereby resulting in an unwarranted rejection of such claims. Part I will provide a background discussion of *Hanover Shoe* and *Illinois Brick*. An examination of the conflicting policy considerations concerning indirect purchaser suits will follow in Part II. Part III will discuss the joint proposal of the House and Senate Committees on the Judiciary and assess its probable impact on the effectiveness of the national antitrust policy. Finally, recommendations for improving the bill will be presented in Part IV.

I. BACKGROUND

A complete evaluation of whether indirect purchasers should be within the ambit of section 4's protection and the effect of such actions on private enforcement of the antitrust laws necessitates a balancing of several policy considerations. Allowing indirect purchaser suits would further both the compensatory and deterrence objectives of antitrust law.[12] In addition to providing an opportunity for a large group of potential plaintiffs to seek redress for injuries resulting from past violations, the institution and successful resolution of such suits would deter future violations.[13]

On the other hand, indirect purchaser suits would make section 4 actions more complex, thereby increasing the burden placed upon the federal courts. These actions would be difficult to manage because of the likelihood that a single overcharge will cause many persons to suffer injuries, all of whom are potential plaintiffs. In addition, the amount of damages would be difficult to determine because the plaintiff must establish the extent to which the illegal overcharge was passed on to him.[14]

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8. 431 U.S. at 728-29.

9. *See* S. 300, 96th Cong., 1st Sess. (1979). The author would like to express his appreciation to Joel Perwin, Staff Counsel to the Senate Committee on the Judiciary, for his assistance in providing information concerning S. 300 and its predecessors.

10. Telephone Interview with Joel Perwin, Staff Counsel to the Senate Committee on the Judiciary (May 15, 1979).

11. *See* authorities cited note 4 *supra*.

12. Statement of John Shenefield, Assistant Attorney General Antitrust Division, Dep't of Justice, before the Senate Committee on the Judiciary, at 2 (Feb. 1, 1979) [hereinafter cited as Shenefield Statement].

13. *Id.* at 3.

14. Illinois Brick Co. v. Illinois, 431 U.S. at 731-33.

Still another drawback of indirect purchaser actions is that they present a potential for subjecting antitrust defendants to two different forms of multiple liability. First, direct and indirect purchasers may receive overlapping damage recoveries in an action based on the same illegal overcharge.[15] Second, juries in separate actions may render inconsistent findings as to the amount of the overcharge passed on to the indirect purchaser or the amount absorbed by the direct purchaser.[16] Thus, for example, one jury may decide that the direct purchaser absorbed seventy-five percent of the overcharge while another jury in a subsequent indirect purchaser action may determine that sixty percent of the same overcharge was passed on.

A. Hanover Shoe Inc. v. United Shoe Machinery Corp.

In *Hanover Shoe,* a shoe manufacturer sued a producer of shoe machinery alleging that he violated section 2 of the Sherman Act.[17] The damage claim was predicated upon the defendant's practice of leasing rather than selling the machines. The plaintiff contended that this practice was an instrument of the defendant's attempt to monopolize the shoe machinery industry and sought to recover the difference between the defendant's leasing price and the price of the machines had they been sold.[18]

The Supreme Court found for the plaintiff and established an irrebuttable presumption of direct purchaser injury,[19] holding that in order for a buyer to recover in a section 4 action he need only prove that he paid an illegally high price and the amount of the overcharge.[20] In addition, the Court rejected the defendant's attempt at escaping liability by introducing evidence that the plaintiff had passed on the illegal overcharge and thus had not been injured.[21] This rejection of the defensive use of pass-on evidence was based on three considerations: (1) that the injury is based upon the extent of the overcharge, mitigation being irrelevant to the assessment of damages;[22] (2) pass-on evidence would result in added complexity and its use would further burden the

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15. *See* notes 129-66 *infra* and accompanying text.

16. *See* notes 130-66 *infra* and accompanying text.

17. 15 U.S.C. § 2 (1976). *Hanover Shoe* followed the decision in United States v. United Shoe Mach. Corp. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954), in which Judge Wyzanski found that United Shoe had monopolized the shoe machinery industry in violation of § 2. Hanover Shoe then brought a private action against United Shoe, and submitted the findings in *United Shoe* pursuant to § 5 of the Clayton Act which makes "[a] final judgment or decree . . . in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws . . . prima facie evidence against such defendant . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . ." 15 U.S.C. § 16(a) (1976).

18. 392 U.S. at 483-84.

19. *Id.* at 490-94.

20. *Id.* at 489.

21. *Id.* at 488. For a detailed synopsis of the history of the pass-on issue in this case, see *id.* at 488 n.6.

22. *Id.* at 490; *accord,* Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906); *see Offensive Use, supra* note 4, at 102-04; *Offensive Passing-On, supra* note 4, at 980-82.

courts;[23] and (3) the need to maintain effective private enforcement of the antitrust laws.[24]

In holding that the overcharge itself is the appropriate measure of damages, the *Hanover Shoe* Court refused to examine the remote consequences of the illegal overcharge.[25] It relied primarily upon *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*,[26] in which shippers sought to recover reparations from a railroad company for charging a freight rate that the Interstate Commerce Commission found to be excessive.[27] Although the defendant railroad company asserted that the shippers passed the overcharge on to their customers, the Court awarded damages to the shippers based on the difference between the rates actually charged and those which would have been reasonable.[28] The *Darnell-Taenzer* Court reasoned that just as the law does not hold a defendant responsible for remote consequences, the tendency is to limit damages to the "first step."[29] In addition, it believed that the purchaser who dealt with the carrier should be the only one to force him to disgorge his illegal gain because it would be futile "to follow every transaction to its ultimate result."[30] As will be discussed later, *Illinois Brick* subsequently

23. 392 U.S. at 492-94; *see Offensive Use, supra* note 4, at 105-06; *Offensive Passing-On, supra* note 4, at 982-83.

24. 392 U.S at 494; *see Offensive Use, supra* note 4, at 105-06; *Offensive Passing-On, supra* note 4, at 983-84.

25. It did recognize, however, that when the differential between the price unlawfully charged and the price required by law could not be ascertained, another measure, such as lost profits, would have to be employed. 392 U.S. at 494.

26. 245 U.S. 531 (1918). The *Hanover Shoe* Court further elaborated on its finding that subsequent mitigation is irrelevant in assessing damages: "If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher. It is also clear that if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed . . . . We hold that the buyer is equally entitled to damages if he raises the price for his own product." 392 U.S. at 489.

In limiting the damage analysis to the initial impact of the overcharge, *Hanover Shoe* partially relied on Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906). In that case, the city of Atlanta instituted a treble damage action alleging that it was injured as a result of its purchases of iron water pipe at an excessive price. *Id* at 395. Although the Supreme Court did not address the potential pass-on issue, it affirmed a judgment for the city in the amount of the difference between the price actually paid and what would have been paid but for the price fixing conspiracy. *Id* at 399. Emphasizing the limited scope of the damage analysis, the *Chattanooga* Court stated "We do not go behind the person of the sufferer . . . . [Rather we] stop there." *Id.*

27. 245 U.S. at 533.

28. *Id.*

29. Although *Darnell-Taenzer* was not an antitrust case, Atlantic City Elec. Co. v. General Elec. Co., 226 F. Supp. 59, 65 (S.D.N.Y.), *appeal dismissed,* 337 F.2d 844 (2d Cir. 1964), held that the decision and rationale was applicable to such cases.

30. 245 U.S. at 533-34. Although this language could be interpreted as establishing a privity requirement in § 4 private treble damage actions, a close reading of *Hanover Shoe* indicates its reliance on *Darnell-Taenzer* does not warrant such a conclusion. The issue of whether § 4 requires privity was not before the Supreme Court in *Hanover Shoe.* Its discussion of *Darnell-Taenzer* was presented solely as an example of a case holding that the potential recouping of an overcharge from customers is irrelevant in assessing a direct purchaser's damages. 392 U.S. at 490. As

applied this policy in rejecting indirect purchaser claims and their use of offensive pass-on evidence.

The second factor in the *Hanover Shoe* Court's rejection of defensive pass-on evidence was its perception of the added judicial burden that would result from the use of such evidence. This factor incorporates two separate but related concepts. The first relates to the added complexity and manageability problems that would result from large damage actions.[31] The second concerns the difficulty of proving damages. In order to establish that a direct purchaser passed on an illegal overcharge, a defendant must explain to the court how the purchaser arrived at a price for his product. This requires the defendant to present economic evidence based upon demand and supply elasticities.[32] In *Hanover Shoe,* the Court refused to hear such evidence because it determined that economic theory could not reconstruct a direct purchaser's pricing decisions. In the Court's opinion, it was questionable whether "an economist's hypothetical model" could be employed to establish either the existence of the overcharge or the extent to which it was passed on.[33] The Court also established a stringent standard for proving that a direct purchaser passed on an illegal overcharge. Assuming arguendo that economic evidence could reconstruct the direct purchaser's pricing decisions, the Court further required the defendant to prove "that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued."[34]

The primary consideration in *Hanover Shoe's* rejection of defensive pass-on evidence, however, was its potential detrimental effect on private antitrust enforcement.[35] According to the Court, increased complexity along with

pointed out by two commentators, "[t]he Court in *Hanover Shoe* interpreted the *Darnell-Taenzer* case as standing for the proposition that a first purchaser may sue despite the possibility that he passed on the overcharge, not for the proposition that only the first purchaser may sue." Rodos & McMahon, *Standing To Sue of Subsequent Purchasers for Antitrust Violations—The Pass-On Issue Reevaluated,* 20 S.D. L. Rev. 107, 111 (1975).

This narrow reading of *Darnell-Taenzer* was expressly adopted by the Ninth Circuit in *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 197 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974). It is additionally substantiated by *Hanover Shoe* itself. In quoting language from *Darnell-Taenzer,* the *Hanover Shoe* Court deleted the following passage: "If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier." 245 U.S. at 534. Two commentators have suggested that the deletion of this language in the Court's lengthy quotation from *Darnell-Taenzer* indicates that the Court had no intention of establishing a privity requirement in § 4 actions. *See Offensive Use, supra* note 4, at 100; *Offensive Passing-On, supra* note 4, at 981 n.26. *But see* Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13, 30 (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971) (correlating the rejection of defensive pass-on evidence with the imposition of a privity requirement under section 4.)

31. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. at 493.

32. *See* R. Posner, Economic Analysis of Law 215-18 (2d ed. 1977); Schaefer, *supra* note 4, at 887.

33. 392 U.S.at 493.

34. *Id.*

35. *See* Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347, 1374 n.27 (5th Cir. 1976), *cert. denied,* 429 U.S. 1094 (1977); *In re* Western Liquid Asphalt Cases, 487 F.2d 191,

decreased efficiency could only result in an inefficacious system of enforcement. If the defendant were given the opportunity to assert pass-on evidence defensively, it would thereby eliminate the best plaintiff. Because the Court assumed that indirect purchasers generally incur only minimal damages and therefore would not assert many damage claims,[36] the defendant would "retain the fruits of [its] illegality."[37] Thus, acceptance of defensive pass-on evidence would seriously frustrate private antitrust enforcement efforts.

B. Illinois Brick Co. v. Illinois

Illinois Brick dealt with the use of offensive rather than defensive pass-on evidence as in *Hanover Shoe*. The state of Illinois, on behalf of itself and 700 governmental entities in the greater Chicago area, brought an indirect purchaser damage action under section 4 of the Clayton Act.[38] The plaintiffs alleged that the defendant manufacturers and distributors engaged in a conspiracy to fix the price of concrete blocks in violation of section 1 of the Sherman Act.[39] The indirect purchaser plaintiffs employed offensive pass-on evidence to establish that they, rather than the direct purchasers, absorbed the illegal overcharge. In rejecting their use of offensive pass-on evidence, the *Illinois Brick* Court found itself constrained by the previous ruling in *Hanover Shoe*. The Court determined that the exclusion of defensive pass-on evidence required a similar rejection of offensive pass-on evidence.[40] This rejection was predicated upon considerations of stare decisis, a desire to protect antitrust defendants from multiple liability, and a concern for the effectiveness of antitrust treble-damage actions.[41]

In the Court's view, the acceptance of offensive pass-on evidence required either overruling or narrowly confining *Hanover Shoe,* both of which the

196 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); H R. Rep. No. 499, 94th Cong., 1st Sess. 6 n.4 (1975), *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572, 2576 n.4; Schaefer, *supra* note 4, at 935; Comment, Mangano *and Ultimate-Consumer Standing: The Misuse of the* Hanover *Doctrine,* 72 Colum. L. Rev. 394, 410 (1972) [hereinafter cited as *Ultimate-Consumer*]. *But see* Illinois Brick Co. v. Illinois, 431 U.S. at 732 n.12 (complexity in proving pass-on was the primary consideration); Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp, 50 F.R.D. 13, 29 (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3rd Cir. 1971) (same); *Offensive Use, supra* note 4, at 108 (judicial burden was the primary consideration).

36. The assumption that indirect purchasers would have minimal interests in seeking relief is now questionable in light of the Antitrust Improvements Act of 1976 (HSR), 15 U.S.C. §§ 15c-15h (1976), *discussed at* notes 59-66 *infra* and accompanying text. *See* Berger & Bernstein, *An Analytical Framework for Antitrust Standing,* 86 Yale L.J. 809, 872 n.277 (1977); McGuire, *supra* note 4, at 189-91; Schaefer, *supra* note 4, at 886.

37. 392 U.S. at 494.

38. 431 U.S. at 726-27.

39. 15 U.S.C § 1 (1976). The distribution chain consisted of four links: (1) manufacturers who sold to (2) masonry contractors, who built masonry structures after their bids were accepted by (3) general contractors, who incorporated the structures into facilities and sold them to (4) the state of Illinois and local governmental entities. 431 U.S. at 726. The claims of the masonry and general contractors, as well as those of the private builders, were settled without prejudice to the action by the governmental entities. Illinois v. Ampress Brick Co., 536 F.2d 1163, 1164 (7th Cir. 1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

40. 431 U.S. at 730.

41. *Id.* at 728-31.

Court believed to be inappropriate.[42] In examining the policy considerations raised by allowing indirect purchaser actions, the *Illinois Brick* Court therefore assumed that *Hanover Shoe*'s irrebuttable presumption of direct purchaser injury would remain intact. Under such circumstances, indirect purchaser actions would create a serious threat of multiple liability because indirect purchasers could establish damages by employing pass-on evidence while, at the same time, defendants could not rebut a direct purchaser's claim by using the same evidence.[43] In addition, conflicting claims to the overcharge in separate suits could easily lead to inconsistent adjudications.[44] Although procedural devices might be used to minimize the likelihood of duplicative liability, the Court believed that even if the devices were successfully utilized,[45] severe manageability problems would result.[46]

Second, like *Hanover Shoe,* the *Illinois Brick* Court was concerned with the problems associated with using highly technical economic theory. In its view, the primary factor in the rejection of defensive pass-on evidence was the *Hanover Shoe* Court's perception of the difficulties in reconstructing a seller's pricing and output decisions and the resultant judicial costs of such a reconstruction.[47] These added complexities and costs are multiplied when offensive pass-on evidence is employed to determine the absorption and/or pass-on of the overcharge at each successive link in a distribution chain.[48] Emphasizing the negative impact of the introduction of economic theory, which itself is of questionable practical value, the Court decided to preclude its use.

Finally, the Court believed that the introduction of complex pass-on theories along with a potentially large number of plaintiffs would increase the cost of section 4 actions, thereby reducing the beneficial impact of providing for treble damages.[49] Because indirect purchaser plaintiffs would be uncertain as to the establishment and apportionment of the overcharge, their incentive to sue would be minimal. The *Illinois Brick* Court therefore reasoned that the decision in *Hanover Shoe* to provide direct purchasers with the exclusive right to the full overcharge was the most effective means to enforce the antitrust laws.[50]

In his dissent, Justice Brennan did not agree with the majority's interpretation of *Hanover Shoe*'s effect on the use of offensive pass-on evidence. Emphasizing section 4's compensatory and deterrence objectives, he concluded that *Hanover Shoe*'s application should be limited to cases of defensive

42. *Id.* at 729, 736.

43. *Id.* at 730.

44. *Id.*

45. The Court believed that existing procedural devices such as statutory interpleader, 28 U.S.C. § 1335 (1976), and rule interpleader, Fed. R. Civ. P. 22(1) as well as those available in the Multidistrict Litigation Act, 28 U.S.C. § 1407 (1976), would be ineffective in preventing multiple liability. 431 U.S. at 731 n.11, 738-42.

46. 431 U.S. at 731 n.11.

47. *Id.* at 731-72.

48. *Id.* at 732-33. Plaintiffs alleged that the concrete blocks incurred an overcharge of four cents per brick at each link in the chain resulting in overpayments exceeding $3 million. *Id.* at 727.

49. *Id.* at 745.

50. *Id.* at 745-46.

assertion of pass-on evidence when direct and indirect purchasers are not parties to the same action.[51] This would prevent the defendant from escaping liability and thus facilitate maximum enforcement. His interpretation of *Hanover Shoe* would remove the irrebuttable presumption and allow a defendant to assert defensive pass-on evidence against a direct purchaser when an indirect purchaser was present in the same action. Moreover, in such a situation, Justice Brennan would allow indirect purchasers to use offensive pass-on evidence to prove their damages.[52] Justice Brennan's acceptance of offensive pass-on evidence was predicated upon several factors. In balancing the compensatory and deterrence considerations with the problems of complexity and multiple liability, he believed that the rationales for the authorization of offensive and the limitation of defensive pass-on evidence represent two different sides of the same enforcement coin. In his view, enforcement can best be facilitated by rejecting an antitrust violator's attempt to escape liability, while accepting an indirect purchaser's attempt to impose liability.[53]

II. A BALANCING APPROACH: THE CONSEQUENCES OF RECOGNIZING INDIRECT PURCHASER SUITS.

The *Illinois Brick* Court's extension of the concerns expressed in *Hanover Shoe* established a per se rule limiting section 4 actions to direct purchasers. This rule was a result of the Court's decision to emphasize the problems of complexity and manageability over the compensation and deterrence objectives of section 4. It is questionable, however, whether this determination will best serve the nation's antitrust policy. Such a rigid rule is justified only if a balancing of these considerations indicates that indirect purchaser actions are so unmanageable and complex as to be counterproductive.

A. *Compensating Those Injured by a Violation.*

An examination of its legislative history and the case law establishes that compensation is one of the primary objectives of section 4 of the Clayton Act.[54] In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[55] decided only six months prior to *Illinois Brick,* the Supreme Court explicitly endorsed compensation as being Congess' primary objective in enacting section 4.[56] According to its evaluation of the legislative history, the treble damages provision of section 4 "is designed primarily as a remedy."[57] The *Brunswick* Court

51. *Id.* at 753 (Brennan, J., dissenting).

52. *Id.*

53. *Id.*

54. The legislative history of § 4's provisions reveals that it was designed to encourage damaged parties to seek redress for their injuries. For example, the liberal venue and jurisdictional requirements, *see* 15 U.S.C. § 15 (1976), provide plaintiffs with easy access to the federal courts. 21 Cong. Rec. 2612 (1890) (remarks of Sen. Teller) (amount in controversy requirement should be eliminated to ensure that those damaged have an opportunity to seek redress). Moreover, although the treble damages provision serves a strong enforcement function, it also serves as an incentive to assert § 4 damage claims. *See* Illinois Brick Co. v. Illinois, 431 U.S. at 755 (Brennan, J., dissenting); 21 Cong. Rec. 3148-49 (1890) (remarks of Sens. Sherman and Edmunds).

55. 429 U.S. 477 (1977).

56. *Id.* at 485-86.

57. *Id.* (footnotes omitted).

determined that this provision was conceived primarily for " '[t]he people of the United States as individuals, *especially consumers*".[58] Inasmuch as consumers generally do not purchase goods directly from manufacturers, this broad compensatory objective incorporates indirect purchasers within its purview.

The legislative history of the recent Hart-Scott-Rodino Antitrust Improvements Act of 1976[59] (HSR) provides additional support for the contention that section 4 of the Clayton Act was designed to compensate consumers in their status as indirect purchasers.[60] This legislation, enacted prior to the decision in *Illinois Brick,* authorizes state attorneys general to institute parens patriae suits on behalf of natural persons injured by a violation of the antitrust laws.[61] The damage awards are recovered in the name of the state and are distributed in any manner authorized by the court or deposited with the state as general revenues.[62] HSR contains provisions that encourage consumers to bring suit[63] and that also alleviate possible procedural impediments to these actions.[64] The legislative history of this act clearly indicates that it was intended to facilitate the assertion of section 4 rights, which Congress believed to include those of indirect purchasers.[65] This intention was explicitly enunciated by Representative Rodino when he stated:

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58. *Id.* at 486 n.10 (emphasis added) (quoting 21 Cong. Rec. 1767-68 (1890) (remarks of Sen. George)). During the congressional hearings on the treble damages provision, Senator George further stated: "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.'

"This is the express provision of the bill . . . . But even if it were not . . . 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. . . . He buys to sell again. He buys only for profit on a subsequent sale. So whatever he pays he receives again when he sells, together with a profit on his investment . . . . The consumer, therefore, paying all the increased price advanced by the middlemen and profit on the same, is the party necessarily damnified or injured." 21 Cong. Rec. 1767 (1890); *see id.* at 3149 (remarks of Sen. Morgan), 3150 (remarks of Sen. George), 2457 (remarks of Sen. Sherman), 2558 (remarks of Sen. Pugh).

59. 15 U.S.C. §§ 15c-15h (1976). For a historical perspective and an examination of the viability of parens patriae actions, see Hawaii v. Standard Oil Co., 405 U.S. 251 (1972); California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), *cert. denied,* 412 U.S. 908 (1973); Curtis, *The Checkered Career of* Parens Patriae: *The State as Parent or Tyrant?,* 25 De Paul L. Rev. 895 (1976); Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of* Parens Patriae *and A Suggested New Approach,* 85 Yale L. Rev. 626 (1976); Hoffman, *Antitrust Standing: Congress Responds to* Illinois Brick, 1978 Wash. L.Q. 529, 545-551.

60. Illinois Brick Co. v. Illinois, 431 U.S. at 755 (Brennan, J., dissenting); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 486 n.10 (quoting 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb)); Berger & Bernstein, *supra* note 36, at 845-46.

61. 15 U.S.C. § 15c(a)(1) (1976).

62. *Id.* § 15e.

63. *Id.* § 15c(d) (authorizing recovery of reasonable attorney's fees).

64. *Id.* § 15d (authorizing statistical sampling methods as well as fluid recovery of damages to facilitate a plaintiff's proof of the extent of his injury).

65. Illinois Brick Co. v. Illinois, 431 U.S. at 756-58 (Brennan, J., dissenting) (citing S. Rep. No. 803, 94th Cong., 2d Sess. 6, 42-43 (1976)).

[R]ecoveries are authorized by the bill whether or not the consumers purchased directly from the price fixer, or indirectly, from intermediaries, retailers, or other middlemen. 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 . . . bill.[66]

An examination of the relevant case law also manifests a strong concern for compensating indirect purchasers. Although earlier cases did not specifically confront either aspect of the pass-on issue, the opinions contain language that justifies an inference supporting the use of offensive pass-on evidence by indirect purchasers.[67] For example, in *Radovich v. National Football League,*[68] a football player brought suit under section 4 alleging that the National Football League conspired to prevent him from playing professional football. The defendant contended that the plaintiff's action should be dismissed because he did not state in his pleadings the basis for his right to damages with sufficient particularity. The Court rejected the defendant's argument, adopting a literal interpretation of section 4 without added requirements not explicitly set forth in the statute. Although the Court was primarily concerned with the sufficiency of the pleadings,[69] this literal approach would preclude a per se rule such as that established in *Illinois Brick.*

Supplementing the older decisions is a majority of lower federal court cases that interpret *Hanover Shoe* as allowing the utilization of offensive pass-on evidence by indirect purchaser plaintiffs.[70] In *In re Western Asphalt Cases,*[71] the Ninth Circuit rejected the application of privity to section 4 and concluded that *Hanover Shoe*'s primary purpose was to maintain an effective mechanism for compensating injured parties.[72] This pro-compensation interpretation of *Hanover Shoe* is further supported by *In re Master Key Antitrust Litigation,*[73] which was a consolidation of builder-owner damage claims brought by several cities, states, and private owners against manufacturers of hardware components. The district court, in determining that *Hanover Shoe* allows indirect purchaser suits, stated:

66. 122 Cong. Rec. H10295 (daily ed. Sept. 16, 1976).

67. *See, e.g.,* Mandeville Farms v. Sugar Co., 334 U.S. 219 (1947). In *Mandeville,* local growers of sugar beets alleged that refiners of sugar had fixed the price they paid the farmers for the beets, in violation of §§ 1 and 2 of the Sherman Act. The Court accepted the growers' treble damage claims based on the underpayments although the price-fixing conspiracy was implemented by purchasers rather than sellers. *Id.* at 235. In recognizing the damage claims, the Court found that § 4 was "comprehensive in its terms and coverage, protecting all those who are made victims . . . of forbidden practices" including consumers. *Id.* at 236.

68. 352 U.S. 455 (1957).

69. *Id.* at 454.

70. *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 200 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1084 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971); Carnivale Bag Co. v. Slide-Rite Mfg. Corp., [1975] 1 Trade Cas. (CCH) ¶ 60,370, at 66,610 (S.D.N.Y. 1975); Bray v. Safeway Stores, Inc., [1975] 1 Trade Cas. (CCH) ¶ 60,193, at 65,666 (N.D. Cal. 1975); Southern Gen. Builders, Inc. v. Maule Indus. Inc., [1973] 1 Trade Cas. (CCH) ¶ 74,484, at 94,152 (S.D. Fla. 1972); Boshes v. General Motors Corp., 59 F.R.D. 589, 596-97 (N.D. Ill. 1973).

71. 487 F.2d 191 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974).

72. *Id.* at 196.

73. [1973] 2 Trade Cas. (CCH) ¶ 74,680 (D. Conn. 1973).

[The] defendant's invocation of *Hanover,* which *rejected* a proposed pass-on defense in order to ensure that those who violated the antitrust laws did not escape liability . . . strikes a discordant note. The attempt to transform a rejection of a defense because it unduly hampers antitrust enforcement into a reason for complete refusal to entertain the claims of a certain class of [indirect purchaser] plaintiffs seems an ingenious attempt to turn the decision and its underlying rationale on its head.[74]

Thus, both cases determined that the authorization of indirect purchaser suits was an essential means to provide compensation for those actually injured.

Despite the importance given to compensation by Congress and the judiciary, *Illinois Brick* nonetheless prevented indirect purchasers from seeking redress. Initially, the Court found that the legislative history of HSR was not dispositive because the statements were made after the passage of the Clayton Act.[75] The Court believed that HSR "simply created a new procedural device . . . to enforce existing rights of recovery under § 4."[76] Inasmuch as the *Illinois Brick* Court determined that indirect purchasers had no substantive rights before the bill's enactment and that its passage created no new substantive liability, it found that the preclusion of indirect purchaser actions was not improper.

Such a finding, however, is totally inconsistent with the Court's conclusion in *Brunswick.* There, the Court determined that section 4 granted substantive rights to consumers who, as noted above,[77] generally do not purchase directly from the manufacturer. In addition, not only does *Illinois Brick* severely limit section 4 damage actions, but its restrictions also preclude indirect purchaser consumer suits under HSR. Assuming arguendo that the Court's contention that HSR's legislative history is not dispositive as to section 4 is correct, such a conclusion with respect to parens patriae actions is untenable.

Even if compensation is the primary objective of section 4, both the *Illinois Brick* Court and opponents of offensive pass-on evidence believe that indirect purchaser actions will not provide any additional compensation to injured parties. First, as noted by the Court, the size and complexity of these actions will significantly increase the cost of litigation and decrease individual recoveries.[78] Second, two eminent antitrust scholars suggest that the manufacturer's litigation costs will ultimately be passed on to consumers, thereby reducing the effect of any recovery.[79] These arguments, however, assume all the characteristics of a genuine catch 22 dilemma. As will be discussed below,[80] there are often situations in which direct purchasers will be reluctant to

74. *Id.* at 94,978-79.

75. 431 U.S. at 733-34 n.14.

76. *Id.*

77. *See* notes 55-58 *supra* and accompanying text.

78. 431 U.S. at 745; *see* Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?,* 70 F.R.D. 199, 206-07 (1976); Wheeler, *Antitrust Treble-Damage Actions: Do They Work?,* 61 Calif. L. Rev. 1319, 1339-40 (1973).

79. *Fair and Effective Enforcement of the Antitrust Laws: Hearings on S. 1874 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 95th Cong., 1st Sess. 69-71 (1977) [hereinafter cited as *S. 1874 Hearings*] (statement of Michael Blechman and Milton Handler); Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The 23rd Annual Antitrust Review,* 71 Colum. L. Rev. 1, 9-10 (1971).

80. *See* notes 89-98 *infra* and accompanying text.

bring section 4 actions. Thus, if indirect purchasers are precluded from bringing section 4 damage claims, manufacturers will be free to increase their prices pursuant to price-fixing schemes, whereas if such claims are recognized, the cost of such suits will be passed on to consumers and ultimately increase the price of the relevant product. These arguments, however, overlook past decisions in which sizeable recoveries have been awarded.[81] In addition, they ignore the fact that the suits are asserted to correct the faults of a displaced market system in order to increase competition and lower prices.[82] Precluding such suits would paradoxically allow the manufacturer to maintain his unlawful prices and prevent the legal system from supplementing the market pressures that attempt to set reasonable prices.

B. *Deterrence and Enforcement*

Deterrence and enforcement will be analyzed together because they both focus on minimizing the negative effects of antitrust violations. Moreover, the effectiveness of section 4's deterrence function is largely determined by the perceived threat of vigorous enforcement while the enforcement goal is simultaneously served by effective deterrence. Although from a deterrence standpoint it is irrelevant which type of purchaser actually asserts a claim, it is nonetheless essential to maximize the availability of potential plaintiffs to ensure effective antitrust enforcement.[83]

The effect of indirect purchaser suits on these two considerations requires a determination of the optimum means of preventing anticompetitive behavior and ameliorating its negative effects. This, according to *Illinois Brick* proponents, can best be accomplished by concentrating enforcement of section 4 exclusively in the hands of direct purchasers.[84] Supporters of this contention believe that direct purchasers are in the best position to discover antitrust violations.[85] They also point out that direct purchasers assert the majority of treble damage actions. Substantiating this claim is a study of 1975 and 1976 price-fixing cases which indicates that direct purchaser suits outnumbered those brought by indirect purchasers by three to one.[86] Opponents of indirect purchaser actions also contend that the effort to compensate indirect purchasers will reduce direct purchaser recoveries, thereby decreasing their incentive to bring section 4 actions.[87] Because the authorization of indirect

81. *See, e.g.*, West Virginia v. Charles Pfizer & Co., 440 F.2d 1079 (2d Cir.) ($37,000,000), *cert. denied*, 404 U.S. (1971); Bray v. Safeway Stores, Inc., [1975] 1 Trade Cas. (CCH) ¶ 60,193 (N.D. Cal. 1975) ($32,712,081); *Effective Enforcement of the Antitrust Laws: Hearings on H.R. 8359 Before the Subcomm. on Monopolies and Commercial Law of the House of Representatives Comm. on the Judiciary*, 95th Cong., 1st Sess. 37, 42-43 (1977) [hereinafter cited as *H.R. 8359 Hearings*] (statement of Arizona Attorney General Babbit).

82. *H.R. 8359 Hearings, supra* note 81, at 463-64 (statement of Sen. Kennedy); M. Green, The Closed Enterprise System 50 (1972).

83. Illinois Brick Co. v. Illinois, 431 U.S. at 760 (Brennan, J., dissenting).

84. *S. 1874 Hearings, supra* note 79, at 67 (statement of Michael Blechman and Milton Handler); *H.R. 8359 Hearings, supra* note 81, at 193 (statement of Richard Posner).

85. *S. 1874 Hearings, supra* note 79, at 67 (statement of Michael Blechman and Milton Handler); *H.R. 8359 Hearings, supra* note 81, at 193 (statement of Richard Posner).

86. *S. 1874 Hearings, supra* note 79, at 67 n.9 (statement of Michael Blechman and Milton Handler).

87. *Id.* at 69-71 (statement of Michael Blechman and Milton Handler).

purchaser suits is designed merely to supplement enforcement by direct purchasers, a decrease in actions by the latter group is viewed as being counterproductive to the overall enforcement effort.[88]

Supporters of indirect purchaser suits, however, emphasize the problematic nature of concentrating private enforcement of the antitrust laws in direct purchasers. According to the findings of a House Judiciary Committee report, "indirect purchasers have been equally significant in antitrust enforcement."[89] This significance is further substantiated by another recent study of price-fixing cases since 1960 which established that almost two-thirds of these section 4 cases involved indirect purchasers and over twenty-five percent were brought exclusively by indirect purchasers.[90] In addition, these supporters also believe that the 1975-1976 study was an inaccurate measure of the importance of direct purchaser suits because some courts did not recognize indirect purchaser claims.[91] More importantly, many of those classified as direct purchasers were simultaneously claiming substantial damages in their status as indirect purchasers, with the latter claim often providing the major impetus for the suit.[92]

Proponents of indirect purchaser actions further question the incentive of direct purchasers to bring section 4 actions. First, because direct purchasers can pass on a substantial portion of an illegal overcharge to their customers, they frequently have little incentive to bear the risks and expenses of litigation.[93] Second, when a direct purchaser's selling price is determined by simply adding a percentage mark-up to its costs, it may actually profit from the manufacturer's overcharge because its percentage mark-up will be applied to a larger base price.[94] Third, even assuming it suffers an injury, a direct

88. *Id.*

89. H.R. Rep. No. 1397 (pt. 1), 95th Cong., 2d Sess. 9 (1978) [hereinafter cited as 1978 House Report].

90. *See* S. Rep. No. 934, 95th Cong., 2d Sess. 19, 20 (1978) [hereinafter cited as 1978 Senate Report].

91. *H.R. 8359 Hearings, supra* note 81, at 16 (statement of Assistant Attorney General John Shenefield).

92. 1978 House Report, *supra* note 89, at 9.

93. *Id.* at 7-8; *S. 1874 Hearings, supra* note 79, at 10 (statement of Sen. Scott), 112 (statement of Colorado Assistant Attorney General Hill); Shenefield Statement, *supra* note 12, at 3; Schaefer, *supra* note 4, at 913.

94. *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 198 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); 1978 House Report, *supra* note 89, at 7; *S. 1874 Hearings, supra* note 79, at 10 (statement of Sen. Scott), 112 (statement of Colorado Assistant Attorney General Hill). West Virginia v. Charles 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) provides an example of direct purchasers profiting from the imposition of a manufacturer's illegal overcharge. In *Pfizer*, wholesalers sold prescription drugs to retail druggists at a mark-up of 16⅔% over cost. The druggists then imposed additional uniform increases of 66⅔% over their costs in selling these drugs to consumers. The result of these mark-ups, according to the court, was "that [the] wholesalers and retailers, far from sustaining damages, made substantial profits from [the] antitrust violations." *Id.* at 745. One druggist who declined to institute a damage claim asserted: "Any pharmacy claiming damages is, in my opinion, guilty of lying. All pharmacies base their retail prices for drugs on their costs, either using a fixed percentage or a professional fee. Either way, they do not suffer damages due to higher wholesale costs of these drugs. If anyone has a complaint, it would be the individual consumer, not the pharmacists." *Id.* at 746.

purchaser's dependence upon the manufacturer as a source of supply might result in a reluctance to initiate a section 4 damage action.[95] Lastly, the direct purchaser may not want to subject itself to the extensive discovery requests that would follow the institution of a suit because of possible detection of its own illegal activities.[96]

Thus, it is apparent that in some situations indirect purchasers are often the only private parties willing to enforce the antitrust laws.[97] From an enforcement and deterrence perspective, therefore, establishing direct purchasers as the exclusive agents of this private enforcement effort is unwise. *Illinois Brick*'s failure in this respect is aptly pointed out by the House Committee on the Judiciary:

> [A] major purpose of the Clayton Act is to deter would-be violators. This purpose is not well served by a rule that sharply limits the number of plaintiffs who can challenge a violation. The deterrent effect of the treble damage remedy is lessened when the violator knows his liability ends with his customers.[98]

The rejection of indirect purchaser suits has an additional negative effect on antitrust enforcement. Besides eliminating an entire class of plaintiffs from claiming damages pursuant to section 4, it also, as mentioned above, appears to vitiate the parens patriae cause of action provided by HSR.[99] These actions are brought under section 4 of the Clayton Act[100] which, according to *Illinois Brick,* has the same privity requirement as section 4.[101] Such a determination would render the legislation virtually useless. Thus, *Illinois Brick* eliminates a significant portion of potential antitrust enforcers, thereby weakening deterrence, a result which is inimical to one of the primary purposes of section 4 private treble damage actions.

C. *The Reliability of Pass-on Evidence*

The preceding analysis of section 4's compensation and deterrence objectives establishes substantial support for indirect damage claims. A complete evaluation of *Illinois Brick,* however, requires balancing these interests with the problems inherent in indirect purchaser actions such as the added com-

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95. *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 198 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); *S. 1874 Hearings, supra* note 79, at 10 (statement of Sen. Scott), 122 (statement of Colorado Assistant Attorney General Hill); Shenefield Statement, *supra* note 12, at 4.

96. *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 198 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); *S. 1874 Hearings, supra* note 79, at 10 (statement of Sen. Scott), 122 (statement of Colorado Assistant Attorney General Hill); Shenefield Statement, *supra* note 12, at 4.

97. As one eminent antitrust attorney stated: "I think [*Illinois Brick*] detract[s] 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." *S. 1874 Hearings supra* note 79, at 52 (statement of Harold Kohn).

98. 1978 House Report, *supra* note 89, at 8.

99. *Id.* at 10; *S. 1874 Hearings, supra* note 79, at 121 (statement of Chauncey Browning), 123 (statement of Richard Turner), 178 (statement of Samuel Murphy); Shenefield Statement, *supra* note 12, at 5. *But see S. 1874 Hearings, supra* note 79, at 163 (statement of Ross Young).

100. 15 U.S.C. § 15c (1976).

101. 431 U.S. at 733-34 n.14; *see* notes 75-76 *supra* and accompanying text.

plexity of pass-on evidence. Opponents of indirect purchaser actions emphasize the negative aspects of utilizing pass-on evidence either defensively or offensively because of its reliance on economic theory. They contend that economic theory is a complex and unreliable means of proving liability and calculating damages.[102] One commentator further accentuated this problem by asserting that even if economic evidence could be utilized effectively, "the element of irrationality in pricing and purchasing would render the analysis suspect."[103]

In addition to questioning the validity and complex application of economic theory itself, its opponents, appropos of *Hanover Shoe,* assert that the measure of damages that would result from the utilization of offensive pass-on evidence is inequitable.[104] This inequity results from imposing a damage award that includes the mark-ups at each successive intermediate level. According to one economist, the ultimate damage assessment is based upon too many arbitrary factors and thus is unjustifiably punitive to antitrust defendants.[105] Because the defendant has no control over the number of links in the chain, the proportion of the overcharge absorbed to that passed on, and the intermediate mark-ups,[106] it is unjust to hold him liable for these subsequent increases. Inasmuch as the incorporation of these mark-ups would result in great uncertainty as to the scope of a defendant's potential liability, the opponents of offensive pass-on would limit the damage figure to the initial overcharge.[107]

Although proponents of indirect purchaser suits generally concede that introducing pass-on evidence would result in additional complications, they believe that this potential for complexity is greatly exaggerated.[108] The economic evidence needed to prove pass-on and to establish damages would entail a presentation of the elasticities of supply and demand in the relevant market. Elasticity theory indicates the responsiveness of the quantity supplied by producers and/or demanded by consumers to a given percentage change in the competitive price.[109] As a general rule, the more inelastic the demand, the

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102. *See, e.g.,* Illinois Brick Co. v. Illinois, 431 U.S. at 731-33; Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. at 492-93; Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13, 29 (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971); Majority Report of The Committee on Trade Regulation of the Association of the Bar of the City of New York, before the Subcomm. on Monopolies and Commercial Law of the House of Representatives Comm. on the Judiciary, at 6-9 (Apr. 17, 1978) [hereinafter cited as New York Majority Report].

103. *See* Note, *Scaling The Illinois Brick Wall: The Future Of Indirect Purchasers In Antitrust Litigation,* 63 Cornell L. Rev. 309, 312 (1978) [hereinafter cited as *The Future of Indirect Purchasers*].

104. New York Majority Report, *supra* note 102, at 11-12, 30.

105. *Id.* at 10-12, 30.

106. *Id.* at 13.

107. Statement of Betty Bock, Member of the Committee on Trade Regulation of the Association of the Bar of the City of New York, before the Subcomm. on Antitrust and Monopolies of the Senate Comm. on the Judiciary, at 20-21 (Apr. 17, 1977) [hereinafter cited as Bock Statement].

108. *See, e.g.,* McGuire, *supra* note 4, at 185; Pollock, *Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Decision,* 13 Antitrust Bull. 1183, 1210 (1968).

109. *See* R. Posner, *supra* note 32, at 196-97; P. Samuelson, Economics, 381-90 (10th ed.

greater the buyer will absorb the overcharge.[110] The seller in this situation can increase the cost of his product without decreasing its demand to a degree that would cause a loss of total revenue. Because purchasers are willing to continue buying a product, such as gasoline, despite its increased cost, the seller can pass on the overcharge. Conversely, as demand becomes more elastic, the seller must absorb a larger portion of the overcharge.[111] In this situation purchasers are not willing to pay the higher price; they will substitute another similar product assuming one is available. Thus, the seller will be forced to maintain his price while incurring the increased costs.[112] Elasticity theory also indicates that in most manufacturing and/or distribution chains the direct purchaser passes on some portion of the overcharge.[113] Complete absorption, or an exclusive direct purchaser injury, will occur only when demand is perfectly elastic, which is a rare occurrence.[114]

Use and application of economic theory can provide the statistics necessary to show which purchaser was injured, and to what extent.[115] Indeed, such evidence is used in tax incidence theory, which examines the effect that excise taxes have on the supply and/or demand for a product.[116] In addition, economists often make daily forecasts based on elasticity analysis concerning the effect that anticipated changes in inputs would have on a business's sales and profits.[117] As one economist stated to the House Committee on the Judiciary:

> [These calculations] are the basis for necessary pragmatic business decisions. Even if these forecasts seldom are precise to the last dollar, they meet the real world test of being an important basis for major corporate policy decisions. Such forecasts incorporate the very same real world considerations which enter into an antitrust damages calculation.[118]

Thus, acceptance of this method of projecting and calculating the effects of business ventures provides sufficient support for its application in assessing

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1976); Schaefer, *supra* note 4, at 887-97. Demand is elastic when a decrease in price increases the quantity demanded to the extent that total revenue (price times quantity) increases. Elasticity is unitary when the percentage decrease in price results in a proportionate increase in quantity demanded which maintains the preexisting level of total revenue. Demand is inelastic when the percentage decrease in price elicits a negligible increase in quantity demanded so as to result in a decrease of total revenue. P. Samuelson, *supra,* at 382.

110. *See* P. Samuelson, *supra* note 109, at 389-90; Schaefer, *supra* note 4, at 893.

111. *See* R. Posner, *supra* note 32, at 221-22; P. Samuelson, *supra* note 109, at 390.

112. *See* R. Posner, *supra* note 32, at 390; Schaefer, *supra* note 4, at 891.

113. Schaefer, *supra* note 4, at 897.

114. *Id.* at 893. Thus, *Illinois Brick*'s preclusion of indirect purchaser suits along with *Hanover Shoe*'s presumption of direct purchaser injury will result in a windfall recovery for direct purchasers who will automatically recover for damages relating to the overcharge which has been passed on.

115. *Id.* at 887. *But see* Bock Statement, *supra* note 107, at 11-12.

116. *See* P. Samuelson, *supra* note 109, at 389; Schaefer, *supra* note 4, at 883, 887, 893; *H.R. 8359 Hearings, supra* note 81, at 200 (statement of Peter Max).

117. *H.R. 8359 Hearings, supra* note 81, at 200 (statement of Peter Max). In addition, the statement of Kenneth Reed providing statistics of the Portland Cement Association clearly establishes that manufacturers often make detailed calculations concerning the nature and extent of the pass-on of a price increase. *Id.* at 43-56.

118. *Id.* at 200.

antitrust damages. Inasmuch as a manufacturer's pricing decisions often result from a cost-benefit analysis based on such calculations, the same analysis can and should be used in determining both liability and the extent of damages when the manufacturer's decision results in a violation of the antitrust laws.[119]

The liberal standard of proof required in antitrust actions provides additional support for permitting the use of economic evidence. Many courts have held that in such actions the jury may assess damages based on reasonable estimates and "act upon probable and inferential, as well as direct and positive proof."[120] Several courts have liberalized this standard of proof to a greater degree in class actions.[121] *Bray v. Safeway Stores, Inc.*,[122] provides a useful example. In *Bray*, retailers conspired to underpay cattlemen for their beef. The court rejected the retailers' attempt to escape liability, and assessed damages on the basis of national averages, which was held to be a reasonable method of calculation.[123]

In addition, principles of equity can be offered in response to the argument that offensive pass-on evidence would result in an unjust damage assessment against the defendant.[124] These include the traditional maxim that a wrongdoer cannot be allowed to profit from his own wrong.[125] *Illinois Brick*'s emphasis on complexity problems and its per se rule, however, condones and legitimizes this inequitable situation. The effect of the Court's holding is to minimize deterrence by encouraging antitrust violators to design their wrongdoings in the most complex manner possible. The more difficult it is to determine damages, the more likely that a violator will escape prosecution.[126] As the Supreme Court has pointed out in a different setting, such a result is particularly inequitable because it is the defendant's successful control of the market that eliminates a more precise method of calculation.[127]

119. *See* Kohn & Kaplan, *The Antitrust Class Suit: A Manageable Instrument for Social Justice*, 41 Antitrust L.J. 292, 296 (1972).

120. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 561-64 (1931); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 377-79 (1927); Bray v. Safeway Stores, Inc., [1975] 1 Trade Cas. (CCH) ¶ 60,193, at 65,667 (N.D. Cal. 1975).

121. *See, e.g., In re* Arizona Bakery Prods. Litigation, [1976] 2 Trade Cas. (CCH) ¶ 61,120, at 70,078 (D. Ariz. 1976); *In re* Toilet Seat Antitrust Litigation, [1976] 1 Trade Cas. (CCH) ¶ 60,915, at 69,004 (E.D. Mich. 1976); Bray v. Safeway Stores, Inc., [1975] 1 Trade Cas. (CCH) ¶ 60,193, at 65,666-67 (N.D. Cal. 1975); *In re* Coordinated Pre-trial Proceedings in Antibiotics Antitrust Actions, 333 F. Supp. 278, 282 (S.D.N.Y. 1971). "[T]here is in most cases no reason why damages must be computed separately for each individual claimant. Alternatives include ascertaining a dollar amount statistically arrived at for the entire conspiracy which can be translated into percentage of purchase formula for distribution, or ascertaining damages directly as a percentage of, or formula related to, the price charged which can again be used across the board in distribution." Kohn & Kaplan, *supra* note 119, at 296.

122. [1975] 1 Trade Cas. (CCH) ¶ 60,193 (N.D. Cal. 1975).

123. *Id.* at 65,667. *But see* Ralston v. Volkswagenwerk, A.G., [1973] 2 Trade Cas. (CCH) ¶ 74,772 (W.D. Mo. 1973).

124. *See, e.g.*, Bigelow v. RKO Radio Pictures, Inc., 372 U.S. 251, 264-65 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563-66 (1931).

125. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

126. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946).

127. *Id.* In Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931), the

Clearly the factors of increased complexity and judicial burden must be considered in a balancing approach concerned with the merits of indirect purchaser suits. It appears, however, that the complexity problem is exaggerated, and that a per se rule barring such suits is an inequitable "cure more debilitating than the disease."[128]

D. *Multiple Liability*

The final consideration involved in discussing the impact of indirect purchaser actions is that of protecting the defendant from multiple liability. Because the *Illinois Brick* Court assumed that *Hanover Shoe*'s irrebuttable presumption would remain intact and therefore a defendant could not assert that an overcharge had been passed on, it would not allow an indirect purchaser to use pass-on evidence to establish that he had suffered damages. Inasmuch as the direct purchaser is presumed to have absorbed the full overcharge, any recovery on the part of an indirect purchaser would duplicate the damages already assessed.[129] If *Hanover Shoe*'s irrebuttable presumption is removed, indirect purchasers may subject a defendant to a different form of multiple liability. Juries in separate actions may render inconsistent findings as to the amount of the overcharge that was passed on, thereby forcing the defendant to pay overlapping damage awards.[130]

Initially, supporters of indirect purchaser actions argue that the threat of multiple liability is minimal.[131] Substantiating this contention are congressional findings that show that in the nine years between *Hanover Shoe* and *Illinois Brick* duplicative damages were never awarded.[132] Assuming arguendo that the threat of multiple liability is genuine, proponents of indirect purchaser actions assert that existing procedural devices, the statute of limitations, and the doctrine of collateral estoppel virtually eliminate any potential problems.[133] Moreover, they contend that courts can allocate damages in such a way as to preclude duplicative recoveries.[134] Finally, although

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Court further elaborated on the uncertainty of proving damages: "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect to their amount." *Id.* at 562.

128. Berger & Bernstein, *supra* note 36, at 877.

129. 431 U.S. at 730; *accord,* Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13, 29 (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971).

130. *See* note 16 *supra* and accompanying text.

131. *See, e.g.,* Carnivale Bag Co. v. Slide-Rite Mfg. Corp., [1975] 1 Trade Cas. (CCH) ¶ 60,370, at 66,610 (S.D.N.Y. 1975); Boshes v. General Motors Corp., 59 F.R.D. 589, 596 (N.D. Ill. 1973); *In re* Master Key Antitrust Litigation, [1973] 2 Trade Cas. (CCH) ¶ 74,680, at 94,979 (D. Conn. 1973); Washington v. American Pipe & Constr. Co., 274 F. Supp. 961, 965 (1967); 1978 House Report, *supra* note 89, at 12; Shenefield Statement, *supra* note 12, at 6-8.

132. 1978 House Report, *supra* note 89, at 12.

133. *See, e.g.,* Carnivale Bag Co. v. Slide-Rite Mfg. Corp., [1975] 1 Trade Cas. (CCH) ¶ 60,370, at 66,610 (S.D.N.Y. 1975); Boshes v. General Motors Corp., 59 F.R.D. 589, 596 (N.D. Ill. 1973); *In re* Master Key Antitrust Litigation, [1973] 2 Trade Cas. (CCH) ¶ 74,680, at 94,979 (D. Conn. 1973); 1978 House Report, *supra* note 89, at 12; Shenefield Statement, *supra* note 12, at 6-8.

134. *See In re* Western Liquid Asphalt Cases, 487 F.2d 191, 200-01 (9th Cir. 1973), *cert.*

some proponents concede that a potential problem does exist, they nonetheless conclude that the negative aspects of allowing indirect purchaser actions are outweighed by their positive effects on the objectives of compensation and deterrence.[135]

The procedural devices suggested to reduce the possibility of multiple liability by the supporters of indirect purchaser actions include statutory interpleader, intervention, joinder, and transfer and consolidation pursuant to the Multidistrict Litigation Act.[136] An examination of these procedures, however, leads to the conclusion that they will not totally eliminate the potential for multiple liability.

Statutory interpleader[137] is a means by which an antitrust defendant can bring all claimants together in one forum and require them to determine the distribution of damages among themselves.[138] In order to employ this device, the amount involved must be at least five hundred dollars, and two or more adverse claimants must be domiciled in different states.[139] An additional condition requires the stakeholder, the antitrust defendant, to deposit the amount in dispute with the court or post a bond in such amount.[140]

Assuming *Hanover Shoe*'s presumption of direct purchaser injury is eliminated, this device could protect an antitrust defendant from both forms of multiple liability as it would bring present direct and indirect purchasers together in one forum. This is made possible by provisions allowing service of process anywhere in the country,[141] along with liberal venue requirements.[142] Commentators, however, have pointed out several drawbacks to this alternative. Initially, they contend that this device may create complex class actions which may be dismissed as unmanageable.[143] In addition, if the amount in dispute is very large, requiring the defendant to post bond may preclude use of this device.[144] Moreover, any defendant that uses statutory interpleader

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denied, 415 U.S. 919 (1974); West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1084 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); Washington v. American Pipe & Constr. Co., 274 F. Supp. 961, 964-65 (1967); 1978 House Report, *supra* note 89, at 12; Rodos & McMahon, *supra* note 30, at 120; *Ultimate-Consumer*, *supra* note 35, at 410-11.

135. McGuire, *supra* note 4, at 192; *Offensive Use*, *supra* note 4, at 113-14; *Offensive Passing-On*, *supra* note 4, at 976.

136. 28 U.S.C. § 1407 (1976).

137. *Id.* § 1335.

138. *See, e.g.*, Carnivale Bag Co. v. Slide-Rite Mfg. Corp., [1975] 1 Trade Cas. (CCH) ¶ 60,370, at 66,610 (S.D.N.Y. 1975); Boshes v. General Motors Corp., 59 F.R.D. 589, 596 (N.D. Ill. 1973); *In re* Master Key Antitrust Litigation, [1973] 2 Trade Cas. (CCH) ¶ 74,680, at 94,979 (D. Conn. 1973); *Offensive Use*, *supra* note 4, at 117.

139. 28 U.S.C. § 1335(a)(1) (1976). Statutory interpleader must be distinguished from rule interpleader, which requires complete diversity. *See* Fed. R. Civ. P. 22(1).

140. 28 U.S.C. § 1335(a)(2) (1976).

141. *See id.* § 2361. The Federal Rules of Civil Procedure normally limit service of process to the state's territorial limits or as extended by long arm statutes. *See* Fed. R. Civ. P. 22(1).

142. *See* 28 U.S.C. § 1397 (1976) (action can be brought in any district court where one or more of the claimants reside).

143. *See* McGuire, *supra* note 4, at 197; *Offensive Use*, *supra* note 4, at 113-14; *Offensive Passing-on*, *supra* note 4, at 994.

144. 3A Moore's Federal Practice ¶ 22.10 (2d ed. 1974); *see* note 140 *supra* and accompanying text. Although this bond requirement appears to be prohibitive, courts possess the discretionary

must be willing to concede the antitrust violation.[145] Finally, this alternative would be an inefficacious means to cure the inconsistent adjudications problem if the defendant is unaware of all those purchasers who will bring actions under section 4.

Intervention also can decrease the likelihood of multiple liability. This procedure may be used by either a direct or an indirect purchaser, as long as he could establish that he has interests which may be adversely affected by the judgment in the pending action.[146] Interests may be adversely affected,[147] and thus protected, if, for example, the pass-on issue may be decided against the potential intervenor. This mechanism's utility, however, would be nullified if the absent purchaser does not voluntarily seek to intervene, or if his application is not timely.[148] In such a situation, the potential for inconsistent adjudications would still remain.

Although the defendant cannot compel a purchaser's use of intervention, either absent purchaser could be joined as a necessary party pursuant to Federal Rule of Civil Procedure 19(a)(2)(ii). According to this rule, the purchaser not yet present shall be joined if his absence may cause "any of the persons already parties [to be] subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest."[149] This procedure, however, has several limitations. Its application requires the plaintiff to provide the court with the names of known absent claimants so that it may notify them that an action is pending.[150] As already mentioned, some purchasers may not assert claims to the overcharge, and thus the plaintiff will not know that they are potential claimants. Even assuming that the plaintiff can supply the court with these names, the prospective plaintiffs may present an unmanageable class, or be beyond the personal jurisdiction of the court.[151] If a purchaser is beyond the personal jurisdiction of the court, he may bring a suit in another jurisdiction. This suit would raise the potential for inconsistent findings as to the pass-on issue, thereby exposing the defendant to multiple liability.

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authority to set the amount of the bond low enough so as to ensure the device's general availability. *See Offensive Use, supra* note 4, at 116.

145. *See Offensive Passing-On, supra* note 4, at 994. In addition, damages must be liquidated. *Id.*

146. Fed. R. Civ. P. 24.

147. *Id.* R. 24(a)(2).

148. *Id.* R. 24(a).

149. *Id.* R. 19(a)(2)(ii). It appears that rule 19(a)(2)(i) would provide an additional reason for permitting joinder of indirect and direct purchaser damage claims arising out of the same antitrust violation. Inasmuch as the pass-on issue may be decided in favor of the purchaser who instituted the damage claim, (*i.e.*, a direct purchaser) the absence of the other purchaser (an indirect purchaser) "may as a practical matter impair or impede [the latter's] ability to protect [his] interest." *Id.* One commentator suggests two interpretations of rule 19 that would further minimize the potential for multiple liability. First, a court should find that an absent purchaser claims an interest relating to the subject of the action unless he expressly disclaims the interest. Second, the absent purchaser should be joined if he has *some* interest in the controversy and a judgment in his absence would expose any persons already parties to a substantial risk of incurring multiple liability. *See* McGuire, *supra* note 4, at 202.

150. Fed. R. Civ. P. 19(c).

151. Illinois Brick Co. v. Illinois, 431 U.S. at 739-40.

The Multidistrict Litigation Act also may provide some additional help to antitrust defendants. Under the provisions of the Act, a defendant may request the transfer[152] and consolidation[153] of indirect purchaser claims. The protection against inconsistent adjudications afforded by these procedures, however, is once again limited to situations in which both purchasers have actually brought suit in different district courts.

The Clayton Act's four year statute of limitations is also advanced as a way to reduce the potential for multiple liability.[154] Initially, proponents of *Illinois Brick* believe that because indirect purchasers rarely have knowledge of a violation, they may not bring section 4 actions until the termination of a successful direct purchaser suit.[155] Assuming this is true, it is further asserted that the protracted nature of civil antitrust actions effectively bars the commencement of a subsequent suit within the allotted time period.[156] Reliance on this statute, however, has not met with unanimous approval.[157] It is quite possible that the direct purchaser suit may terminate within the four year period, leaving sufficient time for an indirect purchaser to institute an action.

Another alternative is the doctrine of collateral estoppel. Two courts have stated that use of this doctrine could minimize the potential for inconsistent adjudications in separate actions.[158] They contend that a defendant could use a jury finding in a prior action to collaterally estop relitigation of the pass-on issue in any subsequent proceeding. This argument, however, is without merit. In almost all cases, the plaintiff in the subsequent action was not a party to the prior suit, and therefore is not bound by the jury finding concerning the pass-on issue. Thus, the doctrine cannot be used to deny him his day in court.[159]

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152. 28 U.S.C. § 1404 (1976).

153. *See id.* § 1407; 2 Moore's Federal Practice: Manual for Complex Litigation § 5.20-40 (2d ed. 1976) (Judicial Panel on Multidistrict Litigation may consolidate actions for trial as well as pretrial proceedings); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation,* 87 Harv. L. Rev. 1001 (1974).

154. Plaintiffs must commence the antitrust suit within four years of the accrual of the action. *See* 15 U.S.C. § 15b (1976).

155. *See S. 1874 Hearings, supra* note 79, at 67 (statement of Michael Blechman and Milton Handler); *H.R. 8359 Hearings, supra* note 81, at 193 (statement of Richard Posner).

156. *See* Carnivale Bag Co. v. Slide-Rite Mfg. Corp., [1975] 1 Trade Cas. (CCH) ¶ 60,370, at 66,610 (S.D.N.Y. 1975); Boshes v. General Motors Corp., 59 F.R.D. 589, 596 (N.D. Ill. 1973); *In re* Master Key Antitrust Litigation, [1973] 2 Trade Cas. (CCH) ¶ 74,680, at 94,979 (D. Conn. 1973); *Ultimate-Consumer, supra* note 35, at 410-11.

157. *See Offensive Passing-On, supra* note 4, at 994-95.

158. Boshes v. General Motors Corp., 59 F.R.D. 589, 596 (N.D. Ill. 1973); *In re* Master Key Antitrust Litigation, [1973] 2 Trade Cas. (CCH) ¶ 74,680, at 94,979 (D. Conn. 1973). *See also* Note, Illinois Brick: *The Death Knell of Ultimate Consumer Antitrust Suits,* 52 St. John's L. Rev. 421, 443 n.87 (1978).

159. Blonder-Tongue Labs., v. University of Illinois Foundation, 402 U.S. 313, 329 (1971); Carnivale Bag. Co., v. Slide-Rite Mfg. Corp., [1975] 1 Trade Cas. (CCH) ¶ 60,370, at 66,610 (S.D.N.Y. 1975); 1B Moore's Federal Practice ¶¶ 0.411-.412, .441[3], at 1251, 3781 (2d ed. 1974); *Offensive Passing-On, supra* note 4, at 995. *But see* The Pillar, Feb. 21, 1979 at 11, col. 1. One commentator suggests that a more cogent argument favoring the use of collateral estoppel could be based upon one of the policies underlying the doctrine—protecting absent parties. According to this argument, it is not inequitable to bind a subsequent claimant to the original

Realizing that the above mentioned alternatives do not completely eliminate the multiple liability problem,[160] other proponents of indirect purchaser damage claims turn to the apportionment of damages for relief.[161] In order to use this alternative, however, *Hanover Shoe*'s holding must be limited. First, the irrebuttable presumption of direct purchaser injury must be removed so that indirect purchasers may bring section 4 actions. Second, proponents suggest that damages include the profits the direct purchaser lost as a result of the violation.[162] When a direct purchaser is forced to raise his price as a result of such a violation, he will lose profits if the revenue lost from decreased demand exceeds the additional revenue gained from the higher sales price. Allowing a recovery for this loss will provide both indirect and direct purchasers with adequate compensation while not subjecting the defendant to multiple liability. Although supporters of this alternative concede that it may increase the defendant's total liability, they argue that it is a foreseeable result of his illegal conduct.[163] The effectiveness of apportioning damages as a means of preventing multiple liability, however, is limited to those situations in which both types of purchasers are present in the same action. Thus, although it would eliminate the potential for duplicative recoveries, it would not reduce the possibility of inconsistent adjudications.

E. *Summary*

Although the potential for multiple liability presents a strong argument for denying indirect purchaser damage actions, a majority of the commentators[164] and the lower federal courts[165] that have dealt with the problem

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judgment because both the defendant and the subsequent claimant would want the original plaintiff's pass-on allegation rejected. *Offensive Passing-on, supra* note 4, at 995. This argument, however, is tenuous because the defendant is not likely to present evidence in a manner that would facilitate a subsequent action by an absent purchaser.

160. A complete elimination of the multiple liability problem is achieved by HSR which bars private litigation of all § 4 claims previously adjudicated in a parens patriae suit and/or excludes from recovery in a subsequent parens patriae suit any damages already awarded on behalf of injured private parties. *See* 15 U.S.C. § 15c(a)(1)(A), (c)(B)(3).

161. *See, e.g., In re* Western Liquid Asphalt Cases, 487 F.2d 191, 200-01 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1084 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971); Washington v. American Pipe & Constr. Co., 274 F. Supp. 961, 964 (S.D. Cal. 1967); 1978 House Report, *supra* note 89, at 12; Rodos & McMahon, *supra* note 30, at 120; *Offensive Use, supra* note 4, at 995-96; *Ultimate-Consumer, supra* note 35, at 410-11.

162. *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 200-01 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); Rodos & McMahon, *supra* note 30, at 117-20.

163. *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 200-01 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); Rodos & McMahon, *supra* note 30, at 118-20.

164. *See Berger & Bernstein, supra* note 36, at 875, 878; Rodos & McMahon, *supra* note 30, at 125-27; McGuire, *supra* note 4, at 192; Schaefer, *supra* note 4, at 993; *Offensive Use, supra* note 4, at 117; *Offensive Passing-on, supra* note 4, at 1000.

165. *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 198-201 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); Carnivale Bag Co. v. Slide-Rite Mfg. Corp. [1975] 1 Trade Cas. (CCH) ¶ 60,370, at 66,610 (S.D.N.Y. 1975); Bray v. Safeway Stores, Inc., [1975] 1 Trade Cas. (CCH) ¶ 60,193, at 65,667 (N. D. Cal. 1975); Boshes v. General Motors Corp., 59 F.R.D. 589, 596 (N.D. Ill. 1973); Washington v. American Pipe & Constr. Co., 274 F. Supp. 961, 964 (S.D. Cal. 1967).

conclude that a per se rule, such as that established in *Illinois Brick,* is an inappropriate and harsh solution. One court, recognizing the importance of indirect purchaser actions, stated that "[t]he day is long past when . . . federal courts will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages."[166] Thus, notwithstanding the multiple liability problem, indirect purchaser damage actions continue to draw cogent support.

A careful analysis of the legislative history and judicial interpretations of section 4 reveals a fundamental concern for antitrust enforcement. This concern manifests itself in the statute's provisions which facilitate private enforcement by emphasizing the objectives of compensation and deterrence. Although recognition of indirect purchaser damage claims may result in some additional judicial complexities as well as potential problems for antitrust defendants, a balancing approach indicates that section 4's twin objectives can best be served by the authorization of such claims.

III. S. 300—THE CONGRESSIONAL RESPONSE TO *Illinois Brick* AND *Hanover Shoe*

Congress, responding to *Illinois Brick* and *Hanover Shoe,* has proposed remedial legislation that authorizes indirect purchaser damage actions and the use of pass-on evidence. The most recent draft S. 300, the Antitrust Improvement Act of 1979,[167] is a joint proposal co-sponsored by Senator Kennedy and Representative Rodino. This bill represents a compromise of previous proposals drafted by both the House and Senate during the last two years.[168]

A. *Section 4I(1)*—Illinois Brick *Overruled*

Section 2 of the current proposal amends the Clayton Act by adding Section 4I. Section 4I(1)provides:

> 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.[169]

166. *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 201 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974).

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

168. S. 1874, 95th Cong., 2d Sess. (1978) and H.R. 8359, 95th Cong., 2d Sess. (1978) were introduced on July 15, 1977. These original, identical proposals were concerned with protecting both direct and indirect purchasers who were in fact injured. The language was drafted soon after the *Illinois Brick* decision in very simple and broad terms in order to initiate an analysis of the relevant policy issues at the earliest possible date. On May 25, 1978, after ten days of hearings, S. 1874 was ordered favorably reported to the Senate. S. Rep. No. 934, 95th Cong., 2d Sess. 19, 20 (1978). The hearings before the House Subcommittee on Monopolies and Commercial Law yielded a more comprehensive proposal—H.R. 11942, 95th Cong., 2d Sess. (1978). This bill was designed to overcome the criticism of S. 1874, and was favorably reported to the House on June 20, 1978. 1978 House Report, *supra* note 89, at 29-30. Neither S. 1874 nor H.R. 11942, however, was considered by their respective congressional chambers before the end of the 95th Congress. The original draft of the current proposal, S. 300, was initially introduced by Senator Kennedy on January 31, 1979. S. 300, 96th Cong., 1st Sess. (1979) 125 Cong. Rec. S855 (daily ed. Jan. 31, 1979). The current proposal, an amended version of this earlier draft, was favorably reported out of the Senate Committee on the Judiciary on May 8, 1979 by a nine to eight vote. New York Times, May 9, 1979, § D, at 1, col. 6.

169. S. 300, 96th Cong., 2nd Sess. § 2 (1979).

This section overrules *Illinois Brick* by specifically providing a cause of action for indirect purchasers. One should note that these actions are explicitly authorized under section 4C, the parens patriae title of HSR. This evinces a congressional concern that *Illinois Brick*'s rejection of indirect purchaser actions would also prevent such actions under HSR.[170] By mentioning section 4C, this provision effectively eliminates the potential need for further judicial interpretation of the scope of the parens patriae remedy.

The next point of interest concerns the scope of protection provided by section 4I(1). The actions authorized therein are available to all "persons." This language is less explicit than an earlier proposal which stated that actions could be brought by purchasers and/or sellers in a chain of manufacture, production, or distribution.[171] The current proposal's incorporation of such vague language may create problems in the future when courts attempt to reconcile the bill with existing standing tests under section 4 of the Clayton Act.[172] It should be noted that *Illinois Brick* was not decided on the ground of standing. The scope of the Court's analysis focused upon evidentiary problems of proving pass-on rather than whether indirect purchasers were too remote to assert damage claims under section 4.[173] Nonetheless, the current proposal's failure to enunciate how it relates to the three recognized tests for standing under section 4 leaves a court free to find that an indirect purchaser is too remote to seek damages even though Congress might have desired that such purchaser have standing to bring a claim.[174]

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170. Telephone Interview with Joel Perwin, Staff Counsel to the Senate Committee on the Judiciary (May 15, 1979).

171. *See* S. 300, 96th Cong., 1st Sess. § 2 (1979) (earlier version); H.R. 11942, 95th Cong., 2nd Sess. § 2 (1978). The word "production" was added because many products subject to price fixing, such as beef or wheat, are not manufactured. 1978 House Report, *supra* note 89, at 14-15. The terms "purchaser" and "seller" were defined as "anyone who acquires or sells a property interest in return for valuable consideration." *Id.* at 15. These terms were chosen to avoid disturbing the case law concerning which persons have standing under § 4. *Id.*; *see, e.g.*, Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975) (zone of interests test); Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073 (9th Cir. 1970) (target area approach), *cert. denied*, 402 U.S. 923 (1971); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955) (same); Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910); note 172 *infra*.

172. Basically, there are three different standing tests applied to § 4 of the Clayton Act. The first is the direct injury test which incorporates privity into the antitrust laws. This test examines the relationship between the defendant violator and the plaintiff. *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 125-28 nn.6-9 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). The second test is the target area approach which focuses on the plaintiff's relationship to the area of the economy affected by the violation. *Id.* The last, and most recently enumerated approach, is the zone of interests test. This analyzes the claimant's injury in terms of the zone of interests protected by the statute under which the claim is asserted. *See* Berger & Bernstein, *supra* note 36, at 809-45; Hoffman, *Antitrust Standing: Congress Responds to Illinois Brick*, 1978 Wash. L.Q. 529, 538-43.

173. 431 U.S. at 728 n.7 (citing Illinois v. Ampress Brick Co., 536 F.2d 1163, 1166 (1976); Handler & Blechman, *supra* note 59, at 644-45).

174. It should be noted that Congress did intend to deny some individuals standing to sue. The House Committee provided several examples of indirect purchasers it considered to be outside "the chain": (1) consumers, such as the consumers of shoes in *Hanover Shoe*, who buy a product manufactured by a price-fixed capital good which has an insubstantial affect on the price of the finished product; (2) consumers who purchase goods and services from a business that buys

The final issue presented by the first section concerns the applicable measure of damages. As previously stated, *Hanover Shoe* held that the overcharge, except in certain limited situations,[175] was the exclusive measure of damages. Unlike an earlier House proposal,[176] the current bill does not contain an explicit requirement that damages be measured solely in terms of the original overcharge.[177] It does appear, however, that such a limitation was intended by the drafters of the current joint proposal.[178] Despite this intention, its deletion from the final version of the bill may cause uncertainty in the future.[179]

B. *Section 4(I)(2)*—Hanover Shoe *Limited*

Section 4I(2) provides:

> In any action under section 4, 4A, or 4C of this Act, the defendant shall be entitled to prove as partial or complete defense to a damage claim, in order to avoid duplicative liability to it, that the plaintiff has passed on to others, who are themselves entitled to recover under 4, 4A or 4C of this Act some or all of what otherwise would constitute plaintiff's damage.[180]

In order to prevent duplicative damage awards, this provision partially repeals the holding of *Hanover Shoe*. Its repeal is not absolute because a defendant cannot introduce defensive pass-on evidence unless there exists a genuine potential for duplicative liability. According to the section's language, the pass-on defense may be raised only "in order to avoid duplicative liability" and only when the defendant can establish "that the plaintiff has passed [the overcharge] on to others, who are themselves entitled to recover."[181] Thus, if

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price-fixed overhead items, such as stationery, building maintenance services, and coal used to heat the business' buildings; (3) buyers of used homes that are equipped with price-fixed brass tubing; and (4) taxpayers of a governmental entity that buys price-fixed goods and services, unless that entity resells the goods and services in a proprietary manner. *See* 1978 House Report, *supra* note 89, at 17-18.

175. *See* note 25 *supra* and accompanying text.

176. *See* H.R. 11942, 95th Cong., 2nd Sess. § 2 (1978).

177. Damages may also be measured by a direct purchaser's lost profits, *see* notes 162-63 and accompanying text, and/or the sum of the intermediate mark-ups ultimately passed on to an indirect purchaser. *See* notes 104-07 *supra* and accompanying text.

178. Telephone Interview with Joel Perwin, Staff Counsel to the Senate Committee on the Judiciary (May 10, 1979).

179. *See* 125 Cong. Rec. H688 (1979) (daily ed. Feb. 15, 1979) (remarks of Rep. McClory). One may argue that limiting indirect purchaser damages to the amount of the initial overcharge is contrary to the emphasis given compensation under § 4 and S. 300. Inasmuch as intermediate mark-ups are reasonably foreseeable by an antitrust defendant, one might conclude that liability for such increases should be imposed. This conclusion, although apparently valid, ignores the political feasibility of a provision that would significantly increase a defendant's potential liability by holding him responsible for mark-ups outside his control.

180. S. 300, 96th Cong., 1st Sess. § 2 (1979).

181. *Id.* This proposed limited repeal of *Hanover Shoe* has the same pro-plaintiff orientation as that originally proposed under the first Senate bill. S. 1874 provided: "In any action under section 4, or 4A, 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 sue under section 4, 4A or 4C some or all of what would otherwise constitute plaintiff's damage." S. 1874, 95th Cong., 2nd Sess. § 3 (1978). H.R. 11942, on the other hand, authorized the defense when the

an indirect purchaser is not entitled to recover because, for example, his action was barred by the statute of limitations, the defendant could not raise a pass-on defense.[182]

Under an earlier draft of this section, the defendant's defensive use of pass-on evidence was left to the discretion of the court and was contingent upon the possibility of duplicative liability.[183] This earlier draft was arguably more pro-plaintiff than the current proposal because a court could exclude defensive pass-on evidence if it believed that an indirect purchaser was unlikely to assert his claim even though he was still entitled to recover.[184] Although the present provision does not permit assertion of defensive pass-on in every situation, it leaves open the possibility that a court will accept defensive pass-on evidence without examining whether the indirect purchaser will actually assert his claim. Such an interpretation of this section may have an adverse effect on antitrust enforcement because, if it is unlikely that the indirect purchaser will assert his claim, the defendant may escape liability. Leaving the matter to the discretion of the court is therefore the better alternative as it may encourage further inquiry into the actual potential for duplicative liability. Although one may criticize this restrictive interpretation of the use of defensive pass-on as being inequitable, it is nonetheless justified for several reasons. First, it would reinforce as well as effectuate the holding of *Hanover Shoe* by preventing the defendant from escaping liability. Second, it precludes the defendant from availing himself of the legal system for which he shows no respect, and finally, it serves the deterrence objective of section 4.

C. *Attorney's Fees*

Two sections of the current proposal deal with attorney's fees and are designed to discourage strike suits.[185] Section 4I(3) provides:

> In any class action under section 4 of this Act and Rule 23 of the Federal Rules of Civil Procedure, and in any action under section 4 of this Act by or on behalf of any government, the amount of the plaintiff's attorney's fee, if any, shall be determined by the court.[186]

This provision responds to the opponents of indirect purchaser actions who contend that such suits will only serve the interests of plaintiffs' attorneys.[187]

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defendant could prove that the direct purchaser passed on all or part of the overcharge to another purchaser in the chain. H.R. 11942, 95th Cong., 2nd Sess. § 2 (1978). The assertion of the defense was an absolute right that was not expressly contingent on the availability or viability of a subsequent purchaser's claim.

182. One other point concerning § 4(I)(2) is worthy of mention. Consumers ordinarily buy in the capacity of indirect purchasers and therefore appear at the end of the distribution chain. Defendants in such a situation will not be allowed to use defensive pass-on evidence because the indirect purchasers cannot pass on the illegal overcharge to others who are themselves entitled to recover.

183. S. 300, 96th Cong., 1st Sess. § 2 (1979) (earlier version).

184. Telephone Interview with Joel Perwin, Staff Counsel to the Senate Committee on the Judiciary (Mar. 12, 1979).

185. 1978 House Report, *supra* note 89, at 23.

186. S. 300, 96th Cong., 1st Sess. § 2 (1979).

187. *S. 1874 Hearings, supra* note 79, at 69 (statement of Michael Blechman and Milton Handler).

In their view, because individual plaintiffs in a class action receive only de minimus recoveries while their attorneys receive generous fees, the major impetus for such suits will be supplied by the attorneys rather than the injured plaintiffs.[188] In order to deter such frivolous strike suits and settlements which favor plaintiffs' attorneys, this provision establishes the court as a fiduciary to protect the interests of both indirect and direct purchaser plaintiffs.[189] In addition, it supplements rule 23 of the Federal Rules of Civil Procedure, which requires courts to approve any settlement of a class action.[190] Under this provision, the court must now apportion the damage award between the class members and their attorney(s) prior to such approval.[191] The attorney will be compensated for the reasonable value of his services and such compensation shall "be made with an eye toward moderation."[192]

Section 5 of the current proposal, amending section 4 of the Clayton Act, also attempts to deter strike suits. It provides:

> The Court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the plaintiff has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.[193]

The provision incorporates a malice requirement in order to encourage responsible litigation.[194] This section, like its counterpart in the parens patriae title,[195] is intended to codify recent case law concerning bad faith actions.[196] Although the earlier draft of S. 300 did not contain either attorney's fee provision, inclusion in the current proposal is warranted both as a concession to defendants and as a means of fostering meritorious private damage claims.

D. *Trial Joinder Procedures*

Section 4 of the current proposal amends the Multidistrict Litigation Act[197] to permit the Judicial Panel on Multidistrict Litigation to consolidate direct and indirect purchaser actions.[198] This provision gives the Panel the dis-

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188. *Id.*

189. 1978 House Report, *supra* note 89, at 23; *see* Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

190. *See* Fed. R. Civ. P. 23(e).

191. 1978 House Report, *supra* note 89, at 23.

192. City of Detroit v. Grinnell Corp., [1977] 2 Trade Cas. (CCH) ¶ 61,612, at 72,548 (2d Cir. 1977) (quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1974)); *see* Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 110 (3d Cir. 1976).

193. S. 300, 96th Cong., 1st Sess. § 5 (1979).

194. 1978 House Report, *supra* note 89, at 24.

195. 15 U.S.C. § 15c(d)(2) (1976).

196. *See, e.g.*, Christiansburg Garment Co. v. EEOC, 434 U.S. 413, 420-24 (1978); Carrion v. Yeshiva Univ., 535 F.2d 722, 727 (2d Cir. 1976); United States Steel Corp. v. United States, 519 F.2d 359, 363 (3d Cir. 1975).

197. 28 U.S.C. § 1407 (1976).

198. 1978 House Report, *supra* note 89, at 24.

cretionary authority to utilize trial joinder procedures in order to minimize the potential for inconsistent adjudications. Although trial consolidation will be effective only when separate actions have already been initiated,[199] this section will help alleviate the problems of added judicial burden as well as protect defendants from multiple liability in such instances.[200]

E. *Application Date*

The bill's final provision concerns its application date. Section 6 provides:

> (a) The amendments made by this Act, except as provided in section 6(b), shall apply to any action under section 4, 4A, or 4C of the Clayton Act which is pending on the date of enactment of this Act or which is commenced on or after the date of passage of this Act.
>
> *Provided,* however, that in any case pending on the date of enactment of this Act in which a direct purchaser or seller is a party plaintiff, the court shall take all steps necessary to avoid duplicative liability for the same injury, including preclusion of subsequently filed actions not consolidated with previously filed actions seeking damages for the same injury. *Provided, further,* that where such actions are consolidated, the court shall apportion damages according to actual injury.
>
> (b) Section 4I(2) of the Clayton Act, as added by section 2 of this Act, shall apply to any action under section 4 or 4A of the Clayton Act which is commenced on or after the date of enactment of this Act.[201]

These provisions serve three main purposes. First, they correct any potential constitutional problems raised by the original Senate proposal. The provisions of the first Senate proposal would have applied to actions that were pending or filed on or after June 9, 1977, the date of the *Illinois Brick* decision.[202] This would have nullified the effect of *Illinois Brick* on indirect purchaser actions pending or initiated on or after the date of the decision. Inasmuch as it is conceivable that a final judgment could be rendered after June 9, 1977 and before the enactment of the bill, opponents argued that the provision was

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199. *See* note 153 *supra* and accompanying text.

200. Another provision which should be noted, but is beyond the scope of this Comment, is § 3 of the current proposal. This section authorizes treble damage suits by foreign governments, departments, or agencies thereof against antitrust violators. Its limited authorization, however, modifies the Supreme Court's decision in Pfizer Inc. v. Government of India, 434 U.S. 308 (1978). In *Pfizer,* several foreign nations brought separate actions, which were later consolidated, against six pharmaceutical manufacturers alleging violations of §§ 1 and 2 of the Sherman Act. Each foreign government claimed that it had been damaged in its business or property and sought treble damages under § 4. The Court held that a foreign government otherwise entitled to sue in the courts of the United States was a "person" within the meaning of § 4. *Id.* at 320. Section 3 restricts *Pfizer* by requiring that the alleged violation be unlawful in the plaintiff's territory and by limiting the recovery to actual damages. Its inclusion in S. 300 represents a compromise designed to enlist the support of various manufacturers and members of the defendants' bar. Telephone Interview with Joel Perwin, Staff Counsel to the Senate Committee on the Judiciary (May 11, 1979).

201. S. 300, 96th Cong., 1st Sess. § 6 (1979).

202. *See* S. 1874, 95th Cong., 2d Sess. § 4 (1978). Under this section, a case was considered to be pending if it was within the jurisdiction of, or reviewable by, any district or appellate court or by the Supreme Court. 1978 House Report, *supra* note 89. at 25. It appears that this definition is equally applicable to the current proposal.

unconstitutional because it was retroactive.[203] The current proposal, with the exception of section 4I(2), however, is applicable only to actions pending on or after the date of enactment, thereby eliminating this problem.[204]

Second, this section additionally provides several means for ameliorating the multiple liability problem that may arise in connection with these pending cases. In order to protect the defendant from the inequitable results of inconsistent adjudications, it gives the court authority to preclude actions initiated by indirect purchasers subsequent to the initial damage claim asserted by direct purchasers. This authority was granted in order to encourage indirect purchasers to join the initial action. This provision further minimizes the potential for inconsistent findings as to the pass-on issues presented by these pending cases by effectively requiring the indirect purchaser to assert his newly found right to damages in the original action filed by the direct purchaser.

The third purpose served by this section is that it eliminates the possibility of duplicative recoveries by statutorily recognizing apportionment of damages in pending cases. Because, as noted below[205], the pass-on defense cannot be asserted in pending cases, defendants could easily incur duplicative liability. Once separate direct and indirect purchaser claims are successfully combined in one forum, the court has the authority to apportion the damage award between the adverse claimants. The direct purchaser will receive that portion of the overcharge he has absorbed, whereas the indirect purchaser will be awarded the portion that was ultimately passed on to him.[206]

It is important to note that the provision concerning a defendant's use of defensive pass-on evidence applies only to actions commenced on or after the enactment of the current proposal.[207] Although application of this section to pending cases would not be unconstitutional, Congress decided to protect the interests of direct purchasers who instituted damage claims subsequent to *Illinois Brick* and prior to the enactment of the current proposal. This provision favors those purchasers who, in reliance on *Illinois Brick,* expended large sums of money presuming that the defendant could not defeat their damage claims by utilizing defensive pass-on evidence. It is conceivable, however, that indirect purchasers can defeat the congressional intention of protecting direct purchasers by asserting their own claims to the damage fund. According to one congressional official, however, the potential of such a situation is minimized by the statute of limitations as well as the small time period envisioned until the enactment of the proposal.[208]

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203. *See* Hoffman, *Antitrust Standing: Congress Responds To* Illinois Brick, 1978 Wash. Univ. L.Q. 529, 559; *cf.* 1978 Senate Report, *supra* note 90, at 47-48 (Sen. Allen's analysis of the potential constitutional infirmities of S. 1874 wherein he discusses the need to protect direct purchaser expectations in receiving the entire damage award.

204. Shenefield Statement, *supra* note 12, at 13.

205. *See* note 207 *infra* and accompanying text.

206. *See In re* Western Liquid Asphalt Cases, 487 F.2d 191, 200-01 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1084 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971); Rodos & McMahon, *supra* note 30, at 118-20.

207. *See* notes 180-84 *supra* and accompanying text.

208. Telephone Interview with Joel Perwin, Staff Counsel to the Senate Committee on the Judiciary (May 17, 1979).

IV. RECOMMENDATIONS

The effectiveness of S. 300 could be enhanced by incorporating several modifications. One important improvement would be the inclusion of a provision authorizing classwide proof of injury and damages, similar to that contained in the original draft of the current proposal.[209] Such a provision would furnish an effective means of ensuring the certification of indirect purchaser class actions as well as reducing the complexity associated with pass-on evidence.

Authorization of indirect purchaser damage claims without this provision may result in the denial of certification when such claims are asserted as class actions.[210] If each claimant must prove damages on an individual basis, indirect purchaser class actions would often fail the commonality requirement of rule 23(a)(2) as well as the manageability requirement of rule 23(b)(3).[211] In addition, because pass-on questions may predominate over the common questions of liability and the assessment of damages, these actions may not satisfy the predomination requirement of rule 23(b)(3).[212] The incorporation of a provision calling for classwide proof of injury and damages would therefore assure the viability of indirect purchaser class actions.

The authorization of classwide proof of injury and damages would also significantly reduce the difficulty of proving that an overcharge was passed on. Such proof of damages would be facilitated by allowing the class to recover average damages on behalf of all class members. As originally proposed, the Act contained a presumption that the total damages attributable to a member of such a class would be equal to the ratio of that member's purchases or sales to the purchases or sales of the class as a whole.[213] Indeed, the use of similar statistical methods in calculating an individual's damages has been endorsed by several courts.[214]

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209. Section 2 of the original draft of S. 300 provided: "In any action brought under section 4 or 4C of this Act by or on behalf of a class of purchasers or sellers, the fact of injury and the amount of damages sustained by or passed-on to or by the members of the class may be proven on a classwide basis, without requiring proof of such matters by each individual member of the class. The percentage of total damages attributable to a member of such class shall be the same as the ratio of such member's purchases or sales to the purchases or sales of the class as a whole." S. 300, 96th Cong., 1st Sess. § 2 (1979) (earlier version).

210. Rule 23(a) sets forth the prerequisites to class actions: "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Once these prerequisites are met the action must fit within one of the 3 types of class actions authorized by rule 23(b). Indirect purchaser class actions would most likely satisfy rule 23(b)(3) which permits class action status if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

211. Shenefield Statement, *supra* note 12, at 11-13; Telephone Interview with Joel Perwin, Staff Counsel to the Senate Committee on the Judiciary (May 17, 1979); *see* note 210 *supra*.

212. *See* note 210 *supra*.

213. S. 300, 96th Cong., 1st Sess. § 2 (1979) (earlier version).

214. *See* note 121 *supra* and accompanying text.

Opponents of these damage provisions assert that they unnecessarily extend rule 23. They believe that the provisions are without judicial precedent[215] and manifest an overreaction to the potential manageability problems presented by indirect purchaser class actions.[216] Moreover, opponents contend that the provisions, if adopted, should be presented as amendments to rule 23 rather than included in an act exclusively designed to authorize indirect purchaser actions under section 4.[217] This opposition was strong enough to force the deletion of these damage provisions from the original draft of the current proposal.

Rejection of these provisions, however, is inimical to the Act's objectives. Recognition of indirect purchaser damage claims and the offensive use of pass-on evidence necessitates a means to minimize the resultant complications. Indeed, Congress made this same determination only three years ago when it incorporated similar provisions into HSR.[218] In addition, these provisions are necessary to allow indirect purchasers to bring class actions. Although some indirect purchasers, such as municipalities, will suffer sufficient damages to justify the institution of individual suits, class actions will often be the only economically practical mechanism open to injured consumers. The availability of parens patriae actions, designed to provide an effective remedy for these consumers, is contingent upon a state's financial commitment to antitrust enforcement. Thus, given the importance of class actions, these damage provisions should be re-incorporated into the current proposal.

In addition to the inclusion of the class action provisions, other procedural improvements can enhance the effectiveness of the proposed bill. For example, defendants who choose not to interplead or join injured indirect purchasers do not merit protection when they later assert that such claims should be precluded because of the potential for inconsistent adjudications. Courts should condition the defensive use of pass-on evidence on the defendant's interpleading or joining those indirect purchasers known to have been injured.[219] Although this may increase a defendant's total liability, the imposition of this condition precedent to the assertion of the pass-on defense is justified by principles of equity.

Attempts also should be made to maintain the direct purchasers' incentive to sue. One of these measures, not addressed by the bill, would be to allow direct purchasers to recover for their lost profits in addition to the proportion of the overcharge they absorbed. Because it is probable that a portion of the overcharge will be passed on, providing for lost profits would furnish an inducement for direct purchaser actions.[220]

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215. 1978 House Report, *supra* note 89, at 58-59 (statement of Rep. Flowers). For a case holding that rule 23 requires each class member to prove his individual damages, see Ralston v. Volkswagenwerk, A.G., [1973] 2 Trade Cas. (CCH) ¶ 74,772, at 95,358 (W.D. Mo. 1973).

216. Telephone Interview with Joel Perwin, Staff Counsel to the Senate Committee on the Judiciary (May 8, 1979).

217. *Id.*

218. *See* 15 U.S.C. § 15d (1976).

219. McGuire, *supra* note 4, at 202; *The Future of Indirect Purchasers, supra* note 103, at 335-36 n.111 (1979).

220. *See* notes 162-63 *supra* and accompanying text.

CONCLUSION

The authorization of indirect purchaser damage claims under section 4 provided by S. 300 sufficiently cures the negative effects of *Illinois Brick*. It balances all the relevant policy considerations rather than neglecting one in order to advance another. This is accomplished by providing for compensation and deterrence while taking measures which lessen complexity and the potential for multiple liability. Although it should incorporate procedures, such as those recommended above, which would create a more effective private antitrust damage remedy, the proposal, even in its present form, merits immediate enactment and implementation.

Andrew Tureff