Y4. J89/2: An 8/24

FAIR AND EFFECTIVE ENFORCEMENT OF THE ANTITRUST LAWS, S. 1874

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ANTITRUST AND MONOPOLY

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 1874

A BILL TO RESTORE FAIR AND EFFECTIVE ENFORCEMENT OF THE ANTITRUST LAWS

JULY 21, 22, AND SEPTEMBER 9, 1977

Printed for the use of the Committee on the Judiciary

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FAIR AND EFFECTIVE ENFORCEMENT OF THE ANTITRUST LAWS, S. 1874

THURSDAY, JULY 21, 1977

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:15 a.m., in room 1318, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senators Thurmond and Laxalt.

Also present: David Boies, consultant; Thomas Susman, chief counsel; Terry Lytle and Robert Banks, counsel; Walter Measday, chief economist; Emory Sneeden, minority chief counsel; Peter Chumbris, minority consultant, and Garrett Vaughn, minority economist.

Senator KENNEDY. The subcommittee will come to order.

OPENING STATEMENT OF SENATOR KENNEDY

The Senate Subcommittee on Antitrust and Monopoly will focus today and tomorrow on S. 1874. This bill will once again allow consumers the right to recover damages for antitrust violations which injure them. Consumers have always been the intended beneficiaries of the antitrust laws. The purpose of the antitrust laws, emphasized by both Congress and the Courts, has always been to provide consumers with better products and lower prices, to prevent suppliers singly or in combination from raising prices at the expense of individual citizens.

It is conservatively estimated that price fixing and other antitrust violations cost American consumers more than $150 billion a year. This cost is too often borne by persons who can least afford it. The exorbitantly high prices charged consumers as a result of antitrust violations do more than frustrate the economic goal of better products and lower prices. They frustrate as well basic human goals of fair and equitable treatment that are a fundamental part of the fabric that holds our society together. Consequently, both Courts and Congress have long recognized that consumers must be able to recover for antitrust violations that injure them because the threat of such suits deters antitrust violations, and because fundamental fairness requires that those who are injured by antitrust violations should be compensated.

It is ironic, then, that on June 9 of this year the Supreme Court, in its *Illinois Brick* decision, held that most consumers were barred from recovering damages for antitrust violations. In *Illinois Brick*

the Court held that only those parties who purchase directly from an antitrust violator could recover damages. Thus, if a group of manufacturers overcharge customers as a result of a price-fixing conspiracy, only the direct purchasers—usually wholesalers and other middlemen—can recover. In reality, of course, a middleman is often able to pass on his increased cost to ultimate consumers who are the real parties injured. But the *Illinois Brick* majority opinion says that these injured consumers cannot recover.

In so deciding, the majority opinion was contrary to the vigorous dissent of three Supreme Court Justices, contrary to the rule previously adopted by four Federal Courts of Appeals, and contrary to the legislative history of the Sherman Act and other antitrust legislation. At the time both of the Sherman Act in 1890 and of the Hart-Scott-Rodino bill enacted just last year, Congress clearly expressed its intent that consumers, whether "direct" or "indirect" purchasers, were entitled to recover damages for antitrust violations.

Senator Sherman, in the debates on the Sherman Act, emphasized, in response to a question from Senator Morgan, that individual consumers could sue in Federal courts even where the products like sugar, oil and molasses were ones where the consumer did not deal directly with the trusts. Likewise, in part of the floor debate, Senator Hiscock noted: "The middlemen will never commence these actions. I mean the parties who in the first instance purchase of the combination . . . the people who are to suffer the damages are those who are distributed all over this broad land, the consumers of the article . . . and they have the right to follow this combination or a party to it wherever he is domiciled and recover . . . damages . . . ." Likewise, just last year Congressman Rodino, cosponsor of the Hart-Scott-Rodino Act said: "First, if this bill means anything, it means that the State may recover damages for purchasers of price-fixed bread, potato chips, and the like. To argue that consumers must be direct purchasers from the price fixer is to deny recovery in these cases—for the consumer rarely, if ever, buys potato chips directly from the manufacturer, or bread directly from the bakery. In these cases, the manufacturer invariably sells through wholesalers and retailers—grocery stores, drug stores, and the like—and if the intervening presence of such a middleman is to prevent recovery, the bill will be utterly meaningless."

In particular, the majority decision in *Illinois Brick* directly conflicts with the intent of the parens patriae section of the Hart-Scott-Rodino bill. The clear purpose of the parens patriae amendment was to enable State Attorneys General to act on behalf of ultimate consumers whose individual interests might be too small to justify separate, individual lawsuits. Although the *Illinois Brick* decision did not deal directly with the parens patriae section, the majority opinion's restriction on consumer actions is flatly inconsistent with the whole purpose and spirit of the Hart-Scott-Rodino bill.

Moreover, in a footnote, the Supreme Court interprets parens patriae actions as simply a new, procedural device to enforce existing damage claims. This interpretation, together with the majority's opinion that most consumers have no existing damage claim because they are indirect purchasers, means that the *Illinois Brick* decision effectively frustrates the clear legislative intent of Congress. The ma-

jorty opinion justifies its result, in part, by arguing that it is compelled by stare decisis to follow the earlier *Hanover Shoe* case. In *Hanover Shoe*, the Supreme Court held that the first or "direct" purchaser could recover the entire amount of an overcharge even if most or all of the overcharge were passed on to consumers.

In *Illinois Brick* the Supreme Court said that since first purchasers could under *Hanover Shoe* recover everything, the consumer can recover nothing. The result is that the first purchaser may get a huge undeserved windfall and the real injured party may go entirely uncompensated. In addition, enforcement of the antitrust laws may be impaired because ultimate consumers, who often will have the most incentive to sue, are barred unless they happen to be direct purchasers. While many middlemen do sue, many times the first purchaser will not want to sue or not be in a position to sue. In such cases, unless the ultimate consumer is able to sue, private enforcement of the antitrust laws is effectively precluded. By depriving injured consumers of compensation while granting windfall profits to middlemen, and by impairing the effective enforcement of the antitrust laws, the majority opinion in *Illinois Brick* raises the serious problems that it is the purpose of these hearings to conclude and solve. The majority opinion itself in *Illinois Brick* recognizes some of those problems, but says that if indirect consumers are to be allowed to sue, Congress should provide the remedy. S. 1874 does just that.

We want to welcome, with very special pleasure, the return of Senator Scott to the Judiciary Committee this morning. He was, for many years, a member of the full Judiciary Committee, where he was enormously active. He worked very closely with all the members of the committee on a variety of public policy questions. He, with Senator Hart, was the driving force in one of the most important changes in the antitrust laws passed last year. He has a broad range of experience and understanding of the law, as well as the intention of the legislation. There is probably no finer witness to speak on this issue than our former distinguished colleague and the minority leader of the U.S. Senate, Senator Scott. We are delighted to welcome you back.

Senator THURMOND. Mr. Chairman, I ask unanimous consent that my opening statement be put in the record. I have to be in another committee, but I want to join you in welcoming the former distinguished U.S. Senator, Hugh Scott. We are delighted to have him here with us.

Senator KENNEDY. Without objection, Senator Thurmond's statement will be inserted in the record at this point.

OPENING STATEMENT OF SENATOR THURMOND

Mr. Chairman, the pending bill was introduced this past Friday, July 15, 1977, less than one week ago. The decision of the U.S. Supreme Court in the *Illinois Brick* case, which precipitated this bill, was decided only 40 days ago. It is within reason that many persons affected by this decision and this bill to override that decision have not read either the decision or the bill, much less have had the time to consult experts—legal, economic, governmental—to testify before this subcommittee as to the impact on plaintiffs, and on defendants, and on the court system.

The majority of the Supreme Court stated among other reasons the following: "The reasoning of *Hanover Shoe* case cannot justify unequal treatment of plaintiffs and defendant with respect to the permissibility of pass-on arguments. The principal basis for the decision in *Hanover Shoe* was the court's perception of the uncertainties and difficulties in analyzing price and output decisions in a real economic world rather than an economist's hypothetical model, and on the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom."

"This perception that the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damage proceedings applies with no less force to the assertion of pass-on theories by plaintiffs than to the assertion by defendants."

The Supreme Court stressed the significance of its decision on the plaintiffs, the defendants, and the operation of the Federal Judicial System. Hence, I am urging additional days of hearings.

Why are we rushing into hearings within one week of the introduction of this bill, and 40 days of the court's ruling? All of us have pressing matters in the Senate that must be dealt with before the August recess to meet the President's or the leadership's programs. Some may pass, some may not.

My staff has been advised that some prospective witnesses or their experts could not prepare testimony on such short notice. There are too many Supreme Court decisions and legislative bills for even the most diligent citizens to be fully aware of—much less fully prepared to determine the disastrous impact on our citizens, on the various segments of our economy, and our judicial system.

Mr. Chairman, primarily due to lack of time to obtain witnesses, the witness list for the 2 days are predominantly in favor of the bill. Hence, fairness requires that additional days should be provided for witnesses who wish to present an opposing point of view, especially on the issue of burdens on the Federal Court system as noted in the Supreme Court ruling. Appropriate notice should be given early and noted in the Congressional Record of the dates set, presumably for a September week or two.

Mr. Chairman, the Chief Justice has spoken on occassions on the issue of burdening the Federal court system. I ask unanimous consent to insert in this hearings record the following:

Senator KENNEDY [continuing]. Senator Scott, we welcome you.

STATEMENT OF HUGH SCOTT, COUNSEL, OBERMAYER, REBMANN, MAXWELL, AND HIPPEL

Mr. SCOTT. Thank you, Mr. Chairman, Senator Laxalt and Senator Thurmond. I want to thank Senator Thurmond for his comments. This is my first opportunity to testify in other than a congressional capacity in some years. I confess to some nostalgia in this return to some of the scenes of my own flamboyance.

King Alphonso the Tenth ruled Spain for the last half of the thirteenth century. Like other absolutist monarchs of his day, he

could lay claim to a certain personal familiarity with the Creator. He got away with it, since the centuries shielded his credibility from challenge by the investigative media.

At one point in his long reign, Alphonso, with a kingly modesty, ventured that if he had been present at the creation, he "would have given some useful hints for the better ordering of the universe." I know that I am in the senatorial area when I express sentiments of that kind, but, alas, Alphonso had not been present, and the Almighty was forced to proceed without his helpful advice. As a result, we share Alphonso's fate in having to deal with a disorderly world. Yet Alphonso accepted the world as he found it, and learned to live with its imperfections.

THE COURT MUST ACCEPT THE WILL OF CONGRESS

The Supreme Court would do well to take inspiration from Alphonso's fatalistic words. In its recent decision in *Illinois Brick*, [*Illinois Brick Co.* v. *Illinois*, U.S., June 9, 1977], the Court forgets that it was *not* present at the creation of the Antitrust Improvements Act of 1976. No doubt, if the eminent Justices had been there, they, like Alphonso, would have had some useful hints for improving the bill. Our Constitution, however, does not mandate such a role for the Court, and we were forced to proceed last year without the Court's helpful advice. Under our Constitution, the Court must accept the will of Congress as it finds it expressed in both legislation and the legislative history. The Court, unless it finds a constitutional flaw, must carry out the clear intent of Congress even if the course Congress charts offends the Court's notion of an orderly universe. The Court must resist the urge to ignore congressional debate when the printed record leads to a conclusion the Court would rather avoid.

I think it deplorable that the Court referred to "particular legislators" as if they were speaking only for themselves rather than the intent of these legislators, two of whom were named sponsors of the bill, to engage in what has been accepted by the Court heretofore as an aid for procedure, namely, the making of legislative history.

PURPOSE OF HART-SCOTT-RODINO BILL WAS TO ALLOW CONSUMER RECOVERY

Senator Hart cannot be with us today to give us his account of events. As his cosponsor and friend, I am pleased and honored to be here today. Let me tell you what you already know: I *was* present at the creation of the Hart-Scott-Rodino bill. In my view, there can be no doubt that Congress intended to enable the State Attorneys General to sue on behalf of all consumers—both direct and indirect—who suffered injury to their pocketbooks as a result of an illegal price fix or other Sherman Act violation. The purpose of the act is to protect those on whom the blow falls. We viewed the remedy as a consumer remedy, not a middleman windfall. We were acting to close a gaping hole in the coverage of the antitrust laws. Experience had shown that middlemen are ordinarily reluctant to sue their suppliers.

Thus, we were guided by two basic concerns: First, a genuine concern for the ultimate victims, to allow cash payments to the small consumer who previously had no meaningful remedy; and, second, a

desire to deter the widespread practice of price fixing in small consumer items by exposing the price fixers to potentially ruinous liability. Unless one accepts these premises as true, the debate that preoccupied the Senate and House last year makes absolutely no sense.

I need not remind you that those who opposed this legislation raised many thoughtful objections to the parens patriae title of the bill. I think they would concede, however, that their dire portents were premised on the assumption that the Attorneys General would sue on behalf of all consumers who suffered injury, not just the first purchaser in the chain of distribution. Their assumption was, of course, correct. They would not have fought this legislation with such tenacity had it been an illusory remedy, a toothless guardian. To the contrary, they genuinely feared that such a consumer remedy would raise the specter of bankruptcy in the eyes of honest businessmen and businesswomen, and coerce settlements. While I disagree with their conclusion, I share their view that the legislation allows, and was intended to allow, the Attorneys General to sue on the behalf of the ultimate consumer.

The Court, in so limiting the remedy, has amended the law, and it has done so in the name of the orderly administration of justice. Sympathetic though I am to that latter goal, I feel an obligation to Phil Hart to set the record straight.

The Senate Report leaves no doubt as to the Senate's intent on the issue. The report states: "Section 4C(a)(1) . . . contains a proviso to assure that defendants are not subjected to duplicative liability, particularly in a chain-of-distribution situation where it is claimed that middlemen absorbed all or part of the illegal overcharge." [S. Rept. No. 803, 94th Cong., 2d sess. at 44 [1976], (hereinafter cited as *Senate Report*).]

Quoting *Western Liquid Asphalt* cases [In re *Western Liquid Asphalt* cases, 487 F. 2d 191 (9th Cor. 1973)], the report continues, "The day is long past when courts, particularly Federal Courts. will deny relief"—how optimistic may I add, I parenthetically—"to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages." The report concludes with the observation that "as between competing claimants within the chain of distribution . . . including consumers, the section 4C(a)(1) proviso is intended to assure that the monetary relief is properly allocated." That passage, to any fair-minded person, can mean only one thing: that all the injured parties in the chain of distribution were entitled to appropriate damages.

On September 8, 1976, Senator Hart commented on this section in the course of the debate that accompanied Senate passage of the bill in its final form. He stated:

> Section 4C(a)(1) provides, in its last sentence, that a court should exclude from the amount of monetary relief awarded, any amount (A) which has already been awarded for the same injury, or (B) which is properly allocable, as of the time the court is to make its determination of the case filed under section 4C, to natural persons who have excluded their claims pursuant to section 4C(b)(2), and to any business entity. The plantiff will

have to establish the amount of damage properly allocable to consumers.

Depending on the nature of the business, and the economic activities involved, however, the burden of going forward may shift back and forth depending on who most readily, and with the best reliability, can establish the competing claims within a chain of distribution. The Senate intention with respect to burden of proof, as set forth in report 94–803, is carried forward in this provision." [Quoted above.] [122 Cong. Rec. S. 15418 (daily ed. September 8, 1976) (remarks of Sen. Philip A. Hart).]

While I will otherwise defer to Chairman Rodino as to the import of the House debate, I must read at this point his words on the final day of debate in the other House. He was even more specific in his assertion that Congress intended the Attorneys General to sue on behalf on the ultimate consumer, whether or not they purchased directly from the violator. He stated:

First, if this bill means anything, it means that the State may recover damages for purchasers of price-fixed bread, potato chips, and the like. To argue that consumers must be direct purchasers from the price fixer is to deny recovery in these cases—for the consumer rarely if ever buys potato chips directly from the manufacturer, or bread directly from the bakery. In these cases, the manufacturer invariably sells through wholesalers and retailers—grocery stores, drug stores, and the like, and if the intervening presence of such a middleman is to prevent recovery, the bill will be utterly meaningless." [122 Cong. Rec. H. 10295 (daily ed. September 16, 1976) (remarks of Rep. Rodino).]

These quotations are not, as the Court so cavalierly suggests, "views expressed by particular legislators." [*Illinois Brick Co.* v. *Illinois*, U.S. (June 9, 1977) at 11.]

They are the views of two of the name sponsors of the Act—the Senate and House floor managers—speaking for the majority of their colleagues, and speaking for the express purpose of establishing legislative history. Congress voted overwhelmingly in favor of the measure as a whole. Furthermore, the "double recovery" issue was fully debated prior to passage of the Hart-Scott-Rodino Act, and the argument was rejected. I have difficulty imagining how Congress could have stated more forcefully that it intended that the courts read section 4 of the Clayton Act broadly.

As most of you know by now, I am usually restrained and circumspect in criticizing public figures. I will not indulge in anything of the sort in this polite and esoteric forum. There is always a "however" that follows a disavowal of that sort. So, however, I would lack candor if I did not say to you today that in my opinion the majority of the Court in *Illinois Brick* has flouted the will and purpose of Congress in a most crass fashion. The Court stated, and I quote, "that the legislative history of the 1976 Antitrust Improvements Act is [not] dispositive of the interpretation of section 4 of the Clayton Act."

Senator Laxalt. What do you think the Court meant by that statement?

Mr. Scott. As near as I can interpret the Court, I think they mean that there are not terribly interested in the attempt to make legislative history, but that they would rather make it for us.

Senator LAXALT. Can you give me an indication that they refer to legislative history at all?

Mr. SCOTT. I think in passing they referred to legislative history by dismissing it only. Therefore, they only negatively refer to it because they expressed it as views expressed by "particular legislators."

But the whole history of the Sherman and Clayton Acts and cases following them quotes freely from Sherman and Senator Vest and many other Senators of the time. It quotes them for the purpose of establishing and searching out the intertwining correlation and comment to establish legislative history.

In this case, the Court seems to be running full tilt away from legislative history, but dismissing it as if to say, "Oh, well, that is only Senator Hart and Congressman Rodino speaking." They dismiss them as views expressed by "particular legislators" as not having any other weight.

Senator LAXALT. Could the interpretation be that the legislative history to them is unclear?

Mr. SCOTT. They do not say that it is unclear.

Senator LAXALT. You say it is not "dispositive." What do they mean by that?

Mr. SCOTT. I think they mean, in effect, they do not want to be bound by it.

Senator LAXALT. True. I am trying to find the reason why they do not want to be bound by it.

Mr. SCOTT. I do not think we will ever find the reason because the Court impaled itself on what it conceives to be stare decisis. In law school I once wrote about that. All I can remember is that it went something like this: "In every legal crisis, we must cite stare decisis because McNaughton's case was just the same." That, of course, related to insanity. This, at least on the surface, does not.

[Laughter.]

Senator KENNEDY. As I understand it, when the briefs were filed with the Supreme Court, the legislative history was not really presented. Apparently the Justices would not even look beyond the briefs. These points, however, were not really argued, which is incomprehensible, I think. But, it is a fact.

Mr. SCOTT. It does so appear.

My own comment is this. In so stating, the Court engages in, at best, a disingenuous bit of legalistic sophistry, and, at worst, a rather high-handed exercise in judicial legislation, while soaking consumers with the impact of their constitutional "last best guess." It is correct, too, that the Court quoted none of the legislative history that I cited in my statement. One has to wonder whether or not the Court was sufficiently steeped in this legislation to even have been aware of it.

S. 1874 SHOULD BE RETROACTIVE

Whatever the case, I commend your subcommittee for responding with such alacrity to the Court's invitation to reverse *Illinois Brick* legislatively. Since I believe that congressional intent was absolutely clear, I would urge that you make S. 1874 retroactive to June 9, 1977. The Court deserves to have its attention respectfully recalled to the will of the Congress.

THE DISSENTING OPINION IN ILLINOIS BRICK

What impresses me are some of the comments in the dissenting opinions. Mr. Justice Brennan, for instance, says, "The Court regrettably weakens the effectiveness of the private action as a deterrent to the antitrust violations by, in most cases, precluding consumers from recovering for antitrust injuries. For, in many cases, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers, acting as middlemen, are ordinarily reluctant to sue their suppliers, pass on the bulk of their increased costs to consumers farther along the chain of distribution."

He says additionally, "Congress has given a clear signal that paragraph 4 is not to be read in the restrictive scope prescribed to it by the Court today. I would follow the congressional understanding and therefore would affirm."

Then Justice Blackmun, in one of those brief opinions, where a member of the Court respectfully throws up his hands at the impenetrably illogical course of his colleagues and states it as respectfully as he can. He comments: "The Court is hung up with the fact on stare decisis."

If *Hanover Shoe* had not been on the books, he is positive that the Court would be affirming, perhaps unanimously, the judgment of the Court of Appeals. That is the same as the intent of the legislative authors of the act. All of the signs point in that direction. The conclusion in favor of indirect purchasers to demonstrate injury, would almost be compelled.

He thinks that the Court's effort to be consistent ends up merely in their being wooden. He says that the Court's reasoning is entirely inadequate when considered in light of the objectives of the Sherman-Clayton Act. This is the final statement. The Hart-Scott-Rodino Act of 1976 tells us all that is needed as to Congress' present understanding of the act. Nevertheless, we must now await still another statute which, as the Court acknowledges, the Congress may adopt.

Justice Blackmun, with thoughts too deep for tears, concludes on this sad requiem for the Court: "One regrets that it takes so long and so much repetitious effort to achieve and have this Court recognize the obvious congressional aim." At this point the Justice folds his briefcase and retires from the scene. I thank the subcommittee for this opportunity to help fight back this latest challenge to Phil Hart's legislative legacy. As the Hart-Scott-Rodino Act encounters further challenge in the courts, I expect that your subcommittee will be called upon again to shore up the Act's innovative heart and purpose. I am confident that you should and will succeed in preserving it intact. It will remain an enduring monument to the wisdom and skill of our beloved late colleague, Phil Hart.

I express my thanks to the subcommittee for extending to me the opportunity to testify.

Senator KENNEDY. Thank you very much.

Let me ask you this. Do you think that if we revert to what was obviously the clear intention of the Act of 1976, that this will mean that antitrust violators will have greater liability. Or, is it your tes-

timony that it will probably mean the same liability, but that there will be different recipients? Do you have any feel on that?

MIDDLEMAN RELUCTANT TO SUE

Mr. Scott. I have the feeling that justice will not fairly be done in many cases because the middleman will be reluctant to take action for several reasons. He will have his relationship with his supplier. Another is the fact that he has passed on the burden. There is the cost and the expense of it. There is the lack of benefit occurring to him. There are the different interests that he has from the ultimate consumer. There is the fear of counterclaims. He is reluctant to reveal his own antitrust violations. I think it tends to repress the kind of action which would result in effecting the intent of the Act, which is to penalize the violator.

EFFECT ON CONSUMER

If I could be forgiven a personal note, I used to say to my wife that I would look after the law and count on her to advise me on the 'equities' situations. It has worked for some 50 years. I asked her to read this and comment on it, using coffee as an illustration. I know nothing which causes the American housewife to spring to violent and angry attention than the mention of coffee.

I suggested to her that if there were an antitrust violation of coffee sellers and if the costs were passed on to the middleman, that is, the excessive costs were passed on to the wholesaler and then to the Safeway. The Court has said she is a consumer and would get no remedy for having to pay $5.39 for a pound of coffee. But the person who would get the benefit would be somebody who paid $4.25 for a pound of coffee and passed the charge on. Her reaction, of course, was that the Supreme Court must be crazy. Not daring to criticize the Court as a member of the bar, I did think I could submit an anecdote from my wife.

[Laughter.]

Senator Kennedy. I think you have already answered the question about your perception of the consumer reaction to this decision.

Mr. Scott. If informed, consumer reaction ought to be extremely angry and very resentful. The free enterprise system actually ought to be concerned at the emasculation by the Court of congressional intent.

Senator Kennedy. What about the argument that it is more efficient to permit these middlemen to sue? The argument is that it is more efficient and orderly to permit them to sue.

Mr. Scott. I think it is. I think it is more efficient and more orderly. But I do not know anywhere in the law where it is held that justice is to be equated simply with efficiency. I do know in many foreign states where justice is equated with orderliness. But the proceeding was recognized as essentially a proceeding not noted for its orderliness since one must pursue and hope to find the injured parties. That is where the parens patriae section comes in, that is, enabling that to be done and enabling groups of people to recover and benefit in order to provide that where they cannot all be identified, that those who can be identified would be compensated. The remaining funds would

either go to the Treasury or by some court agreement resulting in lower prices for the same product in the future for a stipulated time.

Senator KENNEDY. What we are doing in our bill is this. By inserting the language, "injured in fact directly or indirectly," we are attempting to permit the middlemen, to the extent that they are injured, to recover on the basis of that injury. If we have the indirect plaintiffs who are injured, they can recover to the extent of their injury. The attempt, then, is to apportion the recovery to relate to the amount of injury, that is, for the middlemen, as well as the consumer. Do you think that is the fairest way to proceed?

Mr. SCOTT. It seems to me that it is. If a middleman has been damaged to the extent of 25 cents for 10,000 items, then there should be some way for him to recover. If the consumer has been damaged to the extent of 50 cents for a dozen items, then there ought to be some way for him to recover. I am speaking about small amounts of money.

MIDDLEMAN WILL NOT BE PRECLUDED FROM SUING

Senator KENNEDY. Obviously we are not interested in precluding the opportunity for the middleman to recover, nor are we trying to shift it all back to the consumer. But to the extent there is injury for each party, we want to try to permit recovery. It seems to me both in terms of logic and justice, that it makes sense.

Mr. SCOTT. I think it is fair and logical. The middleman is entitled. It is shown so by this litigation. The Court thinks so, but the ultimate consumer, to whom most of the burden has been passed, has even more just a cause. At the moment he has even less opportunity for relief.

Senator LAXALT. Senator Scott, I welcome you. We miss your gentle touch around here.

Mr. SCOTT. Thank you.

Senator LAXALT. I assume by this that you are not doing much work over there.

[Laughter.]

Mr. SCOTT. The Senator is absolutely right. I also figure that since the Court does not read about what the Senate is doing, they will never hear what I said here anyway.

[Laughter.]

RATIONALE FOR ILLINOIS BRICK DECISION

Senator LAXALT. May I say to the Senator that I am thoroughly perplexed by this whole situation. I was here for just a short while when this was being debated. Of course, it has many years of history before that. There are hours and hours of extensive debate on the floor and thorough consideration in the committee on both sides. How in the world in the face of all that, can they come up with a decision which. in your estimation, totally conflicts with the intent of Congress?

Mr. SCOTT. It is a mystery to me as to how they could have come up with this decision in the first place. The debates on the Sherman and Clayton Act run counter to what they are saying here. As often happens, the simplest reason is the best one. They were simply hooked up on *Hanover Shoe*. They confused their idea of equity with being re-

lated to offensive and defensive pass ons. They caught themselves in a football analogy and decided that each team ought to have equal treatment here.

Their argument has almost that cast to it. If we did this in *Hanover Shoe* on one side of the issue, then we ought to do the same thing in here, notwithstanding the intervention of legislation. The late Jesse Wolcott of Michigan who was chairman of a committee in the House used to say, "Hereafter the Congress ought to add one sentence to every law they pass; namely, 'By God, we mean it.' "

Senator LAXALT. Tell me this. Perhaps the Court ruled as it did because it would fractionalize things and clog the calendar. Why in the world, in face of those obvious obstacles, with the clear intent expressed by Congress, was the recovery not given to the ultimate consumer?

Mr. SCOTT. In light of hindsight, it is perfectly obvious that the more that was said about this, the better it would have been. Statements were made by Senator Hart and Congressman Rodino. There were various colloquys in which I took part. The point was made over and over again that the ultimate consumer had the greatest interest here. The arguments around these committee tables touched on the point time and time again. The opposition to some features of the bill, particularly parens patriae, turned on the difficulty of enforcement. It turned on how the Attorneys General will compile the information as to who had been harmed and things of that kind.

We were thinking one step in advance, assuming, I think, that it was clear we wanted to help the consumer. How do we locate this consumer? How do we do justice to him? What does the Attorney General do if he gets a judgment and harvests his recovery and has some money left over? Where does it go? Those were the kinds of considerations we were discussing.

Senator LAXALT. Were there any political considerations for leaving the language general and getting more horses in the corral?

Mr. SCOTT. In all legislation, political considerations may be helped. I do not recall that being so in this one especially.

They made concessions generally through the bill in order to secure more support. I do not think so in this connection.

Senator LAXALT. Was this particular language settled in conference?

Mr. SCOTT. It was not settled in conference, as I recall. We had conferences?

Senator LAXALT. Apparently there was not a conference.

Senator KENNEDY. There was never a conference. Maybe there was a back room conference.

Mr. SCOTT. We had two or three filibusters. We had the House bill and the Senate bill. The problem was how to conform them to get legislation. We were never able to get the conference; is that right, Mr. Chairman?

Senator KENNEDY. That is right.

THE MULTIPLICITY OF SUITS PROBLEM

Senator LAXALT. Let me ask you this. To me, the multiplicity of suits and clogging the system and fractionalizing claims is a problem. I met with the Chief Justice. We have been processing judge-

ships. All we hear is that the courts are being clogged. It seems to me that taking on actions of this kind, involving thousands and thousands of litigants, would add to that problem.

Is there any middle ground here where we can settle upon a remedy being available, let us say, no non-Attorneys General claims? There was a great concern of overzealous Attorneys General who want to be governors and senators.

Senator KENNEDY. Particularly senators.

[Laughter.]

Senator LAXALT. Yes, that was a principal concern.

[Laughter.]

Senator LAXALT. We will have testimony from my own State where the action is not brought by the Attorney General's Office, but brought by counsel on behalf of a limited number of consumers, some cattle sellers.

Is there some middle ground here so that we can arrive at a realistic remedy for those who are going to go private and are limited in numbers?

CREATION OF AN INTERMEDIATE COURT

Mr. SCOTT. I do not know that I can be very helpful on the spur of the moment, that is, offering suggestions as to middle ground. There may be some way in which you can provide a terminal point for certain types of litigation, short of the Supreme Court. You might adopt the Chief Justice's favorite one just to create an intermediate court, which the States do. I do not think justice ought to be denied simply because of the multiplicity of the cases. That is what concerns me. There ought to be some forum, some place, for any aggrieved, truly aggrieved person with a just cause for action to be heard. It does not necessarily have to be the Supreme Court.

Senator LAXALT. That strikes the heart of it. You get thousands and thousands of people buying potato chips. Have they been aggrieved? I do not know. That is almost a subjective determination.

But during the course of the deliberation on the bill, was there any consideration of some fallback position short of opening the door entirely to parens patriae?

Mr. SCOTT. I simply have to say I cannot remember.

Senator LAXALT. I cannot remember either.

Mr. SCOTT. I am sorry, but I do not remember.

The issue is whether or not the authority ought to be given to the Attorneys General. It was always overriding. We discussed the issue itself. I do not believe anything short of that or any limitations on that authority of the kind the Senator is mentioning occurred.

Senator LAXALT. I would appreciate greatly in the days ahead if you might give that a bit of consideration.

Mr. SCOTT. I would be very glad to. I would be glad to comment on any intermediate or median language that the subcommittee might be considering. I think the thing to be avoided at all costs is to not leave an aggrieved person without a remedy.

Senator LAXALT. The question is the definition of an aggrieved person.

Mr. SCOTT. Yes, the definition of the aggrieved person and the definition of the remedy. But like Banquo's ghost, since I have been

quoting clichés with mad abandon here today: What was traipsing through those chambers of the Supreme Court was the concern of the Court about multiplicity of suits.

It never appears, but how many future cases of the Supreme Court are going to be affected in their decisions by the fact that the Chief Justice and the Members of the Court feel they are overworked and that there are too many cases? I think the Court is overworked. I do not criticize them for that. But I say that the Chief Justice has his own solution, which I have never opposed, which is an intermediate court. There are 50 States and only nine judges. If you want to create an intermediate court with 41 judges, then you have an appointment then for each Senator.

Senator LAXALT. Thank you.

Senator KENNEDY. One final comment. Even though there has been some increase in cases, it has been a manageable increase.

As I understand the *Hanover* case, even though they indicated the middleman could recover, they did not preclude the indirect party. They did not indicate the indirectly damaged person could not recover. There was still the possibility of them getting remedies.

During the whole period, up to June of this year, all of these types of plaintiffs could come into the courts. The courts have generally been able to manage them. No one discounts the importance of not overburdening the court.

But here we have various antitrust violations which have been estimated at over $100 billion a year. I believe you think the most important enforcement of the antitrust laws has to be done through the consumer. Unless we provide this remedy, I think we are not only failing to provide justice to those who are damaged, but we are also moving back an important step. We would be denying ourselves effective antitrust enforcement.

Mr. SCOTT. There has been no avalanche of litigation. The Supreme Court controls the faucet through the certiorari in each channel. They then say to the lower courts, "That is your baby." They do not have to be swamped with litigation on it. They can decide not to accept something.

DETERMINATION OF SUFFICIENT DAMAGE

Senator LAXALT. At what point is there enough damage incurred by the plaintiff to warrant bringing that action? That is where we are, it seems to me. That strikes at the heart of this problem. At what point is there sufficient damage incurred by a plaintiff to warrant the substance of that action?

Mr. SCOTT. The other side of that is the price-fixer who says, "I am only going to cost the individual consumer three or four or five cents by this uppage, but I will make millions out of it." I can tell you that in the last 60 days the price of my favorite brand of tobacco has gone from $3.30 to $3.60 to $3.63 to $3.69. I am beginning to get curious about whether somebody is trying to fix the price of tobacco.

[Laughter.]

Mr. SCOTT. This is with all due respect to those who may be affected. If I felt that somebody had ripped me off for 39 cents in 2 months, I would like to see all the people who had been ripped off for 39 cents given a collective remedy through the Attorneys General. I believe

that is involved in what we are trying to do here. But if we say, "Oh, it is just 39 cents a month," then we are losing sight of what the parens patriae provisions deal with.

Senator LAXALT. I agree. We will have to weigh that as opposed to what it will do to the system. We still have criminal remedies. Admittedly, there are problems within FTC and Justice. That is all I have Senator.

Senator KENNEDY. We thank you very much, Senator Scott.

[The prepared statement of Mr. Scott follows:]

PREPARED STATEMENT OF HUGH SCOTT, ESQ.

King Alphonso the Tenth ruled Spain for the last half of the thirteenth century. Like other absolutist monarchs of his day, he could lay claim to a certain personal familiarity with the creator. He got away with it, since the centuries shielded his credibility from challenge by the investigative media. At one point in his long reign, Alphonso, with a kingly modesty, ventured that if he had been present at the creation, he "would have given some useful hints for the better ordering of the universe." But, alas, Alphonso had *not* been present, and the Almighty was forced to proceed without his helpful advice. As a result, we share Alphonso's fate in having to deal with a disorderly world. Yet Alphonso accepted the world as he found it, and learned to live with its imperfections.

The Supreme Court would do well to take inspiration from Alphonso's fatalistic words. In its recent decision in Illinois Brick,[1] the Court forgets that it was *not* present at the creation of the Antitrust Improvements Act of 1976. No doubt, if the eminent Justices had been there, they, like Alphonso, would have had some useful hints for improving the bill. Our Constitution, however, does not mandate such a role for the Court, and we were forced to proceed last year without the Court's helpful advice.

Under our Constitution the Court must accept the will of Congress as it finds it expressed in both legislation and the legislative history. The Court, unless it finds a constitutional flaw, must carry out the clear intent of Congress even if the course Congress charts offends the Court's notion of an orderly universe. The Court must resist the urge to ignore congressional debate when the printed record leads to a conclusion the Court would rather avoid.

Senator Hart cannot be with us today to give us his account of events. As his cosponsor and friend, I am pleased and honored to be here today. Let me tell you what you already know: I *was* present at the creation of the Hart-Scott-Rodino bill. In my view, there can be no doubt that Congress intended to enable the State Attorneys General to sue on behalf of all consumers—both direct and indirect—who suffered injury to their pocketbooks as a result of an illegal price fix or other Sherman Act violation.

The purpose of the Act is to protect those on whom the blow falls. We viewed the remedy as a consumer remedy, not a middleman windfall. We were acting to close a gaping holiday in the coverage of the antitrust laws. Experience had shown that middlemen are ordinarily reluctant to sue their suppliers. Thus, we were guided by two basic concerns: first, a genuine concern for the ultimate victims, to allow cash payments to the small consumer who previously had no meaningful remedy; and, second, a desire to deter the widespread practice of price fixing in small consumer items by exposing the price-fixers to potentially ruinous liability.

Unless one accepts these premises as true, the debate that preoccupied the Senate and House last year makes absolutely no sense.

I need not remind you that those who opposed this legislation raised many thoughtful objections to the *parens patriae* title of the bill. I think they would concede, however, that their dire portents were premised on the assumption that the Attorneys General would sue on behalf of all consumers who suffered injury, not just the first purchaser in the chain of distribution. Their assumption was of course correct. They would not have fought this legislation with such tenacity had it been an illusory remedy, a toothless guardian. To the contrary, they genuinely feared that such a consumer remedy would raise the specter of bank-

[1] *Illinois Brick Co. v. Illinois*, —— U.S. ——, June 9, 1977.

ruptcy in the eyes of honest businessmen and businesswoman, and coerce settlements. While I disagree with their conclusion, I share their view that the legislation allows, and was intended to allow, the Attorneys General to sue on behalf of the ultimate consumer.

The Court, in so limiting the remedy, has amended the law, and it has done so in the name of the orderly administration of justice. Sympathetic though I am to that goal, I feel an obligation to Phil Hart to set the record straight.

The Senate Report leaves no doubt as to the Senate's intent on the issue. The Report states that "Section 4C(a)(1) . . . contains a proviso to assure that defendants are not subjected to duplicative liability, particularly in a chain-of-distribution situation where it is claimed that middlemen absorbed all or part of the illegal overcharge." [2] Quoting *Western Liquid Asphalt* cases,[3] the Report continues, "The day is long past when courts, particularly Federal courts, will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages." The report concludes with the observation that "as between competing claimants within the chain of distribution . . . including consumers, the section 4C(a)(1) proviso is intended to assure that the monetary relief is properly allocated." [4]

That passage, to any fair-minded person, can mean only one thing—that all the injured parties in the chain of distribution were entitled to appropriate damages.

On September 8, 1976, Senator Hart commented on this section in the course of the debate that accompanied Senate passage of the bill in its final form. He stated:

> Section 4C(a)(1) provides, in its last sentence, that a court should exclude from the amount of monetary relief awarded, any amount (A) which has already been awarded for the same injury, or (B) which is properly allocable, as of the time the court is to make its determination of the case filed under section 4C, to natural persons who have excluded their claims pursuant to section 4C(b)(2), and to any business entity. The plaintiff will have to establish the amount of damage properly allocable to consumers. Depending on the nature of the business, and the economic activities involved, however the burden of going forward may shift back and forth depending on who most readily, and with the best reliability, can establish the competing claims within a chain of distribution. The Senate intention with respect to burden of proof, as set forth in report 94–803, is carried forward in this provision. [Quote above].[5]

While I will otherwise defer to Chairman Rodino as to the import of the House debate, I must read at this point his words on the final day of debate in the other house. He was even more specific in his assertion that Congress intended the Attorney General to sue on behalf of the ultimate consumer, whether or not they purchased directly from the violator. He stated:

> First, if this bill means anything, it means that the State may recover damages for purchasers of price-fixed bread, potato chips, and the like. To argue that consumers must be direct purchasers from the price fixer is to deny recovery in these cases—for the consumer rarely if ever buys potato chips directly from the manufacturer, or bread directly from the bakery. In these cases, the manufacturer invariably sells through wholesalers and retailers—grocery stores, drug stores, and the like—and if the intervening presence of such a middleman is to prevent recovery, the bill will be utterly meaningless.[6]

These quotations are not, as the Court suggests, "views expressed by particular legislators." [7] They are the views of two of the name sponsors of the Act—the Senate and House floor managers—speaking for the majority of their colleagues. Congress voted overwhelmingly in favor of the measure as a whole. Furthermore, the "double recovery" issue was fully debated prior to passage of the Hart-Scott-Rodino Act, and the argument was rejected. I have difficulty imagining how Congress could have stated more forcefully that it intended that the courts read section 4 of the Clayton Act broadly.

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[2] S. Rept. No. 803, 94th Cong., 2d sess. at 44 (1976) (hereinafter cited as *Senate Report*).
[3] In re *Western Liquid Asphalt* cases, 487 F.2d 191 (9th Cir. 1973).
[4] Senate Report at 45.
[5] 122 Cong. Rec. S. 15418 (daily ed. Sept. 8, 1976) (remarks of Sen. Philip A. Hart).
[6] 122 Cong. Rec. H. 10295 (daily ed. Sept. 16, 1976) (remarks of Rep. Rodino).
[7] *Illinois Brick Co. v. Illinois*, — U.S. —, June 9, 1977 at 11.

As most of you know by now, I am usually restrained and circumspect in criticizing public figures. I will not indulge in anything of the sort in this polite and esoteric forum.

However, I would lack candor if I did not say to you today that in my opinion the majority of the Court in *Illinois Brick* has flouted the will and purpose of Congress in a most crass fashion. The Court stated, and I quote, "that the legislative history of the 1976 Antitrust Improvements Act is [not] dispositive of the interpretation of section 4 of the Clayton Act." [8] In so stating, the Court engages in, at best, a disingenuous bit of legalistic sophistry, and, at worst, a rather high-handed exercise in judicial legislation, while soaking consumers with the impact of their constitutional "last best guess."

Whatever the case, I commend your committee for responding with such alacrity to the Court's invitation to reverse *Illinois Brick* legislatively. Since I believe that congressional intent was absolutely clear, I would urge that you make S. 1824 retroactive to June 9, 1977. The Court deserves to have its attention respectfully recalled to the will of the Congress.

I thank the subcommittee for this opportunity to help fight back this latest challenge to Phil Hart's legislative legacy. As the Hart-Scott-Rodino Act encounters further challenge in the courts, I expect that your committee will be called upon again to shore up the Act's innovative heart and purpose. I am confident that you should and will succeed in preserving it intact. It will remain an enduring monument to the wisdom and skill of our beloved late colleague, Phil Hart.

I express my thanks to the subcommittee for extending to me the opportunity to testify.

Senator KENNEDY [continuing]. Our next witness is John Shenefield, Acting Assistant Attorney General, Antitrust Division, Department of Justice. We welcome you back to the subcommittee. We look forward to your testimony.

STATEMENT OF JOHN H. SHENEFIELD, ACTING ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. SHENEFIELD. Thank you, Senator. I am pleased to be here today to express the Justice Department's strong support for S. 1874. This proposed legislation would grant indirect purchasers the right to sue for damages under the antitrust laws by amending sections 4, 4A and 4C of the Clayton Act, 15 U.S.C. sections 15, 15A and 15C. It would permit all persons who are injured in fact by an antitrust violation to recover for those injuries. We assume the bill is not intended to alter existing law regarding those injuries that are so remote or unrelated to the purposes of the antitrust laws as to preclude recovery of damages. (See, *Brunswick Corp.* v. *Pueblo Bowl-O-Matic*, 45 U.S.L.W. 4138, U.S. Jan. 25, 1977.)

DOD SUPPORTS S. 1874

We also assume that it is not intended to alter existing standing requirements for plaintiffs not directly in the chain of distribution. See, e.g., *Loeb* v. *Eastman Kodak Co.*, 183 F. 704 (3rd Cir. 1910); *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971). Moreover, we do not read the bill as in any way limiting recoverable damages to the amount of the overcharge.

Section 4, as presently interpreted by the Supreme Court in *Illinois Brick Co.* v. *Illinois*, [45 U.S.L.W. 4611 (U.S. June 9, 1977)], only allows direct purchasers subject only to certain limited exceptions,

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[8] *Illinois Brick Co.* v. *Illinois*, —— U.S. ——, June 9, 1977 at 11.

such as cost plus contracts or their functional equivalence to obtain monetary relief for illegal overcharges. The Department of Justice believes this rule severely damages private enforcement of the antitrust laws and undermines the deterrent effect of private rights of action. Antitrust damage actions, particularly private treble damage actions, have two important, broad objectives: Compensation of victims of antitrust violations and deterrence of future violations. We do have resource limitations in the Justice Department. We do the best we can.

While the material resources of the Justice Department to investigate antitrust violations have grown somewhat and the criminal sanctions for such violations have been increased, treble damage actions remain a vitally important part of the antitrust arsenal. In recent years, private antitrust cases filed in the district courts outnumber Government cases by a factor of more than ten. Damage recoveries from these cases have also substantially increased in recent years. Private parties recovered about $450 million from the electrical equipment manufacturers; 43 States recovered about $82 million from the antibiotic manufacturers; and about $70 million was recovered from the gypsum manufacturers.

TREBLE DAMAGES PROVIDE NEEDED DETERRENT

Treble damage actions provide a significant deterrent for antitrust violations by removing the profit incentive for such violations. This means that from the perspective of effective antitrust enforcement, it is important to maximize the chance that some plaintiff will be available to challenge a violation and that any recovery will be large enough to serve the deterrent objective of private damage actions.

As a former private antitrust lawyer, I am personally familiar with the fact that private treble damage liability is taken very seriously indeed by businesses—sometimes more seriously even than the possibility of Government prosecution. To ensure that the treble damage remedy remains fully effective, indirect purchasers must be allowed to bring damage actions for several reasons. In many cases, the direct purchaser will not sue. The direct purchaser may have passed on a substantial part of the overcharge to its customers and, therefore, may have little incentive to bear the risks of litigation. In some instances, where the direct purchaser's selling price is set by a fixed percentage markup, it may actually be a beneficiary of a price-fixing scheme.

MIDDLEMAN CANNOT SUE

Second, even if damaged, the direct purchaser may not bring suit in order not to risk disrupting an important source of supply. Thus, in a substantial number of cases, indirect purchasers are the only available parties to see that an antitrust violator is not allowed to retain its ill-gotten gains. Moreover, and this is the second important point, the rule of *Illinois Brick* leaves most indirect purchasers with substantial injuries without a means to obtain just compensation. I include in that category State and local governments and also the Federal Government, all of which may have suffered millions of dollars of damages as indirect purchasers. This result alone, I believe, would require congressional action.

EFFECT ON PARENS PATRIAE ACTIONS

Additionally, the present rule—and this is the third major point—may vitiate the *parens patriae* title of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. This law was intended to allow State Attorneys General to sue to recover antitrust damages for natural persons residing in their States. It was designed to ensure that individual consumers received compensation for antitrust injuries without the complexities and burdens of traditional class actions.

An additional purpose was encouragement of State antitrust enforcement programs. Since individual consumers most often suffer damage as indirect purchasers, either purpose of the *parens* remedy can be fulfilled unless indirect purchasers represented by State Attorneys General can sue for antitrust damages.

RATIONALE FOR DECISION

The majority in *Illinois Brick* expressed two principal reasons for its holding that indirect purchasers could not recover for overcharges passed on to them by upstream purchasers.

In *Hanover Shoe, Inc.* vs. *United Shoe Machinery Corp.* [392 U.S. 481 (1968)], the Court has held that defendants could not attempt to avoid liability in suits by direct purchasers by arguing that any overcharge was passed on down the distribution chain. The majority in *Illinois Brick* believed this rule by necessity precluded indirect purchasers from recovering for overcharges passed on to them. Otherwise, defendants would be subject to possible multiple liability for the same injury.

Moreover, the Court believed that passing-on, used either offensively or defensively, would unduly complicate private damage actions, reducing the incentives for any plaintiff to sue.

AVOIDING MULTIPLE LIABILITY

In our view, the approach taken by this bill addresses the Court's fear of multiple liability by permitting any plaintiff to recover who can prove injury in fact. Under its provisions, a defendant would not be faced with the prospect of being denied the right to sue passing-on defensively in a suit by direct purchasers, while nevertheless being subject to an award of damages in a suit by purchasers further down the distribution chain based on an allegation that the illegal overcharge was passed to them. Thus, the approach taken by this bill is entirely fair and equitable. We continue, however, to be convinced that the danger of multiple recovery for the same injury is largely theoretical. The defendant is fully able to protect itself from the possibility of multiple recovery by a number of procedural devices already in existence, which I would be glad to go into in detail if the committee is interested.

If suits by direct and indirect purchasers are pending in different courts, they may be transferred and consolidated in one or more of the ways suggested by the "Manual for Complex Litigation" [1 Pt. 2 Moore's Federal Practice: Manual for Complex Litigation, sections 5.20–5.40, 2d ed., 1976]. Once cases are consolidated, damages may be allocated under Rule 42(a) of the Federal Rules of Civil Procedure.

[See, e.g., *West Virginia* v. *Chas. Pfizer & Co. Inc.*, 440 F.2d 1079 (2nd Cir. 1971).]

In addition, our discussions with various members of the antitrust bar indicate that any danger of multiple liability arising from subsequent lawsuits is remote. Given the usual length of antitrust litigation and the 4-year statute of limitations for private antitrust actions, few would-be plaintiffs will be willing or able to wait for a previous case to be completed before filing suit.

In any case, by permitting passing-on to be employed both offensively and defensively, this proposed legislation would avoid much of this largely theoretical possibility of multiple liability. Multiple liability for the same injury would be possible only in the remote case where different courts in subsequent cases reach substantially inconsistent conclusions on the passing-on issue. We do not believe that possibility is sufficiently probable to warrant any more than passing mention in a law review article footnote. It is certainly not comparable to the tremendous damage we see having been done to the treble damage remedy by the *Illinois Brick* rule.

Thus, in both *Illinois Brick* and *Hanover Shoe*, the Court was anxious to avoid making antitrust litigation more complex by introduction of the passing-on issue. Undoubtedly, this issue would provide some additional complications for these cases. We are satisfied, however, that this issue is not in any sense unmanageable. As the Supreme Court recognized in *Bigelow* vs. *RKO Radio Pictures*, Inc. [327 U.S. 251 (1946)], measuring damages in an antitrust case often requires a good deal of estimation based upon reasonable inferences about the nature of the market.

THE PASSING-ON ISSUE

A similar approach can be adopted regarding the passing-on issue. In fact, the Ninth Circuit in in re *Western Liquid Asphalt* cases [487 F.2d 191, 201 (9th Cir. 1973), *cert. denied* 415 U.S. 919 (1974)], directed the district court to follow such a common sense approach to resolution of the passing-on issues present in that case. There is every reason to believe that the courts will be able to fashion practical means for handling this issue in the same way that means have been found to handle such complex issues as proof of the amount of an overcharge.

Furthermore, we do not believe the additional complexity created by permitting proof of passing-on will significantly reduce the incentives for plaintiffs to sue antitrust violators. With the substantial recoveries involved, direct purchasers who are actually injured and who are otherwise disposed to sue are unlikely to be deterred by the requirements of this legislation that proof of injury in fact be established.

LESS INCENTIVE FOR MIDDLEMAN TO SUE

From the perspective of maximizing the more significant deterrent function of private antitrust actions, permitting indirect purchasers to sue clearly outweigh the additional burden placed on direct purchasers by introduction of the passing-on issue. For the reasons previously discussed, direct purchasers may, in some instances, not be the most likely plaintiffs, and it is important that suits by indirect purchasers be available as a backstop for such circumstances.

Moreover, those persons actually injured by a violation, rather than those merely seeking a windfall are, in our view, more likely to further the remedial purposes of section 4 of the Clayton Act.

In conclusion, the Department strongly supports the approach adopted by S. 1874 and recommends its swift passage.

Senator KENNEDY. You are saying that there will be incentive for the middleman to sue in some cases, but in other areas there will not be an incentive, I suppose, that relates to the nature of the supply relationship within industry.

Mr. SHENEFIELD. That is correct. In an industry characterized by shortage, for instance, then middlemen are reluctant to incur the wrath of suppliers by filing litigation.

Senator KENNEDY. I think that is an important point. Given the availability of supply, I think you could estimate that. You would not get precise accuracy. Under *Illinois Brick* indirect purchasers would not be able to sue. Is that right?

Mr. SHENEFIELD. That is correct. There would be no private damage actions.

Senator KENNEDY. It is difficult to estimate with any degree of accuracy what those parameters really are. But that is the fact.

Mr. SHENEFIELD. It would be difficult to quantify it. But one has the intuitive sense that it is a large number of situations, particularly given the fact that our economy in last few years has had the shortage situation. I personally know of a number of situations. The major decision point is: "Are you willing to risk making your primary supplier, the lifeblood of your manufacturing industry or distribution, a hostile litigator?

THE IMPORTANCE OF PRIVATE PLAINTIFFS SUITS

Senator KENNEDY. Why are the criminal penalties insufficient?

Mr. SHENEFIELD. There are several reasons. First of all, we, in the Department of Justice do not always know it first hand when the situations arise. Nobody is more likely to know about antitrust violations than firms in the industry in the distribution chain.

Secondly, if you prosecute under the criminal law, you are faced with a much higher standard of proof. Skillful criminal lawyers, even against our good staff, sometimes are able to pull rabbits out of hats and beat us.

Thirdly, I think it is more likely than not that we will always have some resource limitations. We can be busily filing cases when there are price-fixing situations and still leave a large number of situations unattended.

Senator KENNEDY. Do you believe that the private plaintiff's cases are extremely important for antitrust enforcement?

Mr. SHENEFIELD. Absolutely. We rely on that as a supplement to our efforts very strongly.

Senator KENNEDY. It is an important part?

Mr. SHENEFIELD. Very important.

AVAILABILITY OF PROCEDURAL DEVICES FOR THE EFFICIENT ADMINISTRATION OF JUSTICE

Senator KENNEDY. Let's get back to the administration of justice issue that Senator Laxalt has talked about? I think that is a legitimate concern. Do you want to comment on that?

Mr. SHENEFIELD. Yes, sir. I think there are a number of procedural devices that are already available at hand which can deal with this problem. There is, first of all, the whole notion of transfer and consolidation. We already have in title 28 of the United States Code, means by which judges on their own motion can, if they have a suit that comes up subsequent to some other private treble damage suit, transfer for the convenience of the party and in the interest of justice, that suit to the central count.

Moreover, we have the judicial panel for multi-district litigation that consolidates or transfers cases to a central court for pre-trial treatment. So, it seems to me that under that procedure we could very well collect up all the cases that may have been filed and put them in one central piece of litigation. That is the first step.

The second step is to get the variety of suits in one courtroom. Some of the plaintiffs that may sue you already have filed pieces of litigation. Others have not.

Your problem is how to get all of those plaintiffs into the same courtroom. Then you have to look to the Federal Rules of Civil Procedure with compulsory joiner under rule 19 or the other procedures that you have available to you under the interpleader device of rule 22. You can, in effect, bring in all the other plaintiffs who do not choose to opt out in a rather orderly way.

Senator KENNEDY. There are probably other ways and means that this can be done, too. Is the Department working on other ways, or are you satisfied with this?

Mr. SHENEFIELD. I am happy to be able to report that the Office for the Improvement of the Administration of Justice, under Professor Meador of the University of Virginia Law School, is working toward not only rehabilitation or revision of rule 23 of the class action procedures, but looking toward the wholesale revision of the Federal rules to make, as Judge Bell told you in the oversight hearings, our judicial system more efficient and more responsive.

I gather that Chief Justice Burger is making the same effort.

I have one additional point that I think might be made in this connection. There is no substitute for a judge who is determined to reach justice and who is determined to do so by the shortest line between his present position and that end. A judge in remarkably efficient manner, if he is determined to do so, can take control of the litigation and make the procedure a manageable one even under the existing rules.

ALLOCATION OF DAMAGES

Senator KENNEDY. Do you think the legislation is too complex because it may require allocating damages? Are courts making these kinds of allocations now?

Mr. SHENEFIELD. They are making those kinds of allocations right now. Property law is one good kind of example. There is the value of

a particular asset to be owed to various claimants. That requires the same intellectual process. Judges trying antitrust cases are fully able to deal with the problems, and lawyers representing the various claimants are happy to oblige in the problem of allocating damages. You can approach the allocation problem in a number of ways. You can approach it by the total number of dollars to which all plaintiffs would be entitled and then divide it up, based on the arguments of the available claimants. Or, you can ask each claimant to prove its own particular damages. But which ever way you proceed, it is a simple intellectual problem. It sometimes works out in a complex way. But I think judges and the rules we have can deal with them. If they cannot, I would rather see us redraft those rules than deny people who, in fact, have been injured any right of redress.

RETROACTIVITY CLAUSE

Senator KENNEDY. What about provisions in legislation that make applications of S. 1874 applicable to pending cases? What is your view about the constitutionality of that provision?

Mr. SHENEFIELD. I think it is fully constitutional. As I recall it, retroactive legislation can be examined under the due process clause or the contracts clause, or under ex post facto clause of the constitution. The last two probably do not apply here, inasmuch as respectively they apply only to State legislation and criminal or penal forfeiture legislation. You would then be looking at the due process clause.

Curative legislation is judged under the due process clause if it is reasonable under all the circumstances. The standards that the courts have used are: Number one, the importance of the right said to be modified or ruled out by the new enactment; secondly, the extent to which it is modified and ruled out; and thirdly, the important public policy that the new enactment serves. So, you have three ready-at-hand standards to judge this enactment by.

If I applied those standards to this situation, I would come to the conclusion that, number one, the public policy served by this legislation is a very important one indeed. It is a fundamental national economic policy. Secondly, the right said to be modified is, in fact, not really modified. We are not talking so much about taking more money away from defendants. We are talking about giving it to different people. So, it seems to me that we really do not have a modified right so much as we have a redistribution of claims that already are in existence.

Senator KENNEDY. Senator Laxalt?

EFFECT ON PARENS PATRIAE ACTIONS

Senator LAXALT. Do you have any overview as to how many actions have been affected by the passages of the 1976 Act? How many actions have been initiated, if you know?

Mr. SHENEFIELD. Under *parens patriae?*

Senator LAXALT. Yes.

Mr. SHENEFIELD. Relatively few today. We are required to give notice and to supply information for such actions which have been filed.

I would hazard a guess. It would only be that at this point, that is, that it is less than ten.

Senator LAXALT. Are they substantial actions?

Mr. SHENEFIELD. They vary.

Senator LAXALT. Are they actions ordinarily brought by those indirectly affected under terms of the court's decision?

Mr. SHENEFIELD. Some are clearly on behalf of consumers in the sense of indirect purchasers. I just do not have at hand a catalogue of all pieces of litigation.

Senator LAXALT. So those who would be affected by the retroactive provision under Senator Kennedy's proposed legislation, are not a significant number; is that right?

Mr. SHENEFIELD. It is not a large number, but as to the indirect purchasers in those cases, it is an important consideration. There is one other point that I think would be relevant here.

The Federal and State Governments themselves are often indirect purchasers. Speaking as a representative of the Federal Government, I would very much hate to see our several damage actions disappear as a result of a nonretroactive sort of a statute.

Senator LAXALT. I am inclined to agree. That could be created separately.

Mr. SHENEFIELD. Yes.

Senator LAXALT. I gather the thrust of your testimony is that this type of action would deter price fixing, is that right?

Mr. SHENEFIELD. Right.

Senator LAXALT. What worries me is the mechanism. I agree with that intent totally. Is there some other mechanism, short of the multiplicity of suits brought under *parens patriae*, where we can achieve the price-fixing deterrents by say, heavy civil fines?

Mr. SHENEFIELD. I have always looked upon *parens patriae* as the halfway point. You start with the situation that prevailed before, which was classes in various States or even within the same State, indirect purchaser classes, represented by different lawyers, private treble damage lawyers. They are coming at the courts with different cases and arguing that they should be classified as the class representative.

Out of that confusion, as a result of the Improvements Act, we at least, look forward to the possibility of having the State Attorney General represent the citizens of the State and one action in place of prior actions. I always looked on that as the simplifying and clarifying improvement that was so badly needed. It seems to me that we ought to try to go with that as the halfway step rather than doing away with it or making it more difficult to effectuate.

As to the large civil penalties situation, I guess the difficulty there is that you have not keyed in the amount of money that the defendant is likely to pay, necessarily at least, to the injury of particular parties.

Senator LAXALT. Is that not subject to estimation?

Mr. SHENEFIELD. That is to say that you could estimate?

Senator LAXALT. The same as you would have if you had a multiplicity?

Mr. SHENEFIELD. You could do that, yes. I, myself, particularly again representing the Government, would prefer to see the State

governments get what, in fact, they have been damaged rather than having it paid in some other gross form to some other entity.

MULTIPLICITY OF SUITS PROBLEM

Senator LAXALT. I am concerned about giving legal standing to people who cannot show demonstrable damage. This presents a terrible problem for us in the administration of justice.

Mr. SHENEFIELD. I would be, too, Senator, except that is precisely what this proposal does not do because it requires injury in fact. That will require, in the case of all judges that I am familiar with, a level of certainty that would avoid the problem that you are concerned about.

Senator LAXALT. But what concerns me, at least insofar as I can determine, is that there is no standard established for a judge to be guided in trying to determine the injury. Is it minimal injury? Is it substantial? What is the test? What is the test in your estimation?

Mr. SHENEFIELD. The test that would be created by the statute is injury in fact.

Senator LAXALT. What is that?

If I have a one penny injury, and I can demonstrate that does that give me standing in the proceeding?

Mr. SHENEFIELD. It seems to me that if, as a part of a group of citizens of a State, all of you aggregated can prove that you have been damaged one cent each, but it amounts to a million dollars in total. So, you should have that standing and you do have that standing under current law. The intellectual process of segregating out that claims and giving it recognition in the judicial system, is not a difficult one.

Senator LAXALT. But if we weigh that against the obvious problems that it creates within the administration of justice, is it worth it?

Mr. SHENEFIELD. I believe it is because I think the administration of justice's problems can be solved, both by use of procedural devices we already have and, if necessary, by the creation of the Supreme Court and the Congress of the United States of other procedural devices. Secondly, if we do not have that option and if we do not have that right of action, we are then, it seems to me, relying on a hollow private treble damage option, which is not going to be a deterrent, in fact.

Senator LAXALT. That is undesirable to me, as well. I am groping for something to have the deterrent value and do away with minimal lawsuits in terms of damages.

Mr. SHENEFIELD. If you choose to look at it in terms of the single individual citizen of a State, then all that you can readily say or think is that the cumulative effect of a number of different antitrust violations to a citizen of limited means over a period of years can become a very important thing in his budget. So, it seems to me that you would want, even if you consider the matter in that limited context, to encourage this kind of a procedure.

Senator LAXALT. Do you have within your agency a list of the current matters in litigation? You mentioned ten. Would it be too much trouble for me to have a general analysis as to what the experience has been since the passage of the 1976 Act?

Mr. SHENEFIELD. I would be happy to.

Senator KENNEDY. So ordered.

[See appendix for material referred to above:]

Senator KENNEDY [continuing]. We will be hearing from a distinguished group of State Attorneys General tomorrow, which will give us some idea as to what is happening in the States.

LOSS TO FEDERAL GOVERNMENT IN PENDING CASES

What is the extent of the loss of the United States as purchaser under the *Illinois Brick* decision?

Mr. SHENEFIELD. We have not cataloged a complete list. We made an estimation shortly after the opinion was rendered that it could be argued—and we do not concede that it necessarily will turn out that way—that the loss to the Federal Government in three of our major cases would amount to around $205 million.

Senator KENNEDY. That is a lot of money.

Mr. SHENEFIELD. It is, indeed.

Senator KENNEDY. So, in terms of the United States, unless we pass this, there is the potential loss of that amount of money?

Mr. SHENEFIELD. That is correct. In addition to that, there are the vast number of State Government losses that have nothing whatever to do with the loss to the Federal Government.

Senator LAXALT. Are you in the position of being an indirect purchaser in these cases?

Mr. SHENEFIELD. That is correct.

Senator LAXALT. Do you think they are all not precluded by the court's decision?

Mr. SHENEFIELD. If I said that, I would be giving away arguments which we very well may want to make. But it could be argued that way.

Senator LAXALT. Thank you. You have been most helpful.

Senator KENNEDY. We thank you.

[The prepared statement of John Shenefield follows:]

PREPARED STATEMENT OF JOHN H. SHENEFIELD

I am pleased to be here today to express the Justice Department's strong support for S. 1874. This proposed legislation would grant indirect purchasers the right to sue for damages under the antitrust laws by amending sections 4. 4A and 4C of the Clayton Act, 15 U.S.C. section 15, 15A and 15C. It would permit all persons who are injured in fact by an antitrust violation to recover for those injuries.[1]

Section 4, as presently interpreted by the Supreme Court in *Illinois Brick Co.* v. *Illinois*,[2] only allows direct purchasers, those in privity with antitrust violators, to obtain monetary relief for illegal overcharges. The Department of Justice believes this rule severely damages private enforcement of the antitrust laws and undermines the deterrent effect of private rights of action.

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[1] We assume the bill is not intended to alter existing law regarding those injuries that are so remote or unrelated to the purposes of the antitrust laws as to preclude recovery of damages. See *Brunswick Corp.* v. *Pueblo Bowl-O-Matic*, 45 U.S.L.W. 4138 (U.S. Jan. 25, 1977). We also assume that it is not intended to alter existing standing requirements for plaintiffs not directly in the chain of distribution. See, e.g., *Loeb* v. *Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910); *Mulvey* v. *Samuel Goldwyn Productions*, 433 F. 2d 1073 (9th Cir. 1970), cert denied, 402 U.S. 923 (1971). Moreover, we do not read the bill as in any way limiting recoverable damages to the amount of the overcharge.

[2] 45 U.S.L.W. 4611 (U.S., June 9, 1977).

Antitrust damage actions, particularly private treble damage actions, have two important, broad objectives: compensation of victims of antitrust violations and deterrence of future violations. While the material resources of the Justice Department to investigate antitrust violations have grown somewhat and the criminal sanctions for such violations have been increased, treble damage actions remain a vitally important part of the antitrust arsenal.

In recent years, private antitrust cases filed in the district courts outnumber Government cases by a factor of more than ten. Damage recoveries from these cases have also substantially increased in recent years. Private parties recovered about $450 million from the electrical equipment manufacturers; about $82 million from the antibiotic manufacturers; and about $70 million from the gypsum manufacturers.

Treble damage actions provide a significant deterrent for antitrust violations by removing the profit incentive for such violations. This means that from the perspective of effective antitrust enforcement, it is important to maximize the chance that some plaintiff will be available to challenge a violation and that any recovery will be large enough to serve the deterrent objective of private damage actions. As a former private antitrust lawyer, I am personally familiar with the fact that private treble damage liability is taken very seriously indeed by businesses—sometimes more seriously even than the possibility of Government prosecution.

To ensure that the treble damage remedy remains fully effective, indirect purchasers must be allowed to bring damage actions. In many cases, the direct purchaser will not sue. The direct purchaser may have passed on a substantial part of the overcharge to its customers and, therefore, may have little incentive to bear the risks of litigation. In some instances, where the direct purchaser's selling price is set by a fixed percentage markup, it may actually be a beneficiary of a price-fixing scheme. Even if damaged, the direct purchaser may not bring suit in order not to risk disrupting an important source of supply. Thus, in a substantial number of cases, indirect purchasers are the only available parties to see that an antitrust violator is not allowed to retain its ill-gotten gains.

Moreover, in cases where the direct purchaser has in fact passed on an overcharge, the rule of *Illinois Brick* leaves an indirect purchaser with substantial injuries without a means to obtain just compensation. For instance, in many cases, State and local governments (and the Federal Government) has suffered millions of dollars of damages as indirect purchasers. This result alone requires Congressional action.

Additionally, the present rule may vitiate the *parens patriae* title of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. This law was intended to allow state attorneys general to sue to recover antitrust damages for natural persons residing in their states. It was designed to ensure that individual consumers received compensation for antitrust injuries without the complexities and burdens of traditional class actions. An additional purpose was encouragement of state antitrust enforcement programs. Since individual consumers most often suffer damages as indirect purchasers, neither purpose of the *parens* remedy can be fulfilled unless indirect purchasers represented by state attorneys general can sue for antitrust damages.

The majority in *Illinois Brick* expressed two principal reasons for its holding that indirect purchasers could not recover for overcharges passed on to them by upstream purchasers. In *Hanover Shoe, Inc.* vs. *United Shoe Machinery, Corp.*[3] the Court had held that defendants could not attempt to avoid liability in suits by direct purchasers by arguing that any overcharge was passed on down the distribution chain. The majority in *Illinois Brick* believed this rule by necessity precluded indirect purchasers from recovering for overcharges passed on to them. Otherwise, defendants would be subject to possible multiple liability for the same injury. Moreover, the Court believed that passing-on, used either offensively or defensively, would unduly complicate private damage actions, reducing the incentives for any plaintiff to sue.

In our view, the approach taken by this bill addresses the Court's fear of multiple liability by permitting any plaintiff to recover who can prove injury in fact. Under its provisions, a defendant would not be faced with the prospect of being denied the right to use passing-on defensively in a suit by direct purchasers, while nevertheless being subject to an award of damages in a suit by

[3] 392 U.S. 481 (1968).

purchasers further down the distribution chain based on an allegation that the illegal overcharge was passed to them. Thus, the approach taken by this bill is entirely fair.

We continue, however, to be convinced that the danger of multiple recovery for the same injury is largely theoretical. The defendant could protect itself from this possibility by a number of procedural devices. It suits by direct and indirect purchasers are pending in different courts, they may be transferred and consolidated in one or more of the ways suggested by the *Manual for Complex Litigation.*[4] Once cases are consolidated, damages may be allocated under rule 42(a) of the Federal Rules of Civil Procedure.[5]

In addition, our discussions with various members of the antitrust bar indicate that any danger of multiple liability arising from subsequent lawsuits is remote. Given the usual length of antitrust litigation and the 4-year statute of limitations for private antitrust actions, few would-be plaintiffs will be willing or able to wait for a previous case to be completed before filing suit.

In any case, by permitting passing-on to be employed both offensively and defensively, this proposed legislation would avoid much of this largely theoretical possibility of multiple liability. Multiple liability for the same injury would be possible only in the remote case where different courts in subsequent cases reach substantially inconsistent conclusions on the passing-on issue. We do not believe that possibility is sufficiently probable to warrant any more than passing mention in a law review article footnote. It is certainly not comparable to the tremendous damage we see having been done to the treble damage remedy by the *Illinois Brick* rule.

In both *Illinois Brick* and *Hanover Shoe*, the Court was anxious to avoid making antitrust litigation more complex by introduction of the passing-on issue. Undoubtedly, this issue would provide some additional complications for these cases. We are satisfied, however, that this issue is not in any sense unmanageable. As the Supreme Court recognized in *Bigelow* vs. *RKO Radio Pictures, Inc.*,[6] measuring damages in an antitrust case often requires a good deal of estimation based upon reasonable inferences about the nature of the market. A similar approach can be adopted regarding the passing-on issue. In fact, the Ninth Circuit in *In re Western Liquid Asphalt* cases,[7] directed the district court to follow such a common sense approach to resolution of the passing-on issues present in that case. There is every reason to believe that the courts will be able to fashion practical means for handling this issue in the same way that means have been found to handle such complex issues as proof of the amount of an overcharge.

Furthermore, we do not believe the additional complexity created by permitting proof of passing-on will significantly reduce the incentives for plaintiffs to sue antitrust violators. With the substantial recoveries involved, direct purchasers who are actually injured and who are otherwise disposed to sue are unlikely to be deterred by the requirements of this legislation that proof of injury in fact be established.

From the perspective of maximizing the more significant deterrent function of private antitrust actions, permitting indirect purchasers to sue clearly outweighs the additional burden placed on direct purchasers by introduction of the passing-on issue. For the reasons previously discussed, direct purchasers may in some instances not be the most likely plaintiffs, and it is important that suits by indirect purchasers be available as a backstop for such circumstances. Moreover, those persons actually injured by a violation, rather than those merely seeking a windfall are, in our view, more likely to further the remedial purposes of Section 4 of the Clayton Act.

In conclusion, the Department strongly supports the approach adopted by S. 1874 and recommends its swift passage.

We now have Mr. Albert Peterson and Mr. R. Dirk Agee. They are Nevada ranchers. With them is Mr. Robert Vaughan.

We welcome you.

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[4] 1 Pt. 2 Moore's Federal Practice: Manual for Complex Litigation, Sections 5.20-5.40 (2d ed., 1976).

[5] See, e.g., *West Virginia* v. *Chas. Pfizer & Co. Inc.*, 440 F. 2d 1079 (2d Cir. 1971).

[6] 327 U.S. 251 (1946).

[7] 487 F. 2d 191, 201 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974).

Senator Laxalt, I am sure, will be wanting to add a personal word of welcome.

Senator Laxalt?

Senator LAXALT. I would like to personally welcome my fellow Nevadians. As you have seen from the questioning thus far, your situation so far as I understand it, is distinguished from the type of litigation that we have been considering so far. We would like for you to describe to us the nature of your particular litigation. The thing that intrigues me is that although the debates on this were in terms of the Attorneys General and thousands of cases with minimal damage, your case has been brought through private counsel.

It involves a limited number of plaintiffs with substantial damages. It is a marked departure from what was anticipated under the original legislation. To that extent it will be extremely helpful.

STATEMENT OF ROBERT O. VAUGHAN, ATTORNEY, VAUGHAN, HULL, MARFISI & MILLER, ELKO, NEVADA

Mr. VAUGHAN. My name is Robert O. Vaughan. I am a country lawyer practicing in Elko, Nevada, which is a city of 8,000 or 9,000 people situated in the northeast corner of Nevada. It serves as a marketing and professional center for that part of the State. A basic industry of that area is cattle ranching.

PASSAGE OF S. 1874 NECESSARY FOR SURVIVAL OF RANCHERS

I appreciate the opportunity to appear before the subcommittee. We do represent an entirely different aspect than the purchaser-consumer. The problem requires the passage of your act otherwise a major portion of this industry will not survive economically. I speak on behalf of 143 of those ranching operations and the five local law firms who are representing them in an antitrust suit against the major supermarket chain stores. I hope to be able to demonstrate to you that it is essential to the economic survival of those ranchers, and ranchers similarly situated, that the bill to restore effective enforcement of the antitrust law, be passed and that it hopefully will be passed without delay.

The antitrust action to which I make reference is entitled, *Agee, et al.* vs. *Safeway, et al.* and is one of the 12 cases presently consolidated for pretrial proceedings at Dallas, Texas. Any adverse rulings based on the *Illinois Brick* case will also adversely affect hundreds of other beef producers who are plaintiffs in the other cases.

The *Agee-Safeway* cases is a perfect example of the enforcement of the antitrust laws through the private Attorneys General concept. It is a case of individual, independent businessmen, cattle ranchers in this instance, proceeding on their own to enforce the antitrust laws, stop the supermarket chain's practice of price-fixing and obtain for their product a free market and a sufficient price to earn them a livelihood. The *Agee-Safeway* plaintiffs are hard-working, independent and dedicated to their industry and their way of life. The ranches involved are primarily family ranches with very little outside or large corporate ownership.

PRICE FIXING HAS SEVERELY AFFECTED RANCHERS

These ranches have existed successfully for approximately 100 years, through several generations. Now they are in financial jeopardy. I will leave the details of that to Mr. Agee and Mr. Peterson to describe. They are both livestock operators and producers, but they have a little different story because they sell at a different level. The financial picture is a little different. While there is much discussion and many theories as to why beef prices at the ranch level are low, at least the *Bray* case decided in the Federal District Court at San Francisco, proved that one of the reasons, if not the primary reason, was that certain of the supermarket chains were conspiring and fixing low prices.

RANCHERS DO NOT SELL BEEF DIRECTLY TO SUPERMARKETS

Most of the cattle raised by these plaintiffs are not initially sold to supermarkets, but are sold to order buyers who buy them for feeders, one or several feeders may own them before they are sold to feedlot operators for finishing. After finishing they are sold to packers who slaughter them and sell most of their product to the supermarket chain stores. Therefore, price fixing at the supermarket chain level filters back through the packer, through the feedlot operator, through the feeders to the producer who bears the brunt of the fixed prices. The producer has no bargaining power whatsoever. Any manipulation goes right back to the producer. In the ranching business you depend on two things: the weather and your prices. You do not have a thing to say about either one of them. These people live with the various weather that the good Lord sends us and they can live on the free market that goes up and down, but they cannot live with increased costs projected upon them and low-fixed beef prices. They will not survive and cannot survive. These plaintiffs are represented in their action by their regular local attorneys, the attorneys who do their year-by-year work, handle their water rights and range problems, do their real estate work, and work out the planning as the ranches pass from generation to generation, or sell as the case may be.

The attorneys are not called upon to handle very much rancher litigation, as the ranchers are not prone to be litigators. It is not their nature. Those law firms are by name: Evans and Bilyeu; Wilson, Wilson and Barrows, Ltd.; Ross P. Eardley; Jack B. Ames; and my firm, which is Vaughan, Hull, Marifisi & Miller, Ltd. I say with pride, and Senator Laxalt will confirm, that these firms are very capable and highly ethical. Of the five firms, four of them carry the AV rating which is the highest Martindale-Hubbell rating. One sole practitioner carries the next to highest rating, not having been in practice long enough to carry the highest rating.

The local attorneys are not antitrust lawyers, have not been before involved in antitrust litigation and probably will not be again. They are in *Agee-Safeway* because their clients have a problem. These ranchers, upon hearing of the decision in the *Bray* case, where certain of the supermarket chains were found to have conspired and fixed prices, sought relief in the matter. They joined with their neighbors to share costs, and through their local counsel retained an experienced

antitrust lawyer. An economist was consulted who advised that in spite of the jolt that the *Bray* case gave the supermarket chains, that the practice of price fixing was continuing.

RANCHERS WANT CHANCE TO PROVE THEIR CASE

Based on the *Bray* case, the advice of the antitrust counsel, and of the economist, the ranchers proceeded with an action. When the case became consolidated with the other beef cases, the position that the case had considerable merit became fortified by reason of the fact that in the other cases, other economists, through independent studies, were coming to basically the same conclusions, that is, that the supermarket chains were continuing to fix prices. These people, of course, do not ask that you make the decision that the price fixing exists. They want only a chance to prove their case in a court of law.

Considering that a purpose of the antitrust laws was to create private attorneys general, it is interesting that a great portion of the ranchers who proceeded in the *Agee-Safeway* action expressed their motivation as being that of wanting to stop the price-fixing to enable them to have a free market for their beef, rather than any particular concern about how much they might recover by way of judgment. For that reason, a subsequent remedy sought is that of injunctive relief against the price-fixing. Consider the complexity of the cases, the *Agee-Safeway* case and the other cases with which it is consolidated is processing through the court on a reasonable basis. The cases are before an excellent Federal District Court judge, who has given full consideration to each issue raised by motion, and renders decisions promptly.

I suppose any movement in the case at all is to be commended considering there are at least 12 antitrust law firms involved on behalf of the plaintiffs and at least 52 law firms involved on behalf of the defendants.

Senator LAXALT. I gather from my somewhat narrow understanding of your litigation, that there are substantial damages involved, are there not?

Mr. VAUGHAN. Hundreds of millions of dollars.

Senator LAXALT. Substantial damages inflicted on individual plaintiffs?

Mr. VAUGHAN. Yes, we will give you some examples.

Senator LAXALT. Could it be that the court is telling all of us that indirect damage or insignificant damage would not preclude any action that would be brought by people like you on an individual basis?

Mr. VAUGHAN. In the *Illinois Brick* case there was substantial damages. It was not that the damages were too small. But, the State of Illinois had substantial damages, if I recall.

Senator LAXALT. So you think the analogy would be about the same as between the two cases in terms of damages?

NONPASSAGE OF S. 1874 WILL LEAVE RANCHERS WITHOUT REMEDY

Mr. VAUGHAN. I hate to say so, but I am afraid so. If the *Illinois Brick* case is held to be the law of the beef cases, and your S. 1874 is not passed, I can see that there is a likelihood that the judge in Dallas,

Texas may very well grant defendants motion for judgment on the pleadings, which is pending, and to be heard on September 28, 1977. If that happens, our rancher clients in the *Agee-Safeway* case, as well as others, will be left totally without remedy in the matter and will have no way that I know of to enforce a free market whereby they can obtain an adequate price for their product to stay in business. Another aspect of the *Illinois Brick* case decision which needs your consideration and requires the passage of this bill is that if that decision were applied to the beef cases, it would mean that, in most instances, the only parties who would have an action against the supermarket chains would be the packers.

PACKERS RELUCTANT TO SUE SUPERMARKET CHAINS

The supermarket chains, being their best customers, you can see that they would be very reluctant and would probably not bring such an action. The further aspect of this is that the packer may well pass on the low price as set, and would not have damages. I have two examples of it in the *Agee-Safeway* case.

Senator KENNEDY. Why not?

Mr. VAUGHAN. They are their best customers. The supermarket is the packers best customer. How are you going to talk him into suing him?

Senator KENNEDY. It might mean money for those packers.

Mr. VAUGHAN. I will give you an example. We have two large operators who deal with Safeway. They do sell to packers. There has developed evidence that the packers might be co-conspirators with the supermarket chains.

If this were true, then these two clients potentially have a claim against the packers. When they were asked if they wished to give this any consideration, they replied that they would have no part of such an action, as the packers were their best customers and they would not want to be subject to any retaliation that their customer-packers might exercise.

Senator LAXALT. Is insurance involved in these cases at all? Can you be insured against these cases?

Mr. VAUGHAN. I have never heard of it.

Senator LAXALT. It is not a factor at all?

Mr. VAUGHAN. Not that I am aware of.

Senator LAXALT. So it is a highly personal basis?

S. 1874 WILL NOT CREATE ADDITIONAL LITIGATION

Mr. VAUGHAN. Yes. While I come to speak on behalf of the cattle ranchers who produce beef, I recognize that you gentlemen have the responsibility of looking at all aspects of the proposed legislation. It is my opinion that if Senate bill 1874 is adopted, the activity in the antitrust field will be just about the same as it has been. Prior to the *Illinois Brick* case, most practitioners assume that anybody damaged was in a position to bring an action, regardless of whether or not his transaction was directly with the price-fixer. Therefore, I do not believe the passage of the legislation will create significant additional antitrust litigation.

On the other hand, if the *Illinois Brick* case is to remain the law, you can see that antitrust litigation may very well come to a standstill, leaving damaged parties without remedy.

May I humbly suggest that the multimillion dollar corporate giants can well take care of themselves, and that the small independent businessman, who only asks that he have a free, fair, and unfixed market for his product, be given a helping hand by the passage of Senate bill 1874, which will permit him access to the courts to protect his rights. Thank you for your consideration.

Senator KENNEDY. That is fine testimony.

Mr. Agee? Could you tell us a little about yourself? Where were you born?

STATEMENT OF R. DIRK AGEE, RANCHER, WELLS, NEVADA

Mr. AGEE. My name is R. Dirk Agee. My family and I live on and own Twin Meadows ranch in a remote part of northeastern Nevada. I raise cattle. I am the third generation that has lived and worked on this ranch. My family has been in the cattle business in Nevada for over 100 years. I have lived on this ranch all my life except while attending the University of Nevada and while serving with the Army Engineers in the Far East. After the death of my father, I was released from the service to take over management of the ranch for my mother.

Now married, my wife and I are buying the ranch from other members of the family. We work the ranch as a family. The children ride and work in fields along with my wife and me. I consider my ranch and family typical of Northern Nevada.

The ranch itself is located in high desert mountains. The elevation runs from 6,000 to 9,000. It is 80 miles to the closest small town and 115 miles to a town large enough to provide repair parts and supplies. The last 40 miles is all dirt road. The ranch is made up of privately-owned land and leased public grazing lands. In the summer the cattle are ranged on the public land, which we totally depend on for summer feed. During the time the cattle are on the public grazing, we are producing hay on the privately-owned land. We have to irrigate the wild meadows and put up enough hay to feed the cattle through the winter. In the fall, the cattle are brought into the meadows for the winter. Winter often comes early and I have seen temperatures of 50 degrees below zero with deep snow, while other winters are mild.

Most of the cattle on Nevada ranches consist of a breeding herd of mother cows. From this herd we sell the offspring and cull the unproductive and old cows. Some ranchers sell the calves in the fall as weaners. Others hold the calves another year, selling them at about 1½ years. These cattle are known as yearlings. Our ranch is a yearling operation.

Most Nevada ranches sell their cattle the same way I do. We sell in the fall when the cattle are in the best condition. The cattle buyers come to the ranch to look and try to negotiate a price. The negotiations are usually on fractions of a cent and on weighing conditions. We are forced to accept prices far below production costs. Last year we sold yearlings for 34½ cents per pound. You will have to bear with me. I am a cowboy and not a politician.

Senator KENNEDY. You are doing very well. We are glad to hear your story. Just tell it in your own words. We are happy to hear about it.

Mr. AGEE. In most American businesses, the businessman determines his cost, his return on capital, and sets his price. The cattle business does not work like most American businesses. We take the price offered. If we had set the price of cattle we sold last year on a cost-of-production basis, we should have sold for about 60 cents instead of 34½ cents. Our cattle are usually sold and shipped either to a feedlot or to another rancher that places them on grass in another State. We have never dealt directly with the big food retail chains. There are many middlemen in agriculture. Many add a needed service or processing to the product. However, I believe that a handful of big retailers ultimately determine the price I receive for my cattle.

Senator LAXALT. These feedlots and other ranchers are all friends and neighbors, are they not? You very seldom see a stranger in those parts, do you?

Mr. AGEE. They go about everywhere. They go to Texas and California.

Senator LAXALT. But the person you ordinarily deal with is someone that you know, is it not? He is ordinarily someone you have known for a long while, is he not?

Mr. AGEE. Some of the time, yes.

The last few years we have been getting in the low 30-cent-per-pound range for our cattle. My father was getting that 20 years ago. Imagine if you will today's expenses with the income of 20 years ago. A few items can show you the cost increase we are facing. In 1971 we brought a piece of haying equipment. It was an International windrower that cost $6,000. Today I should replace that machine. The same basic machine is now priced at $15,000. In 1972 gasoline was costing 32 cents. This summer I had to pay 58½ cents. Government fees have soared. The 1968 grazing fee was 33 cents per AUM; now it is $1.51. The neighboring ranches' grazing fees have gone from $6,000 to $23,000 in 9 years. Basically, everyone knows how prices have increased over the last few years. Everyone knows an income of the fifties will not cover 1977 expenses.

The losses we have incurred over the last few years have been astronomical. Yet, a breeding herd of living animals cannot be shut down like an assembly line and restarted when prices improve. In 1972 we owed $85,000 on our cattle. That debt was reasonable. Five years later we owe over a half of a million dollars. The cattle are valued at about one-half of the debt they carry. Only two things have kept us from bankruptcy. First, my wife was able to sell her family ranch and put the capital into our ranch. Second, there has been real estate appreciation. Infusion of capital and real estate appreciation are the only reasons the creditors have not already foreclosed. The equity that was built up by three generations has been practically destroyed in the last couple of years. My situation is not unique. Many friends have either sold out or may do so soon. My own family shows it. Three years ago I had four ranchowners among my relatives. One relative was forced to sell out; a second is now close to bankruptcy; a third went bankrupt last fall; and a fourth died of a heart attack partly caused by his financial distress.

Today, only one cousin and myself are left in the cattle business. So, in the last 3 years, 75 percent of my relatives have been driven out of the cattle business by low cattle prices. With all of this, we have been trying to understand what has been happening. Why are so many being forced out of business? We had suspected market manipulation but we could not be sure. Then, gradually through trade papers and becoming aware of litigation in California, a pattern emerged. We came to understand that the big retail food chains, with their huge buying power and other means, were controlling and manipulating the prices. After coming to this conclusion, we did not know what to do. We went to our local lawyer for advice. What finally evolved was that many ranchers of northern Nevada joined together and hired an antitrust lawyer. Economic studies showed that prices were still being fixed. We then proceeded with legal action. We have suffered grave losses and damages. We had hoped that the action would stop the price fixing. We are now told that our case may be in jeopardy due to the recent Supreme Court case.

Senator LAXALT. Has it really changed the pricing structure of the supermarkets since you brought your action? Have you seen any difference at all?

Mr. AGEE. No.

Senator LAXALT. It has not stopped them at all, yet?

Mr. AGEE. We have not noticed any.

NEED FOR S. 1874

If this is so, we have no remedy left to us. Not only are we prevented from recovering past losses and damages, but we have no legal recourse to stop price-fixing in the future. It is clear to me that the cattle industry and agriculture, in general, must have legislation that will enable us to stop price manipulation, now and in the future. We need a free, fair market for our livestock. Without this, there is no way other ranchers and I are going to be able to continue to produce beef for this Nation.

Senator LAXALT. I thank you for an excellent statement. We needed a breath of fresh air here in the chamber.

May I ask a question here?

Apparently your understanding, Mr. Agee, is that unless some relief comes from us, you will not have any relief. Apparently this is important to the industry and producers like yourself.

Perhaps I should ask Mr. Vaughan this. Are you left totally without a remedy, or could you proceed with class actions under the rules?

Mr. VAUGHAN. I do not see how you could distinguish a class action, that is, distinguish the *Illinois Brick* case, from an individual action.

Senator LAXALT. Do you think it would apply equally well?

Mr. VAUGHAN. It is the same thing. We are still about six or seven steps removed from the guy who is price-fixing.

Senator LAXALT. Thank you.

Mr. Peterson?

STATEMENT OF BURKE PETERSEN, RANCHER, EUREKA, NEVADA

Mr. PETERSEN. My name is Burke Petersen. My wife and I are owners of the Eureka Ranch Company, which is in Eureka, Nevada.

Our ranch operation is one of the largest in our area. I grew up on a ranch and have been ranching and in the banking business most of my life. In the development of my current ranching operation, I have had ranches in Iowa and Montana before buying the ranches that I have in Nevada. I am familiar with the economic varities in these respective areas. I formerly owned controlling interest in three banks, but I have liquidated my interest in these banks to sustain my ranching operations.

While I have been successful in my other business ventures in my ranch operations, I have sustained losses in each of the last 4 years. These losses have range from $250,000 per year to in excess of a $1½ million. As compared to Mr. Agee, who sells yearlings, we run a cow-calf operation. Our current cost-of-production is 53 cents a pound for calf beef at the 400-pound weight level. This cost includes fixed and variable expenses. We are currently selling a 400-pound calf for 38 cents per pound. Therefore, we are sustaining a loss of approximately 15 cents per pound on our current production.

This beef ultimately reaches the consumer through a complicated subsequent chain of sales. Usually an independent buyer purchases from me, then resells to a feeder. Several feeders may own and feed them before they are sold to a finishing lot. The finishing feedlot then sells to a packer who sells to the chain stores, who are sellers to the ultimate consumer. The chain of sales is further complicated by speculators purchasing in at any level. I am advised by my experts that the price that the retail chain is willing to pay is, in large measure, responsible for the ultimate price which I receive.

I love the ranch as a way of life, and I have been fortunate to have had sufficient resources from the liquidation of my bank stocks to sustain the on-going operation of my ranching business. Many of my neighbors have not been as fortunate as I have and have either terminated operations or are on the verge of terminating them.

RANCHERS SEEK CHANCE TO PROVE DAMAGES

Keep in mind that we do not ask Congress to resolve the complicated situation of beef from producer to consumer as it affects the price we receive. We only ask that we be given the right to prove to a court of law how much we are damaged.

I believe that Senator Kennedy's bill, S. 1874, will accomplish that. I wish to thank you for this opportunity of expressing myself and participating in these hearings.

Senator KENNEDY. That is impressive testimony.

The people up there in Massachusetts in the milltowns are paying about a 300 or 400 percent increase in meat in the last 20 years. The people I represent want to see you people get a fair price. There is absolutely no question about that. What is clearly happening is that through this market manipulation and speculation, we see that you people are getting squeezed in the most insidious way. It is tough enough, I imagine, to deal with the weather, but I suppose it is not any different than people in Massachusetts who are facing the elements of the sea. There is good weather and bad weather. An awful lot of people are not prepared to deal with this uncertainty, but to also have

to deal with market manipulation through price-fixing, is really intolerable.

You people are the ones who feel it and see it and smell it. You understand it. You should be assured of a remedy. That is the underlying theme of this legislation. It seems to me that these are the persuasive reasons for its enactment. You are not interested in seeing the courts overburdened or whatever. Mr. Vaughan mentioned the ability of judges to be able to move the situation along and consolidate various questions.

As Mr. Shenefield pointed out, the efforts that are being made to consolidate these actions are there. But the underlying theme is to get protection for you people.

Let me ask this, Mr. Agee, what is happening to those other ranchers? Have the lands been sold to large operators?

Mr. Agee. In my immediate area, we have one ranch which is smaller and two ranches which are larger than I am.

Senator Kennedy. Mr. Peterson, what has happened to those people who have gone?

Mr. Peterson. It happens to be an industry that has been romantically attractive to many people. Fortunately, we have had an industry where some have retired from business in Denver or San Francisco and they have decided to get lost in Nevada. They buy a piece of land. Most of the larger operations have been divided into smaller ranches or have become a retreat. This is the sad part of it. Many ranchers sit idle today. Eventually maybe that will help our business as a whole.

I do not think I have any feelings that our ultimate goal in this country is to keep the price of beef down so the consumer can enjoy a nice piece of beef. I hate to hear statements to the effect that some supermarkets' meat department accounts for over one-half of their net profit. I hate to see ourselves and the consumer used that way. That is the attempt that we are trying to use.

Senator Kennedy. They are trying to whiplash you against each other, are they not?

Mr. Peterson. That is right.

Senator Kennedy. Basically, that is wrong. It is enormously complex, of course. I plead a good deal of ignorance about it. But you do not need a roadmap to know that you people are being ripped off, quite frankly, by the existing system. I hope that we can do something for you.

I would expect this. I would expect that what is being reflected in your operations is true in other areas of the country with regard to ranchers. I am sure that the story you told this morning could be told by your neighbors and friends.

Mr. Agee. We have over 140 who have gotten together on these cases. Yes, the same story would be there.

Senator Laxalt. I would like to thank Senator Kennedy for inviting my constituents here. He has exhibited today a special understanding of our Western problems. We do not always agree. I am thinking of making him an ex-officio member of our Western Coalition.

[Laughter.]

Senator Kennedy. The one thing that we understand in our part of the country is that you cannot sell shoes unless you have prosperity

in the rural areas of the country. You cannot sell machine tool products and the other kinds of products in the industrial areas unless you have prosperity. We do not sell those products to the conglomerates who do not employ people.

Our prosperity, to a great extent, depends on the prosperity in the other parts of the country. That is axiomatic. That is terribly important. It is related to a number of factors. Many people are denied an opportunity to work in these areas. Through no fault of their own, they are going to be under siege by all kinds of complications.

The strength of our country is out there in the rural parts of the country and we must permit the industrial base areas of our country to be prosperous by having them interrelate. Where there are these distortions and where you have these manipulations which work to your disadvantage, then they work at our disadvantage as well. We will try to deal with them.

Senator LAXALT. It is terribly important to have the Ted Kennedys' of the world express that, too, because I know we, in the West, feel that we are fighting this battle by ourselves. With Senator Kennedy's assistance, I think we can make some progress.

Senator KENNEDY. Thank you, gentlemen, very much.

We now have Mr. Clark S. Willingham. Welcome and please proceed.

STATEMENT OF CLARK S. WILLINGHAM, FEEDLOT OWNER, TEXAS

Mr. WILLINGHAM. My name is Clark Willingham. I own interests in farming and ranching activities and cattle feedlots in Oklahoma and Kansas. In our feedlot operation, we take the cattle that you just heard about in Nevada and feed them a nutritionally balanced ration, basically of feed grains, but also we add protein supplements.

Among the protein supplements is molasses. Because we are, in effect, an industrial consumer of molasses, we became involved in the sugar antitrust suit currently pending before the Northern District of California. There have been over a dozen classes already certified by Judge Boldt in the sugar litigation, one of which is molasses users, such as ourselves. The case has been going on since late 1974. There has already been a settlement offered to several of the classes for some $25 million. While the settlement offer does not prove antitrust violations, the size of this one leads us to believe that we have merit in our lawsuit.

Our feedlots purchase molasses from the Pacific Molasses Co. and other wholesalers and brokers. We do not purchase directly from Holley, C. & H. and the other big sugar manufacturers. They are the defendants in the sugar litigation.

Ten days ago, some 4 weeks after the *Illinois Brick* decision, our feedlots received one interrogatory and request for admission to admit whether or not we have ever purchased molasses directly from any of the named defendants.

Senator KENNEDY. As I understand it, you are saying that other claimants, similar to yours, have received generous settlements, is that correct?

ILLINOIS BRICK WILL RESULT IN DISMISSAL OF LAWSUIT

Mr. WILLINGHAM. Yes. I think there are 13 classes which were certified. We were advised by the Northern District of California that if we had ever sold molasses or ever purchased molasses, that we should be involved in the class. This is already a class action that started in 1974.

There have been settlement offers that still are pending, I believe, in three of the other classes, not in the molasses suit in particular. Since the *Illinois Brick* case, the defense counsel has quite wisely asked for admission that we do not deal directly with any of the named defendants.

Obviously, the defense counsel feels that this puts an end to the litigation.

Senator LAXALT. Have they filed a motion yet?

Mr. WILLINGHAM. As soon as they get our admission that we have not dealt directly, then that will be the next step. If they are correct, even though there apparently is an antitrust violation in this case, we will not be able to recover simply because we did not purchase directly from the defendants.

DIRECT PARTIES MAY NOT SUE

We are not asking you Senators to pass on whether or not there was a violation of the law. Like the cattlemen, we simply wish the opportunity to go to court and have a fair judicial determination. The previous testimony has already pointed out the obvious reasons why the wholesaler or broker is not going to turn around and sue his supplier.

Senator KENNEDY. Is that true in your industry also?

Mr. WILLINGHAM. Yes.

Senator KENNEDY. Why?

Mr. WILLINGHAM. We are dealing strictly with brokers. Somebody like Pacific Molasses does not do anything other than gather the molasses. It is a byproduct of the sugar manufacturing industry. They sell it to industrial users, such as the feedlot industry. This particular lawsuit involves feedlots in Texas, New Mexico, Kansas, and Oklahoma. They have been purchasing molasses at highly inflated prices. Even if the brokers sue and win, they are not the ones who are damaged. They simply pass the higher prices on to us. So, we are the injured party. But we are not the ones who recover.

S. 1874 is a very short bill which simply, in effect, adds "indirectly" to the Clayton Act. We think it is an important word to be added. We think it is also extremely important that section 4 of your bill, as it is now written, keep the effective date as it is because of the pending litigation. If we do not have it, in effect, retroactive, then all the existing litgation would be thrown out of court on a technicality and not really decided on the merits.

Thank you.

Senator KENNEDY. Your feeling is that the direct purchasers would not sue?

Mr. WILLINGHAM. Yes, they have not.

Senator KENNEDY. They have seen other recoveries take place. It has amounted to millions of dollars. Is that because of the nature of the supplier relationship and they do not want to antagonize their suppliers?

Mr. WILLINGHAM. Yes. I think that is the main situation.

We are also among the plaintiffs in the suits against the supermarkets. Our family is. We have been in the cattle business since 1884 in the Oklahoma Panhandle. When the *Bray* case was decided in San Francisco, none of the packers sued the supermarkets. That was proved there. If they are inclined to sue, they were the ones with the direct contact, I think they would have at that time.

We do not feel that we have any procedural remedy in either the sugar litigation or the supermarket litigation because you really cannot bind the packers who are the direct participants with the supermarkets, as an involuntary party and get a satisfactory solution.

DIRECT PARTIES COULD BE COCONSPIRATORS

We cannot have them join us. If we had to prove a conspiracy on their part, they will not be willing defendants. Yet, we would be in a position of having to prove that they conspired all the way down the line with the supermarkets. Once the court decides that they did not conspire, then they would not be an indispensable party. They would be thrown out and we would lose under *Illinois Brick*.

Senator KENNEDY. Your testimony reinforces the testimony we have heard earlier. We express our appreciation to you. Are there other people in similar circumstances to you?

Mr. WILLINGHAM. Oh, yes. In the cattle industry, there are. The sugar suit is somewhat unique. We do not have any problem with the antitrust violations in buying grain from neighboring farmers. Basically we are feeding the feed stuffs that we grow and that are grown by our neighbors. But in this one unique instance where we are purchasing molasses as a byproduct, we are the little guy there by far.

Senator KENNEDY. Thank you very much.

[The prepared statements of Robert Vaughan and Dirk Agee follow:]

PREPARED STATEMENT OF ROBERT O. VAUGHAN

My name is Robert O. Vaughan and I am a country lawyer practicing in Elko, Nevada, which is a city of 8,000 or 9,000 people situated in the northeast corner of Nevada and serves as a marketing and professional center for that part of the State. A basic industry of that area is cattle ranching.

I appreciate the opportunity to appear before the subcommittee. I speak on behalf of 143 of those ranching operations and the 5 local law firms who are representing them in an antitrust suit against the major supermarket chain stores. I hope to be able to demonstrate to you that it is essential to the economic survival of those ranchers, and ranchers similarly situated, that the bill to restore effective enforcement of the antitrust law, be passed and that it hopefully will be passed without delay.

The antitrust action to which I make reference is entitled, *Agee, et al.* vs. *Safeway, et al.* and is one of 12 cases presently consolidated for pretrial proceedings at Dallas, Texas. Any adverse rulings based on the *Illinois Brick* case, will also adversely affect hundreds of other beef producers who are plaintiffs in the other cases.

The *Agee-Safeway* case is a perfect example of the enforcement of the antitrust laws through the private Attorneys General concept. It is a case of individual, independent businessmen, cattle ranchers in this instance, proceeding on their own to enforce the antitrust laws, stop the supermarket chains practice of price-fixing and obtain for their product, a free market and a sufficient price to earn them a livelihood.

The *Agee-Safeway* plaintiffs are hard-working, independent and dedicated to their industry and their way of life. The ranches involved are primarily family ranches with very little outside or large corporate ownership. The ranches have existed successfully through a number of generations since the 1860's, 70's, and 80's. During recent years they have been placed in extreme financial jeopardy by reason of fact their operating costs have continually risen and beef prices have dropped, whereby they are sustaining tremendous annual operating losses. Details as to the extent of these losses I leave to witnesses Dirk Agee and Burke Peterson.

While there is much discussion and many theories as to why beef prices at the ranch level are low, at least the *Bray* case, decided in the Federal District Court at San Francisco, proved that one of the reasons, if not the primary reason was that certain of the supermarket chains were conspiring and fixing low prices.

Most of the cattle raised by these plaintiffs are not initially sold to supermarkets, but we are sold to order buyers who buy them for feeders, one or several feeders may own them before they are sold to feedlot operators for finishing, after finishing they are sold to packers who slaughter them and sell most of their product to the supermarket chain stores. Therefore, price fixing at the supermarket chain level filters back through the packer, through the feedlot operator, through the feeders to the producer who bears the brunt of the fixed prices.

These plaintiffs are represented in their action by their regular local attorneys, the attorneys who do their year by year work, handle their water rights and range problems, do their real estate work, and work out the planning as the ranches pass from generation to generation, or sell as the case may be. The attorneys are not called upon to handle very much rancher litigation, as the ranchers are not prone to be litigators. It is not their nature. Those law firms are by name Evans & Bilyeu, Wilson, Wilson & Barrows, Ltd., Ross P. Eardley, Jack B. Ames, and my firm which is Vaughan, Hull, Marfisi & Miller, Ltd. I say with pride, and Senator Laxalt will confirm that these firms are very capable and highly ethical. Of the five firms, four of them carry the AV rating which is the highest Martindale-Hubbell rating and one sole practitioner carries the next to highest rating, not having been in practice long enough to carry the highest rating.

The local attorneys are not antitrust lawyers, have not before been involved in antitrust litigation and probably will not be again. They are in *Agee Safeway* because their clients have a problem.

These ranchers, upon hearing of the decision in the *Bray* case, where certain of the supermarket chains were found to have conspired and fixed prices, sought relief in the matter. They joined with their neighbors to share costs, and through their local counsel retained an experienced antitrust lawyer. An economist was consulted who advised that in spite of the jolt that the *Bray* case gave the supermarket chains, that the practice of price fixing was continuing.

Based on the *Bray* case, the advice of the antitrust counsel, and of the economist, the ranchers proceeded with an action. When the case consolidated with the other beef cases, the position that the case had considerable merit became fortified by reason of the fact that in the other cases, other economists, through independent studies were coming to basically the same conclusions, that is, that the supermarket chains were continuing to fix prices.

These people, of course, do not ask that you make the decision that the price fixing exists, they want only a chance to prove their case in a court of law.

Considering that a purpose of the antitrust laws, was to create private attorneys general, it is interesting that a great portion of the ranchers who proceeded in the *Agee-Safeway* action expressed their motivation as being that of wanting to stop the price-fixing to enable them to have a free market for their beef, rather than any particular concern about how much they might recover by way of judgment. For that reason, a subsequent remedy sought is that of injunctive relief against the price fixing.

Considering the complexity of the cases, the *Agee-Safeway* case and the other cases with which it is consolidated is processing through the court on a reasonable basis. The cases are before an excellent Federal District Court Judge who has given full consideration to each issue raised by motion, and renders decisions promptly. I suppose any movement in the case at all is to be commended considering there are at least 12 antitrust law firms involved on behalf of the plaintiffs and at least 52 law firms involved on behalf of the defendants.

If the *Illinois Brick* case is held to be the law of the beef cases, and bill S. 1874 is not passed, I can see that there is a likelihood that the Judge in Dallas, Texas may very well grant defendants' motion for judgment on the pleadings, which is pending, and to be heard on September 28, 1977. If that happens, our rancher clients in the *Agee-Safeway* case, as well as others, will be left totally without remedy in the matter, and will have no way that I know of to enforce a free market whereby they can obtain an adequate price for their product to stay in business.

Another aspect of the *Illinois Brick* case decision which needs your consideration and requires the passages of this bill is that if that decision were applied to the beef cases, it would mean that in most instances the only parties who would have an action against the supermarket chains would be the packers. The supermarket chains, being their best customers, you can see that they would be very reluctant and would probably not bring such an action. The further aspect of this is that the packer may very well pass on the low price as set, and would not have damages.

An example of the reluctance of a party to sue his best customer has arisen in the *Agee-Safeway* case. Two of the plaintiffs in the *Agee-Safeway* case sell to packers. There has developed evidence that the packers might be coconspirators with the supermarket chains. If this were true, then these two clients potentially have a claim against the packers. When they were asked if they wished to give this any consideration, they replied that they would have no part of such an action, as the packers were their best customers and they would not want to be subject to any retaliation that their customer-packers might exercise.

While I come to speak on behalf of cattle ranchers who produce beef, I recognize that you gentlemen have the responsibility of looking at all aspects of the proposed legislation. It is my opinion that if bill S. 1874 is adopted, the activity in the antitrust field will be just about the same as it has been, as prior to the *Illinois Brick* case, most practitioners assume that anybody damaged was in a position to bring an action, regardless of whether or not his transaction was directly with the price-fixer. Therefore, I do not believe the passage of the legislation will create significant additional antitrust litigation. On the other hand, if the *Illinois Brick* case is to remain the law, you can see that antitrust litigation may very well come to a standstill, leaving damaged parties without remedy.

May I humby suggest that the multimillion dollar corporate giants can well take care of themselves, and that the small independent businessman, who only asks that he have a free, fair and unfixed market for his product be given a helping hand, by the passage of bill S. 1874, which will permit him access to the courts to protect his rights.

Thank you for your consideration.

Prepared Statement of R. Dirk Agee

My name is R. Dirk Agee. My family and I live on and own Twin Meadows ranch in a remote part of northwestern Nevada. I raise cattle. I am the third generation that has lived and worked on this ranch. My family has been in the cattle business in Nevada for over 100 years.

I have lived on this ranch all my life except while attending the University of Nevada and while serving with the Army Corp of Engineers in the Far East. After the death of my father I was released from the service to take over management of the ranch for my mother. Now married, my wife and I are buying the ranch from other members of the family. We work the ranch as a family. The children ride and work in fields along with my wife and me. I consider my ranch and family typical of Northern Nevada.

The ranch itself is located in high desert mountains. The elevation runs from 6,000 to 9,000. It is 80 miles to the closest small town and 115 miles to a town

large enough to provide repair parts and supplies. The last 40 miles is all dirt road. The ranch is made up of privately owned land and leased public grazing lands. In the summer the cattle are ranged on the public land, which we totally depend on for summer feed. During the time the cattle are on the public grazing we are producing hay on the privately owned land. We have to irrigate the wild meadows and put up enough hay to feed the cattle through the winter. In the fall, the cattle are brought into the meadows for the winter. Winter often comes early and I have seen temperatures of 50 degrees below zero with deep snow, while other winters are mild.

Most of the cattle on Nevada ranches consist of a breeding herd of mother cows. From this herd we sell the offspring and cull the unproductive and old cows. Some ranchers sell the calves in the fall as weaners. Others hold the calves another year selling them at about a 1½ years of age. The cattle are known as yearlings. Our ranch is a yearling operation. Most Nevada ranches sell their cattle the same way I do. We sell in the fall when the cattle are in the best condition. The cattle buyers come to the ranch to look and try to negotiate a price. The negotiations are usually on fractions of a cent and on weighing conditions. We are forced to accept prices far below production costs. Last year we sold yearlings for 34½ cents per pound.

In most American businesses the businessman determines his cost, his return on capital and sets his price. The cattle business does not work like most American businesses. We take the price offered. If we had set the price of cattle we sold last year on a cost of production basis, we should have sold for about 60 cents instead of 34½ cents. Our cattle are usually sold and shipped either to a feedlot or to another rancher that places them on grass in another state. We have never dealt directly with the big food retail chains. There are many middle men in agriculture. Many adding a needed service or processing to the product. However, I believe a handful of big retailers ultimately determine the price I receive for my cattle.

The last few years we have been getting in the low 30 cents per pound range for our cattle. My father was getting that twenty years ago. Imagine that if you will with today's expenses with the income compared with that of 20 years ago. A few times can show you the cost increase we are facing. In 1971 we bought a piece of haying equipment. It was an International windrower that cost $6,000. Today I should replace that machine. The same basic machine is now priced at $15,000. In 1972 gasoline was costing 32 cents. This summer I had to pay 58½ cents. Government fees have soared. The 1968 grazing fee was 33 cents per AUM; now it is $1.51. The neighboring ranches' grazing fees have gone from $8,000 to $23,000 in 9 years. Basically, everyone knows how prices have increased over the last few years. Everyone knows an income of the fifties will not cover 1977 expenses.

The losses we have incurred over the last few years have been astronomical. Yet a breeding herd of living animals can not be shut down like an assembly line and restarted when prices improve. In 1972 we owed $85,000 on our cattle. That debt was reasonable. Five years later we owe over a $½ million. The cattle are valued at about one-half of the debt they carry. Only two things have kept us from bankruptcy. First, my wife was able to sell her family ranch and put the capital into our ranch. Second, there has been real estate appreciation. Infusion of capital and real estate apreciation are the only reasons the creditors haven't already foreclosed. The equity that was built up by three generations has been practically destroyed in the last couple of years.

My situation is not unique. Many friends have either sold out or may do soon. My own family shows it. Three years ago I had four ranch owners among my relatives. One relative was forced to sell out; a second is now close to bankruptcy; a third went bankrupt last fall and a fourth died of a heart attack partly caused by his financial distress. Today, only one cousin and myself are left in the cattle business. So in the last 3 years 75 percent of my relatives have been driven out of the cattle business, by low cattle prices.

With all this, we have been trying to understand what has been happening. Why are so many being forced out of business. We had suspected market manipulation but we could not be sure. Then gradually through trade papers and becoming aware of litigation in California a pattern emerged. We came to understand that the big retail food chains with their huge buying power and other means were controlling and manipulating the prices. After coming to this conclusion, we did not know what to do. We went to our local lawyer for advice.

What finally evolved was that many ranchers of Northern Nevada joined together and hired an antitrust lawyer. Economic studies showed that prices were still being fixed. We then proceeded with legal action. We have suffered grave losses and damages. We had hoped that the action would stop the price fixing. We are now told that our case may be in jeopardy due to the recent Supreme Court case.

If this is so, we have no remedy left to us. Not only are we prevented from recovering past losses and damages but we have no legal recourse to stop price fixing in the future. It is clear to me that the cattle industry and agriculture in general must have legislation that will enable us to stop price manipulation, now and in the future. We need a free, fair market for our livestock. Without this there is no way other ranchers and I are going to be able to continue to produce beef for this Nation.

Senator KENNEDY [continuing]. Our next witness is Mr. Harold Kohn, a lawyer from Philadelphia. Welcome, Mr. Kohn.

STATEMENT OF HAROLD E. KOHN, ATTORNEY, PHILADELPHIA

Mr. KOHN. Senators, my name is Harold Kohn. I have had the pleasure of testifying before your subcommittee over a period of some 10 years or so on many occasions. My pedigree is fully documented in your records, but I will briefly summarize it, particularly as it pertains to the problem before you now.

I have been at the bar some 40 years. I have been practicing in the antitrust field for a quarter of a century. I think I am generally regarded by the defense Bar as one of the primary plaintiff ogres whom they would like in someway to disappear. I am lead counsel now in approximately a half dozen of the major cases, including the sugar case that you just heard about. Over the course of the past 15 years, beginning with the electrical cases, I have been responsible for a couple of hundred million dollars of distributions both to direct and indirect purchasers and other persons who have been injured by violations of the antitrust laws. There is no doubt that my primary allegiance is to the vigorous enforcement of the antitrust laws. My firm is known for that. We have some 17 lawyers, including Jerry Cohen, who used to be associated with the committee.

SUBCOMMITTEE SHOULD PROCEED WITH CAUTION

I say that because I want to urge that perhaps the subcommittee can proceed with a little more caution than is manifested in the legislation which is pending now before you. I want to discuss with you some of the problems.

I think the problem that you face is a little more complex, and I think the solution must be a little more sophisticated than the three or four words that you have here by way of amendment. If it were possible, I would like not to lose the benefit to the enforcement of the antitrust laws which is derived from the certainty which follows from the opinion in the *Illinois Brick* case.

Hitherto, the defendants bar has enjoyed the practice of saying, depending on how the case lay, that the first purchaser, for instance, passed it on. However, since most of the recoveries are now today vindicated in class actions, they then contend the class action for the ultimate purchaser is unmanageable because he keeps no record of his purchases. He cannot tell where he purchased it and so on. It varies.

For example, if you have people who are selling cattle, obviously they have records. If, on the other hand, you have consumers who purchase sugar, then the question is where you stop. They have no records. So, I think one of the things I would like to preserve—and the only justification for the decision in the *Illinois Brick* case—is that that case gives us a kind of certainty. I think it is poor jurisprudence. I think very few lawyers or judges would defend it as a well-written or well-considered opinion or rule of law because the primary purpose of law is to achieve justice and to compensate those who have been injured. This obviously fails as a result of that opinion.

Senator LAXALT. Do you think the legislation was unsatisfactorily drafted?

Mr. KOHN. What you propose as a way of amendment now?

Senator LAXALT. No, the 1976 Act.

Mr. KOHN. The 1976 Act is not immediately concerned in the *Illinois Brick* case. What Justice White there was passing on was the basic right of action, which is vindicated either by the parens patriae device in the 1976 action or by individuals or ordinary class suits. I think he is thrusting at something more basic.

That is one thing I would like to see not lost. I think that we have to be careful the way the legislation is drafted not to go back abruptly to the situation where the defendants cannot argue that a particular plaintiff can or did not pass on, and the fellow to whom he passed it did not expeditiously maintain his litigation.

Senator LAXALT. On the basis that he has sustained no damage?

PROBLEM IS PROOF OF DAMAGES

Mr. KOHN. Yes, or he cannot prove his damage.

The problem that the Supreme Court passed on was not so much a problem of the antitrust law as it was a problem of proof of damage. It may have broader implications in the law. It obviously has broader implications in the antitrust field than the particular situation of the classic price fixing case which was immediately before it. What do you do, for example, in the boycott case where people get together and agree that they will not sell to somebody?

This decision may rub off ill or it may rub off well. We do not know yet. All I am saying is this. Let us study the thing a little more. I think the subcommittee is to be commended in getting to the problem immediately. What I would like to be sure of—and I have some interest in the law as well as in plaintiffs—is to be sure that what you will stand up and that you will not find 4 years from now that what you have done is abortive. That is the thing I am concerned about.

For example, you have in your proposed amendment a reference to a person who is injured "in fact" directly or indirectly. Unless somebody can persuade me that those two words "in fact" must be added to the law, I think you have given the defense bar a bonanza that they will litigate plaintiffs to death with for the next 17 years up and down to the Supreme Court.

They will argue that what has been added is a requirement that you have to prove to maintain an antitrust action that you did not have to prove before. There is the so-called "fact of injury," and "impact" which is an esoteric question which defense lawyers have made hay

with over a long period of time. I question whether that is necessary, for example. That is the sort of thing that requires a little more discussion between your experts and the other experts, the nongovernmental experts who are interested in this field.

I do not think Justice White says that an indirect purchaser is not directly injured by a violation of the antitrust laws. In other words, you are directly injured, or indirectly injured, rather. He did not decide that you were not injured. He was deciding that it was a matter of administrative, judicial convenience. Even though you are injured, you cannot collect. I do not want him 5 years from now, when this comes forward, to say that this adds nothing to the proof of damages, but all that is said is what everybody knew. In other words, I am trying to look forward beyond today and beyond what is the kneejerk reaction. I understand why everybody is offended by that opinion.

Senator KENNEDY. How would you word it?

Mr. KOHN. I have a number of suggestions. They do require further consideration.

Senator KENNEDY. You see the issue we are raising?

Mr. KOHN. Yes.

Senator KENNEDY. Help us drive at it.

Mr. KOHN. Everybody wants to get to the same place, but I do not want to find when we get there that we are in quicksand and that we have wasted 5 years. For example, you might look at it from the other way around. You might go to the legislation with respect to damages, which is really what the *Illinois Brick* case deals with, not the right of action under the antitrust law. You might say, for example, that the so-called benefits theory is what you are going to adopt. In other words, what benefits did the defendant derive from their antitrust violation? You would permit suit by any person who was injured or affected to recover for the benefit of the entire group of persons who were affected, the amount of those benefits obtained illegally by defendants.

In other words, the old legal theory of unjust enrichment is how much did the defendant gain by what he did, and not how much did the particular plaintiff, or a group of plaintiffs, lose as a result of what he did. It may be much more suspectible to proof. They may then put the fund before the court. Then everybody comes in who has an interest and endeavors to persuade the court as to what his respective share ought to be. That is one way.

I think now we have a golden opportunity and the need to consider that kind of remedy which courts have been speaking about. Law school professors and writers of law reviews have thought about it. That is one way.

Senator KENNEDY. Let me ask you this. If we follow that suggestion what happens to Mr. Agee? Does he have to go in and show then how much the supermarket chains actualy benefitted? Is that the burden he actually will have to carry in order to be able to follow your reasoning?

Mr. KOHN. He would simply show what the price would have been absent the conspiracy, as against the price they paid with the conspiracy. It is precisely the same thing which he must show now.

Senator LAXALT. It is the same standard.

Mr. KOHN. Let us say his beef sold at 50 cents a pound. Absent the conspiracy it would have sold for 60 cents a pound. Safeway supermarkets bought 10 million pounds. Multiply 10 million pounds by 10 cents, which is precisely what he has to show. But it is easier, in my opinion, to show it concentrated in the hands of the conspirators than it is to whack it up among the various plaintiffs with all their divergent interests if each has to prove what he suffered. That is what you are going to do if this bill is construed to mean what we all want it to mean.

Then, you would be right back in the situation where Safeway will say, "Well, Mr. Agee, you think you suffered some damage, but how about the fellow you sold it to? How much damage did he suffer?"

Senator LAXALT. How do you arrive at the distribution? Do you assume that everybody's damages are exactly the same?

Mr. KOHN. You do very much as you would, for example, in a bankruptcy where everybody files his claim, or very much as you do in a class suit.

Senator LAXALT. Mr. Agee then would come in and prove his damage?

Mr. KOHN. We have a number of situations where we obviated the necessity of proving damages. For example, in the gasoline case in the State of New Jersey where we got a recovery by way of settlement of some $30 million, it was distributed based on population of States and municipalities in that area.

Senator LAXALT. Was that by agreement?

Mr. KOHN. By agreement of all the parties.

Senator LAXALT. Did the States rebate that to the consumers or did they simply hold it?

Mr. KOHN. The States, in that case, used it for their own purposes. Obviously the State I come from—Pennsylvania—is hopelessly unable to balance their budget. That was the contribution to the budget which goes broadside throughout the community.

Senator LAXALT. We do not have that kind of problem here.

[Laughter.]

Mr. KOHN. In the *Quinidine* case, for example, where we recovered, the court in Philadelphia permitted it. We paid 100 percent to each claimant that bought *Quinidine* and made a claim: 100 percent of the purchase price. We had a few hundred thousand dollars left over. The Philadelphia court permitted us to distribute that to the Universities of Pennsylvania, Temple, and Cornell for *Quindine* heart and cardiac research. It is amazing. The research departments of those three universities have been able to obtain some amazing results on some $200,000. We report regularly to the court, which monitors the program.

I think that certainly was better than distributing another $1.15 to each of hundreds of thousands of people around the country. I do not say that any of these is the sole remedy——

Senator LAXALT. In the course of the gasoline case, was it determined that you distribute on an individual basis as to what it would amount to?

Mr. KOHN. The judge in that case refused to certify the consumer class on the basis that it was unmanageable. He said he would not be

put in a position of having people coming in and try to prove each ten gallons that they bought. But we did not appeal that finding. We kept it open. We negotiated a settlement which included the possibility that he might be wrong. It was distributed to the States which helped everybody in terms of roads and whatever. I am trying to show you that it is an opportunity to be much more imaginative and constructive than you may be in just these three words.

Also, you can cement this down so that you would not find that five years from now what you did was completely aborted. That is one of the things that may happen. Another way is this. You could simply take care of the minute problem which is covered in the *Illinois Brick* case and simply state right after the words "any person", in section 4: "Any person, including without limitation, direct or indirect purchasers from, or direct or indirect sellers to defendants."

Senator LAXALT. How does that vary from what we have here? Are you worried about the words, "in fact?"

Mr. KOHN. I am worried about the words "indirectly or directly injured." Also, I think it covers the thing you want to cover without possibly creating ripples which will hurt somebody later on.

Also, I think it may preserve the benefits of the certainty that you now have, by permitting the first purchaser to recover because it is nothing in there that sets aside *Illinois Brick*. I do not espouse it as anything particularly superior. I am merely showing you that there are alternatives which we want seriously to consider.

As I said before, it is good that the consideration has begun early. But I do not think you want to rush in with things that will not accomplish the job. I think we want to do it, but we want to do it so it stands up. I am afraid that the particular draft here may not do it because I can see this Supreme Court collecting five judges who will say that the amendment which says: "Any person who shall be injured directly or indirectly in his business can recover" is simply what the law always provided. It has nothing to do with the damage problem. So, while your heart was in the right place, your finger did not quite get to where your heart wanted to get when you wrote it.

You also have a lot of other problems that you have not focused on which are equally important to the effective administration of antitrust laws.

Take the boycott cases, for example. They have the rules that the owner of a motion picture theater, which is denied the product, cannot recover even though his loss is obviously on a percentage lease. If the leasee for some reason or other, happens to be a participant in the conspiracy and will not sue, then you have that problem. You have the problem as to whether stockholders can sue. You have the problems as to whether employees and other persons down the line can sue. This is undoubtedly a retrogressive decision in the field of damages. I think it has to be corrected. The Supreme Court itself invited the court to direct——

Senator LAXALT. Why do you feel it needs correcting?

ILLINOIS BRICK DECISION MOTIVATED BY ADMINISTRATIVE CONVENIENCE

Mr. KOHN. For several reasons. It offends me as a legal professionalist to see an opinion written which is not motivated by the desire

to achieve justice or which does not even put justice into the scales to balance it. It simply relies upon administrative convenience. It is very much like the Chief Justice going around saying that the "Courts are overburdened and we have to leave people out. We cannot handle all of our work." It is nonsense. They can handle all the work. They can manage all kinds of complex cases. I have been in cases with 50,000 claimants. If you have the will to manage it, you can. That is a bad judicial attitude. The courts have to be patient. They cannot be too much concerned about administrative problems. That is all the decision is.

Senator LAXALT. But what if you weigh that against minimal damages?

Mr. KOHN. It is not always minimal damage. For example, I have distributed a great deal of money to indirect purchasers. The direct purchaser would not sue because of the nexus of relationships in the industry. In many instances perhaps even the ultimate consumer does not sue. But somewhere in the middle you have somebody who does have a very real and substantial interest. Another example is the sugar case or the plywood case.

Incidentally, many of the plaintiffs in these cases are also defendants in other antitrust cases. It has now become respectable to make claims in antitrust cases.

I do a lot of defendants' work. They kid us and say that we keep respectable by representing defendants, but we keep our bank balance up representing claimants.

[Laughter.]

Mr. KOHN. There are a great many very respectable companies. We have public utilities. We have food chains. The very chains that you heard mentioned here as defendants in the meat case are claimants in the sugar case. They were claimants in the *Folding Carton* case. It has now become a case of proper corporate managers looking for the dollar wherever they can find it. You will not have situations where they will not be able to prove it just because they are indirect purchasers. They will be able to prove it, even though they are indirect purchasers. There will be large concentrations of funds that will be paid to them and will enable them, in turn, to lower their costs.

I think it is bad law, first of all.

Second, I think there are many situations where the direct purchaser will not sue. I think in those situations there is no reason why the indirect purchaser should be crippled and automatically barred from suing so that you have a bonanza or windfall to somebody who has admittedly violated the antitrust laws.

Senator LAXALT. The given plaintiff has only sustained a dollar damage. What if that can be demonstrated? How does it make any sense to go through all the burdensome activities in that instance?

JUDGES HAVE AUTHORITY TO RULE THAT CLAIMS ARE UNMANAGEABLE

Mr. KOHN. You are dealing with extremes. That is what I think should be left to the trial judge courts. The judge, for example, in the gasoline case that I had said that he was not going to permit the fellow who lost the dollar to recover, but that he would allow the taxicab company indirect purchaser or even newspapers and public utilities

who were indirect purchasers and who bought hundreds of thousands of gallons, and who could document their purchases to recover, because they were manageable. I say that a rule which does not permit the judge to exercise that judgment is bad. It is bad judicial administration. The judges will not permit people to do that. In the sugar case the judge refused to certify a class of ultimate consumers. He simply was not going to have a woman who buys two pounds of sugar every month try to come in and make a claim. But, he permitted all kinds of other indirect purchasers, like the Mom and Pop grocery stores. Also, a restaurant. All those people can collect. A government agency that supplies hundreds of pounds of sugar for prison, and that has records can collect.

Every lawyer worth his salt, at least on the plaintiff's side, would like to see that. He would like to see litigants have an opportunity to do that, instead of being barred. The Illinois decision says that even though you are second in line, if you can prove it, you still cannot come in. If you are first in line, then you collect even though you suffered no loss.

Senator LAXALT. Given Senator Scott's interpretation, which I gather placed no restraint on damage, would that create a problem in that a judge could not isolate the individuals who suffered damage? In the gas case, for instance, he excluded them because they were unmanageable and had not sustained sufficient damage. Is that not a problem on the other side of the coin?

Mr. KOHN. I do not want to get ultracomplex here, but there are three problems here.

The problem is: Do you have a right? Second, do you have any damage you can show in a court of law under the method whereby you have to prove damage? Third, is it manageable if you have a class action? For example, in some of these cases I have represented people who are big enough that they do not want to be part of that class action. In the sugar case, for example, I am representing supermarkets in the East who are suing on their own behalf, quite independently of the class. You do not have any problems of manageability.

In the West, I am representing classes which do invoke the problem of manageability. The person who has the one dollar claim is in a class by himself. That is in view of the parens patriae statute.

Senator LAXALT. Why do you think they are in a class by themselves?

PARENS CASES ARE MANAGEABLE

Mr. KOHN. Parens patriae now says the Government can go in and collect for all private individuals who have suffered damages. If we can find a way to word the statute so that we can show that they are damaged, or we can revert to the benefit theory, where the defendant benefits and injustly is enriched, then parens patriae people are no longer a real problem. These ranchers that you heard today have a problem. Parens patriae does not help them. Parens patriae only helps persons not engaged in business. I think that if we can find a way to show that they have a right to damages, then that is no longer much of a problem, even though the money really does not always get distributed to them. Sometimes it is better not to distribute it to them.

It is better to use it for them. I do not want to be too paternalistic, but there are problems of administration. It has worked out well through experience.

I would like the courts to continue to have that discretion and not rob them of it, because the courts have done an amazingly effective job, very innovative. Nobody has been particularly hurt by it. Everybody, I think, who has been hurt by the violations has been helped by these methods of distribution. So, I think something has to be done about the *Illinois Brick* decision. I think you are headed in the right direction. I think it is good to begin the inquiry. I think everybody knows what you want to do, but unfortunately there is a certain artificiality in judicial administration.

Just because you want to do it, and I know you want to do it, and if they do not want you to do it, it does not mean they are going to say that you did it.

[Laughter.]

Mr. KOHN. The five judges who wrote that could come up with any result they wanted to come up with. But let us not kid ourselves. I think you have to put it into words of one syllable that are subject to no misconstruction later on. At the same time while you have this under consideration, you want to be sure that you do not give away anything that we now have. I think also that you want to take into account the things that are not immediately before you, like what do you do with the people who have been boycotted? What do you do with the leasors of buildings and so on?

There is a whole gammut of things.

ANTITRUST LAWS OF CRITICAL IMPORTANCE

Then you want to be sure that the Round Table, or whatever they call themselves, and my good friend, Professor Handler, and the leading law firms in America do not use this takeoff point to gut the antitrust laws completely and come back with all the "blackmail" and that stuff: "Nobody ever gets any money. It is just a lawyers paradise. We do not need the antitrust laws. We are in competition with the British," and all that sort of nonsense. Once you open the gate you will get a full scale attack on the antitrust laws. You will have that pleasure. I have sat in these committee hearings over the past ten years or so. People can give you all sorts of arguments as to why General Sherman or Senator Sherman should never have been elected to the Senate. I think the antitrust laws are a very important part of the way of life in America. I think they are vital. I think we want to be careful that we do not open the avenues for their destruction, or do anything that is misguided. I have rambled here longer than I intended to. I simply say I would like to be able to participate and to deal with something that will turn the *Illinois Brick* case into an opportunity to move the antitrust laws forward and not result in something which we find five years from now was simply illusory.

Senator LAXALT. You have been extremely helpful to me, but let me ask one last question. Do you think that the *Illinois Brick* case effectively guts the Clayton Act?

Mr. KOHN. No. I think you have to be candid. While I am a partisan, I try not to be a blind partisan. It does not gut the antitrust laws.

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

I am a little concerned also about what it will spawn hereafter. We will have this principle that you will have to be an immediate contact with the fellow who violates the antitrust laws before you can recover. I wonder how this will rub off in other situations. For those reasons. I am very much concerned. I think something has to be done about it.

Senator LAXALT. Do you see any merit in that decision at all?

Mr. KOHN. There are some people who think that to the extent that you can achieve certainty, that is a merit. In other words, law. or the administration of justice should make it easier to come out with a decision. It has something to be said for it. You can flip a coin. That would also get rid of the backlog very quickly. By and large it would not do much more injustice or much less justice than we get now. You could put it through a computer.

It is that kind of automatic feeling, that the judges are too busy to be judges. I think that is bad. I think that is a bad way to approach it. It is a heartless kind of judicial administration. I do like the one thing about it, which is that somebody can now come in and recover the full overcharge without being whipsawed back and forth. That is what I would like not to lose. This is an imperfect world. You cannot keep everything and give up nothing. So there will probably have to be some kind of a compromise with that.

But that I think is where we go if you analyze it. I do not know of anybody—even the defense bar is really not that delighted with it because they see the dilemma they are now going to face as to how you get rid of the direct purchaser and his 100 percent claim. They do not have the luxury of saying, "Well you passed it on, so you ought to compromise."

Everybody wants to see that decision gotten rid of.

Senator LAXALT. Is not the effect of *Illinois Brick* that the defense cannot claim the plaintiff suffered no damage because the plaintiff passed the price increase on?

ILLINOIS BRICK DENIES BONA FIDE CLAIMANTS RIGHT TO RECOVER

Mr. KOHN. If I read *Illinois Brick* as I think I read it, then I think it now means that if the first purchaser can show that the overcharge was 10 cents, then he collects the whole 10 cents, even though everybody knows that he passed it right on. As a matter of fact. in some instances, he benefitted from it because he added his usual markup to it, so that he gets 10 percent increase in the markup. I do not think that is right, although I represent a lot of direct purchasers.

Senator LAXALT. Giving direct purchasers standing can be justified on the basis that price-fixers are then punished; is that right?

Mr. KOHN. That is correct.

The problem there is that you are going to punish fewer price-fixers if you leave it to their bosom buddies to bring the suits against them.

Senator LAXALT. Thank you.

Senator KENNEDY. Our next witness is Eleanor Fox. She is a law professor at New York University. She has testified before us previously.

STATEMENT OF ELEANOR FOX, PROFESSOR, NEW YORK UNIVERSITY

Ms. FOX. Thank you, Mr. Chairman. I am happy to accept your invitation to testify today on S. 1874.

I support S. 1874 in principle. I will discuss questions in the draftsmanship at the end of my remarks.

ILLINOIS BRICK DENIES BONA FIDE CLAIMANTS RIGHT TO RECOVER

I believe that *Illinois Brick* is wrong and should be overruled. The ranchers and meat producers, made a good case for it. The person actually injured by an antitrust violation should have a right to recover. Questions of court administration are totally different questions, which can be handled as matters of court administration. The effect of *Illinois Brick* is to deny bona fide claimants the right to be compensated for clearly inflicted antitrust injury, and, at the same time to remove one of the most important deterrents to antitrust violators.

ILLINOIS BRICK THREATENS VIABILITY OF PARENS

These effects are particularly disturbing in light of three facts, all of which have been mentioned here today: One, the person who suffers the greatest injury and is very often the person not in privity with the violator. Second, the person in privity very often has a business interest not to sue; and third, consumers often bear the brunt of antitrust violations. They pay billions of dollars in overcharges every year. Before the Hart-Scott-Rodino Act, there was not an effective consumer class remedy because of the prohibitive costs of notification. The Hart-Scott-Rodino Act provided what seemed to be an effective remedy against antitrust violators on behalf of consumers. *Illinois Brick* threatens the viability of the parens patriae part of that act.

We also, of course, face the reality that by decreasing deterrents, violations will increase. In addition, *Illinois Brick* will have the perverse effect of encouraging persons in privity, but who are not, in fact, injured to sue for windfall profits. These are the reasons why I conclude that *Illinois Brick* should be overruled. I ask why should it not be overruled. I know there are several justifications that have been offered in support of the case. Two of these pose problems that I think should be dealt with and can be dealt with in other ways than preventing the injured party from recovering, and at the same time, would be fair to the defendant. These two alleged justifications are, number one, the dangers of multiple recovery, and, number two, *Hanover Shoe*, which I think should be faced directly in connection with this bill. As we know, *Hanover Shoe* denied the defendant, United Shoe Machinery, the right to assert pass-on as a defense.

PREVENTION OF MULTIPLE RECOVERY

Multiple recovery against the same defendant for the same violation is wrong and should not be allowed. However, it can, in general, be prevented by existing law and procedures. Mr. Shenefield mentioned a few of these. They are well known. We have ways to coordinate proceedings, including statutory interpleader. Doctrines of res judicata and estoppel may be applicable. Statutes of limitations help because they assure us that lawsuits will be brought within a relatively short period of time. One of the best safeguards against duplicative recovery is the recognition that the plaintiff should be required to prove injury to it in order to recover. If the plaintiff cannot prove injury to itself——

Senator LAXALT. Injury to what extent?

SUBSTANTIALITY OF INJURY

Ms. FOX. It is the plaintiff's burden to show injury. There are two classes of cases. One is that in which the plaintiff has a clearly substantial injury that would justify one's own lawsuit. The other is the case that you have been mentioning, where the plaintiff may be injured in the amount of a dollar's worth. Let me preface this by saying that I do not think you have to deal with problems of insubstantial injury in connection with *Illinois Brick*. I agree with Mr. Kohn that there can easily be a limited amendment that does not even raise this problem and that does not rehash the wisdom of the parens patriae act. My own recommendation would be for a limited amendment.

Of course, those persons in the first category who are injured, to a large extent, will sue for themselves. That is not a problem. Whether you allow a person injured in the amount a dollar to recover does present a separate problem. My own view is that where consumers, let us say a million consumers, are injured in the amount of a dollar each, they ought to have the right to sue.

PARENS PROVIDES AN EFFECTIVE CONSUMER REMEDY

The parens patriae amendment provides a reasonable, coordinated way for them to do it. They can do it through the state's attorneys general. I favor that procedure because I think it is preferable to deprive a violator of his illegal profits.

I turn now to proof of injury. Leaving aside the special procedures of the parens patriae amendment, I think that a plaintiff, should be required to prove its injury.

In other words, I do not think that the defendant should be barred from challenging the fact that the plaintiff has borne and not instigated the injury inflicted on it. Each plaintiff must sue for its own injury. It should not recover for the injury of anyone else. Every plaintiff at every level can sue for a different injury. Each one has the burden to prove its own injury. If injury to a particular plaintiff is so remote and speculative that the plaintiff cannot carry the burden of proof, then the plaintiff loses.

Senator LAXALT. If it is unmanageable, as Mr. Kohn indicated in the gasoline case, what do you do with those?

Ms. Fox. I do not like to think of a category of unmanageable cases. Each injured plaintiff has the right to be in court.

The question is: How do you manage a case if it is very big? I would not simply say that the case was unmanageable and throw up my hands. There are judicial administration problems, but they must be dealt with in the best way possible. It could be through coordination. It could be through an intervention. It could be through joinder of the parties.

PASS-ON ISSUE

On the point of *Hanover Shoe*, which I mentioned as the second justification for *Illinois Brick*, I do disagree with Mr. Kohn. I do think that, although it is simple and nice to say that the first plaintiff always has the right to recover the whole amount, I do not think that is fair to the defendant. Also, I think it is contrary to all of our rules of proof of injury. I think the plaintiff should be required to prove injury.

In other fields of law we see concepts of mitigation of damages. Plaintiff cannot recover the whole amount of the damage inclusive of what the plaintiff has passed on by mitigation.

Senator Laxalt. Do you agree with Mr. Kohn that the practical effect of *Illinois Brick* is that you can recover irrespective of the fact that it may have been passed on?

Ms. Fox. It does not read specifically on that, but the implication is that. I believe, incidentally, that the whole concept of pass-on has been blown up into a concept that confuses us. The language of "pass-on" dignifies the concept and obscures the fact that all we are really talking about is proof of injury and proof of damages. If the plaintiff proves its injury it wins. If the defendant proves that the plaintiff did not really suffer that injury, then the plaintiff does not win.

There has been another justification for *Illinois Brick* which is that the privity cut-off is necessary for manageability. I have mentioned this in passing. I agree very much with Mr. Kohn that the complexity of the plaintiff's case should not be a reason for denying an injured party access to the courts. Many cases are complex. Monopoly cases are complex. Proofs of damages in monopoly cases are enormously complex. But we do not shut the door on plaintiffs who bring antitrust monopoly cases for that reason.

PROBLEMS WITH S. 1874 AS ORIGINALLY DRAFTED

Let me come now to some observations. I believe *Illinois Brick* should be overruled. Let me speak to how it should be overruled. I think the bill, S. 1874, is an acceptable bill. It does clearly overrule *Illinois Brick*. However, it does have some problems. It can be construed by the courts as doing much more than overruling *Illinois Brick*. It could be read to suggest that injury in fact as opposed to antitrust injury is recoverable. It could suggest that any indirect injury, no matter how remote, is recoverable.

Finally, and I think this is one of Mr. Kohn's points, it could undercut the parens patriae act. It says, All plaintiffs must prove injury in fact." It might reflect on the parens patriae provision act giving a right of a recovery without specific proof that all of the perhaps

millions of consumers were injured. I would suggest that Congress simply overrule *Illinois Brick.*

I would suggest that you add to section 4, 4A and 4C of the Clayton Act, the words, Lack of privity with the offender shall not be a bar to recovery."

This leaves open the problem of *Hanover Shoe*, because I have indicated that what is good for the plaintiff should be good for the defendant. I think that *Hanover Shoe* should not be overruled but limited. *Hanover Shoe* was a pro-plaintiff decision. It has been used as a defendant's decision by the court in *Illinois Brick*. It was a decision that turned very strongly on the fact that there was not an adequate consumer remedy.

Under those facts where it was clear that the defendant would not be paid anything unless it paid all to the plaintiff, the court denied defendant's claim of "pass-on." So, I would leave *Hanover Shoe* intact but limit it to its facts. I would say so in legislative history. I do not think it is necessary to have a statute overruling it. Thank you.

Senator KENNEDY. Do you think that we should just change the bill in terms of the words you have mentioned; is that right?

Ms. FOX. I do. I think this reaches all the objectives without creating the ripple effects that Mr. Kohn spoke about.

Senator KENNEDY. If a direct purchaser recovers full damages from a seller, even though the purchaser passed on the overcharges, can consumers have a legal action on a constructive antitrust ground?

Ms. FOX. I suppose that could be made out, but I would not like to see it left to be worked out. I supose there is a good case that could be made for it.

Senator KENNEDY. I suppose that is one of the complexities raised by the case itself; is it not?

Ms. FOX. Yes, it certainly is.

Senator KENNEDY. It may result in a good deal more litigation?

Ms. FOX. That is certainly true, and we are trying to limit litigation. *Illinois Brick* may actually increase it.

Senator KENNEDY. So, by not acting, we might see a good deal more litigation; is that right?

Ms. FOX. I think on balance you will see more litigation if you do act. But meritorious litigation on behalf of injured people no longer barred from suit. People talk about multiplicity of suits as though multiplicity of suits is a terrible thing that must be stopped. But the fact of the matter is that the defendant, if the claims are true, has injured a multiplicity of victims.

So, when you have a multiplicity of victims, it seems quite just and fair that you would, of course, have that number of suits.

Senator KENNEDY. Thank you very much.

[The prepared statement of Eleanor Fox follows:]

PREPARED STATEMENT OF ELEANOR M. FOX

My name is Eleanor Fox. I teach law at New York University School of Law. I am outgoing chairperson of the committee on trade regulation of the association of the bar of the City of New York, and of the section 7 (Clayton Act) Committee of the Antitrust Section of the American Bar Association, and I am incoming vice chairperson the section of antitrust law of the New York State Bar Association and chairperson of the publications committee of the ABA antitrust section. I am a member of the executive committee of the association of the bar

of the City of New York. I have practiced law for a number of years at the New York City law firm of Simpson, Thacher & Bartlett, where I was a partner and am now of counsel, and have spent a large portion of my professional career litigating, advising, lecturing and writing on antitrust.

It is with great pleasure that I accept the invitation of the subcommittee to testify on S. 1874.

I speak for myself only and not for any group with which I am associated.

S. 1874 is a bill that would overrule the Supreme Court's June 9 decision in *Illinois Brick Co.* vs. *Illinois*, which held that a person actually injured by an illegal price-fix cannot recover for its injury if it is not in privity with the violator. The Supreme Court has thus woven the outmoded doctrine of privity into the antitrust laws. The effect is to deny *bona fide* claimants the right to be compensated for clearly inflicted antitrust injury, and at the same time to remove one of the most important deterrents to antitrust violators. These effects are particularly disturbing in light of three facts:

1. The person who suffers the greatest antitrust injury resulting from a violation is often if not usually not in privity with the violator, since the company in privity will pass on the overcharge if it can.
2. The person in privity is frequently the person least likely to sue, for that person has an interest in protecting its business relations with the violator.
3. Consumers often, if not usually, bear the brunt of antitrust violations. Consumers pay billions of dollars in illegal overcharges each year. Before the Hart-Scott-Rodino Antitrust Improvements Act there was no effective consumer remedy because of the prohibitive costs of notifying all members of a consumer class. The Hart-Scott-Rodino Act provided, in the *parens patriae* amendment what seemed to be an effective consumer remedy against antitrust violators. Supporters clearly wanted an effective consumer remedy; that was the purpose of the law. Detractors, who opposed the amendment and lost, based their dire predictions of bankrupting recoveries on the supposition that state attorneys general could sue on behalf of *all* injured persons. *Illinois Brick* threatens the viability of the *parens patriae* amendment.

Also, we must face the reality that, by decreasing deterrence, violations will increase. In addition, *Illinois Brick* will have the perverse effect of encouraging persons in privity but not injured to sue for windfall profits. All of these reasons seem to me to be compelling reasons why *Illinois Brick* should be overruled.

I therefore ask: Why should *Illinois Brick not* be overruled?

Several justifications have been offered in support of *Illinois Brick*. Two pose problems that I think should be and can be dealt with in ways that do not bar an injured party from recovering and are at the same time fair to the defendant. These two alleged justifications are: 1) The dangers of multiple recovery, and 2) *Hanover Shoe*.[1]

Multiple recovery against the same defendant for the same violation is wrong and should not be allowed. It can be and in general is prevented under existing law and procedures. Joinder of parties, statutory interpleader, and less formal coordination of proceedings are available devices. Doctrines of res judicata and collateral estoppel may be applicable.[2] Statutes of limitations aid coordination by assuring no meaningful time lag between suits by potential claimants against the same defendants.

One of the best safeguards against duplicate recovery is the requirement that the plaintiff prove injury to itself, in order to recover. The plaintiff cannot prove injury to itself where the facts show that the plaintiff has not borne the injury but rather has passed it on to someone else. If the law is made clear that plaintiffs who do not suffer the injury claimed cannot recover, plaintiffs will sue only for their own injury, and this mere clarification of the law will go far to alleviate the threat of multiple plaintiffs suing the same defendant for the same damage.[3]

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[1] *Hanover Shoe*, vs. *United Shot Machinery Corp.*, 392 U.S. 481 U.S. (1968), denied defendant United Shoe Machinery the right to assert a pass-on defense.

[2] If in a suit by buyer 1 the defendant proves that buyer 1 passed on the overcharge to buyer 2, in a later suit by buyer 2 the defendant will be estopped to deny that buyer 2 received the passed-on overcharge. If in a suit by buyer 2 the defendant proves that buyer 2 was not the recipient of a passed-on overcharge, in a later suit by buyer 1 defendant will be estopped to deny that buyer 1 passed on the overcharge.

[3] A distinction should be made between multiple plaintiffs who are successive links on a chain suing the same defendant for the *same* damage, and such multiple plaintiffs suing the same defendant for different injury to each of them. The former is duplicative and therefore unfair to the defendant. The latter is not, even though the plaintiffs' combined damages could equal more than the defendant's profit from the violation.

To be sure, in some cases there might be a dispute of fact, but this is not peculiar to antitrust cases and should not be handled differently for antitrust cases. The buyer in privity with the violator might claim that it did not pass on the overcharge, and the next buyer in the chain might claim that the first buyer did so. The defendant has an adverse interest in each case; the defendant has the right to discovery, and the adversary process can be counted on in general to produce the truth.

As to *Hanover Shoe*, I would limit it narrowly. It should not have been applied, as it was in *Illinois Brick*, to bar recovery by an injured person. However, neither should the law deny the defendant the right to refute plaintiff's evidence that it suffered injury.[4] In nonantitrust cases a defendant has the right to show that damages were mitigated, and the antitrust rule should be no different.

I believe that we would benefit by eliminating "pass-on" as a special concept in our antitrust vocabularies. By dignifying "pass-on" as a concept, we have obscured the fact that all we are talking about is proof of injury. If the plaintiff proves antitrust injury, the plaintiff wins. If the defendant introduces evidence that refutes plaintiffs claim that it was damaged, defendant wins.

I have dealt with two justifications of *Illinois Brick*. There is a third. The *Illinois Brick* case has been justified by the claim that, without a privity cut-off, litigation will be unmanageably complex. I submit that the complexity of a plaintiff's case should not be a reason for denying an injured party access to the courts. Monopoly cases are complex, but we do not disallow them for that reason. When cases are brought by antitrust victims, we must find the way to manage them.

Assuming *Illinois Brick* should be overruled, how should it be overruled?

S. 1874 does clearly overrule *Illinois Brick*. However, it might be construed by the courts as doing much more. The language of the bill could suggest that injury in fact, as opposed to antitrust injury, is recoverable.[5] It could suggest that any indirect injury, however, remote, is recoverable. It could be read to repeal Section 4D of the Clayton Act, added by the Hart-Scott-Rodino *parens patriae* amendment, which dispenses with the requirement that each consumer come forward and show that he or she in fact suffered damage in a given amount.

It is probably wise to avoid these ripple effects. A form of bill more narrowly confined to overruling *Illinois Brick* could be as follows: Add to sections 4, 4A and 4C of the Clayton Act the words: "Lack of privity with the offender shall not be a bar to recovery."

STATEMENT OF MICHAEL BLECHMAN, ATTORNEY, KAYE, SCHOLER, FIERMAN, HAYES & HANDLER

Senator KENNEDY. Mr. Blechman, we welcome you here. You and Mr. Handler have written extensively on the subject of antitrust policy. We are glad to hear your testimony. You may proceed.

Mr. BLECHMAN. Senator Kennedy, I have a written statement which I have prepared jointly with Professor Handler and which I have furnished to the subcommittee. I hope that you will consider it, and I hope that you will make it a part of the record. It covers many things that I will not be able to touch on this morning.

Senator KENNEDY. That written statement will be made part of the record, without objection.

S. 1874 WILL HURT ANTITRUST ENFORCEMENT

Mr. BLECHMAN. My concern is that the proposed bill, which is going to allow pass-on to be proved offensively and defensively, is going to

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[4] *Hanover Shoe* could be confined to its time and circumstances, it having been decided at a time when there was no effective consumer remedy.

[5] See *Brunswick Corp.* vs. *Pueblo Bowl-O-Matic, Inc.*, —— U.S. —— (1977): It is not enough that plaintiff prove that, but for a violation, it would have made more money. Plaintiff must prove antitrust injury; i.e., that its injury was of the kind that the act sought to prevent.

hurt rather than help antitrust enforcement. For one thing, it is going to restore the pass-on defense which, prior to *Hanover Shoe*, was a major impediment to private treble damage actions.

There were many cases before 1968, when *Hanover* was decided—a whole series of price-fixing actions against the oil companies, for example—in which pass-on was used by defendants to escape liability. In the *Electrical Equipment* cases, to which Mr. Shenefield referred and where my firm was lead counsel for a large number of utility-plaintiffs, the defendants raised pass-on as a shield against liability for price-fixing on some 19 separate products.

While the defense was rejected in that case, which was a precursor to *Hanover Shoe*, it is clear that if it had not been, for example, then the bill being considered this subcommittee were then the law—the utilities would never have been able to recover, as they in fact did, hundreds of millions of dollars of overcharges. In short, insofar as the proposed bill would set the clock back to before 1968 and restore the impediment to antitrust enforcement that *Hanover* removed, I think it would be very harmful. I am also troubled that the proposed bill is going to discourage direct purchases from suing, both because of the base-on defense and because it is going to make it very hard for them to sustain their claims against conflicting claims by subsequent purchasers. Until now, and contrary to what some of the other witnesses have said today, it has been the direct purchasers who have been the backbone of private antitrust enforcement. Far from being reluctant to sue or fearful of suing, they are the ones who have brought most of the price-fixing actions.

MOST PRICE FIXING SUITS BROUGHT BY DIRECT PURCHASERS

I went back, in preparation for this hearing, and looked through the CCH trade regulation reports for the past several years, and it is very clear that most price-fixing actions are brought by direct purchasers. In those where indirect purchasers sued, in almost all cases direct purchasers have also sued. You have multiple levels that are suing. Furthermore, it is the direct purchasers who actually do business with the potential antitrust violators, the potential defendants. Therefore, it is the direct purchasers who are the ones who are most likely to discover an antitrust violation that Government might not otherwise find.

The theory underlying *Illinois Brick*, which I don't think has been sufficiently articulated this morning, is that by allowing these people, the direct purchasers, to recover treble damages based on the full amount of the defendants overcharges you are encouraging them to sue. You are also doing some thing else. You giving them the means to make sure that the defendants disgorge the full amount of the profits from their price-fixing. As I understand it, this was one of the underlying objectives of last year's parens patriae statue.

By overruling *Illinois Brick* and by destroying the viability of direct purchaser-suits, suits by people like oil jobbers, utilities, and purchasers of equipment, in my view the bill is going to weaken the treble-damage remedy as a deterrent to antitrust violations. I understand that one objective of the proposed bill is to allow indirect buyers,

particularly consumers, to be compensated for antitrust injuries. But, in weighing this consideration, I suggest the subcommittee appraise with some healthy skepticism just how beneficial to consumers a theoretical right to sue for damages is likely to be some cases. Consider, for example, a case like *Hanover Shoe* itself where the alleged overcharge was on a piece of equipment that was only one of many cost items that the purchaser, who was a manufacturer of shoes, then took into account in pricing his own product. To what extent is a consumer who buys a pair of shoes really going to be able to prove that he would have gotten a lower price from the department store if the manufacturer of shoes had bought a piece of equipment at a lower price?

Or, to take another case that was the subject of litigation—price-fixing on plumbing fixtures—what are the chances that the buyer of a $30,000 home is going to be able to show that he would have paid $29,990 but for the fact that the bath tub in that home was originally sold by the manufacturer at a $10 overcharge which was passed on from the wholesaler through several contractors to the builder; and then not only by the builder himself but by each of the former individuals who owned the home?

In each of these cases where the price-fixed item is transformed or used to make something else and passes through a series of unrestrained markets, it is highly doubtful that a consumer could prove that the original overcharge had any ascertainable impact on the price he paid. Consequently, the consumer's interests are likely to be protected, not by a meaningless right to sue for damages that he can't prove but by having the direct purchaser, who can prove injury, bring suit and put an end to the violation. But under the proposed bill, suits by direct purchasers in these kinds of cases are likely to fail because of the restoration of the pass-on defense. For the consumers, in my view, the net effect is going to be a net loss.

In extending to these kinds of cases—cases where the price-fixing is on raw materials or machinery used to make something else—I think it should be noted that the bill goes beyond what even the plaintiff argued for in *Illinois Brick*. The plaintiff argued that pass-on should be considered provable only where the price-fixed item is resold as such. This has also been the position taken, incidentally, by most courts that have, contrary to *Illinois Brick* and many lower court decisions, favored pass-on. Where the item is not resold as such but where it is used to make something else—where to use an example that Justice White raised, there is an overcharge on chromite sand, and there was a Justice Department price-fixing case on chromite sand, where the sand is used to make steel ingots which eventually, after many transformations and many stages down the line, are used to make toasters and cars—then virtually all authorities agree that proving the pass-on and tracing it through the distribution chain is a virtual impossibility.

Furthermore, it is in these cases, where the amount and fact of consumer injury are most uncertain, that indirect purchasers are least likely to sue, which means that the net effect of the bill is likely to hurt antitrust enforcement by raising impediments to suits by direct pur-

chasers. For all of these reasons, I suggest that if the subcommittee wishes to overrule *Hanover Shoe* and *Illinois Brick*—and I want to make it clear that I think that probably the best thing to do for antitrust enforcement is to let those decisions stand, at least for awhile to see how they work out—then I suggest that it at least limit its action so as to allow proof of pass-on only in price-fixing cases where the price-fixed items are resold without change in their original form.

ALTERNATIVE TO S. 1874

Specifically, what I propose as an alternative to the bill under consideration is that a sentence be added to the Clayton Act stating that in price-fixing cases pass-on may be proved offensively or defensively as against purchasers who resell the price-fixed item itself.

I might say that limiting the proof of pass-on to cases where the items is resold itself is consistent with the objectives of the parens patriae statute, at least as they were articulated by Representative Rodino. He referred to the desirability of letting consumers collect on potato chips and on bread and on things that are all resold as such. But he specifically discussed at one point in the hearings the case where there is a price-fixing conspiracy on ballbearings that wind up in a machine that makes popcorn that is sold to people who go to movie theaters. He said that in that kind of a case, of course, you should not have proof of pass-on.

I think that limiting proof of pass-on to cases where items are resold as such would, first of all, take care of a lot of the cases about which you have heard testimony today: sugar, meat, and so on. It would also give effect to the goal of compensating indirect purchasers in those cases where the remedy is most realistic, but still preserve the viability of direct-purchaser suits in those situations in which they have historically been most effective including suits like *Hanover* itself, the utility cases, and so on.

Senator LAXALT. What do we do with the cattle people under this theory?

Mr. BLECHMAN. If I understand the industry correctly, if they sell meat and if it travels as meat through the chain of distribution, then they are reselling the product as such. I don't know the industry well enough to know whether they sell meat that is transformed into other products so that it is only one minor cost item. But if it is essentially meat being sold down the line, then, under my suggestion, proof of pass-on would be allowed; it wouldn't be allowed in the case where it is used to make an entirely different product.

Senator LAXALT. Thank you.

Senator KENNEDY. What about molasses?

Mr. BLECHMAN. That is another industry that I am not familiar with. If price-fixed molasses is resold as such, it is another situation in which, under my suggestion the proof of pass-on would be allowed. If the price-fixing is on sugar which is transformed into molasses, then the sugar is only one cost item that goes into making molasses. The company that makes molasses there can, and I think will, sue. Subsequent purchasers of molasses can sue only if there is price-fixing on molasses.

BILL SHOULD NOT BE RETROACTIVE

Another area in which the proposed bill goes further than I think is wise or legally sound is in its retroactive application to cases pending on June 9, 1977. It is one thing for Congress to decide who can recover damages in future cases. It is quite another to retroactively deprive parties of their rights in pending cases. The latter, I think, unnecessarily raises grave constitutional problems. As of the time that *Illinois Brick* was decided, direct purchasers, if you focus on them, had the right to recover damages. Between now and the time the bill is enacted, I am sure some of those suits are going to go forward and those people will have been found to have a right of recovery. In my view—and there is case law to support this—if you pass legislation which operates retroactively and takes from people the right of action, which is a valuable property right, that violates the due process clause of the fifth amendment.

In addition, I think that for the Congress to go and try to, not just change the rule in *Illinois Brick* but to change the result in that case and the result in pending cases, represents an intrusion into the judicial process which, in my view, distorts the constitutional scheme protected by separation of powers. I might add that I have been assuming that there is not going to be any multiple recovery under this bill because of the fact that pass-on can be proved offensively and defensively. Therefore, only 100 percent of the overcharge is going to be recovered for. But if there is any possibility in which there is going to be multiple recovery, then you are raising the penalty for past conduct and giving the penalty retroactive application, and thus the bill would also violate the ex post facto constitutional guarantee.

Senator KENNEDY. Would that happen very much if we reversed *Illinois Brick*?

MULTIPLE RECOVERY

Mr. BLECHMAN. I have been assuming that, under your bill in its final form, it will be clear that multiple recovery will not be allowed. I have heard a number of speakers say that maybe it will and maybe it won't. If multiple recovery is going to be allowed at all and if you go back and impose multiple recovery for past violations, then that violates the ex post facto prohibition. I might add that the question of retroactive application is one that was considered last year with the parens patriae statute under the original version of the bill there was a provision that would have made it apply retroactively. That was later removed by the Congress. I suggest that in the present bill you do the same thing and follow the general pattern of antitrust enactments which is to make them applicable only to future conduct and future cases.

PROOF OF PASS-ON

I have a further and more general problem with the bill insofar as it represents an effort to correct a flaw in the parens patriae statute which was made apparent by *Illinois Brick*. In my view, the problems of proving pass-on would probably render the parens patriae statute ineffective in many cases, even if *Illinois Brick* had never been decided. The hard fact, which I think has to be dealt with, is that there are no shortcuts available for adjudicating pass-on on a mass scale. Some

buyers get better deals than others, and economic circumstances vary from retailer to retailer and from transaction to transaction. I think the best illustration of this is the *Boshes* v. *General Motors* case which involved monopolization on General Motor automobiles. The judge in that case took a view contrary to *Illinois Brick*. He said that, as a matter of law, pass-on could be proved. But the question that he was then presented with was: How could he go about adjudicating whether overcharges were passed on by thousands of GM dealers to some 30 or 40 million consumers of automobiles? His conclusion was that circumstances vary so much from dealer to dealer and from transaction to transaction that there is no way to adjudicate the issue fairly on a mass scale. Therefore, it has to be adjudicated individually. Adjudicating it individually, however desirable it might be, is just impossible. You can't adjudicate 30 to 40 million separate pass-on issues. Consequently, it is my view that an antitrust enforcement device like parens patriae which depends on consumers having cognizable antitrust plans and which therefore depends on proof of pass-on, is going to be ineffective. So, I would suggest this. Instead of the approach adopted in the present bill, it would be more productive to consider the basic goals that the parens patriae statute was meant to accomplish and see whether there is not a better way to accomplish the same thing. If, as many of the proponents of the bill stated at the time, the goal was to create an adequate deterrent to make sure that guilty defendants disgorge their ill-gotten gains, then the simple and direct way to accomplish that is by applying a fine or civil penalty.

APPLY FINE OR CIVIL PENALTY TO PRICE FIXERS

In other words, where the defendants are found guilty in a Government criminal or civil action, the judge should be empowered to take into account the aggregate amount of the defendant's overcharge in setting the fine or penalty. Since the present $1 million limit is not going to be enough to make sure that the defendants disgorge the profits of their violations, the amount is going to have to be raised. The Congress is going to have to decide how much to raise it in order to accomplish that objective.

Also, in my view, the best way to protect consumers is by improving antitrust prevention and enforcement and deterrence and by making sure that the violations don't start in the first place. I think a fine or penalty would do that.

CREATE ADMINISTRATIVE PROCEDURE FOR DISTRIBUTION OF DAMAGES

However, to the extent that it is deemed important to also give consumers a monetary compensation for injuries caused by antitrust violations, that could be accomplished within the framework of a fine or civil penalty as well by simply creating an administrative procedure—through the FTC, for example—for distributing to consumers the amount of the fine or civil penalty that is collected. Having it in this form would have a number of advantages. For one thing, you would have a judge who, in taking unjust enrichment into account as a sentencing criteria, could make sure he would not be imposing the fine or penalty in an amount which would be unfair in a given case because

of the circumstances or which might be anticompetitive because it might, for example, destroy a small competitor in a highly concentrated market.

The other advantage is this. In an administrative framework, unlike a court framework, particularly under parens patriae, those cases which are truly de minimis and in which the costs of administration clearly outweigh any meaningful benefit to consumers, for example, the one-dollar case Senator Laxalt referred to—could be eliminated and administrative rules could be set up so that the distribution process would only be activated in those cases where it would provide some meaningful benefit to consumers.

Thank you.

Senator KENNEDY. As I understand your testimony, you feel that if there is a possibility of the direct purchaser being compensated, then this would discourage price fixing and ultimately benefit the consumer in that respect; is that right?

Mr. BLECHMAN. That is correct.

Senator KENNEDY. You would have a more orderly process in terms of administration of justice with that certainty and that precision, is that right?

Mr. BLECHMAN. Yes. There are two suggestions. Under *Illinois Brick*, as it now stands, the result will probably be to increase and improve antitrust enforcement by making it clear that the first purchaser has the claim and by giving him the power to make the defendants disgorge the fruits of their violation.

My second suggestion is this. To the extent that the Congress wants to create a device for, first of all, ensuring that in Government cases, for example—cases where you don't want to rely on direct-purchaser suits—that the defendants disgorge their ill-gotten gains and to the extent that you want to ensure that the money is distribued to consumers who are damaged in significant amounts, that can be done outside of the parens patriae context without regard to the pass-on issue through a civil fine and an administrative procedure for distribution.

Senator KENNEDY. How are you going to require that they disgorge what would be considered unjust enrichment?

Mr. BLECHMAN. In two ways. Under *Illinois Brick*, the first purchaser brings a suit for overcharges. For example, a utility sues the electrical equipment manufacturer for price fixing on turbine generators. It proves that they price fixed 10 percent on turbine generators. All the utilities in the country sue, which is what happened in the *Electrical Equipment* cases, and they collect three times the full amount of those overcharges without any reduction or any argument that the amount has been passed on. Under that scheme, which is the scheme that will exist under *Illinois Brick*, the defendant will have disgorged his profits from the price fixing, plus some. Now, the other way of doing it, if that doesn't work in given cases or if you think there is a need for a further deterrent, then you can have the Government come in and bring a price-fixing suit in which it asks for a fine or a civil penalty as a punishment.

Senator LAXALT. Would that be within the treble damages?

Mr. BLECHMAN. That is a separate remedy, if you think that under *Illinois Brick* letting direct purchasers sue isn't going to be enough.

Senator KENNEDY. How does it get to the consumer? How does it get to Mr. Agee and Mr. Peterson who testified earlier?

Mr. BLECHMAN. In the civil penalty or fine case?

Senator KENNEDY. Yes.

Mr. BLECHMAN. You give the FTC the power under the bill to administratively distribute a fine or the civil penalty that they collect to Mr. Agee and other people who are injured, pursuant to an administrative scheme that you establish.

Senator KENNEDY. That shifts the burden to an agency from the courts.

SHIFT RESPONSIBILITY FROM COURTS TO FTC

Mr. BLECHMAN. Yes. Right out of the courts—which accomplishes a number of things. First of all, the courts cannot handle it. You take a case like the *General Motors* case where there is a question of overcharges on automobiles. The courts can't handle the question of adjudicating whether there was a pass-on in each of 30 or 40 million cases. However, in cases like that where there is substantial damage, assuming that is the case, and where individuals have substantial claims, the Government could sue for a civil penalty or for a fine, and you could create an administrative procedure which would distribute it to people who could show they were hurt, without regard to the pass-on issue.

Senator KENNEDY. I am sure you can. But I don't see the value of moving it from the courts. We have listened to other attorneys and people from the Justice Department who feel that it is manageable. They think that it is manageable in the courts.

Mr. BLECHMAN. Senator, when you get to specific cases, regardless of what people may testify to on both sides, it is apparent that it is not manageable. If you take the 30 to 40 million people who bought General Motors automobiles, Judge Decker who was the judge in that case was clearly right in finding that it was not manageable. If you take the *Plumbing Fixtures* case, where the question is who paid the overcharge and to what extent should it be allocated among wholesalers, plumbing contractors, building contractors, and all the homeowners in America, then whatever any witness says, it is simply a fact that anyone who looks at that particular case has to realize that no court is going to be able to adjudicate it. There is one other point that I would like to make about imposing burdens on the court and removing burdens from the court. In representing plaintiffs in the past number of years, it has been my experience that the thing that has hurt antitrust enforcement the most has been the overload on the courts.

If it doesn't sound like much when you talk about it in the abstract, the reality of it is that you can't get trial dates; you can't get motions decided; you can't even get hearings with the court. So, as a result, antitrust suits drag on for years and years and the cost increases to the point where many people who could at one time afford to prosecute antitrust actions cannot do it any more. The removing of a problem like resolving the allocation of pass-on from the courts to an administrative agency really is going to accomplish a great deal in terms of improving antitrust enforcement because it will leave the courts open to handle antitrust cases which, right now, they are swamped with.

Senator KENNEDY. How do you react to these other witnesses who believe in the effect of the cozy relationship between those who deal directly with the supplier?

Mr. BLECHMAN. Empirically looking at most of the price-fixing cases that we have had over the past several years, the direct purchasers have sued, regardless of the so-called cozy relationship. In *Illinois Brick* itself these was a class action on behalf of direct purchasers. They sued, and their suit was settled pursuant to a court-approved class action settlement. I think that the area in which the point is the most troubling is where the direct purchaser is somehow controled or dominated by the defendant so that he does not bring suit. But that kind of situation is covered in a footnote in Justice White's decision in *Illinois Brick*. He recognizes that there is an exception where you can show that the defendant dominates the first purchaser; or, as in the beef case, where it dominates the last seller. In those cases, under *Illinois Brick* as it exists today, without any bill, you can prove pass-on.

Now, it may be that that exception will have to be developed and, probably, if no bill were passed, it would be developed through the judicial process. Putting aside the case where the defendant dominates the first purchaser, in other cases, as Mr. Kohn said, it is perfectly respectable to sue for treble damages. Many companies do it. Now under *Illinois Brick* —if it is not reversed—it is going to be very hard for companies, who are direct purchasers and who are faced with cognizable antitrust violations, not to sue because they are going to have to wind up answering for it to their shockholders, to their public utility commissions, and to others who oversee what they do.

Senator KENNEDY. We thank you very much.

[The prepared statement of Michael Blechman follows:]

PREPARED STATEMENT OF MICHAEL D. BLECHMAN AND MILTON HANDLER

We understand that the purpose of the proposed bill is to overrule the Supreme Court's unanimous 1968 decision in *Hanover Shoe* and its corollary, the recent ruling in *Illinois Brick*. While in our view the language of the bill is dangerously vague (it could, for example, be read as changing existing rules on standing that have nothing to do with pass-on),[1] our main concern is that, in overruling these Supreme Court decisions, the bill will cripple rather than promote private antitrust enforcement. We shall try both to elaborate the reasons for this concern and to suggest some alternatives which we believe may better achieve the subcommittee's objectives.

The pass-on defense which the bill would restore was, prior to *Hanover Shoe*, a major impediment to antitrust enforcement. In a series of cases following *United States* vs. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the defense enabled the oil company defendants to escape liability for fixing prices to their direct purchasers.[2] Other defendants in the fifties and early sixties likewise

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[1] The bill would permit suits by persons injured "in fact, directly or indirectly" by an antitrust violation. The words "in fact" add nothing to the existing legal requirement that an antitrust plaintiff show that he was actually injured. See, e.g., *Flintkote Co.* vs. *Lusfjord*, 246 F. 2d 368, 392 (9th Cir.), cert. denied. 355 U.S. 835 (1957). The words "directly or indirectly," however, may suggest that Congress is overruling the "direct injury" test of standing under which the creditors, suppliers and shareholders of a person directly injured by an antitrust violation cannot assert further claims of their own. See, e.g., *Loeb* vs. *Eastern Kodak Co.*, 183 F. 704 (3d Cir. 1910) ; *Pitchford* vs. *PEPI, Inc.*, 531 F. 2d 92 (3d Cir. 1975) cert. denied, 96 S. Ct. 2649 (1976).

[2] *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. 2d 747 (8th Cir. 1941), cert. denied. 314 U.S. 644 (1941) ; *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F. 2d 967 (7th Cir. 1943), cert. denied, 321 U.S. 792 (1944) ; *Clark Oil Co.* v. *Phillips Petroleum Co.*, 148 F. 2d 580 (8th Cir. 1945), cert. denied, 326 U.S. 734 (1945) ; and *Leonard* v. *Socony-Vacuum Oil Co.*, 42 F. Supp. 369 (W.D. Wis. 1942), appealed dismissed, 130 F. 2d 535 (7th Cir. 1942).

used pass-on either to defeat liability altogether or to embroil plaintiffs in a morass of complex accounting issues.[3] In the *Electrical Equipment* cases, where our firm was lead counsel for a large number of utility-plaintiffs, the defendants raised the pass-on defense as a shield against liability for price-fixing on some 19 separate product lines. Fortunately, Judge Feinberg rejected the defense and adopted the view later expressed by the Supreme Court in *Hanover Shoe.*[4] Had the result been otherwise—if, for example, the bill being considered by this subcommittee were then the law—the utilities would never have been able to recover (as they in fact did) hundreds of millions of dollars in settlements and litigated verdicts.

It was against this background—with the issue of pass-on being "pressed with some regularity in the lower Federal courts"[5]—that the Supreme Court unanimously decided in *Hanover Shoe* to severely limit the pass-on defense. In the nine years since that ruling, the volume of private treble damage actions has more than doubled[6] and many suits have been successfully prosecuted which might have been frustrated if proof of pass-on had been allowed.[7] The proposed bill would set the clock back to before 1968 and do great damage to the cause of antitrust enforcement by restoring the impediment that *Hanover* removed.

The proposed bill will make it very difficult for direct purchasers to recover. Even in cases where it is clear that they paid illegal overcharges, they will still have to face both the defendants' pass-on defenses and the conflicting claims of subsequent purchasers. The net result of the legislation will be to discourage direct purchasers from suing at all.

This result cannot possibly be justified in terms of effective antitrust enforcement unless one assumes that direct purchasers are unwilling plaintiffs who are not going to sue in any event. But, in fact, the opposite is the case: Over the years, direct purchasers (*e.g.*, oil and gasoline jobbers, utilities, other purchasers of equipment like Hanover Shoe) have brought great numbers of antitrust suits against their various suppliers.[8] Indeed, based on a survey of treble damage actions over the past several years, it is clear that the vast majority of price-fixing actions are brought by direct purchasers.[9]

Furthermore, there are many cases (including later *Electrical Equipment* litigation) where direct purchasers have discovered antitrust violations whose scope or even existence had not previously been uncovered by the Government or any private plaintiff. To our knowledge, this has not been true in the case of any suit brought by an indirect purchaser. It is, of course, what one would expect in view of the fact that it is the direct purchasers who actually do business with the defendants in a given case and who are therefore in the best position to discover antitrust violations.

While suits by indirect purchasers might have a theoretical deterrent value in cases where direct purchasers do not sue at all, this rarely occurs in actual practice. Not only do direct purchasers bring more treble damage actions than indirect purchasers, but the cases in which the indirect buyers do sue are almost invariably ones in which direct purchasers are already pressing claims. This was true in *Illinois Brick* itself, for example, where the claims of the direct purchasers were asserted in a class action and ultimately vindicated in a settlement approved by the Court.

While a problem might exist if a case were to arise where the direct purchasers were effectively controlled by the defendants and consequently kept from suing, this contingency is covered by the *Illinois Brick* decision itself. Justice White's

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[3] See, e.g., *Banana Distributors, Inc.* v. *United Fruit Co.*, 162 F. Supp. 32 (S.D.N.Y. 1958), rev'd. on other grounds, 269 F. 2d 790 (2d Cir. 1959): *Wolfe* v. *National Lead Co.*, 225 F. 2d 427 (9th Cir. 1955), cert. denied, 350 U.S. 915 (1955).

[4] *Atlantic City Electric Co.* v. *General Electric Co.*, 226 F. Supp. 59, 71 (S.D.N.Y.), application denied 337 F. 2d 844 (2d Cir. 1964).

[5] *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 490–491 n. 8 (1968).

[6] The number of treble damage actions increased from 659 suits brought in 1968 to 1230 suits brought in 1974. (Statistics compiled from Ann. reps. of the director of the administrative office of the United States Courts.)

[7] These have included, inter alia, suits by utilities as direct purchasers of turbine-generators, aluminum cable and brass mill tubing.

[8] Thus, since 1968 there has been literally hundreds of antitrust actions by direct purchasing gasoline distributors and retailers against oil companies.

[9] Based on cases reported in the 1975 and 1976 CCH Trade Regulation Reports, it appears that price-fixing actions by direct purchasers outnumber those by indirect purchasers by some three to one. Furthermore, the indirect purchaser actions were almost all ones in which direct purchasers were also suing.

opinion recognizes an exception—and would allow proof of pass-on—where buyers are owned or controlled by their suppliers.[10]

Where (as is almost always the case) direct purchasers do sue, there is, as a practical matter, no deterrent value in having indirect purchasers sue as well. Since under *Illinois Brick* the direct purchaser has the right to recover treble damages based on 100 percent of the amount of any overcharges, the direct purchaser suit fully serves the objective of forcing guilty defendants to disgorge any "ill-gotten gains." If indirect purchasers also sue to assert conflicting claims based on the same overcharges, the result may be to protract and increase the costs of litigation, but it will add nothing to the goal of preventing unjust enrichment.

In sum, the proposed legislation contributes little or nothing to effective antitrust enforcement by giving indirect purchasers a basis for suit. On the other hand, it does great harm to the cause of deterrence by undercutting the viability of suits by the direct purchasers who until now have been extremely effective as private attorneys general and who under *Illinois Brick* have an even greater capacity to serve the public interest in that role.

Some proponents of the proposed bill apparently believe that even if it contributes nothing or has a negative impact in terms of deterrence, it is still necessary to overrule *Hanover Shoe* and *Illinois Brick* in order to provide treble damage compensation for injuries to indirect buyers, particularly consumers. In fact, from the consumers' point of view, the benefits of having this theoretical right to compensation are far outweighed by the costs.

In most cases, the nature of the distribution chain is such that, even if an overcharge paid by a direct purchaser is passed-on, the effect becomes hopelessly fragmented, diluted and uncertain by the time it reaches the consumer level. Indeed, it is often precarious to assume that the consumer has suffered any ascertainable injury at all. Consider, for example, the extent to which a consumer of shoes is likely to be able to prove that he would have gotten a lower price from the department store if the shoe manufacturer had obtained some item of equipment at a lower cost;[11] or the chances that the buyer of a $30,000 home would have paid $29,990 had the bath tub in that home not originally been sold by the manufacturer at a $10 overcharge;[12] or whether the purchaser of a car can show he would have gotten a better deal but for the fact that chromite sand used to make molds for steel ingot was sold at an overcharge to the steel fabricator who in turn supplied steel to the automobile maker.[13] In each of these cases, where an item passes through a series of presumably unrestrained markets, it is highly doubtful that a consumer could prove that the original overcharge had any impact on him whatsoever. In such circumstances, the consumers' interests are likely to be best protected if someone who can prove injury, such as the direct purchaser, brings suit and at least puts an end to the violation. Yet, under the proposed bill, suits by the direct purchasers in each of the cases described above (the shoe manufacturer, the bath tub wholesaler, the steel fabricator) could well fail because of the restoration of the pass-on defense. For the consumers in those cases, that result would be a clear loss.

As Justice White demonstrates in *Illinois Brick*, allowing proof of pass-on will necessarily transform virtually every price-fixing case into a gigantic battle among multiple competing classes of conflicting claimants. The costs of such litigation will be huge, particularly in light of the hard fact that there are no short-cuts available for adjudicating pass-on on a class-wide basis. For example, in the *Boshes* case—which, contrary to *Illinois Brick*, ruled that, as a matter of law, pass-on *could* be proved—the Court found that there was no way to avoid individually adjudicating the question of whether and to what extent retailers of GM automobiles passed-on alleged overcharges to a class of some 30–40 million consumers.[14] (Since such adjudication was a practical impossibility, the Court rejected the class.) Some buyers get better deals than others, and economic circumstances vary not only from retailer to retailer but over time from transaction to transaction.

Thus, given the nature of the suits likely to be generated by the proposed bill, litigation costs are virtually certain to erode most of the recovery to consumers.

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[10] See note 16 of Justice White's opinion.

[11] This, of course, is the problem presented by *Hanover Shoe* itself.

[12] See *Mangano* v. *American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13, 26 (E.D. Pa. 1970), aff'd. 438 F. 2d 1187 (3d Cir. 1971).

[13] See n. 23 of majority opinion in *Illinois Brick*.

[14] *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589, 599–602 (N.D. Ill. 1973).

As a result the goal of compensation will be frustrated and the only real beneficiaries of the act will be the lawyers who will participate in the gigantic lawsuits that will be generated. From the consumers' point of view, the dubious benefits of such proceedings would be far outweighed by the disadvantages of less effective deterrence which would result if the bill became law. Furthermore, if economic conditions in an industry are such that cost increases are in fact likely to be passed-on to the ultimate consumer (an assumption one must generally make if the consumers are to have any claim at all), it is probable that litigation costs will likewise be passed-on and that the very large legal and administrative expenses engendered by the bill will ultimately be borne by the consumers themselves.

In our view it would be a mistake for this subcommittee to hastily adopt legislation to overturn *Hanover Shoe* and *Illinois Brick.* The issues at stake are hardly as simplistic as some spokesmen have indicated in suggesting that to be against allowing proof of pass-on is to be against enforcing the antitrust laws. To the contrary, in *Hanover Shoe* the Supreme Court was unanimous in holding that proof of pass-on was an impediment to effective antitrust enforcement. Similarly, in *Illinois Brick*, there was no issue between the majority and minority as to the virtue of antitrust enforcement; the question was rather a pragmatic one as to whether such enforcement would be better promoted by consolidating the right of action in the direct purchasers who actually paid the overcharges, or fragmenting that right among all the different levels in the chain of distribution. Justice White, whose devotion to strengthening the antitrust laws no one would question, presented a number of powerful arguments for the proposition that the effect of allowing direct buyers to sue for the entire amount of overcharges incurred by them would be to strengthen antitrust enforcement. In view of Justice White's lifetime of experience in this field, there is no reason to assume without any data at all that he and his five concurring brethren are wrong. I suggest that it would make more sense to give this approach a chance and see how it works in actual practice. The Congress can then judge on the basis of empirical facts whether antitrust enforcement (measured in meaningful suits and recoveries) *has* been promoted; and if it has not, Congress can proceed with legislation with at least some assurance that it is not going to have consequences diametrically opposite to the ones intended. (In the case of *Hanover Shoe*, we do of course have the benefit of many years of experience, all of which suggests that it would indeed be a great mistake to restore the pass-on defense.)

Furthermore, it should be borne in mind that the antitrust laws have developed successfully over the past 87 years largely through judicially devised growth and experimentation, with only occasional and very general guidance from Congress. The Supreme Court has shown great capacity to correct its own mistakes and fashion the antitrust statutes into effective instruments of economic and social control. In view of this history the Committee should not lightly depart from the traditional methods of legal development in this area by rushing to overrule a particular decision merely because it displeases a group of litigants whose pending cases have been affected by the decision.

To the extent the Committee is determined to overrule *Hanover Shoe* and *Illinois Brick*, we suggest that it limit its action so as to allow proof of pass-on in price-fixing cases only where the price-fixed item is resold as such. This is essentially the position which was urged by the plaintiff in *Illinois Brick* [15] and which has been endorsed by most courts that favored proof of pass-on.[16] The bill presents the most difficult problems where it goes beyond what the *Illinois Brick* plaintiff asked for, and what even the most sympathetic courts have deemed feasible, and allows proof of pass-on even in cases like *Hanover Shoe* itself where the alleged overcharge is on a piece of equipment or a supply that constitutes only one of many cost items that the purchaser takes into account in pricing his own product. In such cases, the fact and amount of consumer injury is most uncertain, the accounting problems of trying to trace the pass-on are most nightmarish, and the litigation engendered by the pass-on issue is likely to be

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[15] In his petition for rehearing, p. 10, the plaintiff in *Illinois Brick* "acknowledged that the *Hanover Shoe* rule *should* apply to situations involving the use of raw material or machinery for manufacture of other products. . . ." [Emphasis added.]

[16] See, e.g., *Boshes* v. *General Motors Corp.*, 59 F.D.R. 589, 597 (N.D. Ill. 1973); *West Virginia* v. *Chas. Pfizer & Co.*, 440 F. 2d 1079 (2d Cir. 1971), aff'd. 314 F. Supp 710 (S.D.N.Y. 1970).

the most protracted and expensive. It is also in such cases that the indirect purchasers are least likely to sue, so that the sole effect of the proposed bill will be to discourage antitrust enforcement by allowing the pass-on defense to be raised against the first purchaser-plaintiffs.

The distinction we suggest is one that has substantial support in the case law. Many authorities have recognized that it is more feasible to prove a pass-on by a "middleman' who resells an item as such than by a fabricator who uses the item to make something else.[17] Indeed, the only cases we know of in which the pass-on of overcharges has actually been established have all involved items resold "as such."

In sum, we propose, as an alternative to the bill under consideration, that a sentence be added to the Clayton Act stating that in price-fixing cases pass-on may be proved offensively or defensively as against purchasers who resell the price-fixed item itself. In this way, Congress can give effect to the goal of compensating indirect purchasers in those cases where that remedy is most realistic and, at the same time, still preserve the viability of direct purchaser suits in those situations in which they have historically been most effective.

The proposed bill obviously represents an effort to patch over defects in the parens patriae statutes made apparent (but not in fact caused by) the *Illinois Brick* decision. Thus, when *Illinois Brick* first came down, the initial proposal was simple pass a one-sentence statute overruling it. It was evidently apparent, however, that to overrule *Illinois Brick* while leaving *Hanover Shoe* standing would open the door to unfair and arbitrary multiple recoveries. (Among other things, the effect of such multiple recoveries would be to make the severity of antitrust penalties depend upon the length of the chain of distribution through which the defendant sells, a rationally irrelevant factor that would discriminate in favor of large integrated companies and against small independent ones.) Hence, the current bill was proposed overruling *Hanover Shoe* and *Illinois Brick*. The net effect is a legislative proposal that undercuts and impedes existing means of antitrust enforcement without, however, curing the real problem with the parens patriae statute. The difficulty, which the proposed bill does not meet, is that the effectiveness of the parens patriae actions depends on consumers having legally cognizable damage claims. Given the unavoidable economic and practical problems of proving pass-on, this essential flaw in the parens patriae remedy would impede its effectiveness in most cases even if the Supreme Court had never decided *Illinois Brick*.

What we suggest is that instead of the *ad hoc* approach represented by the present bill, it would be far more productive to consider the basic goals that the parens patriae statute was meant to accomplish and see whether there isn't a less troublesome way of doing the same thing. If (as many proponents of the bill stated at the time) the goal was to create an adequate deterrent and make sure that guilty defendants did not retain any of their "ill-gotten gains," the simple and direct way to accomplish that objective would be by a fine or civil penalty. Thus, where defendants are found guilty in a Government criminal or civil action, the judge could be empowered to take into account the aggregate amount of a defendant's overcharges in setting the fine or penalty. Since the present $1 million maximum would no doubt be insufficient to ensure that defendants disgorge the fruits of their violations, the amount could be raised to $10 million or any other sum which Congress considered adequate. (By making the prevention of unjust enrichment a sentencing criterion, the discretion of the trial judge would afford an additional safeguard that the remedy would not be imposed where it was unfair or where it had anticompetitive effects, such as driving a small competitor out of business in a commercial market.) Under this proposal, the essential purposes of the proposed legislation in terms of deterrence and preventing unjust enrichment could be accomplished without becoming embroiled in the morass of trying to prove pass-on and without destroying the efficacy of the private treble damage remedy as an additional deterrent.

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[17] See, e.g., *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 185 F. Supp. 826, 831 (M.D. Pa.), aff'd. per curiam, 281 F. 2d 481 (3d Cir.), cert. denied, 364 U.S. 901 (1960); *Atlantic City Electric Co.* v. *General Electric Co.*, 226 F. Supp. 59, 68–69 (S.D.N.Y.), *interlocutory appeal refused*, 337 F. 2d 844 (2d Cir. 1964); *Mangano* v. *American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13, 19 (E.D. Pa. 1970), aff'd. 438 F. 2d 1187 (3d Cir. 1971) (predicating holding that pass-on could not be proved on presumption that plaintiffs did not buy plumbing fixtures "as such").

In our view it makes much more sense to try to protect consumers by taking effective steps to prevent antitrust violations rather than by creating elaborate and expensive procedures to distribute *de minimis* damage recoveries. If, however, the Congress believes that consumer compensation is an essential goal, this can also be accomplished within the framework of a fine or penalty statute by creating an administrative mechanism for distributing to injured consumers the amounts recovered. The Federal Trade Commission, for example, could establish a trained bureaucracy for processing consumer claims, which would at least keep the problem out of the courts, which are the governmental organs least well suited and with the most inadequate resources to handle it. It would also reduce the costs of administration since, outside of an adversary, court setting, less formal and less time-consuming procedures could be used and claimants would not have to be represented by counsel. (If Congress saw fit to adopt such a compensatory procedure—which we don't believe is really needed to protect consumers—minimum standards should at least be set so that the distribution process would not be activated except in cases where the benefits to consumers clearly outweighed the costs of administration.)

Finally, to the extent that the parens patriae bill was intended to promote more vigorous antitrust enforcement to prevent and deter antitrust violations, this goal could also be accomplished far better if it was attacked directly. Thus the capacity of the Antitrust Division and the FTC to prosecute cases could be increased by hiring and training more attorneys; by making more use of U.S. attorneys around the country, particularly in criminal cases; and by hiring experienced trial attorneys from private practice.

Perhaps most important, more judges should be appointed to handle the increasing caseload of Government and private antitrust actions. In representing plaintiffs in recent antitrust actions, we have learned from hard experience that the most frustrating impediment to antitrust enforcement is the current lack of judicial manpower. The overload on judicial resources makes it impossible in many cases to get motions decided, to get trial dates set and even to get conferences with the Court. As a result, litigations drag on for years and wind up costing so many millions of dollars that many companies cannot afford to pursue their rights as antitrust plaintiffs. In our view, there is nothing that would improve the effectiveness of antitrust enforcement more than the appointment of 100 new Federal judges—provided, of course, that Congress does not impose new burdens on the judiciary that would make even that number of judges inadequate.

One aspect of the proposed bill which we believe should be eliminated even if the Committee decides to go forward with the rest of the measure is section 4. This would apply the new rule retroactively to cases pending on June 9, 1977. Such ex post facto application, in our view, unnecessarily raises grave questions as to the constitutionality of the bill. It is one thing for Congress to decide who can sue for damages in future cases; it is quite another to retroactively deprive parties of their rights in pending cases. Since *Illinois Brick* gave direct purchasers the right to recover the full amount of overcharges incurred by them in a given case (a property right which could be of considerable value), depriving them of that right might well be considered an unconstitutional taking of property without due process of law. In addition, the use of legislation to change the outcome of pending cases represents an intrusion into the judicial process which distorts the legislative function under the constitutional scheme protected by the separation of powers.

A similar issue as to retroactive application arose last year in connection with the parens patriae statutes. An early version of that bill which would have given the enactment ex post factor application.[18] It was vigorously opposed on the ground that the retroactive imposition of penalties for past conduct would violate "elementary constitutional requirements of fairness and due process of law.[19] As a result, the bill was modified so as to apply prospectively only. Similar constitutional considerations suggest that the present bill should likewise be modified to follow the general pattern of antitrust enactments and apply solely to future cases.

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[18] It would have provided:

"This title shall apply to all civil actions filed under the antitrust laws . . . including those in which the cause of action accrued before the date of enactment of this Title. . . ." S. 1284, 94th Cong., 2d sess., section 405 (1976).

[19] S. Rep. No. 94-803, pt. II, 94th Cong., 2d sess. 8 (1976).

Senator KENNEDY [continuing]. Our final witness is Mr. Frederick Rowe, representing the Grocery Manufacturers Association.

STATEMENT OF FREDERICK M. ROWE, ATTORNEY, ON BEHALF OF THE GROCERY MANUFACTURERS OF AMERICA, INC.

Mr. ROWE. Thank you very much, Mr. Chairman.

I have prepared a written statement which I would appreciate being inserted into the record.

Senator KENNEDY. That written statement, without objection, will be inserted into the record.

Mr. ROWE. In view of the hour, I will be concise.

BILL DESERVES MORE STUDY

In essence, the Grocery Manufacturers of America deem the bill's provisions to be unwise and premature, at least pending a careful assessment of its impact on fair and efficient antitrust enforcement within the judicial system, and an objective overall evaluation of the recently fortified antitrust enforcement machinery.

In other words, instead of quick-fix legislation with potential Rube Goldberg effects, we urge a thoughtful assessment of the consequences of such proposals, first. I think that Mr. Harold Kohn, who appeared this morning, fully earned his reputation as a highly sophisticated antitrust lawyer because he perceived, to the same extent that I do, that the novel terminology of this bill is bound to foment years of uncertainty and litigation which can only be detrimental to the interests of not only its sponsors but to the consumer and to the best interests of antitrust enforcement.

In other words, Mr. Kohn diagnosed, and I agree, that the cure appears to be worse than the disease. Listening to the other witnesses this morning who are expert antitrust practitioners and scholars, I would say, most respectfully, Mr. Chairman, that the message which I perceived was that the subcommittee should hesitate to rush in where the experts fear to tread.

I would like to double back now to some of the points which were raised this morning and address myself to those.

First, with respect to whether *Illinois Brick* is a good or bad event in the annals of antitrust enforcement, and also what the committee should do if it determines not to recommend enactment the bill now before you, I would like to say this:

ILLINOIS BRICK DECISION IS A WELL-REASONED OPINION

In light of Senator Scott's rather colorful critique of a villanous Supreme Court which does not follow his prose with sufficient care, I would like to point out that the *Illinois Brick* decision was not a cavalier, anticonsumer ruling by a Nixon-Burger court. *Illinois Brick* was a very careful opinion, a very scholarly opinion by former Deputy Attorney General, Byron White, of Colorado who, since his appointment to the Court in 1962, has perhaps been the strongest and firmest proponent of vigorous antitrust enforcement sitting on the high tribunal.

Also, there was a colloquy in which Senator Scott speculated as to what might have happened between the legislative history in 1976 of the antitrust improvements legislation and the Supreme Court opinion in *Illinois Brick.* Apparently, "a funny thing happened on the way to the Supreme Court." I don't think the matter is quite that mysterious. The Supreme Court addressed itself to interpreting the legislative intent and the legislative impact of section 4 of the Clayton Act of 1914, specifically the term "injury" as incorporated in section 4 of the Clayton Act of 1914. Whatever may have been the understanding of the Senators and Congressmen in 1976 with respect to their objectives in the Hart-Scott-Rodino legislation, that could not, under traditional canons of American jurisprudence, vary the impact and the meaning of the term "injury" in the Clayton Act of 1914.

I recall, Mr. Chairman, one of the first admonitions as to the canons of statutory interpretation, which was brought home to me when I served as a Supreme Court law clerk, oh, too many years ago, was an aphorism by Mr. Justice Jackson that in interpreting statute the Court should analyze the statutory text, and not analyze or psychoanalyze the Congress, where the text was sufficiently precise to be understood. That is what the Supreme Court opinion in *Illinois Brick* did under consistent and traditional canons of jurisprudence.

Now, with respect to the contributions to antitrust by the *Illinois Brick* opinion—and I agree with Mr. Blechman—that the first-buyer limitation will simplify and expedite antitrust enforcement, instead of having antitrust monster rallies by platoons of lawyers and armies of plaintiffs each grabbing for a piece of the action and swamping the courts.

I also agree with the witnesses who stated this morning very accurately that the annals of private antitrust enforcement today confirms that there is no enforcement gap. Most industrywide antitrust treble damage cases do in fact include classes of direct buyers: *Children's Book* cases, *Plumbing Fixture* cases, *Gypsum Wallboard* cases, *Concrete Pipe* cases, *Chicago Coal* cases, as well as the *Bakery. Paper*, *Antibiotics*, *Folding Carton*, *Cement*, and *Plywood* cases. This does not purport to be an exhaustive or a complete list.

Also. I believe that the record will confirm that there is no so-called "deterrence gap." The Justice Department is now bringing its first antitrust felony prosecutions under the fortified antitrust powers given to the Justice Department in 1974, which provides for penalties up to $1 million for a violation and jail terms for up to 3 years. In view of those penalties, I doubt whether it can be said, as the release announcing the bill stated, that *Illinois Brick* will encourage manufacturers to go out and fix prices. I hardly believe, in view of the existing deterrents, that people will be putting up smoke to fill the rooms so that they can have price-fixing conspiracies. The penalties and risks are much too high for that. I also discern from Mr. Shenefield's statement and the statement in the Congressional Record introducing the bill that there is a fear of so-called windfall profits accruing to the first purchaser by reason of *Illinois Brick.*

Mr. Chairman. I have some wonderment about windfall profits. After all, the principle was established by *Hanover Shoe* in 1968, ten years ago; and no one concerned himself and no one lamented any

windfall profits. Particularly in view of the fact that antitrust treble-damage remedies provide for three-fold actual injury sustained, three times the damage. I don't find concern about windfall profits to be particularly convincing in view of the fact that triple windfalls are part of the basic legislation.

Senator KENNEDY. The point is that it is going to the wrong person.

RECOVERY BY MIDDLEMAN WILL FILTER DOWN TO CONSUMERS

Mr. ROWE. Mr. Chairman, I believe that if there are recoveries and if there is competition in the marketplace on the level of the person who recovers that the benefits of his recovery will go down to succeeding levels of distribution and to consumers. I think there is much misconception, if I may respectfully say so, with respect to the notion of the so-called overcharge and pass-on. I don't believe it is valid to assume that merely because Safeway, or someone else in business, recovers 10 cents more for a product that he will pocket that amount. If there is competition on the level of the direct buyer who first sustains injury and then makes a recovery, the force of the competition will inevitably tend to pass on some of that benefit to consumers.

Senator KENNEDY. You don't favor Mr. Blechman's disgorging process by one of the regulatory agencies?

Mr. ROWE. Mr. Blechman's suggestion, which corresponds to suggestions made by Professor Handler at an earlier time in parens patriae, is certainly an alternative that should be considered to parens patriae at the time they were recommended and certainly as an alternative to now creating a novel principle to overrule *Illinois Brick.* Our basic recommendation, Mr. Chairman, is that there be appointed an objective antitrust Remedies Study Commission, similar to the Antitrust Review Commission on substance which has been proposed by Senators Javits, Abourezk, and others over the years, focusing on antitrust remedies. The problem of antitrust remedies in the minds of very many serious students of antitrust has gotten out of hand. There have been serious criticisms by Professor Donald Turner of the Harvard Law School, a former chief of the Antitrust Division, by Professor Richard Posner of the Chicago Law School——

Senator KENNEDY. I am not familiar with all of those studies, but I understand your testimony to be this. Even though direct purchasers have not suffered the damages which indirect purchasers have, they ought to be able to accumulate treble damages. You don't favor the disgorging procedure, then; is that right?

NEED STUDY OF ANTITRUST ENFORCEMENT

Mr. ROWE. That is correct. As I see it, the competitive process will inherently provide some measure of disgorgement. Rather than today proposing additional experiments in antitrust remedial enforcement, I would prefer a detached study of the whole enforcement and remedial scene before urging such a course upon this committee.

Senator KENNEDY. What is going to happen to Mr. Agee's farm in the meantime?

Mr. ROWE. I have the utmost sympathy for Mr. Agee. I certainly would not wish to see the decimation of Nevada which was pointed to

this morning, or even Senator Scott's high prices for pipe tobacco. I don't assume necessarily, Mr. Chairman, nor should it be assumed that there was an antitrust violation merely because the price for beef has gone down or the price for tobacco has gone up. I think the matter has been pending in the courts.

Senator KENNEDY. We will never know that because he won't be able to get to court.

Mr. ROWE. I understand. I should comment that I believe my law firm is involved in some facet of that litigation. I should note that for the record and also for fairness. I don't want to comment on the merits of his lawsuit, but I cannot assume in all fairness that he has a meritorious——

Senator KENNEDY. You will let us know how your firm is involved?

Mr. ROWE. I will certainly make that available to the staff. I cannot assume that there was a violation merely because there was a price change. I don't know whether this matter has been within the purview of the Department of Justice.

Senator KENNEDY. Even if there was a violation, then he would not benefits; is that right?

Mr. ROWE. Because of my firm's involvement, I don't wish to comment on the merits, but I would say, as a prototype situation and getting away from the facts of that case and in order to be responsive to your question, that, as I heard the testimony this morning, they were talking about six or seven intermediate steps between the cattle people and the supermarket people. One of those steps was the packing people. As I understand it, there is antitrust litigation involving packing people also, wholly apart from the supermarket people. If you have that kind of chain of distribution and that kind of issue being involved, my reaction would be, as a prototype matter, that this confirms the concern which Mr. Justice White pointed to in trying to fathom through and to sift out and to piece out and to parcel out and to allocate and to figure out—assuming there is a violation, which is not established—who is owed what by whom.

I think, Mr. Chairman, that this may well make the point which the *Illinois Brick* case is trying to establish, namely, that the procedures would be so complicated, so cumbersome, and so awkward that this should not be inflicted on the judicial machinery which is already overburdened by a very heavy caseload and, after all, has other matters to consider, including criminal cases and other matters pending before the courts.

PROBLEMS IN LANGUAGE OF BILL

With regard to the terminology of the bill, again, I would compliment Mr. Kohn who has perceived, in the short period in which the bill has been available to us and to him presumably, that the language is what I can only call vulgarly "a can of worms" because of its new terminology. Thus, it adds the words "in fact." As Mr. Kohn points out, defendants may well, over the next few years, litigate and put before the courts for resolution the question whether a new requirement of "in fact" will in fact reduce the antitrust recoveries that were previously available. I would also say that the addition of the new terminology of "direct" or "indirect" can widen the circle of potential

plaintiffs to an almost infinite degree. I would like to stress, Mr. Chairman, that the amendment does not only apply to price-fixing conspiracies, which are the concerns of the committee, and it does not only apply to the Sherman Act. This amendment applies to the entire corpus of antitrust jurisprudence across the board, including the Robinson-Patman Act involving prohibitions on price discrimination which, I think, everyone versed in antitrust, and perhaps more than that, would agree is a statute of notorious complexity.

To now have a bill which says that a person who sustains "indirect" injury, not by a price-fixing conspiracy—that is to one side—but by a violation of the Robinson-Patman Act from a price discrimination, could create a circle and an ambit of antitrust exposures and liabilities which would attract plaintiffs out of the woodwork who had never been previously aware that they had any kind of colorable cause of action. It would magnify, therefore, hugely the caseload on the courts that would be imposed by the bill, perhaps inadvertently by the sponsors and proponents of the bill.

After all, in the release of July 15, the concern was with price-fixing conspiracies. I can understand that. I can understand where a legislative decision and determination might be made that particularly harsh remedies or particularly severe ordeals, even great burdens on the courts might be justified if you had a hardcore antitrust price-fixing conspiracy. But this bill goes far beyond that. It goes to the Robinson-Patman Act. It goes to section 7 of the Clayton Act, involving mergers. It is, in other words, an omnibus measure which goes far beyond even the proponents' intentions as expressed in the releases.

Therefore, as Mr. Kohn pointed out, and I agree, decades of antitrust decisions which have ruled out claims by landlords for loss of rents, shareholders for loss of dividends, patentees for lost royalties, suppliers, business partners, creditor, employees, even insurance agents, all claiming indirect injury derivative from the direct victim of an antitrust violation might be back in court. I genuinely do not see why the committee in consideration of legislation with respect to *Illinois Brick* would have such a sweeping intention and would wish to bring this about.

Finally, I see no reason to pass quick-fix legislation in an initial surge of panic, by reason of the *Illinois Brick* decision. By the way, Mr. Chairman, there have already been three versions of this legislation published. Within 5 days of the *Illinois Brick* decision, Congressman Steers introduced a bill in the House; the Association of Attorneys General had a second version of the bill; and S. 1874 is a third version of the bill. All of these indicate that there is certainly a great alacrity to jump into the breach.

But I think this would have serious consequences because, as I have pointed out, the testimony this morning, at least to me, shows that the cure is worse than the disease, and that the consequences go far beyond the contemplation of the framers.

What I would respectfully recommend, Mr. Chairman, is that this subcommittee should first seek the experienced views of the judiciary in big antitrust case management.

This committee, in all respects, should get the advice of the Judicial Conference of the United States which gave its advice last year on the parens patriae legislation.

I respectfully submit that this subcommittee should in no event make this bill retroactive to past transactions involving pending cases, for obvious reasons of constitutional vulnerabilities which, again, would foment years of litigation. The bill would go to the Supreme Court conceivably on that issue alone.

As Mr. Kohn pointed out, and I believe accurately, the setback by abortive legislation might well be worse, from the standpoint of even its proponents, than no legislation at all. To use a trite phrase, haste makes waste, particularly in a situation of this kind where years of litigation may be generated by legislative text and variations on that text. These will create years of litigation because the stakes are huge, the liabilities are high, for we are dealing with multimillions and possibly multibillion of dollars in liabilities. People will litigate these matters from now to doomsday. In the interim the consumer will be the loser, and antitrust enforcement will be no better off.

Finally, in view of the recent spate of laws in 1974 and 1976 by this Congress—all of which have strengthened antitrust enforcement machinery in various ways—and the growing criticism of some of the excesses of private antitrust enforcement, I would respectfully recommend that a broad assessment by an objective Commission to Study Antitrust Remedies should precede any new enforcement legislation.

Senator KENNEDY. Thank you very much.

We have some questions by Senator Thurmond which I will submit to you. We would appreciate your responses to them.

Mr. ROWE. Certainly.

[The prepared statement of Frederick Rowe follows:]

PREPARED STATEMENT OF FREDERICK M. ROWE

On behalf of the Grocery Manufacturers of America, Inc., I appreciate the opportunity to testify in opposition to S. 1874.

While GMA supports vigorous enforcement of the antitrust laws, GMA deems the bill's provisions unwise and premature, pending careful assessment of its impact on fair and efficient antitrust enforcement within the judicial system, and an objective overall evaluation of the recently fortified antitrust enforcement machinery.

S. 1874, according to its sponsors, is intended "to restore effective enforcement of the antitrust laws," by overruling the Supreme Court's June 9, 1977 decision in *Illinois Brick Co.* vs. *Illinois*, 45 U.S.L.W. 4611 (June 9, 1977).

But, in my view:

1. As correctly stated by Mr. Justice Byron White, a former Deputy Attorney General and strong judicial antitrust proponent, the *Illinois Brick* principle limiting private antitrust claims to the first or "direct" purchaser from the alleged antitrust violator will in fact simplify and expedite antitrust litigation, and make antitrust enforcement more rational, practical, and effective, without creating antitrust enforcement gaps.

2. S. 1874 goes far beyond its aim to provide effective redress against price-fixing conspiracies violating the Sherman Act, and would expand the potential reach of *all* antitrust jurisprudence by novel and confusing terminology, which is likely to foment years of litigation aggravating already serious court congestion; and

3. Rather than hasty enactment of quick-fix legislation, the wise course is to obtain the experienced views of the judiciary as to the efficient management of complex antitrust cases, and to refrain from imposing unfairly retroactive

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Counsel to the Board of Directors, Grocery Manufacturers of America, Inc.: partner, Kirkland, Ellis & Rowe; former chairman, section of antitrust law, American Bar Association, and council of antitrust and trade regulation, Federal Bar Association.

My law firm is involved in several lawsuits affected by this proposed legislation.

Since the text of S. 1874 and the explanatory statement on the bill became available only two days prior to this submission, the views herein are subject to modification.

new rules until there can be a broader assessment of the recently fortified antitrust enforcement machinery.

I. AS CORRECTLY STATED BY MR. JUSTICE BYRON WHITE, A FORMER DEPUTY ATTORNEY GENERAL AND STRONG JUDICIAL ANTITRUST PROPONENT, THE ILLINOIS BRICK PRINCIPLE LIMITING PRIVATE ANTITRUST CLAIMS TO THE FIRST OR "DIRECT" PURCHASER FROM THE ALLEGED ANTITRUST VIOLATOR WILL IN FACT SIMPLIFY AND EXPEDITE ANTITRUST LITIGATION AND MAKE ANTITRUST ENFORCEMENT MORE RATIONAL, PRACTICAL, AND EFFECTIVE, WITHOUT CREATING ANTITRUST ENFORCEMENT GAPS

As per Mr. Justice Byron White's opinion, the Supreme Court in *Illinois Brick* reaffirmed a decision it made nearly ten years ago, *Hanover Shoe, Inc.* v. *The United Shoe Machinery Corp.*, 392 U.S. 481 (1968), defining the key term "injury" in section 4 of the 1914 Clayton Act.

Each case held, in different settings, that the direct purchaser, and not others within or beyond the chain of manufacture or distribution, was the party "injured in his business or property" within the meaning of that law. Moreover, the direct purchaser "should be deemed for purposes of section 4 to have suffered the full injury" (slip op. at 6, 3). It was the Court's concern in both cases, that under any other rule "the effectiveness of the antitrust treble-damage action would be substantially reduced" (slip op. at 6).[1]

In both cases, the Court decided that the persons "injured" under section 4 are the first buyers, who have dealt directly with the alleged violator. Alternative theories which would permit claims that such persons actually "pass on" their "injury" to others further down the line of distribution were rejected. Thus, the *Hanover* Court disallowed a defendant seller's attempt to avoid his own liability by claiming that the plaintiff customer had passed on its "injury" to its own customers as higher prices. Now the *Illinois Brick* Court has underscored this point, by holding that plaintiffs may not claim that *they* were "injured" by higher prices passed along to *them* by somebody else up the line of distribution.

The Court was gravely concerned about the practical consequences of authorizing antitrust claims by parties beyond the first "direct" buyer. In the Court's view, "permitting the use of pass-on theories under section 4 essentially would transform treble-damage actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers." This effort "would add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness," and would foment "massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." (slip op. at 14, 17.)

In short, the Court was convinced that the antitrust laws "will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." (slip op. at 12.)

In this way, commercial parties in direct dealings with each other will have strong incentives for antitrust compliance, since any antitrust violation may be redressed by the first buyer through a treble damage recovery which is neither complicated nor diluted by a host of competing claimants.

Moreover, such clear-cut and simplified enforcement will pose clear and manageable issues for determining whether the claimed offense was causally responsible for the claimed injuries, and if so, in what monetary amount. Indeed, the principal basis for the *Hanover* decision disallowing pass-on theories was the uncertainty and difficulty of analyzing price and output decisions "in the real economic world rather than an economist's hypothetical model," and the costs to the judicial system and to efficient antitrust enforcement of attempting to reconstruct those decisions in the courtroom. (*Illinois Brick*, slip op. at 8–9.) Otherwise, proof of "indirect" injuries would threaten to bog down in intermi-

[1] The court explicitly did not base its decision on questions of "standing to sue" (slip op. at 5, note 7). Though questions of "standing" may raise issues somewhat similar to those the court discussed in its decision concerning "injury," nonetheless they are different concerns. The judicial concept of "standing" confines the parties entitled to ask for a court adjudication to those who are not too remote from the violation alleged, while "injury" deals with the Clayton Act's statutory reach as to substantive liability in private antitrust enforcement.

nable and inconclusive parades of contradictory witnesses, disembodied statistics and economic speculation. *Hanover* found that "since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures [related to pricing, volume, costs and profits], the task would normally prove unsurmountable." [2]

The Supreme Court's basic concern with the pass-on theory was whether it was susceptible "to proof in a judicial forum." (slip op. at 21.) The Court decided it was not, and that the analytic economic theory of pass-on would be impossible to use efficiently and reliably as a substantive rule of law for adjudicating liability and injury in private antitrust enforcement.

Significantly, the Supreme Court's principle creates neither "windfall profits" [3] for direct buyers, nor enforcement gaps benefitting price-fixing conspirators.

As for alleged "windfall profits," it cannot be assumed that direct buyers who pay too much due to price-fixing conspiracies among their suppliers can simply "pass on" such overcharges in full in their resale transactions, while collecting three times the amount of the "overcharge" from their suppliers.[4] Rather, if competition prevails in the market where the first buyer sells, competitive pressures will prevent such a "passing on" in full, thereby preventing "windfall profits" by recoveries for losses which were never sustained.

Furthermore, since the antitrust laws in any event authorize treble, not single, damages for successful private plaintiffs, the fear of "windfall profits" is hardly persuasive to overrule *Illinois Brick* and *Hanover Shoe*.

Nor will *Illinois Brick's* "first purchaser" limitation create large enforcement gaps. Substantial monetary incentives and pressures encourage direct buyers to pursue meritorious antitrust claims which promise recovery of substantial trebled damages plus attorneys' fees. Not only will corporate managements and counsel be alert to the potential of large recoveries to redress genuine financial injuries attributable to pricefixing conspiracies by a company's suppliers, but failure to pursue large meritorious claims may result in substantial liabilities to corporate stockholders.

Above all, today's antitrust annals in fact reflect vigorous and effective private antitrust enforcement by business plaintiffs who are direct purchasers. In recent testimony before this subcommittee, Maxwell Blecher, a prominent treble-damage antitrust litigator, cited major pricefixing cases in oil, asphalt, and gypsum prosecuted by private business plaintiffs. In a number of instances, including the electrical equipment cases, classes of "direct" purchasers have achieved substantial recoveries. Indeed, in virtually every massive industrywide antitrust suit, classes of direct purchasers participate.

In sum, apart from its contribution to clearcut, simplified antitrust enforcement, *Illinois Brick* does not immunize price-fixing conspiracies from effective attack by private treble-damage enforcement—above and beyond the deterrent of the recently fortified criminal penalties of $1 million per antitrust violation, and jail sentences for convicted antitrust offenders, which may result from government criminal prosecutions.

Nor is legislative nullification of the Supreme Court's decision warranted by last year's parens patriae legislation or the legitimate needs of consumer protection. In the first place, *Illinois Brick* does not touch the right of consumers to claim treble damages for higher prices due to antitrust violations by firms at the retail level, or others with whom consumers deal directly. Accordingly, antitrust violations in the sale of products or services to consumers remain fully amenable to suit, either by consumer class actions or by parens patriae suits filed by state Attorneys General. Also, antitrust conspiracies in consumer and industrial products will hardly go free, in the face of Government actions and private enforcement made even more effective by the streamlined principles explained in *Illinois Brick*. Of course, the benefits of this enforcement activity will ultimately redound to the consumer in the form of lower prices.

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[2] *Illinois Brick*, slip op. at 2.

[3] See Cong. Rec. S. 12040 (July 15, 1977); Department of Justice Release, July 15, 1977.

[4] See *Hanover Shoe*, 392 U.S. at 492–93; Handler and Blechman, *Antitrust and the Consumer Interest*, 85 Yale L. J. 626, 638–43 (1976).

II. S. 1874 GOES FAR BEYOND ITS AIM TO PROVIDE EFFECTIVE REDRESS AGAINST PRICE-FIXING CONSPIRACIES, AND WOULD EXPAND THE POTENTIAL REACH OF ALL ANTI-TRUST JURISPRUDENCE BY NOVEL AND CONFUSING TERMINOLOGY, WHICH IS LIKELY TO FOMENT YEARS OF LITIGATION AGGRAVATING ALREADY SERIOUS COURT CONGESTION

Senator Kennedy and Representative Rodino have announced that S. 1874 is "designed to overrule" the *Illinois Brick* decision, which they said "severely limited remedies against antitrust violators." Also, they have stated that "the *Illinois Brick* decision simply encourages manufacturers to fix prices, for there is now no effective remedy for redress." [5]

But notwithstanding the proponents' objectives, the text of the bill goes far beyond this aim, and will inevitably foment years of uncertainty and litigation before its meaning is ultimately determined. The bill is *not* limited to price-fixing conspiracies, which are its sponsors' prime concern. Nor is it even confined to violations of the Sherman Act, hardcore or otherwise. Rather, the bill will affect all antitrust jurisprudence, for suits may be brought under section 4 not simply to redress price-fixing violations, but violations of *any* of "the antitrust laws."

Accordingly, the bill's revision of the scope of "injury" would inevitably and radically change the scope of *all* private antitrust litigation, not simply that based upon *per se* violations of the Sherman Act. Thus, the bill could expand almost infinitely the number of potential plaintiffs who could allege some obscure "indirect competitive injury" in a price discrimination action under the Robinson-Patman Act. Yet the Department of Justice recently concluded that complex risks of treble-damage liability for "price discrimination" that "under such circumstances, to refrain from . . . price reduction is a reasonable choice." [6]

Likewise, the bill might significantly enlarge the circle of potential plaintiffs who may challenge mergers under section 7 of the Clayton Act, in the face of the Supreme Court's recent opinion in *Brunswick Corp.* vs. *Pueblo Bowl-O-Mat, Inc.*, (45 USLW 4138, Jan. 25, 1977). In that case, the Court limited the availability of treble damages to private plaintiffs challenging mergers, thus promoting the antitrust laws' purpose of "the protection of competition, not competitors." (45 USLW at 4141.)

Also due to the novelty of its terminology, the bill's additions to section 4 may either fall short of or go beyond what even its framers intend. For example, the insertion of the phrase "*in fact*, directly or indirectly" might be construed as a new and strict limitation requiring each "injury" to be factually and fully rather than inferentially proven. Such a construction might well bar claims of injuries where there is some interaction of higher prices and market forces in shaping a reseller's or processor's pricing decision, or a series of such pricing decisions, impacting on a plaintiff claimant.

Conversely, the phrase "directly or *indirectly*" might be construed to authorize antitrust actions not only by consumers down the chain of distribution, or through layers of brokers and resellers, but also by a host of other claimants. For example, a company supplying raw materials to a price-fixing manufacturer could allege its sales were down since the manufacturer's high prices depressed sales of the finished product. Similarly, another manufacturer, which does not deal with the price-fixer at all, but whose products are used in conjunction with the price-fixer's, might claim damages for loss of sales on the same principle. In short, anyone with an economic interest in any of the parties alleging some "direct" or even "indirect" injury along the chain of distribution, could also allege "indirect" injury to himself.

Indeed, S. 1874's novel terminology might be construed to nullify decades of antitrust precedents which have ruled out, for lack of standing, antitrust suits by landlords claiming lost rents, shareholders claiming lost dividends, patentees claiming lost royalties, and suppliers, business partners, creditors, employees, and even insurance agents claiming some loss derivative from the victim of an antitrust offense.[7]

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[5] News release, July 15, 1977.
[6] Department of Justice, report on the Robinson-Patman Act at 9 (1977).
[7] Cases collected in ABA antitrust law developments, p. 259, note 46.

In short, each alleged antitrust violation might breed dozens or scores of antitrust suits, including class actions. In each of these actions, the plaintiffs could be entitled to any damages they could demonstrate as to themselves. But clearly, there is a serious risk that defendants, already subject to treble damages, would be exposed to "double liability trebled"[8] and perhaps quadrupled or worse.

Judicial resolution of multiple claims in one consolidated omnibus proceeding would provide limited protection. Even if all the parties could somehow be joined together in one action, the practical problems of management would be immense. A critical problem would be the multiplicity of conflicts among the various "claimants," conflicts in litigation tactics and conflicts in proof, as each group attempts to show that the lion's share of the damages was really absorbed by it. The inevitable result of these conflicts would be delay, complexity, and hopeless confusion for the judge or the jury attempting to sort out the "facts."

Some people apparently believe that in cases of premeditated, hard-core, price-fixing conspiracies such ordeals may be justifiable, with the conspirators bearing the risk. But many, if not most, areas of the substantive antitrust law are not as clear as the rules against price-fixing, nor are the rules as clearly understood by the business and consuming public. The interrelation of regulation and competition policies, for example, can lead to many situations where the businessman is cursed if he does and cursed if he does not. Even antitrust enforcers give contradictory signals. The Department of Justice once sought to prohibit by consent order conduct which the Federal Trade Commission was simultaneously attempting to encourage by rulemaking.[9] A businessman can be faced with an action under the Robinson-Patman Act for allegedly cutting his price too far, and then with a prosecution for price fixing for checking whether he was "meeting competition" in defense against the Robinson-Patman claim.[10] It is fundamentally unfair in such situations to authorize multiple damages claims.

In sum, the bill threatens a proliferation of extremely complex lawsuits, when the court system is already seriously overloaded. Such a massive influx of litigation, especially complex litigation, could seriously impair the courts' ability to dispense justice at all, antitrust or otherwise.

Such new impositions on the seriously overburdened judicial system are not only unwarranted, but may boomerang on antitrust enforcement. In institutional self-defense, courts faced with a new onslaught of private antitrust litigation by peripheral plaintiffs may accelerate the trend of cutting back on substantive antitrust principles, thereby curtailing Government *and* private antitrust enforcement alike.[11]

The prime beneficiaries of such proliferating or amorphous litigation would be the lawyers, *on all sides*. For example, in the *Antibiotics* litigation settlement, while consumers eventually received a distribution of $28 million, the plaintiffs' attorneys received over $40 million. Attorney General Griffin Bell recently stated that he "would not countenance using the resources of the government or a court when the recovery is going to be $2 for each person in the class, and the real recovery is simply for the lawyers.[12]

Rules of law and procedure which permit such cases to persist, threatening indeterminate but potentially enormous liabilities, clearly create unjust leverage for settlement. For as the Supreme Court has noted, "even a complaint which by objective standards may have little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment.[13] But the "immense and unmanageable" class action antitrust suits which have been devised in recent years have almost never gone to trial. Instead, such suits became "overwhelmingly costly and potent engine[s] for the compulsion of settlements, whether just or unjust."[14]

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[8] *City and County of Denver* v. *American Oil Co.*, 53 FRD 620, 631 (D. Col. 1971).
[9] See, "Oversight of Antitrust Enforcement" hearings, of the Subcommittee on Antitrust, testimony of Maxwell Blecher, May 4, 1977, relating to personal experience in a case now in litigation, pp. 234 ff.
[10] *United States* v. *United States Gypsum Co.*, Nos. 75–1836 through 75–1842 (3d Cir. Jan. 6, 1977) ; BNA ATRR No. 797, p. F–1 (Jan. 18, 1977).
[11] E.g., *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 45 USLW 4828 (June 23, 1977).
[12] Business Week, June 6, 1977, pp. 60–61. See also testimony of Maxwell Blecher, Antitrust Oversight hearings, prepared statement, pp. 8–9.
[13] *Blue Chip Stamps* v. *Manor Drug Store*, 421 U.S. 723, 739 (1975).
[14] *Kline* v. *Coldwell, Banker & Co.*, 508 F. 2d 226, 237–38 (9th Cir. 1974) (Duniway, J.).

III. RATHER THAN HASTY ENACTMENT OF QUICK-FIX LEGISLATION, THE WISE COURSE IS TO OBTAIN THE EXPERIENCED VIEWS OF THE JUDICIARY AS TO THE EFFICIENT MANAGEMENT OF COMPLEX ANTITRUST LITIGATION, AND TO REFRAIN FROM IMPOSING UNFAIRLY RETROACTIVE NEW RULES UNTIL THERE CAN BE A BROADER ASSESSMENT OF THE RECENTLY FORTIFIED ANTITRUST ENFORCEMENT MACHINERY

The proposed amendment of section 4, to overrule the Supreme Court's interpretation of a statute now more than a half century old, would have far-reaching and as yet unconsidered effects on antitrust jurisprudence and on the caseload burden of the Federal courts. Before too hasty action is taken, the implications of S. 1874 deserve the most careful study, to see whether on balance, and in connection with the host of other measures Congress has enacted, it will promote or impair "effective enforcement of the antitrust laws."

It is hard to claim today that new legislation is needed to deter violations and promote effective antitrust enforcement, in view of recent antitrust enforcement innovations which have barely been tested. The first felony indictments and trials under the Sherman Act are only now getting under way. It has been only 9 months since the Justice Department obtained strengthened CID powers, and the State Attorneys General got the new parens patriae authority. Statutory premerger notification is still in the wings. The Congress is considering still further "improvements" in FTC enforcement, as well as further increases in antitrust enforcement budgets.

Yet in the midst of all this innovation, serious students of antitrust are expressing doubts about the effectiveness and social costs of treble damage litigation in many contexts, and about the piecemeal creation of uncoordinated antitrust enforcement procedures.[15] A dispassionate examination of the antitrust enforcement situation, perhaps by a Study Commission on Antitrust Remedies similar to pending proposals for a substantive antitrust review commission, seems appropriate before new enforcement experiments are legislated.

Similarly needed is a careful study of the proposed legislation's potential effect on the courts. The Chief Justice has long called for judicial "impact statements" to accompany legislation imposing significant new responsibilities on the judiciary.[16] S. 1874 cries out for such an "impact" statement, to ensure that Congress understands its impact on the overall administration of justice. The Judicial Conference should be requested to provide Congress with the judges' viewpoint on how this legislation might affect their ability to handle their responsibilities, in light of their experience in antitrust case management and resources. Similar advice was sought, and received, concerning the impact of the parens patriae legislation enacted in the last session of Congress.[17]

But even extended study may not cure the vagueness of the bill's text, nor uncover all of its unforeseen and unforeseeable far-reaching effects on antitrust litigation in general.[18] This legislation reaches beyond its sponsors' announced basic intentions, and is framed to make confusion, unfairness and uncertainty almost inevitable.

The confusion and uncertainty will be compounded if this new rule authorizing expanded scope for treble damage penalty suits is given retrospective effect to pending cases based on *past* activities.

As appeared to be the case in parens patriae, this proposal also "makes substantial substantive changes in the law;" thus, "its retroactive application would violate settled principles of due process. What is more, to change the rules of the game in midstream runs counter to everything we hold sacred in our system of law."[19]

Congress evidently recognized this serious problem, for the version of the parens patriae legislation finally enacted provides that it "shall not apply to

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[15] See, Hearings on S. 1284, Antitrust Improvements Act, 94th Cong., 2d sess., part 3 at 228 (letter from Prof. Richard Posner), 139–140 (statement of Milton Handler); part 2, p. 729 (Breit & Elzinga, Antitrust Enforcement and Economic Efficiency: the Uneasy Case for Treble Damages, 17 J. Law & Econ. 329 (1974).

[16] See, Chief Justice Burger, Report to the American Bar Association, 63 ABAJ at 504, April 1977.

[17] See, letter and report concerning Federal Court workload, in report on S. 1284, Rept. 94–803, 94th Cong., 2d sess., part 2 at 232.

[18] The drafting problems of bills in this area are reflected by the text of S. 1874, which is at least the *third* public proposal to nullify *Illinois Brick*. See, H.R. 7788 (June 14, 1977) (Rep. Steers); BNA ATRR No. 820, p. A–16, June 30, 1977 (NAAG proposal).

[19] Hearings on S. 1284, part 3, at 136, 94th Cong., 2d sess. (1976) (testimony of Milton Handler).

any injury sustained prior to the date of enactment." [20] Congress provided against retroactivity even though it stated that parens patriae was not designed to create new substantive rules of liability.

Surely it is no less appropriate to provide for only prospective application of legislation fundamentally transforming section 4 of the Clayton Act of 1914, the law which defines private antitrust enforcement, as authoritatively construed by the Supreme Court.

The text of the present bill reaches far beyond price-fixing conspiracies passing "overcharges" down the chain of distribution to consumers unable to recover.

This overbreadth is especially unfortunate, since the law already provides ample means to ensure redress and deterrence of antitrust violations affecting consumers. Legal innovations already in place should at least be given an opportunity to prove their effectiveness, before adding the new complications and unexplored consequences of S. 1874.

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[20] Public Law 94-438, section 304.

FAIR AND EFFECTIVE ENFORCEMENT OF THE ANTITRUST LAWS, S. 1874

FRIDAY, JULY 22, 1977

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:15 a.m., in room 1318, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senators Thurmond and Laxalt.

Also present: David Boies, consultant; Thomas Susman, chief counsel; Terry Lytle, and Robert Banks, counsel; Emory Sneeden, minority chief counsel, Peter Chumbris, minority consultant, and Garrett Vaughn, minority economist.

Senator KENNEDY. The subcommittee will come to order.

OPENING STATEMENT OF SENATOR KENNEDY

Today the subcommittee continues hearings on S. 1874, "A bill to restore effective enforcement of the antitrust laws." As discussed yesterday, this bill is a response to the Supreme Court's June 9, 1977 decision in the *Illinois Brick* case. Following the Court's decision, the subcommittee staff contacted people with a broad range of antitrust interests and views. We have heard, and will hear today, the testimonies of representatives of antitrust plaintiffs, defendants, Judge Real, State Attorneys General, the Department of Justice, Governor Byrne of New Jersey, former Senator Hugh Scott, the Chamber of Commerce and other interested parties. The Business Roundtable was invited to attend, but declined with the suggestion that we instead invite persons from a list provided by the Roundtable. We have done that and those people will testify.

The testimony yesterday presented a broad consensus that some change was needed to enable consumers to sue, but the testimony also presented some disagreement as to the nature and extent of the proper remedy, and as to the extent of possible problems raised by the remedy proposed in S. 1874.

We look forward today to continued discussion of four basic issues:

1. Is it desirable to enable consumers, most of whom are indirect purchasers, to sue for injuries they sustain as a result of antitrust violations?
2. Would such suits by consumers unnecessarily burden the judicial system and, if so, is there a way to avoid that burden without depriving consumers of their rights?
3. Is it practical to apportion damages between direct and indirect purchasers, and
4. Is it desirable to leave intact the common-law-type rules of remoteness and proximate cause applied by the courts prior to the Supreme Court's decision in *Illinois Brick*?

In the last analysis, however, both supporters and opponents of the legislation share two common goals. First is the effective enforcement of the antitrust laws through private treble damage cases. Second is disgorging violators of the ill-gotten gains.

So, the question becomes one of approach and one of method. In short, is it better to have one simple adjustment for the first purchaser than to have justice done for the consumer on a smaller and more complicated scale? S. 1874 answers that question; and that is the way I answer it as we begin this morning's hearings.

We are very pleased to have Senator Danforth up here before the subcommittee. He has taken a great interest in this subject matter. He is working very closely with us on the committee. We look forward to his testimony.

Senator DANFORTH. Thank you, Mr. Chairman.

I have a prepared statement which I will not burden the subcommittee by reading verbatim, although I would appreciate it if it could be inserted in the record.

Senator KENNEDY. It will be printed in its entirety, without objection.

STATEMENT OF HON. JOHN C. DANFORTH, A SENATOR FROM THE STATE OF MISSOURI

Senator DANFORTH. Thank you, Mr. Chairman.

Prior to my election to the Senate, I served two 4-year terms as Attorney General in Missouri. Our State, along with many, if not most, other States, was very active in antitrust enforcement. The primary tools that we had for antitrust enforcement were two. First, Missouri participated with other States in filing treble damage lawsuits alleging antitrust violations. These suits were filed by the Attorney General's office on behalf of the State of Missouri, as representative of a class of political subdivisions within the State who also were damaged by the alleged violation, and by the State of Missouri as parens patriae on behalf of the citizens of the State who were injured by the alleged violation. The total amount of damages were recovered while I was Attorney General was in the neighborhood of $2.5 million. It is our opinion that virtually none of that money would have been recovered had the *Illinois Brick* case been the law at the time our litigation was in the courts.

The lawsuits that we had under the Federal antitrust laws included cases against manufacturers of broad-spectrum antibiotics, plumbing fixtures, cast iron pipe, and other violations of the law. In almost none of these cases were any of the plaintiffs either the State or the political subdivisions of the citizens of the State for whom we acted as parens patriae, direct purchasers. Therefore, the *Illinois Brick* case would have made the cases we brought impossible. We would have been dismissed, I think, as to all of them.

The second major method of enforcement is under a Missouri State antitrust statute which was drafted by our office while I was Attorney General. This law is patterned after the Federal antitrust law and States within the statute that the same rules of judicial interpretation which are applied by the Federal courts to Federal antitrust laws will be applied to the State antitrust law. So, the effect of *Illinois*

Brick is that it would not only substantially gut antitrust enforcement in the Federal law, but also in our State it would gut it for the purposes of the State law. Therefore, when I learned of the holding of the Supreme Court in *Illinois Brick*, it was immediately apparent what far-reaching consequences this case would have for antitrust enforcement by State Attorneys General.

I would like to add one additional point, Mr. Chairman. That is that it seems obvious to me that we, as a country, should not turn the clock back to the commercial practices of the 19th century. The days of fair competition promoted by law have been with us now ever since the Sherman Act was passed. I do not think we are going to turn the clock back to the past.

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

I think that the best way of going about antitrust enforcement is not to aggregate yet more responsibility to Washington, either to the Justice Department or to some agency which will receive new regulatory power over the marketplace, but to revert to the conditions that existed prior to *Illinois Brick* and to place a substantial amount of responsibility in the hands of private plaintiffs and in the hands of State Attorneys General.

Senator KENNEDY. Thank you very much, Senator Danforth. I think you bring a good deal of experience to this area. As you mentioned, and as I think the record is very clear, Missouri, under your leadership as Attorney General, was one of the leading States of this country in using parens patriae power and authority. You know full well what can be achieved with this power.

I have just a few questions. The point is made by those who oppose the legislation that we will simplify and provide a degree of certainty with the *Illinois Brick* case by permitting only direct purchasers to sue. Some say the benefits will go to the consumer. They say the benefits will go to the consumer because it will be distributed by the corporation in the form of lower prices.

Secondly, some say we can set up some other kind of procedure in the Federal Trade Commission to distribute price fixing overcharges to affected consumers without leaving a burden on the courts.

How do you react to these points and others that were raised during the course of our testimony yesterday.

Senator DANFORTH. If the second method is followed, then obviously that would not be a simplification at all. It would be transforming what should be a one step procedure into a two step procedure. It would be kind of a convoluted process which would involve the courts and then the FTC or some administrative agency. I think it would be most difficult.

Under the first method, I think that there are a couple of problems. One, I do not think it would necessarily go out to consumers. I think that it would be a windfall profit trebled by the immediate purchaser of the goods which would simply be retained, which I suppose is all right.

It seems to me the whole effect of the antitrust laws since they were first passed at the turn of the century was to provide that those who were injured would be the ones who would police the statute, not somebody who was not injured at all. If the immediate purchaser is allowed to pass on in his price the effect of the conspiratorial price that he had to pay, then it seems to me that is nothing more than a windfall. That is a deviation from the purpose of the original antitrust laws which vested so much responsibility in those who are actually hurt.

Finally, I woud like to add that this business about it being very complex is something that I do not agree with. The fact of the matter is that, in treble damage antitrust cases, typically you do not have these brought all over the country. You do not have scores or hundreds of antitrust cases involving the same fact situation. Typically, you have cases which are consolidated in a single district. That certainly was the case, for example, with respect to broad-spectrum antibiotics.

ALLOCATION OF DAMAGES

Senator KENNEDY. Just on that point, you do not feel that it is putting too much of a burden on the courts to allocate the degree of injury between the direct and indirect purchasers, as we do in this legislation? We heard from the Attorney General yesterday. He thought that was a manageable factor. The courts are making that kind of allocation in property cases all the time, and that is not really an unreasonable burden.

Senator DANFORTH. Mr. Chairman, I do not think it is, either.

Antitrust cases are not simple cases. They are very difficult lawsuits. They go on for weeks or months. There is a substantial amount of evidence that is produced. In any event, the plaintiff or plaintiffs will have to present evidence as to what damages are. So, I would doubt if any additional time would be spent.

BURDEN ON COURT SYSTEM

Senator KENNEDY. What about the burden on the courts when you were Attorney General? Can there be effective judicial management of these cases?

I suppose the corollary to that is, even if it does put a burden on the courts, shouldn't we balance that against the legitimate interests of the consumer? If we do have problems in terms of judicial machinery, should we not deal with that as a different issue rather than effectively robbing the injured consumer of his remedies?

Senator DANFORTH. I do not believe that it is a substantial additional burden on the court. In fact, before *Illinois Brick*, I think the system was working quite well. I do not believe that *Illinois Brick* is going to ease the situation unless it does so in precisely the wrong way. By that, I mean, suppose that the direct purchaser is not going to file a lawsuit at all. Suppose that the direct purchaser is quite content with the status quo and that the direct purchaser has a fairly cozy relationship with the antitrust violator and is dependent upon the

antitrust violator in an ongoing commercial relationship so that he can continue in business. Suppose that the direct purchaser has passed on substantially all of the costs so he has not really been hurt.

In that case, of course, you would have simplification insofar as the courts are concerned because the direct purchaser probably would not file a lawsuit at all. But I do not think that that is the way to lift the burden on the courts. I do not think the way to lift the burden on the courts—if there is a burden on the courts—is to say, well, suddenly we are not going to enforce the antitrust laws. The fact is that, since the outset of the antitrust laws, treble damage suits have been a mainstay of enforcement. As a matter of fact, the antitrust laws have, from their inception, been an exception to the jurisdictional amount requirement for filing suits in Federal courts.

It has always been recognized, since the beginning of the antitrust laws, that the consumers, the people who are really hurt, should be in court. This is not simply for them to recover, but it is because it has been felt historically that this is the way to police the antitrust laws in the most effective way.

If you are going to have a situation so that there is either very little incentive or even a disincentive to file lawsuits against antitrust violators, then it seems to me that you have very substantially weakened the antitrust laws; and I would not be prepared to weaken the antitrust laws in order to save the Federal courts from some portion of their burden. If you would like at some future date to have some idea on how to ease the burden on the Federal courts, I would be delighted to give you some suggestions.

Senator Kennedy. As you know, Dave Meador, who is a professor at a law school in Virginia, and the Justice Department are giving that careful review. I will suggest that they be in touch with you. It is a complex problem.

Senator Danforth. I think that this is something that causes State attorneys general to be up to their ears in litigation. Much of it, frankly, is spurious. The notion of continued Federal court review of judgments and conviction, for example, is something which really is of de minimis value and is a tremendous burden on the courts. I think that that kind of problem is something we should address on its own merits rather than trying to ease the burden on the courts by taking from the courts cases that really should be brought.

Senator Kennedy. Thank you very much.

Senator Danforth. Thank you, Mr. Chairman.

Senator Kennedy. I know you have a full program scheduled. You are more than welcome to join us up here if you have time.

Senator Danforth. I saw some State attorneys general, my former colleagues, in the room. I would very much like to stay for them, but I have got to be some place else at 10. Rather than leaving in the middle, I will leave now. Thank you very much.

[The prepared statement of Senator Danforth follows:]

Prepared Statement of Senator John C. Danforth

Mr. Chairman, I appreciate the opportunity to testify in favor of Senate bill 1874. This bill will once again permit treble damage lawsuits to be an effective tool for the enforcement of antitrust laws.

Since the passage of the first federal antitrust law, 87 years ago, treble damage lawsuits have completed Government criminal and civil actions. These private litigants, long referred to as "private attorneys general," have been recog-

nize as chief deterrents to anticompetitive conduct. Trebe damage actions give the victims of anticompetitive conduct a vehicle to seek compensation for injury at a level three times the amount of loss. An incentive is thereby created to seek compensation no matter how minor the injury.

On June 9, 1977, the Supreme Court decided *Illinois Brick* vs. *State of Illinois* and dealt a serious blow to effective antitrust enforcement through treble damage lawsuits. The need for speedy enactment of S. 1874 is occasioned by this Supreme Court decision. The majority of the Court in *Illinois Brick* said that "(s)hould Congress disagree with (the result of the decision), it may, of course, amend the (antitrust laws) to change it." I would hope that Congress will act on this suggestion by the court and pass S. 1874.

Effective antitrust enforcement is necessary to advance our national economic policy favoring competition in the marketplace. Competition provides the American consumer with the best product at the lowest price. In our free enterprise system, it is the consumer who determines what and how much is to be produced. Competition among businesses then determine who will provide the service or manufactured product. The proper enforcement of the antitrust laws is essential to a healthy economy because the affected manufacturing and service sectors generate over 70 percent of our nation's income.

While the *Illinois Brick* decision does not specifically challenge the underlying goal of our antitrust laws—the preservation of our competitive market system—it will indirectly achieve that result by tampering with the enforcement mechanism of those laws. Antitrust enforcement has been compared to the functions of a referee in a sporting contest. The referee does not choose sides; he has but one purpose and that is to assure that the contest is played within the rules. When an infraction of the rules occurs, a penalty is mandated not only to reprimand the offending party but to serve as a future deterrent. Similarly, state and local governments, consumers and businesses who are injured by anticompetitive practices seek redress under the antitrust laws through government prosecution and private litigation. This process insures that the free market economy is protected, not by governmental regulations, but by the independent decisions of both purchasers and sellers in the market.

The majority in *Illinois Brick* said it very plainly: with limited exceptions, only those persons who purchase directly from an antitrust violator may sue under the federal antitrust laws. I disagree with the logic behind the majority's opinion.

Suppose a company, Jones Manufacturing, makes a consumer product and sells that product to ABC wholesaler. ABC sells to CLEMS retail store which sells the product to consumers. The price at which Jones sells its product is conspiratorially set. Under *Illinois Brick*, CLEMS retail store and the consumers are indirect purchasers and cannot seek redress for their injuries in court. Under the *Illinois Brick* rationale, it is irrelevant that ABC wholesale and all other intermediaries "passed on" the overcharge until it wa finally paid by the eventual purchasers from CLEMS. ABC is the only party, in this instance, who may sue and deny Jones the fruits of its illegal conduct.

Despite the fact that ABC has suffered no real loss, but has "passed on" its higher cost, it may, under the Supreme Court decision, recover treble damages. Despite the fact that the consumer has paid artifically high prices to CLEMS, the consumer may recover nothing. Query the willingness of ABC wholesaler, dependent on a continuing relationship with Jones, to press its case in court when it has the option to pass on its costs to the retail outlet.

The dissent in *Illinois Brick* expressed the view that this decision frustrates the intent of Congress in establishing the treble damage remedy. Enforcement of the antitrust laws through private treble damage actions must be available to persons injured by violations of the antitrust laws. There is nothing in the legislative history of the antitrust laws that justifies establishing a direct purchaser criteria as the basis for allowing a party to maintain a cause of action under those laws. Privity has no basis in antitrust law.

Not only does the *Illinois Brick* decision frustrate the private treble damage incentive of the Federal antitrust laws, but it destroys totally the *parens patriae* provisions of the recently passed Hart-Scott-Rodino Antitrust Improvements Act. As my colleagues are aware, the *parens patriae* provision gives to state attorneys general a cause of action to sue under the federal antitrust laws, *parens patriae*, on behalf of consumer-citizens injured by an antitrust violation. The effect of *Illinois Brick* on the *parens patriae* legislation is to limit this grant of

authority to suits where consumer is a direct purchaser from the alleged antitrust violator. In today's modern society where the intricacies of the marketplace have created numerous levels and channels of distribution for the sale and resale of products, indirect purchasers predominate. Further, it is the indirect purchaser who has the incentive to sue, because this purchaser is many levels removed from the alleged violator and often is the only party in fact injured by the violation.

In his dissenting opinion in *Illinois Brick*, Mr. Justice Brennan effectively states the rationale for S. 1874: "[I]n many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers, acting as middlemen, and ordinarily reluctant to sue their suppliers, pass on the bulk of their increased costs to consumers farther along the chain of distribution." It is the indirect purchaser who has the real incentive to file a lawsuit and it is the threat of such a suit which serves as a major deterrent to continued antitrust violations. Yet under *Illinois Brick* the indirect purchaser is denied a day in court.

I am convinced that the American people will not accept a return to the wide open commercial practices of the nineteenth century. If businesses and consumers are excluded from seeking redress in court from anticompetitive injuries solely because they are indirect purchasers, they will then seek to protect their interests through governmental regulation. Surely this country is burdened by more than enough Government regulation. Surely we should avoid the creation of a bureaucracy which will substitute its interests, feelings and decisions for those of the businesses and consumers in the marketplace. Surely we should maintain adequate antitrust remedies which assure that businesses will satisfy consumer preference for goods and services through open competition.

While I was Attorney General for the State of Missouri from 1969 through 1976, I witnessed firsthand the role that antitrust enforcement can play as the guardian of our free enterprise system. During my tenure, we instituted treble damage actions as counsel for all state agencies, as class representative for political subdivisions within the state and as *parens patriae* for consumer purchasers. We recovered more than $2.5 million in compensation for those injured. If the *Illinois Brick* decision had been law in 1969, the Attorney General's office would not have been able to recover for the state, its agencies, political subdivisions and consumers the $2.5 million. In most instances, the injured parties mentioned were indirect purchasers and, therefore, would have been without a cause of action.

In addition to initiating these wide-ranging treble damage actions and encouraging private treble damage actions by citizens and businesses within Missouri, my office also drafted a new state antitrust law. This new statute was enacted by the Missouri General Assembly in 1974 and was modeled after the federal antitrust laws. In fact, one provision of the bill specifically mandates that state courts construe the statute "in harmony with ruling judicial interpretations of comparable federal antitrust statutes."

Under Missouri antitrust law, the statutory language which affords an injured party a cause of action is similar to statutory language contained in the federal antitrust law (Clayton Act, section 4). Enforcement of the Missouri antitrust law by private and state treble damage actions will be limited to direct purchasers, thanks to *Illinois Brick.* Eight years of effort by the Attorney General's office in creating an environment in which an antitrust enforcement program could thrive through both state and private enforcement is now threatened by the *Illinois Brick* decision.

When I was Attorney General of Missouri, my office was involved in the preparation of the *amicus curiae* brief for 49 states submitted to the Supreme Court in *Illinois Brick.* I was concerned at that time that the door to the courthouse for antitrust litigation remain open for all persons injured within the scope of the antitrust laws. My concern and interest has not waned and as a Senator from Missouri, I will actively work to obtain congressional reversal of the *Illinois Brick* decision. Mr. Chairman, it is my hope that our colleagues in the Senate will perceive the *Illinois Brick* decision as it is an obstacle to an effective and vital antitrust enforcement program through treble damage actions. The suggestion in the Supreme Court's majority opinion that Congress ought to amend the antitrust laws if it disagrees with the Court's ruling should be taken seriously. I commend you, Mr. Chairman, for moving on this legislation with all due speed.

Senator KENNEDY. We are very pleased to have the Governor of New Jersey, the Honorable Brendan Byrne here. He has had a very deep interest in law enforcement. As the Essex County prosecutor for 9 years, and as a New Jersey Superior Court Judge for 3 years, Governor Byrne came to the office of Governor with a well-demonstrated commitment and experience to effective law enforcement. As Governor, he has continued his active involvement in law enforcement, especially white collar crime.

He has served as Chairman of the National Advisory Council on Criminal Justice, Standards, and Goals, and he has greatly increased the enforcement capabilities of his Attorney General's office.

Governor Byrne is here today with his Attorney General, William Hyland. I welcome you both.

Governor BYRNE. Thank you, Senator. If I could, I would submit my statement for the record so that I do not have to burden the committee with a verbatim reading of it.

Senator KENNEDY. It will be included in its entirety, without objection.

STATEMENT OF HON. BRENDAN T. BYRNE, GOVERNOR, STATE OF NEW JERSEY, ACCOMPANIED BY WILLIAM HYLAND, ATTORNEY GENERAL

Governor BYRNE. Thank you, Mr. Chairman. Accompanying me today is Attorney General Hyland, who does have familiarity with this issue in New Jersey.

New Jersey has used laws which existed before the *Illinois Brick* case. We also have a rather vigorous enforcement of antitrust and did have, even before parens patriae was adopted. The *Illinois Brick* case does set us back in New Jersey. I believe it takes from us an important weapon in antitrust enforcement.

It is unusual, Senator, for a Governor, I guess, to come down to testify on a bill unless the bill appropriates some revenue sharing or makes the State a beneficiary of some congressional largess. But this legislation, I think, is as important to a State as any concept of revenue sharing because it gets to the heart of service to consumers in New Jersey. I am aware of some of the reservations that have been expressed toward the reinstatement of what we thought the law was prior to June. Frankly, neither the Attorney General of my State nor I am very much impressed with the so-called problems.

I also ask the committee to remember that not every case gets into court. The fact that a statute is in existence which sets a Federal policy against price fixing is enough to make most people comply with that statute. A statute which sets a policy but which gives no weapon for enforcement is a very weak statement of policy, if an effective statement of policy at all. So, to have on the books a statement of policy and a method of enforcing that policy will keep a great many people from violating that law. It will keep a great many cases from ever coming to court because there will be no violation. Nor can you assume that every violation results in a 6-week or a 6-month trial in court. So, I really believe that that type of criticism is substantially overstated.

We think that our view as a state is typical of the concern that most states have for the present state of the law after the *Illinois Brick* case.

We feel that this legislation, as sponsored by you, Senator, and sponsored by our congressman, Peter Rodino, on the House side, is vital to the protection of our citizens and protection of all citizens.

Senator KENNEDY. Attorney General Hyland, do you want to make a comment?

Attorney General HYLAND. Senator Kennedy, I would cite only one case which I think illustrates our concern over the damage that has been done to the commonlaw powers of the Attorney General when the *Illinois Brick* case was struck down, in effect, what we had worked so hard to accomplish through 1975 nad 1976, the Hart-Ccott Rodino bill.

We were in the Federal court in New Jersey in 1972 and 1973 in gasoline price fixing. The State had the authority in that case only to bring its cause of action on behalf of the State itself and the political subdivisions because of the direct purchaser problem. We did not at that point have the jurisdiction to sue on behalf of the public as a whole.

It is interesting in that case that damage statistics were developed that showed what the true dimension of that lawsuit should have been. We recovered $3 million for the State of New Jersey and $3 million for its subdivisions, but some $24 million in estimated damages that the public generally had suffered could not be recovered. I think it was a great injustice that the consumer was not able to recoup those illegal profits that had been secured through violations of the law that we could not get at in a civil sense.

In my experience, the extensive criminal powers of the Federal and State Governments are not sufficient to deter price fixing. When you do have something that permits you to go directly at the pocketbook of those who are violating the antitrust laws, you have a much more effective deterrent than you would otherwise.

NEW JERSEY IS AN INDIRECT PURCHASER 95 PERCENT OF THE TIME

As a State, we will suffer very greatly if we do not overcome *Illinois Brick*. At least 95 percent of the purchases that are made by the State of New Jersey are made as an indirect purchaser. So, only in a very limited number of cases will we be able to protect our own interests—speaking now just as a governmental plaintiff—unless *Illinois Brick* is set aside.

Beyond that, there is no need to reargue the merits of the parens patriae. Not only did the Congress adopt the legislation in 1976, but it enacted another declaration of congressional intent by having provided in the Crime Control Act of 1976 for funding of state offices. It seems to me that Congress has said we want the states to get into the problems of antitrust enforcement and we are willing to help them financially in doing that. So, we are just back here now, it seems to me, to reestablish that congressional intent which I think has been set aside in an overly rigid application of the *Hanover* case by the United States Supreme Court.

ARE PENALTIES SUFFICIENT?

Senator KENNEDY. You do not think that increased criminal sentences and fines for antitrust violations are sufficient to deal with this problem?

Attorney General HYLAND. I do not. Most of the antitrust violations are corporations. In some cases, individuals receive jail sentences, as they did in the electrical supplier price fixing cases in the sixties. But, if there is a substantial gain to a corporation by virtue of price fixing practices, a criminal penalty of a few thousand or even a few hundred thousand dollars is not enough, in my judgment, to provide the economic deterrent. In addition to that, of course, we have done nothing to make the consumer whole. Of course, I think that is an important part of our responsibility to do total justice in these situations.

MANAGEABILITY

Senator KENNEDY. What about the manageability of the consumer's interest in these situations? Could you comment a little bit about that issue?

Attorney General HYLAND. I do not think that it would be responsible to say that it is not a problem. But it is the kind of problem that courts and attorneys encounter in a great variety and types of litigation. It was demonstrated in the tetracycline case that damage awards are manageable. As you know, a 2-stage program for the distribution of that settlement was arrived at. Those who could prove specific claims were given an opportunity to establish those claims and be paid. Beyond that, the states that participated in the settlement had the opportunity to encourage and help research other health problems in their states by setting up a fund. In New Jersey the monies that came to us were used to set up a very extensive and useful drug rehabilitation facility.

So, I think, both from the standpoint of assessing the damages—which would have to be done scientifically and statistically in some fashion—and from the standpoint of distributing awards, the cases are manageable.

Senator KENNEDY. When do you get to a de minimus situation, where the interest of the consumer is so small that they should not be pursued? That question has been raised by members of the subcommittee. Do you permit that issue to be reasonably open and flexible so that judges can make some judgment on that? Do you have any sense or feel about it?

Attorney General HYLAND. My own concept is that the de minimis character of damages should not be allowed to deter the State Attorney General or other law enforcement officials from pursuing price fixing. If, in the aggregate, substantial sums of the illegal profits have been made by manufacturers, then that civil claim should be pursued even though individual consumers have been damaged in a very minor degree individually.

Governor BYRNE. Is that not a very practical judgment that has to be made and really not one that can be defined by congressional enactment?

Senator KENNEDY. How much price fixing do you have up in New Jersey?

Attorney General HYLAND. I think it is very hard to make a body count of this kind. We have an active antitrust section. We are busier than we can afford to be. Yet, I like to think that we are aware of a number of violations simply because we are pursuing them. The thing that really concerns me are those areas of the country where there may

be the feeling that there is not a great deal of price fixing simply because the states do not have the resources to make an inquiry to find out whether there is or not. Of course, that is what the funding of a State Attorney General's office is for and what antitrust activities will help to overcome.

Senator KENNEDY. It has been very fine and very helpful testimony.

RETROACTIVITY

Governor BYRNE. I have one final comment. I have read some criticism about the fact the Congress has addressed this problem very promptly. We have now motions for summary judgment in antitrust cases in the Federal courts of New Jersey. Now, I do not know how retroactive an adjustment to the *Illinois Brick* case is going to be, but certainly there is a gap now. Corporations are taking advantage of that gap because it exists.

Senator KENNEDY. Thank you very much.

[Prepared statement of Hon. Brendan T. Byrne follows:]

PREPARED STATEMENT OF HONORABLE BRENDAN T. BYRNE

Good morning, and thank you for the opportunity to explain why the passage of S. 1874 is important to the state of New Jersey. First, the state of New Jersey is a major purchaser of goods in its own right. Some commodities, like gasoline, it purchases directly, but most goods, like sugar, plywood, concrete, asphalt, and so on, are purchased indirectly from a point on the chain of distribution several steps away from the manufacturer. Without S. 1874 the state will not be able to sue for damages as an indirect purchaser even though it has been overcharged because of price fixing by the manufacturer.

Second, the State of New Jersey has millions of consumers who are overcharged because of price-fixing schemes which raise the price of goods to them. Without S. 1874, the State is powerless to help them as *parens patriae*, and the intent of Congress in passing *parens patriae* legislation will thwarted. Since the principal purpose of S. 1874 is to rectify the damage done to these essential aspects of our antitrust enforcement capability by the Supreme Court's recent decision in the *Illinois Brick* case, I must go back a year or so in the history of antitrust enforcement.

Before the passage of the Hart-Scott-Rodino *parens patriae* legislation, the State could represent itself in an action for treble damages against a price fixing manufacturer even where the State was an indirect purchaser of the product. The State could not represent its citizens as consumers for their injuries as indirect purchasers of price fixed goods. The Hart-Scott-Rodino legislation allowed the State to pursue both kinds of suits. The public would be benefitted in two ways: They are benefitted indirectly as taxpayers by the State's recovery in the first case; and they are benefitted directly as consumers for their out-of-pocket injury in the latter case.

With the advent of the *Illinois Brick* decision, which forbade suits by indirect purchasers against price fixing manufacturers, we not only lost all the gains made by the Hart-Scott-Rodino legislation because consumers are invariably indirect purchasers, but we also lost the ability as a State to sue for treble damages because the State is almost always an indirect purchaser. In short, *Illinois Brick* eradicated the benefits of the Hart-Scott-Rodino legislation and put states in a worse position than they were in before that legislation was even passed. Let me give you some examples from New Jersey's experience, for it was our longstanding commitment to antitrust enforcement as well as my own strong feelings on the subject which led my administration to fight so hard for the passage of the Hart-Scott-Rodino *parens patriae* legislation.

Let me tell you about the case of *New Jersey* vs. *American Oil*, 53 F.R.D. 45 (D.C., N.J., 1971) which was litigated in the late sixties and very early seventies before the *parens patriae* legislation. This was a classic case of price fixing by the manufacturers of gasoline. The parties injured were not only the State and its political subdivisions but also literally millions of consumers.

We were able to recover $3 million for the State and another $3 million for our political subdivisions. We also wanted to recover the damages done to our citizens who were gasoline consumers. Since we could not represent them as *parens patriae*, we were forced to try to act as a representative of the class of consumers under the Federal class action rules. The court blocked this attempt, however, on the ground that it would be unmanageable for each consumer to come in and prove his individual damages. Had this action been brought after the *parens patriae* legislation, these problems would not have arisen.

We could not only have acted as *parens patriae* for our citizen consumers, but also could have aggregated their damages using statistics, and we would have been able to recover the estimated $30 million in damages which they suffered. That's why we fought for the *parens patriae* legislation and that's why we don't want to see its benefits obliterated by the *Illinois Brick* case.

In light of this treatment of consumer class actions, there will be no remedy for the consumer in antitrust cases unless the State's *parens patriae* power is restored by this legislation. There will be substantial benefits to the consumers of New Jersey and every other State. Consumers will receive both cash recoveries and the benefits of increased government services. In the *Tetracycline* litigation, the surplus consumer recovery which could not be distributed was used to create a trust fund for the establishment of a drug rehabilitation center for youthful drug offenders.

Had this money not been recovered by the State for consumers, this important facility would not exist. Indeed, had *Illinois Brick* been the law when that suit was filed, there would have been no recovery at all for the consumers. Finally, this case clearly demonstrates that consumer recoveries can be effectively administered and equitably distributed.

To illustrate the effect of *Illinois Brick* on actions brought by the State, let us look at the case of *New Jersey vs. Emhart Corp., et al.*, 1973–2 trade cases 74,680 (D. Conn.), also known as the *Master-Key* case. Here was a price fixing conspiracy between four manufacturers of Master Key Systems. The State was a fourth level purchaser of several of these systems. That is, the manufacturers sold to a distributor, who sold to a general building contractor who installed them in a State-owned building. Here the State was allowed to show that the overcharges from the price fixed systems had been passed along to it right down the distribution chain, thus causing the State to pay more for the systems than it should have.

The settlement of the litigation in the plaintiff's favor for $21 million was judicially approved. New Jersey's share of that total recovery will be in excess of $400,000. Had this case arisen today, however, the State could not have sued the price fixing manufacturer for its overcharges. Only the distributor, as first in line in the distribution chain, could have sued. And, given the disinclination of distributors to interrupt their sources of supply, there is a question as to whether the distributor would ever have sued, particularly when the overcharges to the distributor could be passed along to persons lower down on the distribution chain.

Turning now to a related problem, which is not unique to New Jersey as other States have followed our example, I want to advise you that New Jersey uses antitrust recoveries to finance its antitrust enforcement activities. When the court distributes the funds in the *Master Key Case*, for example, those funds will go into a revolving fund to pay for future enforcement activities. If corrective legislation like S. 1874 is not passed, we will soon deplete this revolving fund and be forced to resort to our already overburdened general revenues to support these essential efforts.

Let me assure you that the evidence of our commitment to antitrust enforcement is a matter of record. During the last four years we have tripled our antitrust enforcement staff resources and are in the final phases of implementing a sophisticated computer support system to facilitate broader and more complex investigations and litigation. These initiatives must not be allowed to be thwarted.

For the sake of the States and the American consumers, I urge you to support S. 1874.

Senator KENNEDY [continuing]. Our next witness is Judge Real. Judge Real is United States District Judge for the Central District of California. He has been involved in several notable antitrust cases. We look forward to his testimony.

STATEMENT OF HON. MANUEL REAL, U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge REAL. Thank you, Mr. Chairman.

I have no formal statement because of the time constraint.

I am here to discuss *Illinois Brick* and some of its impact upon the antitrust law. I would like to start with a little bit of discussion because I think in *Illinois Brick* the Supreme Court has invited the Congress to enact some legislation concerning consumer antitrust rights.

I refer to footnote 14 of the opinion. They do say that, while "we do not lightly disagree with the reading of *Hanover Shoe* urged by these legislators, we think the construction of section 4 adopted in that decision cannot be applied for the exclusive benefit of plaintiffs. If Congress disagrees with the result, it may, of course, amend the section to change it; but it has not done so in the recent parens patriae legislation."

EFFECT ON PARENS PATRIAE

I think that is significant from two standpoints, Senator Kennedy. What *Illinois Brick* does, at least in my reading of the opinion, is to effectively prevent consumers from suing under the antitrust laws and, in effect, negating the enactment of the parens patriae act of 1976. There is no creation of a new right in the parens patriae legislation. It is only a procedure by which the rights of individual citizens who could not otherwise bring those rights to the attention of the court can now do so.

The concern of the court in *Illinois Brick* was twofold. I think maybe an analysis of that might be in order. The reason for *Illinois Brick* was, one, that the Supreme Court was concerned about the adoption of a rule which would be unfair. That is, that since the Supreme Court had already made the determination that defendants could not press the defense of pass-on, that the offense of pass-on would be unfair to those defendants. I think a central answer to that concern might be a review of the question of whether or not a defendant in certain circumstances could urge the defense of pass-on. This might be something the courts could look at and review and perhaps reassess in light of facts other than those that were present in *Hanover.*

The second concern was that they had already given a construction to section 4 in *Hanover* that the overcharged direct purchaser and not others in the chain of manufacture or distribution is the party to sue. Then they put in quotes "injured in his business or property" within the meaning of the section.

This brings two disturbing thoughts to mind. One is that I do not believe that *Hanover Shoe* made that determination. I think that Justice White, who wrote the *Illinois Brick* and also wrote *Hanover*, did express in *Hanover* that fact that, although others might be harmed and damaged in the *Hanover Shoe* situation, that they were presented with a fact situation in which the only person who could be held was before the court. That was the direct purchaser. They were not going to allow, in effect, the antitrust violation to be rewarded by the fact that somebody might press a question of damage that had been passed on. Also, there were the difficulties of proof in that case.

There was a very kind of integrated product there. It was not an integrated product. You had the question of whether or not you were buying or leasing the machinery and whether or not that cost was passed on to the ultimate consumer of shoes.

INTERPRETATION OF BUSINESS OR PROPERTY

It was another disturbing aspect. The legislation does not address that question, Senator, and that is a coming question, at least in the courts of appeals. By tacit recognition of the Supreme Court's failure to grant cert in certain cases, the courts of appeals have interpreted the term "injured in his business or property" found in section 4 of the Clayton Act as really meaning business property. Therefore, no consumer, in any aspect of his relationship to an antitrust violator, whether it be at the retail level or manufacturer's level, would have a right to sue since he has no business property which is involved in the violation.

I think that has been the express ruling of the Ninth Circuit, at least in the case in which I was involved. In the so-called smog cases, the courts have directly made the determination that the consumer as such does not have business property and therefore is not one who is injured within the meaning of the antitrust laws. I think it would be ill-advised for a judge to make a judgment on the necessity of the legislation. I can only say that, if the Congress is concerned with the rights of a consumer to sue for damages that might be directly his, the legislation is appropriate. It does not go far enough, I believe, in that respect I believe the Congress should address itself to the question of the interpretation of the courts of the business or property, which is in the disjunctive in section 4 of the Clayton Act but has been made conjunctive by the courts of appeals of the several circuits.

I would be happy to answer any questions.

Senator KENNEDY. That is very helpful.

Some of our witnesses yesterday, Judge, indicated that the bill's language, "injured in fact, directly or indirectly," is not sufficiently clear. One witness said the language might be interpreted to repeal common law-type limitations of remoteness or proximate cause. Do you believe the language is unclear and realistically subject to these interpretations?

Judge REAL. I do not find any problem with that language, Senator. "Injury in fact" is a term which I think is sufficiently familiar to the judiciary of the United States to be able to make a determination of the meaning of that. It is just simply what it says. That is somebody has lost some money by reason of a violation of the antitrust laws.

Senator KENNEDY. You are not troubled by that?

Judge REAL. I am not troubled at all by that language.

HOW WILL S. 1874 AFFECT STANDING?

Senator KENNEDY. What are the chances of having this language interpreted as extending the law of standing? I just want to nail this down for the record.

Judge REAL. I would be presumptuous to speak for how some 500 Federal judges in the United States might interpret terms, but I cannot find any reason for an interpretation which would lend itself to an extension.

Senator KENNEDY. What about the apportioning of the damages, as we do in this, between those that have been directly and indirectly injured? Does that create an undue burden on the courts? Are the courts already dealing with this kind of allocation of resources?

Judge REAL. I may have a very peculiar view because I happen to occupy the position of a trial judge. I appreciate the concern of the courts of appeals and the Supreme Court for burdens of a trial judge, but I do not find that that burden is any more difficult in an antitrust case than it might be in any case in which multiple plaintiffs come to a court for the determination of the specific aspect of damages that have been suffered by those plaintiffs.

MANAGEABILITY

Senator KENNEDY. Let's talk for a few moments about the judicial machinery problem that exists in the courts in managing these types of cases. We heard from the Attorney General yesterday. In his review of the rules of procedure, he felt that there was sufficient flexibility. Just in effective management, do you feel as a judge that you have the tools? If there is a variety of potential litigants, can you bring these parties together for effective management of the case?

Judge REAL. I believe we have presently the procedure to effectively manage, at least in the cases which I have read. We do have the tools to effectively take care of any problems which might arise in terms of the so-called manageability of antitrust litigation or which would come before the courts as a result of this legislation. The question of whether or not it would bring more litigation to the courts is really misunderstood. It assumes that this will bring cases which are not otherwise about in the United States and which would not otherwise be brought. If, however, the concerns of the Supreme Court in *Illinois Brick* or the reasoning given by the Supreme Court in *Illinois Brick* that a direct purchaser would bring a lawsuit in every case in which there was price fixing, I cannot visualize how there would be more litigation.

That has to admit that there would be a lawsuit for every violation of the antitrust laws. Who brings it is really unimportant in terms of the amount of litigation that is involved. It does bring some need for ingenuity, I take it, and more work by a trial judge to sort out the problems of who gets the money if there is, in fact, a violation and a judgment. But I do not find any trial judge has taken his job with the idea that it was an easy job or that it should be made easier at the expense of people who should have their rights vindicated.

Senator KENNEDY. You do not find it an unreasonable burden to apportion damages between the direct and indirect purchasers?

Judge REAL. Well, if the lawyers who appear before me are any example, I do not find those problems. They indicate that that can be done. I am sure that that is the function, if there is any function, to the so-called expert opinion and the function of the expert economist who can tell us where the impact of damage is.

INCENTIVE FOR DIRECT PARTIES

Senator KENNEDY. In your experience as a trial judge, have you observed any reluctance on the part of direct purchasers to bring antitrust suits against their suppliers?

Judge REAL. That is a difficult question to answer because I do not know how many direct purchasers have been involved in situations of price fixing. So, I cannot tell you whether or not there has been a reluctance. I can visualize that there would be reluctance in many cases for the direct purchasers to bring an action for violation of the antitrust laws. I think it may be evident from the fact that generally—and generalizations are very bad—the way a direct purchaser brings an action for violations of the antitrust laws is generally in answer to a suit by the supplier for a bill that is unpaid. It comes by way of counterclaim or by way of cross-complaint in answer to a bill that is not paid. "I do not want to pay the bill because you violated my rights under the antitrust laws." That is very often how the direct purchaser comes to sue under the antitrust laws of the United States.

Senator KENNEDY. Do you see much potential for windfalls for the middleman under the *Illinois Brick* case?

Judge REAL. I think there is a lot of potential for that. If pricing has to do with a fixed markup or if—as it does in some products—a wholesaler, or retailer will just double or add to the price that is given to him by the manufacturer, then there is no real damage.

I understand what the Supreme Court says the problem is. There is some failure to recognize there is no real damage in each of those chains of distribution. As a matter of fact, it might increase their profits. This is particularly so in a product which is not the subject of difficult competition. Price fixing generally does not happen when there is difficult competition. It happens in situations in which the competitive market is not as sharp as it ought to be.

Senator KENNEDY. What would be the principal groups whose interests will not be protected?

Judge REAL. I think it is very significant. One of the reasons given for parens patriae by its legislative history is the case in which I was involved. That was the case entitled *State of California* vs. *Frito-Lay*. There were four classes that were established in that litigation. There was a class of retail grocers. There was a class of restaurateurs who served potato chips and other snack foods as part of a meal. There were liquor stores and specialty stores in a separate class because of the nature of their business; it was a little different than a retail grocer. And, of course, there was the consumer. That was the family that put packages of potato chips into lunchbags. That case was settled for $6 million. The lawyers and the court had no problem in apportioning damages in that case.

That might not be a good example because it was an agreed settlement. But certainly the ultimate consumer got $2.5 million out of that settlement. The consumer would not have gotten that at all.

As a matter of fact, probably none of the plaintiffs who were before the court in those lawsuits would have received anything if *Illinois Brick* stands.

Senator KENNEDY. This has been very, very helpful testimony. Thank you very much.

Judge REAL. Thank you.

Senator KENNEDY. Our next witnesses will be a panel of two State Attorneys General and three Assistant State Attorneys General who have responsibility for their State antitrust programs.

Chauncey Browning is the Attorney General for West Virginia. Richard Turner is Attorney General for Iowa, Attorney General

Browning is also Chairman of the Antitrust Committee of the National Association of Attorneys General. The National Association has worked very closely with us in developing legislation.

Also on the panel are three Assistant Attorneys General: Robert Hill of Colorado, Tom Wilson of Maryland, and Mike Speigel of California.

We welcome all of you.

STATEMENT OF HON. CHAUNCEY BROWNING, ATTORNEY GENERAL, STATE OF WEST VIRGINIA, AND CHAIRMAN, ANTITRUST COMMITTEE, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Attorney General Browning. Mr. Chairman, we appreciate very much the invitation of this committee.

I am Chauncey Browning. We have on the panel with us today Attorney General Richard Turner of Iowa, who has a distinguished record of law enforcement including antitrust law enforcement in the State of Iowa. He is serving his fifth consecutive term as Attorney General. He is accompanied by his antitrust chief, Gary Swanson.

Representing the State of California is Mike Speigel, who has been working in the antitrust division in the Attorney General's office for the last 13 years. He has a substantial history in proprietary treble damage actions. He is familiar with all aspects of the tetracycline case, which you may wish to inquire into.

Representing the State of Colorado is Robert Hill. He is chief of the antitrust division of Colorado. He left a law firm here in Washington to return to Colorado.

Tom Wilson is from Maryland. He is chief of the antitrust division. He has a distinguished record in antitrust enforcement in that State.

Mr. Chairman. I have a prepared statement.

Senator Kennedy. It will be included, without objection.

ALL 50 STATE ATTORNEYS GENERAL SUPPORT BILL

Attorney General Browning. For purposes of the record, the resolution which was unanimously passed by the National Association of Attorneys General only a few days following the June 9, 1977 *Illinois Brick* ruling might also be inserted. It would be an important part of the record, Mr. Chairman because it is very difficult to get all of the Attorneys General of the United States to agree on anything. We are Democrats and Republicans. We come from all sections of the country. We are liberal; we are conservative, depending upon our nature and our constituency.

Yet, in this one instance, there was unanimity among each of the Attorneys General that this problem of *Illinois Brick* is one that so effects each one of our States and each one of our constituents and consumers in all of our States that we could have had perhaps all of our Attorneys General here today.

Senator Kennedy. We might be calling on them to let their Senators and Congressmen know their views.

Without objection, the resolution will be inserted in the record.

[See appendix for resolution.]

Attorney General Browning. So, we not only represent the National Association but those of us here today represent the unanimous deci-

sion of every individual Attorney General. Our testimony here today should be taken in that record, as though there were 50 of us. Actually, there are 52, including jurisdictions. We are here representing every consumer of every State in the United States.

Senator KENNEDY. That is extremely impressive.

Attorney General BROWNING. It is unique, I believe, Mr. Chairman.

Senator KENNEDY. It is unique. Quite clearly, you people know the most about the problem of effective antitrust enforcement; and you believe the citizens themselves are the most effective enforcers. You have a keen awareness of the judicial management in the States. You have more information than the Members of the Congress have on this issue.

I think it would be very wise for all of us to pay close attention to your testimony and the testimony to be received from this panel. As you mentioned, it is unique to have this degree of support on an issue which has enormous implications to consumers and effective enforcement of law. So, we very much look forward to your testimony and statements. I think you have a pretty good understanding of some of the primary concerns of the Members of this Judiciary Committee. We look forward to your testimony.

Attorney General BROWNING. I will keep my statement short, Mr. Chairman. I think each of us might make a very short statement. We are fortunate to have these antitrust chiefs here today who can testify to the nuts and bolts of the problems involved in the court system, apportionment of damages, and many of the other problems that you have raised and that I know are of concern to other members of this subcommittee.

Senator KENNEDY. Senator Laxalt, a very active member of this subcommittee, is very interested in this legislation. He may also question you after your statement.

CONSUMERS AND STATES ARE HURT

Attorney General BROWNING. I think it is important to put this problem in perspective. In the past 15 years, the State Attorneys General have recovered hundreds of millions of dollars from price fixers. This is a return to the public of hundreds of millions of dollars which otherwise would have been truly ill-gotten gain on the part of those who have conspired to fix prices against the public and the governments of the United States. Secondly, I think that it is important to know that, not only has the consuming public been injured severely by the *Illinois Brick* case, but I think that you also should consider in terms of Federal and State tax dollars, which ultimately come from the consumers, because neither the Federal nor State Governments in the United States are permitted to recover those dollars lost as a result of conspiracy because we do not have the opportunity to sue because we do not buy directly from the ultimate conspirator.

I think that it is important to note from the States' standpoint that we have a very close relationship with the Federal Government insofar as antitrust laws are concerned. The Federal Justice Departmment has indicated to us that they recognize their limitations in attempting to bring the number of antitrust cases which are apparent and which exist in each of our States. They simply do not have the ability to do it. It is important that we develop the kind of antitrust enforcement

within State government which is necessary to protect the consumers within their own States. The Congress also recognized this fact when when it passed the parens patriae legislation in 1976.

Now, only a few relatively short months later, we find ourselves, as a result of this decision, having the Congress of the United States put back, in effect, a number of years. The States and Federal Government are put back half a century in their enforcement of antitrust laws.

Let me conclude simply by saying that two questions were raised, Senator Kennedy, by testimony regarding the number of or the proliferation of cases.

Senator KENNEDY. Your point here, General, is that without this you are going to be worse off, obviously, than you were before.

95 PERCENT OF STATES' PURCHASES ARE INDIRECT

Attorney General BROWNING. Very much worse off than we were before. We are 95 percent worse off than we were before. The result of the *Illinois Brick* case means that we cannot bring 95 percent of the cases that we could have brought previously.

What that means to each State is this. Persons may conspire today who are doing business with the State of West Virginia or any other State in the Union or the Federal Government. They may conspire to fix prices against those Government entities.

Let's forget about the direct conspiracy against the consumer in *Frito-Lay* or whatever; lets talk about Federal Government contracts and State Government contracts. Conspiracies may be going on today. In the absence of congressional action to reverse the *Illinois Brick* decision, in 95 percent of those conspiracies neither the Federal Government nor the State Governments can do a thing about it. Those people may conspire with impugnity insofar as treble damage actions are concerned. They may be caught. They may be fined $1,000 on an $18 million conspiracy. They may serve 10 days in jail or 30 days in jail on a $50 million conspiracy or a $100 million conspiracy, which was the tetracycline situation. I suspect that those corporate conspirators would be happy to trade a $1,000 fine or a $1 million fine for a $100 million price fixing profit. The other $99 million they can stick in their pocket. In the absence of a reversal of *Illinois Brick*, that is exactly what we have as the situation in this country today.

If the Congress does not do something about it, it will continue. Every day that the Congress does not do something about it, it will continue. That potential exists for every day in the future. This is why we urge the Congress to move during this session as soon as possible to prevent and to stopgap that potential liability against both the governments and the consuming public.

PROLIFERATION OF LAWSUITS

The last two things I would mention are these. The reference was made to the proliferation of cases. It almost seems to me in listening to the discussion that we could look at the crime rate in the country today and say that the number of breaking and entering cases has reached the point where the best thing for us to do is to no longer cause breaking and entering to be a crime because we cannot handle the court system. Secondly, with regard to the apportionment of damages, the argument on that side seems to be that it is so difficult

to apportion damages that we should permit price fixing because it is too much to control. I do not believe that the Congress of the United States or the judical system of this country is so inept, ineffective, or impotent that we cannot devise a system that is fair to all the parties involved and that would prevent the millions and hundreds of millions of dollars of price fixing funds from going into the pockets of price fixing conspirators.

I have a great deal more faith in Congress and the judical system of this country than that. Thank you, Senator.

Senator KENNEDY. What interests are there that would rather have us not change the *Illinois Brick* decision?

Attorney General BROWNING. What groups or interests are there?

Senator KENNEDY. What groups would not be served by changing the *Illinois Brick* decision?

Attorney General BROWNING. I assume the groups that fought the parens patriae legislation.

Many of those groups. I would have to assume all of the persons who have been defendants in antitrust litigation in the past 50 years, and those who would like to engage in it in the next 50 years.

I do not want to be specific, Senator. Perhaps the yellow pages would be the best place to go. I do not mean to be flippant.

Senator KENNEDY. Let me press the point.

You say they are going to be penalized in any event because you will have cases brought against them by the direct purchasers, and they will get the treble damages. Therefore, one of the purposes of the antitrust laws will be served because you will still have cases brought against them. Maybe it will not go to the people.

How do you answer that one?

Attorney General BROWNING. I have two answers which are probably the same that have been given previously.

One, in many, many instances the direct purchaser simply is not going to bring action for business reasons. Second, at least tacitly or tangentially, he may be aware of the conspiracy and the price fixing and does not want to upset the apple cart. That may be more difficult to prove.

Again, let's speak in terms of the Federal Government contracts. Suppose we have a $100 million contract with the Federal Government and there was a price fixing scheme involved as a result of that award. If the direct purchaser gets the windfall profit as a result of the price fixing on that contract, then every taxpayer in the United States has lost that tax money. I do not think that that is right. I think when I pay my taxes and there is a conspiracy against my Government to fix prices and there is a recovery against the person who fixed those prices, then, as the person who paid that bill, I think I am entitled to my portion of my tax money back through the Government of the United States. I do not mean directly back to me, but back into the Government so that that tax money can be properly spent and services can be attained by me as a result of that tax dollar. This is where the the big money is.

Senator KENNEDY. This brings us back to the fact that you would be denied that right.

Attorney General BROWNING. I would be denied that right completely under the *Illinois Brick* decision.

Senator KENNEDY. General Turner?

STATEMENT OF HON. RICHARD TURNER, ATTORNEY GENERAL, STATE OF IOWA, ACCOMPANIED BY GARY SWANSON

Attorney General TURNER. Thank you, Mr. Chairman.

My views are virtually identical to those expressed by Senator Danforth, and so is my experience. We have been in all of the same cases: tetracycline, cast ironpipe, plumbing fixtures, asphalt. We have recovered virtually the same amount in my years as Attorney General. It is about $2.5 million. None of that could we have recovered had we been confronted with the *Illinois Brick* decision.

INJUSTICE OF DECISION

It is not surprising, though, that there is unanimity of agreement among the Attorneys General; everybody wants justice. What kind of topsy-turvy system of justice do we have when a direct purchaser who may not be injured at all and who may have suffered no loss and who may, in fact, actually have profited as a consequence of the price fixing can recover treble damages? It is most unusual to allow damages to someone who is not injured.

At the same time, the ultimate consumer, who suffered those damages, who has had the damages passed on to him, cannot recover a dime.

Now, that just is wrong. Everybody knows it is wrong. We have got to do something about it. I think the Congress must act in this area to correct this bad situation.

I would go a step further to simplify the procedures. I do not think they are all that complex to start with. There is nothing any more complex than tetracycline, and we settled that for $120 million. But I would go a step further and make it a little easier.

I would create a presumption in these cases that, where price fixing is proven, the presumption would be that the overcharge has been passed on to the ultimate consumer. It is a rebuttable presumption, perhaps; but I think a simple amendment could straighten out the mischief of the *Hanover Shoe* case as well as *Illinois Brick*.

If a direct purchaser has absorbed some of the loss, he can come in. He is the best person to prove that. He can show what he did not pass on. Otherwise, the burden should not be on the ultimate consumer to show how this pass-on occurred. It should simply be presumed. All he should have to prove it the amount of the overcharge to the direct purchaser.

I think the whole thing can be simplified. I think it would simplify a lot of the settlements. We have had cases where the manufacturers come in and offer a big settlement which we are willing to accept. At the last minute, we have some middlemen come in; and they want a *Hanover Shoe* handout. It is something that they are not entitled to. It is there, so they come up for a settlement. To me, they are not entitled to a thing. They did not suffer any loss. Or, if they did, they should not recover any more than the loss they suffered trebled. I support everything that has been said here. I urge the creation of this statutory rebuttable presumption.

Senator KENNEDY. Very good.

Our next witness on the panel is Mr. Hill.

Without objection, General Turner's prepared statement will be inserted into the record.

STATEMENT OF ROBERT F. HILL, STATE ASSISTANT ATTORNEY GENERAL, STATE OF COLORADO

Mr. Hill. Mr. Chairman, my name is Robert F. Hill. I am from the State of Colorado. I would like to carry to the subcommittee the best wishes and appreciation of Attorney General MacFarlane for allowing us to appear today to address this question. It is of serious concern to the State of Colorado, as it is to all the States in the Nation. Without wishing to repeat any of the remarks that have gone before, I think it would be helpful to address one specific case in which the states are now faced with problems as a result of *Illinois Brick*.

EFFECT ON CEMENT CASE

One which comes to mind immediately is the *Cement* case—as they are called—which is located in the State of Arizona. There are four States that are presently active in that case. As you can imagine, both the Federal Government and the State government pay an enormous proportion of funds for highway and other construction for cement and cement products. Roughly, 70 percent of all cement purchases go to ready-mix companies. Practically no purchasers go directly to the State, even though our State highways are built out of cement. We purchase either through a contractor or through a ready-mix supplier. In the State of Colorado, for example—and you find this to be true throughout the Nation—in recent years, ready-mix suppliers have been themselves indicted and the subject of antitrust litigation. Without casting aspersions on any industrial group, ready-mix has been a popular target of antitrust enforcers from time immemorial.

That case was, in our view, the largest potential damage case that is in existence in the Nation today on behalf of State Governments. It is now something in the neighborhood of 1 to 0.5 percent of its former potential. To date, there has been no ready-mix supplier coming in to file suit in that case. While now some may come in because of the potential for windfall profits, I think the merchandising system in effect there has clearly been on a cost-plus basis. You could say that the middlemen have suffered no real damage whatsoever. Yet, under *Illinois Brick*, they would be entitled to the full damages that have resulted to the State and the state's budgetary process as a result of the price fixing.

STATES HAVE AN IMPORTANT ROLE

There have been questions raised about the duplication of the work of the Federal Government. I think, again, this is an excellent case to look to for the answer to that duplication question. There was no predecessor Federal action. Now was there any Federal investigation which preceded this litigation. The most recent Federal action in this area that resulted in litigation was in the forties—the *Cement Institute* case.

I think this shows the importance of maintaining the states in this role—their proprietary capacity—able to recover damages on behalf of their taxpayers in the various states. It also serves the purposes of ferreting out, punishing, and hopefully in the future prohibiting violations of the antitrust laws. But for the state's investigation in that area, there would be no litigation today. I think that is clear. Moreover, that

is true time after time after time these days. The day when states merely bootstrap or piggyback on Federal actions has long passed. I think it is important for this subcommittee to recognize that, if this subcommittee wants effective antitrust enforcement, it must and hopefully will encourage the states to take an active role in this area. You have acted recently I believe, to encourage that.

CONGRESS MUST ACT QUICKLY

You have acted in the parens patriae area to encourage us to bring cases on behalf of our consumers. I am pleased to say that Colorado has two of the three pending actions that have been brought under that statute. If there are questions that go to that statute, I will be pleased to try to address them in the context of those cases. There is a second capacity. It is to recover funds on behalf of our taxpayers. I urge prompt—and I emphasize prompt—action to correct this matter. Within days after the *Illinois Brick* case came down, we were served with requests. The request was one question: "Do you have direct purchases?" The court has been advised already that, immediately following the date for the answer to that question, there will be motions for summary judgment filed in that case; and those without direct purchases will be out of the case in very short order. Therefore, I urge this subcommittee to act to correct the problems created by *Illinois Brick* and to do so as promptly as possible.

Senator KENNEDY. Thank you very much.

Mr. Wilson?

STATEMENT OF TOM WILSON, ASSISTANT ATTORNEY GENERAL, STATE OF MARYLAND

Mr. WILSON. On behalf of Hon. Francis B. Burch, Attorney General of Maryland, I thank you very much for the opportunity to testify on what we consider to be an extremely important matter.

EFFECT ON MARYLAND

The decision in *Illinois Brick*, Mr. Chairman, has damaged the State of Maryland in two capacities. Obviously it damaged it in the proprietary capacity, whereas we will sue for damages for overpricing on goods that the State has bought. As well, we have been injured very severely in the parens patriae capacity. The full extent of the injury cannot be seen yet. We have filed one of the three parens patriae cases. We do not believe that we will be affected there because we are involved there in situations where the consumer, a person who sold real estate in Montgomery County, dealt directly with the person who was alleged to have engaged in the price fixing.

As would be expected, we consider this problem to be a very severe one. We need very fast action on it. Consequently, we have taken what steps we feel we can in order to circumvent the rule of *Illinois Brick*, at least as it pertains to our proprietary capacity. The National Association of Attorneys General set up a subcommittee to propose a form of uniform assignment of a cause of action. The way that this would work is that the State would obtain an assignment from each link in the distribution chain between the manufacturer of price-fixed goods and the State. But, of course, that is a very expensive and very awk-

ward process. You never know if you have them all. It is awfully difficult to anticipate if you are going to have a problem before you have it.

As far as our parens patriae capacity, this type of assignment procedure will not help us a bit. There, we proceed as trustee for the citizens of the State. We never will be in a position to obtain an advance assignment. It is one of these things that you act after the fact. So, there is no way in that situation that any kind of an assignment procedure can help at all.

EFFECT ON PARENS

I know there has been discussion to the effect that *Illinois Brick* does not really affect the parens patriae section because it is in there by footnote and it was not before the court. But I, for one, would never advise my Attorney General to file an antitrust action based on indirect price fixing where the consumer who is not the direct purchaser has been injured. Assuming that the defendant would raise the *Illinois Brick* case as a defense—and I am sure he would—were he to prevail in that, then there is nothing to stop the court from determining the action was instituted wantonly. Of course, because of a provision of the parens patriae section, then it would allow the court to award a reasonable atorney's fee to the defendant.

Now, that is a pretty stiff deterrent to any State Attorney General bringing a parens patriae action for indirect price fixing. So, I would predict that this would not happen.

Finally, the only other comment that I would make would be that we would urge that the legislative history developed about this amendment to the Clayton Act would show two things. Showing these two things would go to show that all we are doing is trying to overrule *Illinois Brick*. We do not want to go beyond overruling *Illinois Brick* because we, at least in Maryland, believe that the law of standing in antitrust cases under section 4 has developed quite well in the Federal courts. We do not want to go back to the dark ages of the direct injury or remoteness of problems.

I would urge that the legislative history as developed show two points. One is that section 4 is not a limitation of liability section. I think the way the Supreme Court has amended section 4 amends it not to read that any person who was injured in his business or property may get threefold the amount of damages; but, rather, any person who violates the antitrust laws by price fixing shall have his liability limited to three times the illegal benefit that he receives. I think that is completely unjustified.

The other point that goes right along with that is that I think that the legislative history should show that the concept of multiple injury in not to be confused with or equated with the concept of duplicative recovery. We are not concerned about one person coming in and collecting twice for the same injury. What we are concerned about is that the courts recognize that quite often one violation causes injury to more than one person. Thank you.

Senator KENNEDY. Thank you.

Mr. Speigel?

STATEMENT OF MIKE SPEIGEL, ASSISTANT ATTORNEY GENERAL, STATE OF CALIFORNIA

Mr. SPEIGEL. Mr. Chairman, on behalf of Attorney General Younger, I would like to thank you for the opportunity to address the subcommittee. The State of California, as you know, has been very active in antitrust enforcement for quite some time. I personally have had the privilege of being involved for some 13 years. During the course of this time, we have probably been on the forefront of almost all the battles that are continually being fought in the courts between plaintiffs and defendants in the sense of how far enforcement will go, and in what respects the State will be permitted to bring lawsuits either as a user in its own proprietary sense or on behalf of consumers. In that context, I would like to talk about the practicalities of enforcement. I think it should be recognized right at the outset that criminal prosecution is not a substitute for civil action.

CRIMINAL PROSECUTION IS NOT A SUBSTITUTE FOR CIVIL ACTION

In the first place, the burden of proof is significantly different. There are many cases that the U.S. Department of Justice will not bring because they do not think they can sustain a conviction, but those cases often are quite easily sustainable in a civil manner. Indeed, in the tetracycline litigation, the defendants were acquitted finally in the criminal case. There was no criminal conviction of any defendant in the tetracycline case. Yet, in the history of that case, to date some $300 million, I believe, has been paid out in settlements of civil actions. None of that would have happened had *Illinois Brick* been decided in the first place.

In addition, there are many cases that the Federal Government does not bring, perhaps for reasons of proof, because of criminal statute of limitations problems. In that regard, the committee should be aware that fraudulent concealment, which quite often finds its way into the civil actions, does not apply to criminal actions.

A good many conspiracies are not discovered until well after the criminal statute of limitations has run out. In these cases, the States, through their Attorneys General, have taken a very active role in the prosecution. The *Western Liquid Asphalt* case—which the Supreme Court in *Illinois Brick* has effectively undermined—was brought by the State of California after a 2-year investigation. We were then joined by other western states. The net result was approximately a $30 million recovery for the states. We had no assistance from the U.S. Department of Justice in this action. They did convene a grand jury at one point, but that lapsed.

So, I think we should all be very aware that enforcement cannot simply rely on the Justice Department. The states have to be involved. They have to be involved in a way that is going to justify their involvement. I do not think that any State Attorney General's office is going to be funded by a state legislature for the purpose of bringing antitrust cases unless there is some likelihood of a recovery that will benefit the state.

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I would like also to address the question that Senator Kennedy posed to Attorney General Browning of West Virginia about who would oppose this legislation. On the surface, it appears that business is against this sort of thing. In reality, from my experience, business benefits from vigorous antitrust enforcement. In the cases in which I have been involved, and one really gets into learning the intricacies of an industry, we have observed that, after the conspiracy is over. when the companies start competing and tightening their belts and getting rid of he deadwood, the profit picture improves. At the same time, prices are lowered. So, in the absence of the conspiracy, the business climate in reality is better for those businessmen who are able to go out there and do their job. It is the lazy and those who like to think that somehow if they have an assured margin of profit and assured sales, that they are going to make more money who are fooling themselves. What happens is that the salesmen sit around and do not do anything; they don't have to. Yet, they are all on the payroll. In effect, the system gets full of deadwood, and the economy of the area in which these businesses operate is affected. I think in the long run it is to the financial benefit of business that there be vigorous antitrust enforcement.

This reminds me of arguments within the fish and game department so to whether or not there ought to be predatory animals for the health of deer herds. I think, in a sense, antitrust enforcement keeps the business community healthy. That is all I have, Mr. Chairman.

Senator KENNEDY. Thank you.

Without objection, the prepared statement of Attorney General Younger will be inserted into the record.

BURDEN ON COURTS

Senator KENNEDY. One question I have is about the overburdening on the courts. You people are close to the courts and have an idea about what the status is in your respective states. What can you tell us about the kind of burden that the restoration of your previous authority would bring? What kind of additional burden would it be on the court? Is it manageable?

Mr. SPEIGEL. In my experience, I think the burden is not as great as some people would like to argue that it is. I think we demonstrated in tetracycline, especially in the groups of states that did not participate in the early settlement but who litigated further, that a class action consumer distribution is not only manageable but is also very effective. I believe that some 700,000 people participated in that settlement. In addition, it has been my experience in cases that when the injured party is there in the court with a legitimate claim, the courts have no difficulty in seeing who is injured. To the credit of the business community, when they are sued by somebody with a legitimate claim, they do not have great difficulty in settling the lawsuit. It is when they are sued by people who they do not feel have a legitimate claim that they begin to get their backs up. We find that things drag around forever and ever.

I think that is what *Illinois Brick* in a sense has created. There are going to be lawsuits by middlemen, perhaps for windfall; and the defendants are not going to be so willing to pay that because they know it is a windfall.

Senator KENNEDY. Could I hear from the others, just briefly, in terms of your own States?

Mr. HILL. I think perhaps one of the best ways to judge the impact of going back to pre-*Illinois Brick* days is to look at the 15 years, for example, prior to *Illinois Brick* when that question was before the courts and to ask how much time the districts courts of the United States spent dealing with that question. I think anyone who is knowledgeable about antitrust litigation would tell you it is a de minimis amount of time. I think there are only two cases that I can think of in which I think a judge would have spent more than one day. I think the amount of time that has been spent by the district judges addressing that specific question, the question of allocation between the various groups, the potential claimants on a multitier system, has been days if not hours. It simply has not been a time-consuming process with the district courts largely because the plaintiff groups have resolved those questions among themselves. We could list case after case in which that has occurred.

As Mr. Speigel suggested, once you are knowledgeable about the industry, once you are into these cases, then the question of allocation between those classes is really not a terribly difficult task. It is generally resolved without litigation. I think that has consistently been the practice, certainly insofar as Colorado is involved and is knowledgeable about.

Mr. WILSON. I would concur.

If you look at an antitrust case, it is somewhat similar to any kind of case such as a tort case. When you analyze it that way, you see the problem is not very great. If you have a situation where a person is involved in an automobile accident and he hits someone on the street and knocks him up on the curb and he hits a few more people, I do not know that it is any great problem for the court to sit back and say, well, we cannot allow four people to come in here and sue, even though we know they have all been injured. Rather, we are going to have to worry about apportionment. The way to handle this is to let the first guy hit by the automobile come in, and everybody else is out. I do not think it is a real problem at all.

Senator KENNEDY. General Turner?

Attorney General TURNER. Certainly it has not been a problem in our State. This is partly because the cases are consolidated for trial and may be tried in another State. It is not that every district court is jammed up with antitrust cases. They all get together and put them in one place. It has worked very well as far as I am concerned. It has not caused any burden to our courts.

Senator KENNEDY. I have two further questions. One is about the filter-down theory. If we stay with *Illinois Brick* and permit the direct purchaser to recover, it is alleged he will filter that back to the consumer one way or another. It may not be the same consumer, but it will return one way or another. How do you react to that type of testimony?

Mr. HILL. I think it would be most appropriate to respond to that if Senator Danforth were here. I believe Missouri is called the "Show-Me State." At least our reaction would be, "I will believe that when I have seen it." In our experience to date, I have not seen it happening That is not to say that it could not in some instances occur in a small

degree. I suspect perhaps it will in a rare situation. As a practical matter, that is simply not going to occur. I think it ignores the underlying question. That is the vigor and interest of the plaintiff in bringing the case and bringing it successfully.

I think it is beyond question that the direct purchaser, for a variety of reasons, is the least likely person in the chain, in many instances, to bring the case. He may himself have profited from the practice. He may have been involved in the practice. He may have other nefarious practices going on that he does not want to reveal in the course of litigation and discovery. Moreover, as we know, our major source of complainants is businessmen who are forced to deal with one, two, or three sources of supply. That is absolutely essential to the continuing existence of their business. People in that situation simply cannot afford to bring such litigation. If they bring such litigation, I think the vigor with which they bring it is often affected by those same factors. So, I think it ignores the first premise, which is, they will bring the same case and recover as much money with the same vigor that a State Attorney General's office for some other purpose was actually injured would do it. That question comes first. The second question comes whether, in fact, the filter-down theory works. I think that is probably not a reality as a practical matter. Moreover, I think we are more able to get the money directly back to those who were injured than would come from such a filter-down process, even if one attempted to conduct such a filter-down process.

DE MINIMIS SITUATIONS

Senator KENNEDY. I have one final question. How do you deal with the de minimis situation where consumers in your States have been affected?

Mr. WILSON. Senator, we have some experience with that. I do not look at that as a problem at all. I will give an example. Under our State statute, we recently brought price-fixing action against the two major newspapers in Baltimore. We settled the case on the same day that we filed it. The relief that we received was that money went back to the subscribers. It was a de minimus amount of money if you talk about it on the basis of each subscriber. But, when you throw the burden of that on to the defendant, once liability is established there is really no problem.

I think also that case indicates the bad rule you come up with when you put *Illinois Brick* and *Hanover Shoe* together. Here is an instance where we settled the case. People who were injured received the money back. Now, because of *Illinois Brick* coming along 2 weeks after we settled the case, we have a group of newspaper dealers who decided that they were the one who really suffered. They passed all the charges on to the consumer, but they are going to walk off with a pot of gold. I think that it is a situation that invites a lot of mischief.

Senator LAXALT. In your Baltimore case, of course, the class was easily identified. They are subscribers.

Mr. WILSON. Yes, they were very easy to identify.

Senator LAXALT. We had testimony yesterday indicating that in a major price fixing case involving gasoline in New Jersey there was a problem identifying citizens who had been affected. The judge finally ended up throwing out the class.

What do we do in a situation of that kind?

Mr. Wilson. We hope the enactment of 4C(a), the parens patriae section, took care of that problem by allowing the Attorney General, when he proceeds in his parens patriae capacity, to prove damages by the aggregate amount. Now the consumer is defined by the statute by showing sales, by gasoline companies, by gasoline stations. You can determine at least a certain number of gallons were sold. One you determine what the illegal overcharge was on that gallon, then you know the number of gallons sold and you know the number of consumers that you have. Then it is just a matter of sitting down and doing the arithmetic on it.

Senator Laxalt. Doesn't that involve a gigantic problem in proving damage. According to previous testimony, the judge was not about to take on that burden.

Mr. Wilson. The numbers are great, but the problem is not.

Mr. Hill. Senator Laxalt, I am not familiar with the New Jersey case, but I am familiar with the case which we have in our office today, which is a parens patriae case. It involves retail sales of gasoline in a small mountain community in the State of Colorado. I am very optimistic, while we have not done so yet, that we will be successful in that.

I would also like to point to the experience in the State of Arizona. They had the so-called bread case down there involving price fixing by bread companies. They have just recently mailed out checks to an excess of 250,000 consumers in the State of Arizona. That was handled very expeditiously. The obviously had a computer system set up to handle the claim forms. The claims forms were mailed to all the residents of the State of Arizona. It was handled very expeditiously. The time, from the initiation of the case to the ultimate disposition, was very short. It involved a minimum of time for the court.

I think if the judge were here today he would tell you that those matters can be handled. Obviously, the complexities vary depending upon the degree of ability, imagination, and whatever of counsel and the court.

I do not mean to cast any aspersions on the New Jersey situation; I am not familiar with it. I am simply saying that, in cases in which I am familiar, such as the Arizona case, there are very large distributions to consumers which have been carried out very effectively.

Senator Laxalt. The testimony overall on this matter has been conflicting, too.

We had a panel composed of Federal judges, all of whom have had extensive experience in this field. They all expressed great concern about the difficulty in handling antitrust cases. Apparently, in their estimation at least, it is a very serious mechanical problem within the framework of the Federal courts.

Mr. Speigel. If I may speak to that, Senator, I think you are now talking about antitrust in general. The whole discovery process is complex and does tie up the courts in a sense. In a sense it goes right to a problem in the legal profession: the lawyer who wears two hats. On one hand, he is an officer of the court. On the other hand, he has a client to represent. It is no secret that to the defendants in an antitrust case the best defense is to confuse the matter and to stall it.

Senator Laxalt. They indicated that was a major problem of discovery.

Mr. SPEIGEL. That is one tack. On the other hand, a lawyer who is acting as a judicial officer could, if he wanted to, find ways to deal with the discovery process that were simple. I do not think that the parens patriae situation or the consumer situation compounds the problem because, in those situations, really, it is not the problem of a defendant to be sitting there and arguing and saying, wait a minute, you are not giving the money in the right way to the plaintiffs. If he is the wrongdoer and, for the purpose of litigation, if he overcharged $100 million and was required to put that into a fund, then I do not really see that it is a defense to say that, well, I want to make sure that that $100 million that I improperly obtained is given out in a certain way. That is something for the court.

Once you take the defendant out of the process—which is what section 4D does—then you do not get the confusion and the stalling and the rest of it. You then have a plaintiff's group whose object is to get the money to the people and the court judge, whose object is to get the money to the people. Then things run very smoothly.

In tetracycline, we sent out claim forms, in California alone, to seven million households. We dealt with the return coming from that. Without the defendants there to make trouble, we did not have any problem. The notice that we sent out was in plain English. When the defendants have anything to say about the notice going out to the public, nobody can understand it.

I think what we are talking about here goes one step further than the discovery problem. It is removing one of the antagonists from the situation.

Attorney General BROWNING. Senators, I would like to make, in one moment, two or three very brief points. You heard many of these same arguments in parens patriae: Give the State Attorneys General a chance to sue, and the courts will be clogged forever.

Since last year, when that bill was signed into law, three—one, two, three—parens patriae suits have been brought by State Attorneys General. There are two in Colorado, and one in Maryland. It is not because we are not concerned about the consumer, but because we are concerned about bringing legitimate lawsuits only. That is what we told you when parens patriae was before you.

Before *Illinois Brick*, I do not recall seeing any defense attorneys or corporations coming in and saying we should repeal the antitrust law because the courts are crowded, because they cannot handle the machinery of antitrust cases, because we cannot handle the distribution problem. Only when *Illinois Brick* did what it did to the consumers are these arguments now being raised by the other side.

Quite frankly, I think they are exactly the same kinds of arguments that were presented in parens patriae. I think they are entitled to just as much weight as experience has now shown their arguments should have been entitled to in parens patriae.

I would conclude by saying that it is inconceivable to me that the laws of this country could permit an antitrust violator, a conspirator who, in the dark of night, has taken millions of dollars from the pockets of the people of this country and who was sued by a direct purchaser, it is conceivable that that man could come into court and defend a hundred million dollars worth of profit on the grounds that, Mr. Direct Purchaser, you are entitled to nothing because you passed

it on to the consumer and they have no right to sue. That is where we are today.

Attorney General TURNER. In Iowa, in the tetracycline case, the judge merely directed the way the money was to be distributed. We did it. The court was not burdened with the problem; the Attorney General was. There was another fund left over where we could not find the people, which we used for health purposes in the State. There is not any reason why—especially where taxpayers are involved—the money cannot go into the State's general fund. It does not always have to go directly to the injured person. It can be paid into the State's general fund and used maybe for the purpose of health or something like that. It would be whatever it was related to. If it was drugs, then it should be used for health purposes. If it is gasoline, maybe it could be used for the roads. Those problems are not insuperable.

Senator LAXALT. I would like to ask a couple of questions.

I might indicate to the various Attorneys General here that I come from a State office, too. So, my instictive reaction is to support you. This has been an interesting experience. When the problem was first brought to my attention, it appeared to be a rather simple one. It appeared to be a case where a court was completely off base. Of course, the solution was simple. I guess that was before we started these hearings. I find now that there are strong contrary opinions concerning whether the court was right or wrong and concerning what, if anything, we should do by way of solutions. It is a tough one.

I would like to ask all of you to put on your hats just for a moment as devil's advocate and tell me if you see anything that is of merit in connection with the court's opinion. Do you see any justification for the court's opinion at all?

Attorney General TURNER. I think it is logical. It is consistent with *Hanover Shoe.* There is a problem of multiple liability and multiple recovery, perhaps. But it is not insoluble. If you would add this presumption idea that I have suggested to section 4 of the Clayton Act and say, "provided that in every case that the entire overcharge resulting from such forbidden act has been passed on to the ultimate consumer," then that will eliminate many of the problems that the court was concerned with in *Illinois Brick.*

Senator LAXALT. It was suggested here yesterday, which is rather a surprise to me, that the vast majority of the actions being brought are by direct purchasers rather than indirect. This was testimony from a rather renowned expert in the field, Mr. Blechman. It surprised me.

He indicated that, if we fool with the legislation here, we are really going to obstruct effective antitrust enforcement in terms of going to diluted claims and, too, various pass-on defenses could be raised. Also, the strongest cases are being brought by direct purchasers.

Attorney General TURNER. The direct purchaser does not suffer any loss; why should he recover?

Senator LAXALT. Obviously, that is a problem.

Attorney General TURNER. He passes it on.

Senator LAXALT. But the thrust, in terms of this legislation, I think, has to be punishment for the price fixer. I think that is the number one priority; is it not? His thesis, right or wrong, was that, from this standpoint the direction action is far more effective.

Attorney General TURNER. But we want to compensate the injured person; that is what justice is all about.

Senator LAXALT. I understand that. That brings us to the other side of the problem. We want to compensate the injured person. When you get to de minimis claims, you are talking about dollar claims. The question is, what type of price are you willing to pay for that type of compensation in terms of administration of justice, in terms of prejudicing claims of persons in direct privity? This is what makes this such a terribly difficult problem.

Mr. WILSON. Senator, as far as the amount of the claim goes and whether the claim or the payment to the individual person is de minimis, I think that all that says is that individual person would have no motivation to bring that suit in the first place because it would be too expensive for him.

Senator LAXALT. Unquestionably.

Mr. WILSON. But, in the aggregate, it is a tremendous deterrent. If we look at it from the standpoint of the antitrust violator, I do not think he is going to, for one minute, that one dollar to every consumer in the United States is at all de minimis. It is a tremendous deterrent.

Senator LAXALT. As a practical matter, how is that type of result achieved?

Mr. Speigel, you referred to 700,000 claims. What was the eventual distribution of those claims per person?

Mr. SPEIGEL. It varied. There were some people who received upwards of $1,000. I think the average claim was something over $10. I think that would be the median point. There were very few small ones.

Attorney General BROWNING. Ours averaged about fifty in West Virginia. These were from the older people. The senior citizens had to take this drug continuously on a daily basis. Many of them could not prove it, but we helped those people who simply did not know how to do it. We helped through our consumer protection division. We got the records from the drug companies. We went back and helped them substantiate their claim. In many instances, it did run from $1,000 to $1,500 for those people who had to take that particular drug on a daily basis. These were the people who got hurt. As it stands now, they could not get it.

Senator LAXALT. I understand that. Somehow we have got to preserve their situation. As a matter of curiosity, I am trying to define how serious this problem is. Presently, how many pending cases, Mr. Hill, are affected in your State?

Mr. HILL. I would say half a dozen. We maintain, probably, 15 to 20 cases at any given time. A number of those would be state criminal actions. They would be solely injunctive actions. They would be direct purchases, for example. Both the parens patriae cases that we have now pending are direct purchase cases, unaffected by the Illinois decision. So, I would say probably half a dozen. Two of the most important bring up contrast in the kinds of cases. One is the cement case in which we are representing solely governmental entities. I think two things are important to remember in the context of the growing complexity of this problem. One is that, what the association stands for and what the governmental entities are concerned about, is not that the committee at this time try to resolve all the multitude of unanswered questions in the antitrust field. I think all of us will

concede we have dozens of questions we would like to be here before this subcommittee and asking you to resolve for us.

Senator LAXALT. I do not think either of us are disposed to take on that kind of chore.

Mr. HILL. We are going to litigate those questions, and I think we will be successful in most instances. I think some complexity that you sense comes from an effort by many parties to use this hearing and to use this need as a vehicle for achieving other ends. What we desire and what we seek is return to what the law was the day before the *Illinois Brick* decision.

Senator LAXALT. Do you think the proposed legislation satisfies that requirement, Mr. Hill?

Mr. HILL. I respectfully suggest, Senator, that perhaps the proposed legislation creates some problems which are unnecessary.

Senator LAXALT. In terms of construction?

Mr. HILL. In terms of return to a day before *Illinois Brick*. That is one, I realize, that scholars and lawyers would debate. But I do suggest that perhaps the language—or perhaps because of the motives of some of the people here today—there is a desire to do more than, or to suggest that this subcommittee ought to address more than, the simple issue of overruling *Illinois Brick*.

Senator LAXALT. There were questions yesterday about construction here.

Mr. HILL. But I suggest that, if the committee seeks and does only to overrule the *Illinois Brick* decision, that is a relatively simple task. It would create no problems that the courts have not been dealing with for the last 15 years. I would commend the courts for having dealt with them in a very imaginative and effective way. There are problems in antitrust litigation that we have not been so successful in dealing with. Anyone who is familiar with the Federal Trade Commission proceedings in Exxon, or the cereal case, or the proceedings in the IBM case are well aware of the extraordinary difficulty we have been having in some areas. It is primarily in the discovery areas. But that is not the issue here today. It is solely a return to our position prior to *Illinois Brick*.

I hope you sense our frustration. It is the same frustration we brought to this subcommittee when we were here for parens patriae. That is the exasperation in participating in cases in which the people we represent, those who were injured by the wrongdoing, are unable to get the funds; and someone walks in from the private sphere and takes an absolute windfall. That is a very exasperating experience to those of us in the public sector.

EFFECT ON PENDING CASES

Senator LAXALT. Mr. Wilson, how many pending cases do you have?

Mr. WILSON. We have approximately five cases that are affected by the rule of *Illinois Brick*. When I say "affected"——

Senator LAXALT. Does it preclude recoveries?

Mr. WILSON. We are about to file a parens patriae case. It would have been a very substantial case. We were going to file it the day after *Illinois Brick*, but that became impossible because our consumers were not direct purchasers.

In regard to the testimony that you mentioned that you had received yesterday about the vast majority of price fixing cases being brought by direct purchasers, all I can say is that I am not aware of these cases. The largest case that I know of today in the area of price fixing is the chicken litigation, the sugar litigation. These are all price fixing litigation. There is the master key litigation and the ampicillin litigation. In each of these, the claimants are indirect purchasers.

Senator LAXALT. Thank you.

Mr. Speigel?

Mr. SPEIGEL. I think there probably are four major cases that will be affected. I think I should explain that all cases are affected in the sense that, once you give a lawyer an argument—I don't know whether you are a lawyer or not, so I do not know how well you appreciate this—a thin line to put the wedge in, the case is affected. Whether or not indirect purchasing is involved, it is going to come up in every case. The defendants are going to make something out of *Illinois Brick*.

Let me give you an example of a strange set of facts. In the early sixties, following a Government indictment on the West Coast involving water pipe, several states on the West Coast brought what was then called the Western Pipe cases, which I alluded to earlier. They did not go to trial. They eventually settled for some $30-odd million. The Federal Government itself was involved in the damage recoveries.

In that case, we were talking about pipe that was part of highway construction, drainage pipe, or water project pipe. It was all part of construction contracts. It all involved general contractors. The question of indirect purchasers did not come up. It was not seriously raised as a defense, nor was it in some other earlier cases. I believe there was one in North Dakota and perhaps one in Missouri. There may have been some others. Then the *Hanover Shoe* case came down. It said something about first purchasers and second purchasers.

As soon as that case came down, the next case that we were involved in, the asphalt case, involving the same highway projects, the same general contractors, suddenly, had an indirect purchaser issue. It took us 5 years to resolve that. I mean 5 years of discovery. Defendants wanted to try that case on a mile-by-mile-of-highway basis. In fact, the trial judge went along with them. He threw the case out and said that, because of *Hanover*, the state cannot sue for the highways. Then the Ninth Circuit reversed the trial judge, and we went back again.

Now we are in a similar situation with *Illinois Brick*. Every case is going to have *Illinois Brick* in it in some way or another. There is no way we can avoid it unless the statute now becomes so clear that it is no longer an issue. I think that is the only solution to this problem of judicial administration. We have got to have the answers so that everybody on both sides knows what the rule is. Once you have got that set up, then you do not have the arguments that are made in the absence of a clear statute.

Senator LAXALT. General Turner, how many cases do you have pending?

Attorney General TURNER. We have one case that is directly affected now that is pending. It involves price fixing of chickens. We have two or three others that we were on the verge of filing when this happened that we might as well forget about now. As I pointed out before, we have recovered $2.5 million in my years as Attorney General, none of

which could we have recovered had we been confronted with *Illinois Brick*.

Furthermore, one of the things I would like to mention is that I do not think Justice White, in his decision, necessarily disagreed with the position that we are taking here in overall philosophy. He does indicate that he thinks these cases are too complex, but he was bound by the rules of statutory construction and by the logic that had come about as a consequence of *Hanover Shoe*.

He actually, I think, invites the Congress to amend the Clayton Act to get around the problem.

Senator LAXALT. There is another complicating feature to this case. Yesterday's testimony from the congressional side indicated that the supporters of this legislation seek only to overturn *Illinois Brick* case, yet the bill's wording may not have this, or only this, effect. That was not answered satisfactorily even though I think at that point it could have been.

CONSTITUTIONAL PROBLEMS

Let me ask you one question without prolonging this. There were some reservations expressed yesterday about the retroactive features of the proposed legislation. Can I have your opinions concerning whether you think that presents a constitutional problem for us?

Attorney General TURNER. I do not think it does. The statute already prohibits the violation. This merely has to do with recovery.

Senator LAXALT. You do not think that there are rights that have been vested since the *Illinois* decision came down?

Attorney General TURNER. I would submit not.

Attorney General BROWNING. No.

Mr. HILL. We have done a limited amount of research in our office on that question. I think there are sort of three subquestions that are sort of helpful to focus in on when trying to address that.

The first is the conduct that is prohibited or allowed under the law. Clearly in this case that is not affected. No conduct is now being made or is proposed to be made lawful or unlawful which was either way before. It solely affects who gets the recovery. That is the second question, in effect. From the defendant's standpoint, there is no change in the law in terms of his obligations to disgorge ill-gotten gains.

The third question becomes whether or not we have now enshrined in this limited period of time a group of people who are direct purchasers who have a potential cause of action at the present time for the full claim which they did not have before and which they would not have after the statute. I think the case law on that is fairly clear that legislatures have regularly affected that so-called potential cause of action, and the courts have regularly upheld it as being wholly constitutional.

Senator LAXALT. So, it is not a parens case at all?

Mr. HILL. I do not think so.

Senator KENNEDY. Whether we have done it or not done it before I think we have in the legislative bill we have before us.

Basically, you are all for going back to the powers that existed in the states prior to the *Illinois Brick* decision?

Attorney General BROWNING. And no more than that.

Senator KENNEDY. Just the restoration?

Attorney General BROWNING. Yes.

Mr. WILSON. Yes.

Senator KENNEDY. You want to support the vehicle to do that. This is the one to do it. I think it is. There were other comments about ways that it could be done.

But that is basically what you are asking for. It is the restoration prior to *Illinois Brick*. The clarification of powers that were included in the Hart-Scott-Rodino legislation is what it is.

Attorney General BROWNING. Yes, the restoration of consumers to their position on June 8, 1977 is what we want.

Mr. WILSON. Senator, in my own mind. I am not clear if that is all we are really asking for. I think it leaves the *Hanover* problem untouched. Speaking solely for Maryland, I would like to get rid of both cases.

Senator KENNEDY. I think that is a fair addendum. If we go back to pre-*Illinois* and leave the *Hanover* case. then we have not really done what we tried to do.

Mr. WILSON. That is right.

Senator KENNEDY. Your testimony has been very, very helpful. Thank you all.

[The prepared statements of Chauncey Browning. Richard Turner and testimony of Evelle Younger as submitted by Mike Speigel follows:]

PREPARED STATEMENT OF CHAUNCEY H. BROWNING, JR.

I am Chauncey Browning, Attorney General of West Virginia and the chairman of the antitrust committee of the National Association of Attorneys General. We are pleased to accept your invitation and to have this opportunity to present a panel of individuals actively involved in state antitrust enforcement for the purpose of assisting in the development of the record to support the immediate legislative correction of the destructive effect of the ruling in the case of *State Illinois* v. *Illinois Brick* decided by the U.S. Supreme Court on June 9, 1977.

I would like to introduce the others at the table with me who have short statements to present and who will be available for questions. Attorney General Richard Turner of Iowa has a distinguished record of law enforcement in his state, including antitrust enforcement. General Turner is serving his fifth consecutive term as Attorney General of Iowa and is a member of the executive committee of our association. He is accompanied by his Antitrust Chief, Gary Swanson. Representing the State of California is Michael Speigel who has been involved on a daily basis with antitrust matters in the California Attorney General's Office for the last 13 years. He has a substantial history in proprietary treble damage actions which are at stake in the *Illinois Brick* ruling, and in particular he is very familiar with all aspects of the tetracycline cases. Representating the State of Colorado is Robert Hill, who practiced with a prominent firm in this city prior to returning to Denver to accept the position of Antitrust Chief with Attorney General MacFarlane. He has instituted two of the three original *parens patriae* actions brought in the United States this year. Tom Wilson is the Antitrust Chief for Attorney General Burch of Maryland. He instituted the third *parens patriae* suit, and also has been involved in treble damage litigation on behalf of his state for several years.

At the outset, the subcommittee should be informed that the National Association of Attorneys General unanimously adopted a Resolution a few days after the Supreme Court announced its decision in *Illinois Brick*, which urges the Congress and the administration to take whatever action is necessary to reverse the devastating effects of the *Illinois Brick* decision at the earliest opportunity. At this time I would like to submit copies of that resolution which I respectfully request be included in the record of this hearing. So far as I am aware, every Attorney General in the United States, Democrat, Republican, North, South, liberal and conservative, is in wholehearted support of the immediate

enactment of legislation which would reverse the adverse effects of this decision. In view of the crippling effect of the *Illinois Brick* decision upon the states, it would have been possible to have had thirty or forty state Attorneys General here today. I would like to point out, therefore, that this panel represents and speaks on behalf of not only the National Association of Attorneys General, but on behalf of each of its members individually.

This unanimous position of our association and its individual members is probably unique, but it is understandable when the result of the *Illinois Brick* decision is properly focused: the impact of that decision is truly devastating upon each of the states. We have estimated that approximately 90 percent of the purchases of state governments are made through middlemen. The six member majority of the Supreme Court in *Illinois Brick* held that states may not commence a suit against persons other than those with whom we deal directly, thereby putting an end to the long and responsible history of state antitrust enforcement activity through proprietary treble damage action. This is a totally unacceptable result when it is considered that the states probably have recovered hundreds of millions of dollars over the last 15 years from price fixers. These recoveries represent scarce tax dollars which were fraudulently and conspiratorily taken from our governments by antitrust violators. The ruling in *Illinois Brick* prevents the states from instituting such actions in the future and deprives us of the ability to recover for each of our states those damages to which we should be entitled for such antitrust violations. With regard to this area of antitrust enforcement, those who would conspire to fix prices against the states now may do so with impunity. It is not surprising, therefore, that persons of all political persuasions, liberal and conservative, support a return to or restoration of adequate antitrust remedies. The state Attorneys General believe that no other concept is so widely shared in this country as the belief that businesses should not be permitted to conspire and fix prices, and that competitors should actually compete. Antitrust enforcement enhances the strength and viability of our capitalistic system and our free market economy. Thus, the discovery by the U.S. Supreme Court that states should not be permitted to sue price fixers because of some ancient concept that privity was required or that symmetry with *Hanover Shoe* was advisable, is a result which should not be permitted to continue any longer than is necessary to draft appropriate legislation and schedule it for a vote.

We are fully aware that this particular session of Congress is one of the busiest on record, and that matters of grave importance affecting the Nation and the world are on your desks for study and review. Accordingly, the temptation exists to put the problem of *Illinois Brick* aside for another day. But, to do so, permits every price fixer in this country to fill their pockets with the public's tax dollars without fear of enforcement or recovery by the states through treble damage actions.

We commend you, Senator Kennedy, and the members of your subcommittee for scheduling hearings on this matter so promptly, and we also commend you and Chairman Rodino of the House of Representatives Judiciary Committee for developing an agreed version of corrective legislation for introduction and consideration by the Congress. These are significant steps which will make possible an accelerated consideration of this legislation which is so desperately needed in this area. Thank you very much for your interest and concern, and for the opportunity which you have afforded us today. I will be available for questions with the other members of the panel.

Prepared Statement of Richard C. Turner

On June 9, 1977, the U.S. Supreme Court dealt a crippling blow to effective antitrust enforcement by its unfortunate decision in *Illinois Brick Company, et al.* vs. *State of Illinois.*

In *Illinois Brick* the Court held in effect that the victims of illegal price fixing cannot recover damages if they bought the goods in question from a middleman or, in other words, that only the direct purchaser can recover treble damages from a producer who has fixed prices even though the direct purchaser may have passed the overcharge on down the channels of distribution to the ultimate consumer.

In reaching the result it did in *Illinois Brick* the Supreme Court concluded that because it had held in *Hanover Shoe, Inc.* vs. *United Shoe Machinery Corp.*, 392 U.S. 481, (1968), that the defendants in a price fixing suit brought by a direct

purchaser could not avail themselves of the pass-on defense, the ultimate purchaser in *Illinois Brick*, the State of Illinois was barred from using the pass-on theory offensively against the manufacture of bricks used in new buildings purchased by it.

Justice White, in a footnote to the decision, said that "Should Congress disagree with this result, it may, of course, amend the section to change it." I appear before you today to urge just such a change.

The National Association of Attorneys General on June 14, 1977, resolved to urge the Congress immediately to enact into law legislation amending the antitrust laws to enable states and other antitrust plaintiffs and consumers to maintain suits against price fixers and other violators of the antitrust laws from whom they have purchased goods or services directly or indirectly, thus removing the barrier to effective antitrust enforcement erected by the Supreme Court in *Illinois Brick*. I understand that the purpose of these hearings is to consider the need for legislation to accomplish such a result.

I join the National Association of Attorneys General in urging you to enact legislation to overturn *Illinois Brick* so that the courts will once again be open to those who, in the final analysis, invariably bear the brunt of illegal price fixing, the American consumer. However, I would go further and ask you to consider legislation which would also modify *Hanover Shoe*.

Such legislation should take the form of an amendment to section 4 of the Clayton Act, 15 U.S.C. section 15, to provide that in treble damage suits brought under that section it is presumed that the entire amount of the overcharge stemming from illegal price fixing has been passed on to the ultimate consumer. This pass-on presumption could be used both offensively and defensively and would be beneficial from a number of standpoints.

It would benefit defendants in price fixing suits brought by middlemen since the plaintiffs would have to rebut the presumption by showing that they had in fact themselves absorbed the illegal overcharge in whole or in part. Thus such plaintiffs would be compensated only to the extent of their actual damages (trebled) and would be denied the windfall they otherwise would enjoy by recovering on overcharges which had been passed on to others.

In suits brought by ultimate consumers the bar erected by *Illinois Brick* would be dismantled and the defendants would be required to rebut the presumption by showing that the overcharge had been absorbed by middlemen. The ultimate consumer is usually the little man who is least in a position to show the extent of his damages in a multitier distribution system. The defendant producer and any middlemen who might intervene in such a suit normally are far better equipped to show the extent to which overcharges are absorbed or passed on at each level in the distribution system.

Finally the presumption that all overcharges are passed on is consistent with the realities of life. As the minority opinion in *Illinois Brick* correctly notes: "In many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution." Mr. Justice Brennan accurately points out that the bad effect of *Illinois Brick* is that "Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen may have little incentive to sue suppliers so long as they pass on the bulk of the illegal overcharges to the ultimate consumers."

The purpose, after all, of price-fixing statutes is two fold: to compensate the victims of illegal overcharges and to deter price fixing by requiring those guilty of such practices to respond in treble damages. *Illinois Brick* and *Hanover Shoe* are both so preoccupied with the deterrent aspects of these types of cases that they ignore and, indeed, frustrate the other and, to my mind, equally important objective of antitrust laws: compensating the victim. By forbidding defensive use of the pass-on theory *Hanover Shoe* effectively requires a defendant to pay damages to a plaintiff who may not have been injured. This may have some deterrent effect but it can hardly be said to involve any element of compensation. *Illinois Brick* would not only deny compensation to injured ultimate consumers but would also reduce the deterrent effect of the law unless a suit were launched by a direct purchaser who, if he had passed on the overcharge, would have little incentive to do so except to reap the undeserved windfall afforded him by *Hanover Shoe*.

Both *Illinois Brick* and *Hanover Shoe* seem to be based as much as anything else on a desire to avoid burdening the courts with the massive evidence problems inherent in tracing overcharges down through the distribution system.

Justice White, in supporting exclusion of suits by indirect purchasers raised the issue that the courts would become embroiled in extremely complicated analyses of how a price was excessive, how much had been absorbed by each reseller and how much passed on. But a Mr. Justice Brennan points out, ". . . this problem hardly distinguishes this case from any other antitrust cases. Reasoned estimation is required in all antitrust cases, but while the damages in such cases may not be determined by mere speculation or guess, it will be enough if the evidence shows . . . the extent of the damages as a matter of just and reasonable inference, although the result may be only approximate. [Cases cited.] Lack of precision in apportioning damages between direct and indirect purchasers is thus plainly not a convincing reason for denying indirect purchasers an opportunity to prove their injuries and damages."

One can hardly help wondering where the majority of the Court in *Illinois Brick* has been the past several years while dozens of such enormously complicated cases have been settled or decided in the Federal courts.

Last year Congress passed legislation to enable state attorneys general to bring antitrust suits to protect the citizens of our states in cases where antitrust violations might otherwise go unpunished. [Hart-Scott-Rodino Antitrust improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1383, 1394–1395]. In authorizing state attorneys general to sue *parens patriae* to recover damages on behalf of these citizens, I believe Congress intended that section 4 should provide a cause of action to indirect as well as direct purchasers. The purpose and effectiveness of this provision of the Antitrust Improvements Act are undermined and frustrated by the *Illinois Brick* decision.

Further, since consumers buy few goods directly from the manufacturer, they will be barred from suing on their own for damages resulting from price fixing or other antitrust violations. Taxpayers also will be affected by *Illinois Brick* because our state governments no longer will be able to sue for damages in most antitrust cases. It has been estimated that at least 80 percent of all state purchases are made through middlemen. States have collected over $200 million from antitrust defendants in the last 15 years [Briefs, vol. XII, no. 13, Council of State Governments, June 23, 1977.]

Support for the proposition that Congress intended to provide a remedy for injured consumers even if they purchased indirectly is found in the Senate report at p. 42: (Parens Patriae legislation)

> A direct cause of action is granted the States to avoid the inequities and inconsistencies of restrictive judicial interpretation[s] . . . Section 4C is intended to assure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to manageability [of class actions], standing, privity, target area, remoteness, and the like."

It seems to me that the intent of Congress with respect to *parens patriae* is clear. Consumers and other indirect purchasers should not be denied recovery because of the mere fact that they are indirect purchasers.

I believe the problems created by *Illinois Brick* in its attempt to rationalize *Hanover Shoe* would be solved by the adoption in section 4 of the presumption I am urging.

The fact that suits might be more complicated if recovery is allowed to other than direct purchasers is no justification for denying compensation to injured consumers. As the dissenting opinion in *Illinois Brick* noted:

> ". . . express approval has been given the 'tendency of the courts to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights.'" [*Bigelow* vs. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265–266 (1946.]

The risk of multiple liability in allowing recovery by indirect purchasers is more imaginary than real. As Justice Brennan observed in his dissent in *Illinois Brick:*

> I acknowledge some abstract merit in the argument that to allow indirect purchasers to sue, while, at the same time, precluding defendants from asserting pass-on defenses in suits by direct purchasers, subjects antitrust defendants to the risk of multiple liability. But as a practical matter, existing procedural mechanisms can eliminate this danger in most instances. Even though, as the Court says, no procedure currently exists which can eliminate the possibility entirely, *ante*, at 8 n. 11, the hypothetical possibility that a few defendants might be subjected to the danger of multiple liability does

not, in my view, justify erecting a bar against all recoveries by indirect purchasers without regard to whether the particular case presents a significant danger of double recovery."

The course of action I am urging you to take would further ameliorate the risk of multiple liability feared by the Court, if not entirely eliminate it. It would actually simplify these complex cases. In a suit by an ultimate consumer against remote manufacturers, the plaintiff would have only to show the amount of the illegal overcharge to the direct purchaser. The presumption would then arise that the entire overcharge had been passed on to plaintiff ultimate consumer. However, the manufacturers or, for that matter any intervening middlemen, could rebut this presumption and, to the extent that they were successful, each participating plaintiff or intervenor would recover only on the basis of the share of the overcharges absorbed by him. Multiple liability would thus be avoided.

Out-of-court settlements, now complicated by intervention of direct purchasers and middlemen seeking a cut of the recovery, all or part of which usually properly belongs to the ultimate ceonsumer, could be much more easily reached. Indeed, the presumption would tend to inhibit direct purchasers and middlemen, who had suffered no actual damage, from seeking a *Hanover Shoe* handout. Thus the presumption would also simplify and encourage out-of-court settlements. No one would be likely to recover a substantial settlement unless it was perceived that he could prove he actually suffered loss and did not merely pass it all on.

Withal, statutory creation of the pass-on presumption which I am suggesting would promote effective antitrust enforcement, remedy the mischief of both *Illinois Brick* and *Hanover Shoe*, place the burden of proof of damages on those best able to furnish that proof, and open the courts to all who may have been injured by anticompetitive practices, without unduly restricting the defenses available to those charged with such conduct. Problems of proof and trial procedure would be simplified, and out-of-court settlements more easily reached, by presuming the pass-ons which usually occur but permitting rebuttal when and to the extent they do not.

Surely, justice will be better served, and settlements happier, under a system which strives to apportion recovery on the basis of the loss actually suffered than under the present topsy turvey system which, because of *Hanover Shoe*, allows treble damages to a direct purchaser who has passed on his loss to an indirect consumer who is denied *any* recovery because of *Illinois Brick*. With respect, I submit that Congress must act.

Prepared Statement of Evelle J. Younger as Submitted by Mr. Mike Speigel

We appreciate the opportunity to present testimony today at the invitation of the Antitrust and Monopolies Subcommittee of the Senate Judiciary Committee. This statement is submitted on behalf of all governmental entities, as well as the citizens, consumers, and taxpayers of the State of California. We strongly support legislation to amend sections 4, 4(a), 4(c), of the Clayton Act, and to change the law as recently announced by the United States Supreme Court in *Illinois Brick Co., et al.* vs. *Illinois*, —— U.S.——, 45 U.S.L.W. 4611, (June 9, 1977). This decision has virtually destroyed the right of indirect purchasers to recover damages under federal antitrust laws and has thereby seriously crippled the power of the States to enforce the antitrust laws pursuant to the recently enacted parens patriae legislation.

The Office of the California Attorney General is renowned for its long-standing and deep commitment to antitrust enforcement at both the State and Federal levels. Indeed, it was not too long ago that we were before this subcommittee seeking final redress in our long battle for acceptance of the parens patriae doctrine.[1]

As the chief law officer of the State of California, the Attorney General has vigorously enforced the criminal, injunctive, and damage provisions of the State's antitrust law, the Cartwright Act. Enacted soon after the Sherman Act, California's Cartwright Act is one of the oldest state antitrust laws in the

[1] See *Hawaii* vs. *Standard Oil Co. of Calif.*, 405 U.S. 251. In *California* vs. *Frito-Lay*, 474 F.2d 774 (1973), the 9th Circuit rejected the California Attorney General's parens patriae suit for lack of legislative mandate. This case prompted Congress to change the Clayton Act, as this Committee recognized in its Report on the Antitrust Improvements Act of 1976. [S. Rep. 94–803.]

country. Since the Cartwright Act was passed in 1907, the California Attorney General's Office has sought amendments to it and brought cases under it to establish a body of state antitrust law virtually identical to and as broad as federal antitrust laws, in both substance and procedures. Indeed, the California Supreme Court has consistently ruled that federal decisions under the Sherman and Clayton Acts are precedents in state antitrust suits under California's Cartwright Act.[2]

In addition to enforcing the State's antitrust laws, the California Attorney General, along with other State Attorneys General, has played a substantial role in federal antitrust enforcement. Since the early sixties California and other States have brought major Federal antitrust class actions in Federal Court on behalf of their states, political subdivisions and citizen-consumers. The recoveries in these suits represent hundreds of millions of dollars in compensation for governmental entities and citizens damaged by antitrust violators. Since 1973 alone, the California Attorney General's Office has recovered over $44 million and returned it to consumers and governmental entities which were the ultimate purchasers overcharged for such commodities as antibiotics, snack foods, gypsum, and asphalt.[3] At the present time, the California Attorney General is maintaining Federal antitrust class actions on behalf of the consumers and governmental entities damaged as a result of restraints in the builders hardware, semisynthetic penicillin, petroleum, cement and sugar industries.[4]

In a continuing effort to establish more effective procedures, the California Attorney General among others had sought to avoid the cumbersome mechanism of Rule 23 class actions by filing parens patriae suits. In *Hawaii* vs. *Standard Oil Co. of Calif.* and *Calif.* vs. *Frito-Lay*, supra, the courts rejected this approach for lack of legislative mandate. Just last year, this subcommittee originated antitrust legislation which cured the judicial roadblock and gave State Attorneys General more streamlined and effective means to recover damages for the overcharged users of commodities within their states. With passage of the parens patriae provisions of the Antitrust Improvements Act of 1976, Congress expressed its approval of and continued support for the efforts of State Attorneys General in enforcing the antitrust laws and giving redress to their citizens through antitrust damage suits.

In June 1977, the Supreme Court decision in *Illinois Brick Co., et al.* vs. *Illinois* destroyed decades of work by State Attorneys General to protect their citizens and political subdivision. The Court also frustrated the will of Congress, expressed only last session.

In *Illinois Brick*, the Supreme Court held that, barring the rare and narrow cost-plus situation, indirect purchasers may not recover antitrust damages by showing that the overcharge was ultimately passed on to them in the chain of marketing and distribution from the violators. Only direct purchasers such as wholesalers and middlemen would be allowed to recover damages flowing from overcharges caused by antitrust violations.

The Court's reasoning goes forward solely on hypothesis and assumption and is not based on history or reality; the Court's concern is for the potential problems of double recovery, lax enforcement resulting from diffused liability, and difficult judicial management of complex economic proofs. The Court ignores and vitiates decades of constructive experience in judicial management and the just vindication of rights.

The first rationale in *Illinois Brick* used to deny indirect purchasers their rights is "double recovery":

> First, allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants. Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount

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[2] *Chicago Title Ins. Co.* vs. *Great Western Financial Corp.*, 69 Cal. 2d 305 (1968) ; *Marin County Board of Realtors, Inc.* vs. *Palsson*, 16 Cal. 3d 920 (1976).

[3] In re coordinated antibiotics antitrust actions *Calif.* vs. *Chas. Pfizer & Co.*, 4–71 Civ. 435 (transferred from S.D.N.Y. to D.C. Minn.) ; in re certain Snack Food Cos., Civil No. 71–2007–R (N.D. Cal.). *Calif.* vs. *Frito-Lay*, 474 F. 2d 774 (1973) ; in re Gypsum cases, Civil No. 46414–AAJZ (N.D. Cal.) ; in re Western Liquid Asphalt cases, Civil No. 50173RES. Civ. Action No. 51107, 487 F. 2d 191 (9th Cir. 1973).

[4] In re Master Key litigation, MDL dkt. 45, Civ. No. H–61 ; 1973 Trade Cases 74, 680 and 1975 Trade Cases 60, 377 (D.C. Conn.) ; Ampicillin Antitrust litigation, MDL 50, Misc. 45–74 ; 1972 Trade Cases 73, 966 (D.D.C. 1972) ; in re Coordinated Pretrial Proceedings in Petroleum Products Antitrust litigation, MDL dkt. 150–WPG (C.D. Cal., 1976) ; *California* vs. *Portland Cement Association, et al.*, dkt. 76–4073 FW (C.D. Cal., 1976). in re Sugar Antitrust litigation, MDL dkt. 201 (N.D. Cal.).

of the overcharge that the indirect purchaser had shown to be passed-on; similarly, following an automatic recovery of the full overchange by the direct purchaser, the indirect purchaser could sue to recover the same amount. The risk of duplicative recoveries created by unequal application of the *Hanover Shoe* rule is much more substantial than in the more usual situation where the defendant is sued in two different lawsuits by plaintiffs asserting conflicting claims to the same fund. A one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications—and therefore of unwarranted multiple liability for the defendant—by *presuming* that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff; overlapping recoveries are certain to result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatever. As in *Hawaii* vs. *Standard Oil Co.*, 405 U.S. 251, 264 (1972), we are unwilling to "open the door to duplicative recoveries" under section 4. *Slip opinion*, pages 7–8 [footnote omitted].

As the language clearly indicates, the Court is concerned with the *hypothetical risk* of double recovery. However, in the long history of these cases, double recovery has not occurred nor even been threatened. This subcommittee fully explored this question in its report on the Antitrust Improvement Act of 1976:

Section 4C(a)(1) also contains a proviso to assure that defendants are not subjected to duplicative liability, particularly in a chain-of-distribution situation where it is claimed that middlemen absorb all or part of the illegal overcharge. The Committee intention is to codify the holding of the 9th Circuit in re *Western Liquid Asphalt* cases, 487 F.2d 191 (9th Cir. 1973):

We therefore see no problem of double recovery, and we believe that if this difficulty should arise in some other connection, the district court will be able to fashion relief accordingly.'" [*Report*, p. 44.]

The Court's second rationale is equally hypothetical:

Second, the reasoning of *Hanover Shoe* cannot justify unequal treatment of plaintiffs and defendants with respect to the permissibility of pass-on arguments. The principle basis for the decision in *Hanover Shoe* was the court's perception of the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economists' hypothetical model,' 392 U.S. at 493, and on the costs to the judicial system and the efficient enforcement of the antitrust law of attempting to reconstruct those decisions in the courtroom." [*Slip opinion*, pp. 8–9 (footnote omitted).]

For a substantial period of time, the courts have acquitted themselves brilliantly in managing antitrust cases with multiple layers of distribution and economic proofs. In its report of May 6, 1976, this subcommittee again found this problem to be manageable:

The Committee believes that title 4 provides that remedy, particularly through the aggregation provisions of section 4C(c)(1) which responds to the issue of manageability posed by Federal district court judge Anthony T. Augelli in *City of Philadelphia* vs. *American Oil Co.*, 1971 Trade Cases section 73, 625 (D.C.N.J. 1971):

The manageability requirement of rule 23 is a significant factor that must be given due weight in reaching a determination on the propriety of class representation in any given case.

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A direct cause of action is granted the States to avoid the inequities and inconsistencies of resrictive judicial interpretation of the notice and manageability provisions of rule 23 of the Federal Rules of Civil Procedure, and of the rights of consumers to recover damages under section 4 of the Clayton Act. Section 4C is intended to insure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to manageability, standing, privity, target area, remoteness, and the like. Section 4C rejects the rationale and result of [restrictive] cases . . . and is patterned after such innovative decisions as in re Western Liquid Asphalt cases, 487 F.2d 191 (9th Circuit 1973); in re Master Key litigation, 1973 Trade Cases section 74, 680 and 1975 Trade Cases, section 60, 377 (D.C. Conn.)" [Report, page 42 (citations omitted).]

The Court's final rationale is the most unjust and unrealistic of all: concentrating the whole claim in direct purchasers will encourage private antitrust enforcement by eliminating complexity and uncertainty:

We think the longstanding policy of encouraging vigorous private enforcement of antitrust laws, supports our adherence to the *Hanover Shoe* rule, under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge. We recognize that direct purchasers sometimes may refrain from bringing a treble damage suit for fear of disrupting relations with their suppliers. But on balance, *and until there are clear directions from Congress to the contrary*, we conclude that the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under section 4, *Hawaii* vs. *Standard Oil Co. of California*, 405 U.S. 251, 262 (1972), is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

"It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been injured by antitrust violations. Of course, as Mr. Justice Brennan points out in dissent, "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation." [*Slip opinion*, pp. 22–23 (footnote omitted) (emphasis supplied).]

In one breath the court gives sole claim to direct purchasers while at the same time recognizing that direct purchasers will receive unjust windfall recoveries and will probably not bring these suits in any case. The problem of fostering just, rational, and consistent private antitrust enforcement was more soundly treated by Congress. In its 1976 report, this subcommittee recognized that, historically, the State Attorneys General had carried virtually the whole burden in bringing treble damage class actions based on the purchase of commodities subject to antitrust overcharges. It was not even questioned that the ultimate consumer, either citizen or Government, was the rightful recipient of damages in almost all of these cases. In passing the 1976 Antitrust Improvement Act, Congress recognized the facts as they are in the real world: both deterrence and justice are served by strengthening the rights of indirect purchasers to seek antitrust damages. Since overcharges are almost always passed through, the indirect purchaser or ultimate consumer most often absorbs the damage resulting from the overcharge. Justice requires vindication of the ultimate purchasers' right to compensation. In addition to being the proper recipients of the damages, the indirect purchasers, represented for the most part by State Attorneys General, have been those most vigorously pursuing antitrust violators by filing suit and carrying virtually the whole burden of litigation in the types of cases in question here.

Unless Congress reverses the *Illinois Brick* decision, the ability of States such as California to recover antitrust damages will be emasculated. In most of these cases, a substantial portion of the damages sought by the Attorneys General are attributable to indirect purchases by consumers and state and local governmental agencies. In the case of California alone, damage claims of well over $100 million in pending cases, have been substantially reduced or seriously jeopardized.[5]

Although claims for direct purchases remain, the amount of money involved in direct purchasing is so small that it will not justify the substantial investment of resources heretofore committed to these cases by the States. The taxpayers and citizens in every State of the Union will absorb the amplified impact of reduced antitrust enforcement: citizens will be deprived of recovering overcharges claimed in current cases; deterrence will suffer, resulting in more illegal activities; and criminal or injunctive enforcement will require a substantially greater expenditure of tax dollars to fill in for the loss of revenues from damage recoveries. In short, the just and economically rational policy of parens patriae has been destroyed.

In addition to substantial direct monetary loss with respect to federal cases, California and other States may suffer indirect losses in terms of inhibition of state antitrust law enforcement. First, enforcement budgets may be reduced by legislatures which were previously encouraged by the parens patriae legislation. Secondly, since State antitrust cases may be determined by federal precedent, redress in State courts may be unavailable.

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[5] See cases cited in footnote 4.

To conclude, the *Illinois Brick* decision is an affront to both rationality and clear congressional mandate. The parens patriae legislation and its history reflect the commitment of Congress to support the type of state antitrust activity destroyed by the *Illinois Brick* decision. The interests of justice and deterrence, which are served by State Attorneys General and which led to the parens patriae legislation, require that Congress reestablish the rights of indirect purchasers to recover antitrust damages.

Senator KENNEDY [continuing]. Our next witness will be Mr. Garth Dooley. Mr. Dooley, we are glad to have you here.

STATEMENT OF GARTH DOOLEY, FARMER, GREENVILLE, TEX.

Mr. DOOLEY. Mr. Chairman, I appreciate your inviting me to testify today.

My name is Garth Dooley. I am not a lawyer, judge, or even a price fixer, but I have been hurt by the antitrust practices of all three. I am a farmer. To earn a profit from my land, I have to use large quantities of fertilizer. That fertilizer contains large amounts of potash, and I've watched it double in price in the last 4 years. So, I was very interested to learn of the conspiracy indictments that a Federal grand jury returned against all the major potash producers for conspiring to limit supply and increase the prices.

Frankly, I became angry after having suffered for years as a result of potash price increases. As I am sure you gentlemen can appreciate, farming is not a high profit business anyway. So, having to pay even more for necessary fertilizer put me between a rock and a hard place. I got good and mad at the thought of such high-handed practices from big businessmen, especially when they were directly harming me.

So, after talking to my attorneys, including an antitrust specialist, I filed a class action suit in Federal court on behalf of all farmers who had bought potash. Because my profit margin and that of other farmers is so small, a class action device was my only way to fight the practice that had cost us millions of dollars.

In the meantime, I have heard that the Supreme Court ruled that only persons who buy directly from price fixers are allowed to come into court and complain or try to get protection. Anyone else is to go unprotected. Well, I buy my potash fertilizer from a local supply firm in Greenville, Texas. So I now have no remedy. I cannot even complain in court. I hear the potash case was settled by direct purchasers for several million dollars, but I did not get a penny. How can that be fair? All the farmers and I were hurt just as certain as anyone else, but our suffering is of no concern to the court. We do not even get a chance to show how much we were hurt. As you can imagine, we do not understand how this can be in America. We believe that if someone broke a wall and injured a person, one of the most basic American rights would be to go to court to get your due. That apparently is not so. I hope the Congress is going to do something about that, but at least you folks, unlike the courts, care enough to hear my complaints. For that much, I thank you.

If I can be of any further help, I would gladly answer any questions you have, if I can. Obviously enough, I and a whole lot of other Americans do not understand this legal rigamarole very well. Thank you.

Senator KENNEDY. Thank you, Mr. Dooley.

Tell us a little bit about yourself, please. How big an operation do you have?

Mr. DOOLEY. I farm approximately 3,500 acres.

Senator KENNEDY. Have you lived in Texas all your life?

Mr. DOOLEY. Yes, sir.

Senator KENNEDY. You were born there?

Mr. DOOLEY. Yes, sir.

Senator KENNEDY. Is that a family operation that you have?

Mr. DOOLEY. Yes, sir, it's a family operation, my dad and I.

Senator KENNEDY. Was your dad in the business?

Mr. DOOLEY. Yes, my dad farms.

Senator KENNEDY. What crops?

Mr. DOOLEY. We have cotton and grain and cattle.

Senator KENNEDY. What do you use that potash for?

Mr. DOOLEY. In our locale, we have salt and acid; that is what they recommend we use. We have blend fertilizer. It is mixed with nitrogen and phosphate. We have to apply the mixture to our pastures and our grain. Every crop we have, we have to use fertilizer on.

Senator KENNEDY. How much potash do you buy per year approximately?

Mr. DOOLEY. Potash would probably amount to a third or a quarter of the complete fertilizer bill. The fertilizer bill runs in the neighborhood of $75,000 a year.

Senator KENNEDY. Who do you buy it from?

Mr. DOOLEY. I buy it from a retail outlet in Greenville.

Senator KENNEDY. Have you been dealing with them for years?

Mr. DOOLEY. Yes, sir. I believe they went in business there in 1960. Before they were in there, we bought from farmer co-ops and things like that in the neighborhood.

Senator KENNEDY. Can you raise crops without that?

Mr. DOOLEY. No, sir; we cannot do in our country without fertilizer. It will not work.

Senator KENNEDY. So, it is really important?

Mr. DOOLEY. If we can't have the fertilizer, we cannot farm where we are.

Senator KENNEDY. When the price went up, did you have to cut back on your acreage?

Mr. DOOLEY. We cannot afford the fertilizer as high as it is. To justify it, we have to concentrate more on fewer acres. You cannot cover the acreage that you have.

Senator KENNEDY. So you had to cut back.

Mr. DOOLEY. Yes, we had to cut back the operation.

Senator KENNEDY. What does that do to your business?

Mr. DOOLEY. That cuts the money off. When you cut the operation down, you suffer a loss.

Senator KENNEDY. I want to thank you. I think you know what we are trying to achieve with this legislation. We are trying to protect people like yourself, the ones who greatly suffer the burden of this kind of price fixing. So, we appreciate very much your coming and sharing with us.

We heard from some ranchers yesterday out in Nevada who had stories not very much different from what you stated here this morning.

Where is the big operation that sells to your retailer? Where is he located?

Mr. DOOLEY. I think the headquarters is in St. Louis.

Senator KENNEDY. Does it make much difference to you if he recovers the money?

Mr. DOOLEY. I do not understand how it would. If I understand it, they work on a markup basis. If they have doubled the price, they double the markup; if I understand it right.

Senator KENNEDY. If he recovers because you paid what you shouldn't have paid, does that do you any good?

Mr. DOOLEY. I don't understand how it would.

Senator KENNEDY. You've been the guy that's been hurt.

Mr. DOOLEY. It hits me right in the pocketbook, yes, sir.

Senator LAXALT. Mr. Dooley, I would like to thank you also for your testimony. I am sympathetic to your position. I come from a ranching background myself.

As Senator Kennedy indicated, we had some ranchers yesterday; they were beef people. Like you, they don't mind scrapping with the weather or an open market; but they cannot cope with the price fixers. And that is basically where you are.

Mr. DOOLEY. Yes, sir.

Senator LAXALT. I gather that you went on your own and engaged private counsel. Is that correct?

Mr. DOOLEY. Yes, sir.

Senator LAXALT. You and others have funded that wholly on your own?

Mr. DOOLEY. Yes, sir.

Senator LAXALT. You have been advised now by your counsel that because of the *Illinois Brick* decision you are effectively out of court?

Mr. DOOLEY. Yes, sir.

Senator LAXALT. How much money are we talking about here?

Mr. DOOLEY. You mean for me to recover?

Senator LAXALT. Yes, sir. Is there a ballpark estimate?

Mr. DOOLEY. The potash part of that would have been in the neighborhood of $20,000 a year. If it was doubled, then I would have $10,000 of that. If they doubled it, twenty. So, it would be $40,000 or $50,000.

Senator LAXALT. So, that means the difference in your operation?

Mr. DOOLEY. That's right.

Senator LAXALT. How many coplaintiffs are there involved in this particular action?

Mr. DOOLEY. I am not sure. There are two in my home town.

Senator LAXALT. Are there several in the area?

Mr. DOOLEY. That probably serves 150 farmers in our county area. They will all use a certain amount of potash. It all has to be mixed with the fertilizer.

Senator LAXALT. I gather in your statement there has been a previous settlement on the part of direct purchasers. Is that with the potash people?

Mr. DOOLEY. Yes.

Senator LAXALT. That is all I have. Thank you very much, Mr. Dooley.

Mr. DOOLEY. Thank you.

Senator KENNEDY. Thank you, Mr. Dooley.

[The prepared statement of Garth Dooley follows:]

PREPARED STATEMENT OF GARTH C. DOOLEY

I appreciate your inviting me to testify today. I've prepared only a brief introductory statement that I'd like to present before answering your questions as fully as I can.

My name is Garth Dooley. I'm not a lawyer, judge, or even a price-fixer—but I've been hurt by the antitrust practices of all three. I'm a farmer, and to earn a profit from my land, I have to use large quantities of fertilizer. That fertilizer contains large amounts of potash, and I've watched it double in price in the last 4 years. So I was very interested to learn of the conspiracy indictments that a Federal grand jury returned against all the major potash producers for conspiring to limit supply and increase the prices. Frankly, I became angry after having suffered for years as a result of potash price increases. As I'm sure you gentlemen can appreciate, farming is not a high profit business anyway, so having to pay even more for necessary fertilizer put me between a rock and a hard place. I got good and mad at the thought of such high-handed practices from big businessmen, especially when they were directly harming me. So, after talking to my attorneys, including an antitrust specialist, I filed a class action suit in Federal court on behalf of all farmers who had bought potash. Because my profit margin and that of other farmers is so small, a class action device was my only way to fight the practice that had cost us millions of dollars. In the meantime, I have heard that the Supreme Court ruled that only persons who buy directly from price-fixers are allowed to come into court and complain or try to get protection. Anyone else is to go unprotected. Well, I buy my potash fertilizer from a local supply firm in Greenville, Texas. So I now have no remedy. I can't even complain in court. I hear the potash case was settled by direct purchasers for several million dollars, but I didn't get a penny. How can that be fair? All the farmers and I were hurt just as certain as anyone else, but our suffering is of no concern to the court. We don't even get a chance to show how much we were hurt.

As you can imagine, we don't understand how this can be in America. We believe that if someone broke a wall and injured a person, one of the most basic American rights would be to go to court to get your due. That apparently isn't so. I hope the Congress is going to do something about that, but at least you folks, unlike the courts, care enough to hear my complaints. For that much, I thank you. And if I can be of any further help, I would gladly answer any questions you have, if I can. Obviously though, I and a whole lot of other Americans don't understand this legal rigamarole very well.

Senator KENNEDY [continuing]. Our next witness is Mr. Earl Pollock. He is a partner of the Chicago law firm of Sonnenschein, Carlin, Nath & Rosenthal. Mr. Pollock.

STATEMENT OF EARL E. POLLOCK, ATTORNEY

Mr. POLLOCK. Mr. Chairman, I am very appreciative of the invitation to testify on this very important legislation. If I may, Mr. Chairman, I would like to briefly review what I consider to be the advantages of the proposed legislation and the difficulties that I think may exist in the proposed legislation. If I may use the language of Senator Laxalt, this is a very tough problem. It does not lend itself to easy or simplistic solutions.

At the outset, though, I think I must respond very briefly to one or two points I heard the witnesses before me make to the subcommittee. First of all, I must register astonishment at Judge Real's statement to the subcommittee that, so far as he can recall, the only time that a direct purchaser sues for antitrust damages is as a counterclaim to a suit brought by a manufacturer.

It is quite to the contrary. And I am sure that Judge Real may reconsider and agree with me that the overwhelming bulk of private antitrust enforcement, even since the enactment of the Clayton Act, has been through actions brought by direct purchasers. I say that unequivocally.

ELECTRICAL EQUIPMENT CASES BROUGHT BY DIRECT PURCHASES

Take, for example, the electrical equipment cases, which produced recoveries of nearly $400 or $500 million. Those were brought, so far as I know, exclusively by direct purchasers. Indeed, when it was attempted to bring an action on the part of consumers, the action was rejected on the ground that their claim was too remote.

This was, I would point out, more than a decade before *Illinois Brick* was ever decided. And, even before the electrical equipment cases, you have the movie cases, which was the biggest group of private treble damage cases brought at that time. Those were brought by direct purchasers, exhibitors against distributor organizations. The idea that direct purchasers have only rarely sued or that direct purchasers have some reluctance about suing, particularly given the kind of opportunity which has existed under *Hanover Shoe*, I think, simply does not square with the facts.

Even before *Hanover Shoe*, direct purchasers, as a regular matter, as almost a systematic matter, brought the principal actions and made the greatest recoveries. Attorney General Browning stated that the State purchasers have collected hundreds of millions of dollars from price fixers. Well, that may be true. But I think it would be very helpful if Attorney General Browning were to detail what those recoveries have been by the State purchasers.

I am confident that an analysis of those recoveries would show that the bulk of those recoveries by State purchasers have been in their capacity as direct purchasers. I think, for example, of the children's book litigation. I think, for example, of many other cases in which states as purchasers have made substantial recoveries.

On the other hand, by comparison, State recoveries in indirect purchaser cases have been relatively rare. To the extent that there have been such recoveries, those recoveries have essentially been on a settlement basis without litigation, without the enormous difficulty of trying to trace, for example, an alleged overcharge from a manufacturer to a wholesaler to a contractor to a builder to a homeowner. That was precisely the situation in the plumbling fixture cases.

Senator KENNEDY. Why are the Attorneys General passing a unanimous resolution? Why are they all coming up here so interested in this? Why aren't there at least some State Attorneys General who say, well, we look at it the way Mr. Pollock looks at it and we don't really mind or care?

Mr. POLLOCK. Senator Kennedy, I think the answer to that is very clear. I certainly do not mean to suggest that there have not been—particularly in recent years—some attempts by indirect purchasers to recover. In fact, there have been some indirect purchaser cases dating back for decades. There are such cases. There are a number of cases now which unquestionably, Mr. Chairman, would be affected by *Illinois Brick*. I do not want to suggest the contrary. One gentleman said that 95 percent of their antitrust program was out of the window, and implied that most of their recoveries have been in indirect purchaser cases—such statements are fundamentally incorrect, and represent the worst kind of exaggeration.

There are certain kinds of cases which will be affected. All I am saying, Mr. Chairman, is that the scope of the problem ought to be seen in proper context.

Senator KENNEDY. What was the tetracycline? Was that direct or indirect?

Mr. POLLOCK. I think the tetracycline case involved both direct purchasers and indirect purchasers.

Senator KENNEDY. How would you allocate the $300 million of recovery?

Mr. POLLOCK. That is a very good example. That case was never litigated with respect to damages. It is interesting that the defendants in that case were acquitted of price fixing; they were acquitted. Nevertheless, they have indeed——

Senator KENNEDY. In the criminal action.

Mr. POLLOCK. That is right—in the criminal action. So, we cannot say they are price fixers.

But they did offer to settle the case. I was not involved in the case, but certainly in the real judicial world it is well know that people frequently settle cases in the same way that people buy insurance policies, because of the risk involved.

There was no litigation of the damage issue. There was no necessity for any court to have to determine who suffered what part of the impact. Essentially what was involved was a group of plaintiffs attorneys who got together, without the defendants, and struck a deal as to how they would split a pot which was offered by the defendants, who wanted to get rid of the potential risk of the litigation.

That case by no means illustrates, to any extent, the manageability of the kind of action which these gentlemen from the Attorneys General offices indicated to this subcommittee that they have in mind.

Senator KENNEDY. What about the Federal Trade Commission? They did an investigation, too, on the tetracycline.

Mr. POLLOCK. Yes, they did. Again, this is not a case in which I was involved.

Senator KENNEDY. It seems to me that $300 million is a pretty expensive way to buy yourself out of court.

Mr. POLLOCK. Mr. Chairman, I cannot comment on that. All I can say is that, on the basis of my own experience—and I have been practicing antitrust law on both sides of the fence for nearly 20 years, after service in the Department of Justice—I confirm to this subcommittee that there are numerous settlements made by defendants who are absolutely sure in their minds that they are completely innocent. But, on the basis of litigation expense, on the basis of difficulty in obtaining financing with that kind of risk overhanging their companies, and on the basis of threatened diversion of executive time, settlements are often made. They are even made by people who have been acquitted.

For example, the previous witness spoke of the potash cases. The fact of the matter is, Mr. Chairman, that earlier this year the defendants in that case were acquitted. They were acquitted of price fixing.

There has been no adjudication of any price fixing on their part. Yet, there remains a substantial problem as to lawyer expenses and the like. That is the reason for that.

Senator KENNEDY. The real issue is who is going to get into court. Obviously, if they are innocent, that's fine. Then everybody is happy. The question is, who is going to get into court when they are not innocent.

Mr. POLLOCK. That's right.

Senator KENNEDY. Do you agree with the conclusion of the *Illinois Brick* case? This is so I will know where you start off, from what vantage point.

Mr. POLLOCK. I think there are three significant advantages to *Illinois Brick*.

ADVANTAGES TO ILLINOIS BRICK

First it rejects a double standard which existed between the *Hanover Shoe* decision and the *Illinois Brick* decision. Also, your bill, as I understand it, rejects that double standard. I therefore think that that is something that should be applauded. The idea that the plaintiff, particularly in view of the presumption of innocence, has the right to offer pass-on proof but the defendant does not, is, I think, intolerable—and very possibly unconstitutional, if that were ordained by statute.

Second, the *Illinois Brick* case has the very distinct advantage of limiting treble damage actions so as to avoid the awesome problem of multiple and duplicative recovery.

Third, the court's decision substantially alleviates the problem of the manageability of large-scale antitrust litigation and the resulting burdens on the courts. As I have indicated, S. 1874 deals with the first of these advantages. Like *Illinois Brick*, it avoids a double standard. At least this is the way I understand the intention of the drafters. Certainly I think that Congress should not put a thumb on the scales.

On the other hand, while the bill is to be applauded in that respect, I am very much concerned, Senator Kennedy, that the bill seriously aggravates the other two problems which the Supreme Court sought to solve in *Illinois Brick*—that is, multiple liability, which gain would be foisted upon the courts, and above all, the uncertainties and difficulties of analyzing price and output decisions in the real economic world.

In addition, as I indicate in my prepared statement, even though the bill is not intended to expand substantive liability of antitrust offenders under section 4 of the Clayton Act, the language used, would I think almost certainly be understood as overruling the long-established direct injury and proximate cause rules which have developed on a kind of common law basis of the Federal courts. It would, in fact, overrule much of the law of standing which has developed in that area. In this connection, I have taken the liberty of burdening the subcommittee with some material which I have written on this subject in past years.

Senator KENNEDY. Without objection, your prepared statement will be inserted in the record.

Senator LAXALT. We were cautioned yesterday that the judicial process, as much as possible, should be respected and our intrusion should be minimal. Do you subscribe to that in this field as a matter of general philosophy?

Mr. POLLOCK. I do not set any fundamental problem with Congress amending a statute which the courts have been directed to enforce. I do not think that it would be improper for Congress to do so.

Senator LAXALT. We created the problem; we should remedy it. Is that what you are saying?

Mr. POLLOCK. I am saying here what I said in the statement. It is that we are dealing here with a set of extremely complex problems. These problems are not nearly as simplistic as has been suggested by some of the gentlemen who testified this morning. If this subcommittee or if this Congress is going to undertake to make changes in the basic antitrust legislation of this country, legislation which has been construed in literally thousands of decisions, legislation which, through construction, has been interpreted in particular ways——

Senator LAXALT. The evolution, I gather, has been rather satisfactory.

Mr. POLLOCK. Yes, it has.

Indeed, I think some of the gentlemen who spoke here this morning testified to their satisfaction with most of the evolution of section 4 in the antitrust laws. But, if there is to be any change, then I think it calls for the most careful study, the most deliberate kind of analysis, for fear that, instead of alleviating the problem, Congress could very well aggravate the problem. Furthermore, if Congress is to make any changes in this area, I think it is significant—as I was trying to respond to Senator Kennedy before—to identify what really are the dimensions of the problem.

Is the problem really that all antitrust enforcement is out the window? Is it really the case that so-called price fixers are going to forever now walk away without worry, without any risk treble damage recovery? Or is it the case that the indirect purchaser-type of recovery has been essentially the exception to the rule and that the assertions which have been made here about the dimensions of the problem are, to say the least, vastly overstated?

Senator LAXALT. That is so pertinent here. If we do open the gates to permit actions on the part of indirect purchasers, it is conceivable that we could dilute and impair effective antitrust enforcement in this country.

Mr. POLLOCK. I think that is entirely possible, depending on how it is done.

As an example of the kind of problems that exists, Attorney General Turner stated just a few minutes ago that he thinks the whole problem should be solved by providing that the intermediate purchaser should get nothing and that the ultimate consumer should get everything. How would the intermediate purchaser look at that? Will they look upon such a mandate as effective enforcement of the antitrust laws? Or will there be groups representing intermediate purchasers coming into this subcommittee saying that they need relief because injustice has been done?

Assistant Attorney General Hill very interestingly asserted to your subcommittee that the intermediate purchasers, such as contractors, are frequently price fixers themselves. Well, that is a very interesting statement. Most economists would say that, in order to establish a pass-on from a direct purchaser to an intermediate purchaser, it is essential to show that there were conditions of free competition. If it is true that there are not conditions of free competition, and if Mr. Hill is correct, then Mr. Hill, I think, will talk himself right out of court in terms of tracing the impact.

This was also pointed out by the Supreme Court in *Illinois Brick*. The whole pass-on theory depends on the assumption that there are conditions of free competition which exist at each level of distribution.

That, I suggest—and as Mr. Hill has pointed out here—is a very dubious assumption.

BURDEN ON COURTS

Senator KENNEDY. If there are so few cases which are being brought by indirect purchasers, then I think it really knocks out of the park the issue about the burden on the courts. We have heard a good deal during the course of the hearing yesterday, and even today, about the burden on the courts. If it is as you said, then we have resolved that particular issue and do not have to be so concerned.

Mr. POLLOCK. First of all, Senator, I did not use the term "a few cases." There are, I am sure, dozens of cases that are pending, even at this very time. Undoubtedly, in the future there could be dozens of cases more. I was talking before about the bulk of private antitrust enforcement. I did not say that there are no cases being brought by indirect purchasers.

Senator KENNEDY. The record will show "dozens of cases." That is a lot different from the sort of heavy burden.

Mr. POLLOCK. Let me respond to this question of burden.

There really are two aspects to that. One aspect is that conventional kind of burden: How many days judges have to spend on cases, as distinguished from criminal litigation and other matters of high importance. Although I think the Judicial Conference would probably emphasize that feature in particular, I would emphasize a second aspect which I think is even more important: Do the courts really have the capacity to make the kind of determination which S. 1874 would seem to require that they make? Do the courts have the capacity—without departing from judicial standards—to determine, for example, in the plumbing fixture case how much of the alleged overcharge to a plumbing wholesaler was passed on to a plumbing contractor or was passed on to a homeowner—who may have passed it on to another homeowner who bought the house from the first homeowner?

Senator LAXALT. Are you talking about intellectual capacity?

DIFFICULTY OF PROOF

Mr. POLLOCK. No. I am talking about the inherent difficulties of proof that are simply beyond judicial determination, no matter how great may be the intellectual abilities of the judge involved. There seems to be an assumption, which, frankly, my experience as an antitrust lawyer contradicts, that you can bring in a gentleman who is named "professor" and who has had some experience in economics, and he can give you a graph or chart which will tell how this alleged overcharge went down from one level to another, all the way from manufacturers down to the consumers.

I suggest to you that generally that is a false hope.

If S. 1874 undertakes to mandate that a judge or jury make that determination, despite the inherent difficulties of proof, and if the judge is to be denied the right to say that this simply is beyond the capacity of any court—while staying within the traditional judicial framework—if that is what S. 1874 is requiring, then S. 1874 will be requiring the courts to engage in an exercise in speculation and to conduct a kind of lottery or blackjack game. It would be a complete departure from established standards for determining the facts.

S. 1874 IS A GOOD CONCEPT

I admire the concept of S. 1874; that is, the idea of "to each according to his own actual injury." I think it is a noble concept, particularly when coupled with the elimination of the double standard. But I urge this subcommittee to recognize, after exploration of the evolution of the section 4 remedy, the enormous difficulties that lie in the path of trying to codify that noble concept without departing from some of the fundamental concepts that we also cherish in this country about how courts ought to be run. I have taken already more time than I should. Unless there are any further questions, I would thank the subcommittee for your consideration today.

Senator KENNEDY. Thank you very much.

[The prepared statement of Mr. Pollock follows:]

PREPARED STATEMENT OF EARL E. POLLOCK

I am Earl E. Pollock, a partner of the Chicago law firm of Sonnenschein, Carlin, Nath & Rosenthal. I am pleased to accept your invitation to testify in these hearings.

My interest in the subject is substantial. For almost my entire professional career, I have been engaged in antitrust practice and—as both a practitioner and occasional author[1]—have been continuously involved with questions as to the nature and scope of the private antitrust action.

In my practice, I have represented companies of all sizes—some very large, some medium-size, and some very small. But probably the smallest antitrust defendant our firm has represented is the Chicago Block Co., one of the defendants in the *Illinois Brick* case.

The Supreme Court's decision in *Illinois Brick* has, to say the least, aroused a storm of controversy, and careful consideration of its impact as well as possible alternatives is certainly warranted. In my view, however, S. 1874 represents a hasty and dangerously oversimplified reaction to a group of complex problems which the Supreme Court addressed in *Illinois Brick*, and its adoption might well compound those problems in ways perhaps unanticipated by the drafters.

At the outset, it is pertinent to identify the principal societal advantages which result from *Illinois Brick*—and which possibly could be lost from its overruling.

The principal advantages of *Illinois Brick* are, I believe, three in number:

First of all, the Court emphasized that there was no basis for a double standard with respect to the *Hanover Shoe* conclusive presumption against proof of passing-on; that if such a conclusive presumption applied to defendants, as *Hanover Shoe* held, then the same conclusive presumption must also apply to plaintiffs as well; that, in effect, what was sauce for the goose was sauce for the gander.

Second, by limiting treble-damage actions to direct purchasers (apart from exceptions noted in *Hanover Shoe*), the Court virtually eliminated the hazard of multiple liability.

Third, the Court's decision substantially alleviates the problem of the manageability of large-scale antitrust litigation and the resulting burdens on the courts.

S. 1874 deals with the first of these points by similarly rejecting a double standard for plaintiffs and defendants. But, instead of applying the conclusive presumption to both sides, the bill is apparently designed to bar its application to either side. In this particular respect, the bill has the virtue of evenhandedness.

Congress should not put a thumb on the scales with respect to permitting proof of passing-on. If plaintiffs are to be allowed to attempt proof of passing-on from a direct purchaser to an indirect purchaser, then why not allow a defendant to attempt to prove the same thing? Indeed, in view of the presumption of in-

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[1] E.g., *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 Northwestern University Law Review 691 (1963); *Standing To Sue, Remoteness of Injury, and the Passing-on Doctrine*, 32 Antitrust Law Journal 5 (1966); *Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Decision*, 13 Antitrust Bulletin 1183 (1968).

nocence supposedly applicable in such cases, it would be unconscionable—and possibly unconstitutional—to permit passing-on proof in only one direction.

While S. 1874 is to be applauded for its rejection of a double standard, the bill would appear to seriously aggravate the other two problems which the Supreme Court sought to solve in *Illinois Brick*—the hazard of multiple liability and "the uncertainties and difficulties in analyzing price and output decisions in the real economic world rather than an economist's hypothetical model."

Indeed, even apart from the issue specifically involved in *Illinois Brick*, adoption of S. 1874 would substantially increase those "uncertainties and difficulties" and "the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom."

Senator Kennedy and Congressman Rodino have stated that the bill "will not increase the liability for an antitrust violation . . . " but the language of the bill does not carry out that intention. It would amend section 4 (and make similar changes in sections 4A and 4C(a)(1)) of the Clayton Act by inserting "in fact, directly" immediately after "injured." Whether intended or not, such an amendment if adopted might well be construed as congressional rejection of 1.) the long-standing "direct injury" limitation on the scope of section 4; 2.) the traditional role of the courts in delineating—often on mixed law and fact grounds—the ambits of a permissible cause of action under section 4; and 3.) much of the law of standing developed by the federal courts as to such suits.

The state of the law at the present time is essentially the same as I summarized it in 1963:[2]

> In many cases, however, even a preponderance of the evidence may be ineffective to satisfy the "injury" and "causation" requirements. Although superficially these requirements might appear to be solely factual in nature, and although courts sometimes use factual in nature, and although courts sometimes use factual-sounding jargon in applying these requirements, actually it is policy, rather than evidence, that is frequently dispositive . . .
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> The explanation is, quite simply, that the statute does not really mean what is literally says. The fact of the matter is that the so-called "fact of damage" is, in large part, not a factual question at all, but instead is a question of judge-made policy. Obviously, there has to be some physical or factual connection between the violation and the loss, and in some instances (such as *Continental Ore*) this may be decisive; but the chain of causation extends indefinitely from a given act and, once that chain is traced, the real problem is determining the point where the chain should be cut off—where the line should be drawn.
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> It follows, of course, that certain losses incurred beyond that point—even though the losses are factually attributable to the violation—are nevertheless held to be noncompensable. When this happens, the result is often articulated in terms of a complete lack of "injury" or "causation" . . . or in terms of indirect, incidental, consequential, remote, or collateral "injury or a lack of proximate "causation." But in this context "injury" and "causation" are only verbal formulas used by a court to express its conclusion that the plaintiff's claim in that particular case falls below the line and that the force of law should not be used in the circumstances presented to compel the defendant to make payment to the plaintiff.
>
> Most courts have been content to recite these incantations about "injury" and "causation" as if their meaning were self-evident. Some courts, however, have gone further and expressly acknowledged the policy considerations involved. They have referred to the drastic nature of the treble-damage remedy, the unfairness of permitting a windfall to those harmed only incidentally, the danger of a flood of litigation, the possibility that more than one plaintiff would each recover treble damages for the same injury, and the burden that might otherwise be placed on a particular industry.
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> What we are really dealing with, therefore, is the scope of the cause of action provided by section 4 of the Clayton Act. This is, of course, basically an issue of law rather than fact; and to the extent that it is legal rather than factual, it should be resolved by judge rather than jury. Treating "injury" and "causation" as if they presented merely factual questions, dealing solely with time and space without reference to values, can only serve

[2] Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 Northwestern University Law Review 691, 697–699, 702–703 (1963).

to confuse analysis and lead either to the jury's adjudication of a basically legal issue or the failure of both judge and jury to consider that issue at all . . . .

The rationale of the *Ames* and *Loeb* decisions have been applied in numerous cases involving, not only stockholders and creditors, but others in a comparable position such as officers, directors and employees of an injured corporation, a partner in an injured business partnership, a landlord of an injured lessee, a supplier of an injured customer, a patent owner who had licensed the patent to an injured licensee, and an insurance agent representing an injured underwriter, and members of a injured association. In each of these cases, the plaintiff was not an object or target of the conspiracy or other violation, but instead his loss resulted only from an impairment of a business relationship with another entity which had been the object or target. In this sense, the plaintiff's loss was "secondary" or "derivative." Recovery for such "secondary" losses has been uniformly denied, "even though in an economic sense real harm may well be sustained as the impact of such wrongful acts brings about reduced earnings, lower salaries, bonuses, injury to general business reputation, or diminution in the value of ownership," and even though in many instances the loss could not be redressed through an action brought by someone else. [Footnotes omitted.]

As the Supreme Court pointed out in *Hawaii* vs. *Standard Oil Co.*, 405 U.S. 251, 262–63 n.14 (1972) : "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." See also *Brunswick Corp.* vs. *Pueblo Bowl-O-Mat, Inc.*, —— U.S. ——, 97 S. Ct. 690 (1977). Even Mr. Justice Brennan in his *Illinois Brick* dissent acknowledged that "I concede that despite the broad wording of section 4 there is a point beyond which the wrongdoer should not be held liable."

For example, in the *Brunswick* case, *supra*, there can be no doubt that the asserted injury of the plaintiffs was *factually* attributed to the allegedly illegal conduct. The asserted violations in that case were acquisitions by Brunswick of certain insolvent bowling alleys which—but for the acquisitions—would have gone out of business with resulting competitive benefits and larger profits for the plaintiffs. To use the language of S. 1874, the plaintiffs were "injured in fact, directly or indirectly" by the acquisitions, since plainly the plaintiffs would have been better off economically if the acquisitions had not taken place. Despite this, the Supreme Court unanimously held that the recovery allowed by the lower courts was improper, on the ground that section 4 of the Clayton Act—despite its broad language—did not apply to such a situation as a matter of law.

Even where supposedly only factual considerations are involved, courts have frequently recognized the sheer impracticability of attempting to trace impact of an alleged overcharge through a succession of distribution levels. Thus, in the *Plumbing Fixtures* case, the defendant manufacturers sold to plumbing wholesalers, who sold to the plumbing contractor, who sold to the builder, who sold to the homeowner, who, in some instances, resold to another homeowner. *Philadelphia Housing Authority* vs. *American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970), *affid sub nom. Mangano* vs. *American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971). Class actions were brought by all five classes of purchasers. With respect to the initial homeowner purchasers, the district court dismissed their complaint:

> . . . plaintiffs would have the Court believe that as the result of an overcharge of approximately ten to twenty dollars, a builder selling a twenty, twenty-five, or thirty thousand dollar house raised his price to reflect this overcharge (assuming such overcharge reached the builder). Such a view strikes the Court as incredible. Similarly, plaintiffs' claim rests on the assumption, demonstration of which the Supreme Court in *Hanover* . . . described as raising "insuperable difficulty," that the builder would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. It would be incredible if the price of a house were determined not by the shifts in supply [and] demand in the market for homes as a whole but rather by a relatively minuscule charge (with respect to the selling price of the house) in the price of the plumbing fixtures. [50 F.R.D. at 26].

A similar situation was involved—but in the context of a motion for class action certification—in *City and County of Denver* vs. *American Oil Co.*, 53 F.R.D. 620 (D. Colo. 1971). The case was brought on behalf of 126 public entities who had paid contractors for paving roads and allegedly had been injured by price-fixing on asphalt which the contractors had purchased from the defendant asphalt manufacturers. The court pointed out the enormous difficulty of "tracing the cost of asphalt into the cost of a 10-mile stretch of new highway blasted out of the Colorado mountains" [*Id.* at 636–37]. Then, describing the ways in which proof of pass-on and injury would vary from claimant to claimant, the court concluded that "to try this case as a class action might be an accountant's paradise, but it would be a court's purgatory" [*Id.* at 637].

How would S. 1874 and its "injured in fact, directly or indirectly" language apply to such a situation? If it means that a district court is to ignore the "insuperable difficulties of proof" which the court found in *Plumbing Fixtures* and the *Denver* case, then it follows: *First*, contrary to the alleged premise of the bill, there *would* be substantive—indeed, a major substantive—expansion of section 4 of the Clayton Act; for (as noted above), quite apart from *Illinois Brick* or *Hanover Shoe*, treble-damage claims have been rejected on "remoteness" or "indirectness" grounds for many decades. *Second*, many treble-damage cases would not only be often unmanageable but indeed would be converted into an exercise in speculation having little resemblance or relationship to a judicial proceeding.

On the other hand, one may properly question whether supporters of the bill have not overstated the need for such legislation. For example, Senator Kennedy and Congressman Rodino were quoted last week as stating "that the *Illinois Brick* decision simply encourages manufacturers to fix prices, for which there is now no effective remedy for redress." [News release, Cong. Rodino, July 15, 1977.] Such an analysis simply ignores the 1974 amendment to the Sherman Act making a violation of felony punishable by 3 years in prison and a fine of up to a million dollars. Such an analysis also ignores the facts 1. that the bulk of private antitrust enforcement (for example, the celebrated *Electrical Equipment* cases) has involved direct purchasers and 2. that even before *Illinois Brick* suits by indirect purchasers (e.g., *Plumbing Fixtures*) have frequently been unsuccessful either because of legal limitations of the cause of action or the difficulties (pointed out by the Supreme Court) of tracing impact through successive distribution levels.

To summarize: There is considerable surface appeal in the theory that each person affected by an allegedly illegal overcharge—no matter where located on the chain of causation—should be allocated his "share" of the overcharge. The appeal of the theory is enhanced if defendants (contrary to *Hanover Shoe*) are even-handedly permitted to adduce the same kind of pass-on proof that an indirect purchaser would have to make to establish his claim against the defendant.

The difficulty is in the implementation of the theory. In short, "saying it does not make it so." In the real economic and litigation world, as the Supreme Court pointed out, it is generally fanciful to think that lawyers, economists, judges, and jurors can trace the ripples of an alleged overcharge through a whole succession of distribution levels and come up with any kind of damage allocation which even remotely would meet established judicial standards.

Nor can the problem of avoiding multiple liability and inconsistent judgments be simply remitted to the courts to handle in some unspecified way. As the Supreme Court also pointed out, the courts have no effective method at their disposal to solve the problem.

S. 1874 essentially ignores these facts of the real economic and litigation world. Furthermore, S. 1874—despite the drafters' announced intention not to expand any substantive liability—would appear to do precisely that by use of the "directly or indirectly, in fact" language.

One thing, I believe, is clear: the questions raised by *Illinois Brick* are too complex, have too many ramifications, and above all are too important, to be resolved on a "panic button" basis. A good deal more careful thought on these questions is essential before any responsible determination can be made as to whether any further changes (and, if so, what ones) should be made in the Nation's basic antitrust legislation.

Senator KENNEDY [continuing]. Mr. Howard Adler is our next witness. He is from the firm of Bergson, Borkland, Margolis & Adler. Welcome, Mr. Adler.

STATEMENT OF HOWARD ADLER, JR., ATTORNEY, REPRESENTING THE CHAMBER OF COMMERCE, ACCOMPANIED BY FRED BYSET, CHIEF, ANTITRUST SECTION, CHAMBER OF COMMERCE

Mr. ADLER. Senator Kennedy and Senator Laxalt, I am Howard Adler, Jr., a lawyer in Washington.

For some 21 years, I have devoted myself professionally entirely to antitrust work. During that time I have represented defendants, and I have represented plaintiffs. It is on the basis of that experience as an antitrust professional that I undertake to speak to you today on behalf of the Chamber of Commerce. I appreciate the opportunity to do so and to express some reservations and questions the Chamber of Commerce has about S. 1874.

With me is Mr. Fred Byset of the Chamber of Commerce. If questions of policy arise regarding the Chamber, he would be in a better position than I to answer them. I will not burden you with a verbatim reading of my prepared statement, but I would like to run through the points that are made in the statement. In the process of preparing the statement, I read both the bill and your remarks and also Chairman Rodino's remarks at the time the similar bill was introduced in the House.

Senator KENNEDY. Your statement will be inserted.

Mr. ADLER. Based particularly on my reading of your introductory remarks, Senator Kennedy, I think the purpose and the structure of the bill are rather clear. Three points come through quite clearly to me.

PURPOSE OF BILL

One is that the bill, if enacted, is not intended to enlarge or change the aggregate liability of the antitrust violators. It is more a matter of how that liability is going to be apportioned among the victims, direct or indirect, of that violation. The second point that emerges quite clearly from your statement is that the direct purchasers of price-fixed products would not be entitled to recover for any amount of overcharge that had been passed on to their customers. They would, in the words of the bill, not be "injured in fact," and, therefore, they would not be entitled to recover to that extent.

The third main point is that all succeeding purchasers down the line of distribution would have a claim for antitrust damages to the extent that they had not in turn passed on the overcharge to their customers. That, as I see it, describes the basic structure and the purposes of the bill.

Senator KENNEDY. You have summarized it very well. There have been some witnesses here who felt it was confusing, misleading, or open to a variety of different interpretations. I am glad you have been able to state it so clearly.

Mr. ADLER. I wanted to do that, Senator Kennedy, because many of the questions we raise go to whether the bill, as it is presently written, would actually do that.

Senator KENNEDY. I thought perhaps there might be some other comments coming.

Senator LAXALT. You will have high credibility coming in, because Senator Kennedy realizes you understand the bill.

Mr. ADLER. I do not have to tell people in this room how the bill purports to achieve the objectives I have just referred to. If the bill is enacted, basically section 4 would read that any person who shall be injured in fact, directly or indirectly, in his business or property by reason of anything forbidden in the act may sue for treble damages. There is only a five-word change in each of the pertinent sections. The words "in fact, directly or indirectly" are inserted, as you know.

DOES S. 1874 ACCOMPLISH ITS PURPOSE?

The first question that I would raise with the committee, the first serious question that the Chamber has, is whether that simple amendment is sufficient to clearly overturn the *Hanover Shoe* decision. Does it get rid of what Mr. Pollock referred to as the double standard? It clearly provides that indirect purchasers have an action. Does it also clearly provide that the first purchaser who passes on the overcharge does not get a windfall?

It is quite clear that it was your intent to get rid of that windfall. It is less clear to me that the bill in its present form does that. There is certainly nothing explicit in the bill that incorporates the passing-on defense.

Senator LAXALT. You don't think the words "in fact," then, do the job?

Mr. ADLER. No, sir, I do not; and I will tell you why in a moment. I do not think the words "in fact" do the job.

Senator KENNEDY. Tell us.

Mr. ADLER. I will tell you now, since the question was raised.

The words "in fact," it seems to me, add nothing legally to the word "injury." I think it was always the intent of Congress that when they said "injury to business or property," it was injury in fact. It was factual injury. It was not hypothetical or theoretical or possible injury. The word it used was "injury."

In my statement, I call to the subcommittee's attention that the word "injury in fact" is a term of art in the antitrust business. Judge Real mentioned earlier that he thinks district judges are familiar with the term "injury in fact." Indeed, they are, because it is often used in the context of section 4 of the Clayton Act interchangeably with the word "injury."

The fact of injury is one of the three elements in a private damage action: proof of violation, proof that the violation caused injury, and then the amount of damage. Courts and judges often refer to that second element as injury or injury in fact. I have a quotation in the statement at page 4 from Judge Wisdom where he uses precisely that terminology. Judge Wisdom, as you know, is a very prominent, distinguished antitrust judge.

I feel that the words, "injured in fact" leave too much ambiguity. I do not think they do the job of clearly establishing that we are going to have, if that is the will of Congress, a right of action by indirect purchasers, but, at the same time, a right to assert to a direct purchaser, no, you cannot recover to the extent that you have passed on the overcharge. I do not think that small change does it. That is the first point made in the statement.

Senator KENNEDY. Would you suggest to us language that would do it?

S. 1874 NEEDS TO BE MORE EXPLICIT

Mr. ADLER. I do not specifically in the statement. I think, however, that if it were simply stated that a defendant may assert as a defense, at least *pro tanto*, to a claim under section 4 that that amount of overcharge had been passed on, that would do it. I could submit language at a later time. I think the ingenuity of the subcommittee would undoubtedly be sufficient. I think something more explicit in terms of a pass-on defense would weaken this first objection that is being raised on behalf of the Chamber.

THE TERM "INDIRECTLY" IS TOO OPEN ENDED

The second objection relates to the words "directly or indirectly" and the open-endedness of "indirectly."

Under the bill as drafted, there is no delimitation, no definition, no restriction on who may recover. There is obviously a vast range of indirect purchasers, going from the retailer who buys a price-fixed product from a middleman, who has resold this product exactly in the same form in which he bought it from the manufacturer, all the way down to the ultimate consumer of a manufactured product containing a component which was price fixed at a much earlier stage in the chain of distribution. A person injured "indirectly," in other words, covers a vast waterfront.

The Chamber believes that without some definition you have a bill that would be unworkable and unfair. It could even invite claims of more remoteness than has been traditionally asserted before *Illinois Brick*. It appears to be an open-ended invitation for anybody. For example, if somebody bought a radio where a component had been price-fixed from a local store, does he have a claim? Well, under the wording of the bill, it appears that he would.

In my statement, we have set forth more fully than I will here this morning two basic problems that the Chamber sees with having that open-ended a bill, with anybody indirectly injured having a cause of action.

One objection is that it can present in very aggravated form some of the problems that Justice White described of tracing an overcharge as a result of a conspiracy on a basic product through many levels of distribution down to another manufacturer who may have bought the price-fixed product, incorporated it in his product, and sent it into another chain of distribution to an ultimate consumer. These are real problems. These can become just almost hopeless to deal with. So, if you get multiple classes of claimants of varying degrees of directness, probably what you end up with is some kind of compromise among the lawyers where they kind of fight it out. That may be one way of solving the problem. But, to the extent that that does not work out, the courts are faced with what we believe are very substantial, real and potentially insurmountable problems.

The second problem with inviting without limitation indirect buyers to sue is this: Each class of indirect buyers at each level of the chain of distribution down to ultimate consumer has a conflicting interest. You could not have one attorney represent a middleman and also represent the ultimate consumers. Their claims are antagonistic by definition.

The problem we see is that there is a real danger there will be greater costs of administration, greater costs for attorneys' fees, so that the ultimate recovery to the consumer could be in danger of being diluted to the point of being insignificant—to the point that one must ask the question whether, on the basis of a cost-benefit analysis, it is really worth the effort to bring suit. While the Chamber of Commerce at this point is not advocating any change in the *status quo*, if this subcommittee and if the Congress believe there should be a change in *Illinois Brick*, then we would strongly urge that you consider putting some words of limitation on "indirectly." Again, we are not proposing where that line should be drawn, although one possibility would be that the claim must be by purchasers of the product in the same form in which it was price fixed. That is one kind of limitation that would be clear, and would avoid many of the serious problems of tracing and multiplicity of claims that we are referring to. Also, it generally would be consistent with the direction case law has gone in cases where the home buyer, for example, is not entitled to claim damages because the plumbing fixture installed in his home was price fixed. Some such limitation ought to be seriously considered.

S. 1874 SHOULD NOT AFFECT STANDING

A third point we make in our prepared statement, and which I think is also significant, is that there seems to be a possible inadvertent, unintended impact by the very sweeping language of this bill on the law of standing.

Our statement discusses this problem. Basically, the law has developed over the years that in section 4 action, as in other tort actions, without a sufficiently close nexus of causation between the violation and the claim there can be no recovery. That is referred to as standing to sue.

Under that doctrine, for example, the landlord of a tenant who is the victim of a violation and therefore loses rent from the tenant who has gone out of business because of an antitrust violation, is not entitled to recover. That is considered too contingent, too indirect, too remote to give the person standing to sue.

As you know, the doctrine of standing is not entirely clear, and there are divisions among the circuits; but there does seem to be a consensus that we ought to have a law of standing—there ought to be some sort of traditional tort limitation on who can maintain a section 4 action. The danger here is that the unrestricted word "indirectly" could be construed so that a landlord who is indirectly hurt because he cannot get rent from the tenant who is put out of business would now, all of a sudden, have standing to maintain this action.

We think that is a matter that the subcommittee ought to clarify. I do not think you intended to change the law of standing, but that seems to be a consequence.

RETROACTIVITY

Finally, there is the matter of retroactivity of this provision. Here, our comments are really directed to the kind of a situation Senator Laxalt suggested earlier where there may be a vesting of some rights during the period between the *Illinois Brick* decision, in reliance on that decision and the enactment of this law, if it were to be enacted.

What I refer to is a situation where there is a pending case termi-

nated by a settlement or a verdict with the understanding that there is no pass-on defense—that the direct purchaser has a good claim despite the fact that he has passed the overcharge on to indirect purchasers. And it is also on the assumption that the indirect purchaser has no claim.

Now, if that case is terminated and then the law were to be changed, giving an indirect purchaser a right of action—in other words, changing the assumptions and ground rules under which that case was concluded—then there would be a danger of multiple recoveries.

I suggest—although the Chamber of Commerce does not have a definitive position on this—that there would be some ways of dealing with that rather limited problem we don't know what the time period is going to be. The problem is more serious the longer the bill is pending, and, of course, we don't know what that time period is going to be. But, I do not think we would want a situation where the uncertainties of the bill in its present form would prevent the work of the courts from going forward and disposing of these cases one way or the other. So, if the bill could be amended to protect the interests of the parties in terminated cases, I think this would be a significant point.

We summarize our position on behalf of the Chamber at page 10 of the statement with respect to the present bill. I think the main points are that it does not clearly eliminate the *Hanover Shoe* problem. It is, we believe, too open-ended. Indirect purchasers are allowed to sue. It creates some problems for the law of standing, which I do not think anybody really intended. Finally, there is this retroactivity problem that I just discussed. That is all we have, Mr. Chairman.

Senator KENNEDY. What is the attitude of the Chamber toward direct purchasers collecting unjust enrichment and the accompanying failure to compensate those people who have been injured? There must be a sense of injustice that bothers the Chamber. You have not talked about that. I would be interested in your viewpoint.

Mr. ADLER. Let me consult with Mr. Byset.

[Consultation between Mr. Adler and Mr. Byset.]

Mr. ADLER. I am a little hesitant to speak for the Chamber but we certainly feel that, if the bill is going to provide an action for indirect purchasers, it ought to provide a pass-on defense.

I think basically there would be a recognition in the Chamber that there is a measure of windfall that would be very hard to justify under the *Hanover Shoe* case as it is.

Senator KENNEDY. How do you suggest we deal with that? How troubled are you about that? How troubled is the Chamber about that unjustified profit?

Mr. ADLER. You mean, would the Chamber advocate a law to provide for a pass-on defense apart from the context of S. 1874? It may be a little hypothetical. I would certainly recommend to the Chamber, if it has not taken a position on this already, that, in the interest of justice, there should be a pass-on defense. The first purchaser should not get the windfall. The antitrust defendant should be able to defend on the basis that there was no injury to the direct plaintiff who has passed this on.

Senator LAXALT. We had a suggestion yesterday that, in a price fixing case where there would be potential windfall, perhaps a fine might be imposed. Have you given that any thought or consideration?

Mr. ADLER. I cannot say that I have on behalf of the Chamber.

I do think that there is a great deal of deterrence out there, based on my experience with our clients with million dollar fines and jail sentences and a great deal of treble damages. I think there is an awful lot of deterrence.

WOULD CHAMBER SUPPORT A REVISED BILL?

Senator KENNEDY. Do you agree with what we are intending to do, as far as your own stated interpretations are of the bill? Or do you have problems even with that?

Mr. ADLER. I think, insofar as the Chamber is concerned, we have addressed the bill in its present form and have objections to the bill as written. If the bill were revised to meet those specific objections, then the Chamber still would have questions as to whether it is in the net public interest to expand antitrust treble damage actions in this way.

When I say that there would be questions, I have to say that the Chamber is not in a position, and I am not authorized by the Chamber, as a matter of policy, to say that, if you made every change that I suggest, then the Chamber would come out and espouse your bill.

I will say, Senator Kennedy, that, if those changes were made in the bill to meet those points that I talked about this morning, then that revised bill would be certainly very carefully examined by the Chamber, and a position would have to be formulated at that time.

Senator KENNEDY. As you stated what were the objectives of the sponsors of the bill, I wonder whether the Chamber supports those objectives or whether it does not support those objectives. It seems to me there are a couple of different facts. I think you stated accurately and fairly my objectives. You indicated in your analysis where we do not carry forward with those objectives. So, I am asking you whether you support those objectives or whether you do not. If the Chamber does not, then we are in a different situation than if it does. That I think is rather a basic question.

Mr. BYSET. Senator, I think I may have an answer to that question.

This came up pretty much on short notice. We are assembled here on short notice. We have only been able to consider the bill as drafted. I can assure you, however, that the concept as you talk about it will be, in due time and as we have an opportunity, seriously considered.

Senator KENNEDY. Could you consult with your policy group and respond to that as to whether you support the objectives or do not support the objectives, which I think have been very fairly stated by Mr. Adler? If you do, obviously we want to work very closely in terms of fashioning a remedy to deal with those.

If you do not, then I think we have got a difference in point of view on it.

We obviously value very highly the careful consideration that you have given to the legislation and the constructive comments that have been made in presenting your viewpoints on the limitations or uncertainties of the limitations. I do think it is a basic question.

Mr. BYSET. I can assure you, Senator, that we will have that kind of consultation. I would add this, though. We are a bureaucratic organization. I would not expect a response next week or even the week after. It will take a little time.

Senator KENNEDY. If you would respond, I would appreciate it very much.

Senator LAXALT. This has been very helpful to me, gentlemen.

Senator KENNEDY. I want to thank you and thank the Chamber for appearing before us this morning. We also thank the other witnesses. It has been very helpful testimony.

Mr. ADLER. Thank you, Senator.

[The prepared statement of Howard Adler follows:]

PREPARED STATEMENT OF HOWARD ADLER, JR.

I am Howard Adler, Jr., a member of the law firm of Bergson, Borkland, Margolis & Adler in Washington, D.C. For more than 21 years I have devoted by professional efforts almost exclusively to antitrust and trade regulation counseling and litigation. During that time, while a majority of my firm's work has been on behalf of antitrust defendants, I have on many occasions represented plaintiffs both in treble damage actions and in complaints to the enforcement agencies. I appreciate this opportunity to present the views of the Chamber of Commerce of the United States in opposition to S. 1874.

In introducing S. 1874 last week, Senator Kennedy stated that the legislation "does not increase the liability for an antitrust violation, but simply ensures that the damages resulting from a violation are recovered by the parties injured." He went on to say that the proposed bill was intended to "change [the] result" of the Supreme Court's *Hanover Shoes* decision so that parties "dealing directly with antitrust violators would . . . only recover damages they 'in fact' sustained." As a consequence, according to Senator Kennedy, the "windfall recovery now received by direct parties who recover the full amount of the overcharge, even though they have passed on most or all of the overcharge, will be eliminated." At the same time, as Senator Kennedy further indicated, the recent *Illinois Brick* decision would be overturned so that "[i]ndirect parties would also be able to sue, but only to the extent of their damages."

In sum, the theory of the legislation seems to be that the aggregate liability of antitrust defendants would not be increased; direct purchasers' treble damage claims would be reduced by the amount of overcharge "passed on" to their customers; and successive purchasers would also have a claim for damages to the extent of any indirect overcharge that they did not, in turn, pass on.

The bill proposes to accomplish these results by inserting the words "in fact, directly or indirectly" immediately after the word "injured" in sections 4 and 4A of the Clayton Act, and by making an essentially similar change in section 4C (a)(1) of the Act. In pertinent part, section 4, as so amended, would read "that any person who shall be injured *in fact, directly or indirectly* in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . ." There is, I believe, serious doubt that these simple changes will actually accomplish the purposes described by Senator Kennedy.

One immediate and basic question is whether the proposed amendment would, in fact, overturn *Hanover Shoe* and establish a passing-on defense. Certainly, the bill does not expressly state that it shall henceforth be a defense in actions brought under the Clayton Act that the claimant has passed on part or all of the overcharge. Since it would be a simple matter to draft clear and specific language to that effect, the absence of an express provision could well lead the courts to conclude that Congress did not intend to overturn *Hanover Shoe*. This is particularly true in light of the fact that Chairman Rodino, in introducing H.R. 8359 in the House of Representatives on Monday, July 18, did not indicate, either directly or by implication, that the bill was intended to create a passing-on defense. If anything, his statement implied the contrary since he referred repeatedly to *Illinois Brick*, but did not even mention *Hanover Shoe*, and since he also referred, with obvious approval, to U.S. Court of Appeals rulings which had held in effect that *Hanover Shoe's* prohibition of a passing-on defense did not prevent indirect purchasers from recovering treble damages from price fixers.

In these circumstances, the modest verbal changes made by the bill are far too cryptic and ambiguous to establish a passing-on defense. At best, it leaves the matter clouded and uncertain—a question to be resolved through still more

litigation. The theory, according to Senator Kennedy's explanation, appears to be that a claimant who has passed on an overcharge has not been injured "in fact" within the meaning of the amended statute. The difficulty with this theory is that the terms "injured" and "injured, in fact" are really synonymous. Indeed, courts have sometimes used the term "injury in fact" to describe the *injury* element of a Clayton Act treble damage action. For example, Judge John Minor Wisdom, a highly experienced and able antitrust judge, in *Copper Liquor, Inc.* vs. *Adolph Coors Co.*, 506 F.2d 934, 953, observed that "once a plaintiff in a private antitrust action has proved that the defendant violated the law and that this violation caused him *injury in fact*, the plaintiff is held to a less rigid standard of proof with respect to the actual dollar amount of his damages. . . ." [1]

The Supreme Court's clear holding in *Hanover Shoe* was "that Hanover proved injury and the amount of its damages for the purpose of its treble damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; United was not entitled to assert a pass-on defense." [392 U.S. at 494.] Under the *Hanover Shoe* analysis, therefore, which is not explicitly overturned by the pending bill, "injury"—or as some courts say, "injury in fact"—is conclusively established merely by proof of an overcharge. In light of this background, if Congress intends to eliminate the windfalls granted by the *Hanover Shoe* decision and to estabilsh a passing-on defense, it should do so explicitly. Merely inserting the words "in fact" after the word "injured" would be wholly inadequate to the task.

A further difficulty with the bill is that it makes no attempt to define which indirect purchasers are entitled to sue for treble damages. There is obviously a vast spectrum of indirect purchasers ranging from the retailer who purchased the price-fixed product from a middleman who resold the product in the identical form in which he purchased it to the ultimate consumer of a manufactured product, one of whose ingredients was price-fixed at a much earlier stage in the chain of distribution. Under the present bill, *all* indirect purchasers are entitled to sue. We submit that this would be unfair and impractical.

We respectfully suggest that two kinds of problems are presented by the bill that may well entail costs outweighing the benefit of providing a cause of action for all persons indirectly injured by an antitrust violation:

First. Courts required to allocate damages among direct purchasers and various classes of indirect purchasers will be faced with most difficult and complex questions of tracing overcharges and other possible market effects. The complexities involved in this process were described by Mr. Justice White in the *Illinois Brick* opinion, where, speaking for the Court, he noted that permitting indirect purchasers to sue under section 4 "would transform treble-damage actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge . . . [and] would add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness." [Slip opin., p. 14.]

The Chamber of Commerce believes that the complexities described by Mr. Justice White are real, substantial, and virtually insurmountable. If, however, this subcommittee should conclude that the courts are able to cope with the complexities described by Mr. Justice White, then I strongly urge it to consider whether limiting the type of indirect purchasers entitled to sue for treble damages would not simplify the task of both apportioning damages and insuring equitable treatment for all parties concerned.

Second. Authorizing treble damage suits by multiple layers of indirect purchasers will inevitably magnify costs of administration and attorneys' fees. As noted earlier, according to Senator Kennedy's explanation, the antitrust defendant's total liability would not be increased under the bill; rather, it is merely a matter of apportioning that liability among all parties directly and indirectly injured. In the apportioning process, of course, the claims of different levels of purchasers will be antagonistic so that each level would necessarily have separate counsel. In addition, to the extent that problems of notice and distribution are increased by virtue of the multiplicity of plaintiffs, the costs of administration are enhanced. The result is likely to be a reduction in the actual

[1] Emphasis added. Actually, Judge Wisdom used the terms "injury" and "injury in fact" interchangeably, stating at 954 that "[p]roving *injury in fact* and proving damages are obviously similar tasks in an action of this nature. . . ." while, later, on the very same page, noting that "plaintiff faces a substantial hurdle on remand in proving injury . . ." [emphasis added]. See also, *Yoder Bros., Inc.*, vs. *California-Florida Plant Corp.*, 537 F.2d 1347, 1361 (5th Cir. 1976) ; *Greene* vs. *General Foods Corp.*, 1975–2 Trade Cas., paragraph 60, 144, at p. 66, 973 (5th Cir. 1975) ; *Smith* vs. *Denny's Restaurants, Inc.*, 62 F.R.D. 459, 461 (N.D. Cal. 1974).

recovery of the injured parties and an increase in the amount paid to plaintiffs' attorneys and others involved in the administration of these massive litigations.

The proposed amendment in its present form would also have a serious, and probably unintended, effect upon the law of standing. Since treble damage actions are based on tort theory, courts have considered whether the antitrust violation alleged was a sufficiently proximate cause of the claimed injury to give the plaintiff standing to sue under section 4. As the Supreme Court has observed, "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." [*Hawaii* v. *Standard Oil Company of California*, 405 U.S. 251, 262–63, n. 14 (1972).] In those cases, courts have tended to base "their decisions on whether the claimed injury to plaintiff is a 'direct' result of defendant's antitrust violation, rather than merely a 'remote,' 'incidental' or 'consequential' result." [ABA, *Antitrust Law Developments*, p. 259 (1975).] In sum, while there is considerable variation among the Circuits in the specific application of the standing doctrine, nevertheless, it has been common ground among all courts and authorities that certain claims are too indirect to be asserted under section 4.

In this context, the question could well arise whether the proposed bill, by conferring a right of action on *all* persons "injured, in fact, directly or indirectly" by a violation of the antitrust laws, does not mean that landlords, suppliers, employees, and other incidental or consequential victims of an antitrust violation,[2] as well as indirect purchasers, may sue for treble damages. We do not believe that result is intended, but without some clarification, the bill as drafted could be so interpreted.

Finally, the Chamber of Commerce has difficulty with section 4 of the bill, which makes it applicable "to any actions commenced under section 4, 4A or 4C(a)(1) of the Clayton Act . . . which was pending on June 9, 1977, or filed thereafter." This provision could have particularly unjust consequences to the extent treble damage actions filed by direct purchasers are terminated between the time *Illinois Brick* was decided and the pending legislation was enacted. Any such disposition would be predicated on the law existing at the time, as expressed in the *Hanover Shoe* and *Illinois Brick* decisions. The termination, whether by verdict or settlement, would thus rest on the assumptions that, as a matter of law, the defendants had no passing-on defense and indirect purchasers had no valid claim. Those assumptions would, of course, be overturned by the pending bill, so that indirect purchasers *could* assert claims previously barred under *Illinois Brick*, thereby subjecting the settling defendants to substantial multiple liability.

While the Chamber of Commerce has not formulated a definitive position on this problem, there are several possible remedies: 1.) the amendment could be made prospective only; 2.) the amendment could create an exception for cases terminated between June 9, 1977 and the date of enactment; or 3.) the amendment could provide that where there has been concluded during that period, indirect purchasers could recover their appropriate share of the aggregate settlement from the settling direct purchasers. Any of these solutions would avoid subjecting defendants to multiple recoveries. In the meantime, the pendency of this bill, with its retroactivity provision, creates confusion and uncertainty that could prove a deterrent to resolution of pending antitrust cases.

In conclusion, the present bill is wholly unacceptable to the Chamber of Commerce on several counts: It does not clearly and unambiguously provide a passing-on defense, although that is apparently the intent of Senator Kennedy; it is entirely open-ended with respect to the remoteness of indirect claims that may be asserted; in its present form, it creates apparently unintended confusion in the law of standing to sue; and it contemplates retroactive application, with the consequences just discussed. If the bill were revised to meet these specific objections, there would still be basic policy questions to consider as to whether the public benefit of allowing for recovery by indirect purchasers would offset the cost in terms of bigger and more complex treble damage litigations.

Senator KENNEDY. The subcommittee stands in recess.

[Whereupon, at 12:40 p.m., the subcommittee stood in recess.]

[2] Applying the concept of standing to sue, the courts have typically, although not uniformly, denied standing to employees, landlords, suppliers, franchisers, stockholders, creditors, and patentees of an injured corporation.

FAIR AND EFFECTIVE ENFORCEMENT OF THE ANTITRUST LAWS, S. 1874

FRIDAY, SEPTEMBER 9, 1977

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:15 a.m., in room 2226, Dirksen Senate Office Building, Senator Strom Thurmond, acting chairman of the subcommittee, presiding.

Present: Senators Kennedy and Thurmond.

Staff present: David Boies, consultant; Thomas Susman, chief counsel; Terry Lytle, and Robert Banks, counsel; Emory Sneeden, minority chief counsel; Peter Chumbris, minority consultant; Garrett Vaughn, minority economist.

Senator THURMOND. I welcome those who are here to testify today.

OPENING STATEMENT OF SENATOR THURMOND

During previous hearings on S. 1874 it quickly became apparent that some who supported the concept of overruling *Illinois Brick* were dissatisfied with S. 1874. The majority staff of the subcommittee has since addressed some of the problems raised. A draft substitute bill has been given to the minority. I understand that some who are here today have reviewed it. Hopefully, you will give the subcommittee the benefit of your views on S. 1874 and the draft bill.

Legislation which proposes to overrule the U.S. Supreme Court, particularly on a 6 to 3 decision, is an unusual and serious matter. Early in our hearings, I pointed out some of the reasons of the court:

> The reasoning of *Hanover Shoe* case cannot justify unequal treatment of plaintiffs and defendant with respect to the permissibility of pass-on arguments. The principal basis for the decision in *Hanover Shoe* was the court's perception of the uncertainties and difficulties in analyzing price and output decisions in a real economic world rather than an economist's hypothetical model, and on the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom.
>
> This perception that the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damage proceedings applies with no less force to the assertion of pass-on theories by plaintiffs than to the assertion by defendants.

Mr. Harold Kohn, a well-known attorney specializing in antitrust law, who testified on S. 1874, stated that he was offended by the *Illinois Brick* decision. In his view, the opinion was not motivated by a desire to achieve justice. On the other hand, he was dissatisfied with S. 1874. He views the bill as an unsophisticated effort to solve a sophisticated

problem. Further, Mr. Kohn described the bill as a bonanza for the antitrust defense bar. His advice to the subcommittee was caution and serious study before proceeding with legislation.

Mr. Earl Pollock, another well-known attorney specializing in antitrust law, testified. He counseled caution on S. 1874. Mr. Pollock suggested that the bill was a hasty and oversimplified reaction to a group of complex problems which the Supreme Court addressed in *Illinois Brick*. Other witnesses supported the bill, some with reservations. We have the testimony of witnesses opposed to S. 1874.

Serious questions are raised in S. 1874 and the draft substitute. How will the reversal of *Illinois Brick* affect the enforcement of the antitrust laws? How much of a burden will the reversal of *Illinois Brick* place on our court system? What effect will S. 1874 and the draft substitute have on judicial manageability of antitrust cases? Multiple liability, duplicative recovery, and possible other problems yet to be raised face this subcommittee.

We hope that you will assist with solutions to some of the complex questions we must consider in the proposed legislation. Our minds are open. We want to do what is right and just. We appreciate your being here today to testify.

We have a number of witnesses with us here today. We have first Hon. Charles Joiner, U.S. District Court, Detroit, Mich. Judge, I welcome you here and we are delighted to have you present to testify.

Senator Kennedy, the chairman of this subcommittee, is with us. As you know, the Democrats control all subcommittees, so I am presiding as acting chairman.

Senator KENNEDY. We are fortunate to have the judge here. We shall look forward to hearing your testimony as well as that of the other witnesses.

Senator THURMOND. You may proceed now.

STATEMENT OF HON. CHARLES JOINER, U.S. DISTRICT COURT, DETROIT, MICH.

Judge JOINER. Thank you for the invitation to express my views on *Illinois Brick* and the proposed legislation dealing with its holding. I shall limit my comments to what I understand to be the thrust of that legislation. The permitting of the claim of passthrough as a defense to the antitrust litigant, overruling *Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation*, 392 U.S. 481 (1968), and the permitting of consumers who have been overcharged by the direct purchaser from the antitrust violator—the overcharges having been passed through—to sue for the antitrust violation, overruling *Illinois Brick Company* v. *Illinois*, June 9, 1977.

I speak from the background of a judge interested in the efficient administration of justice: (1) I have been a Federal district judge for 5 years; (2) I was a member of the Judicial Conference Advisory Committee on Civil Rules for about 9 years; (3) I was a member of the Judicial Conference Advisory Committee on the Rules of Evidence; (4) I am a member of the Standing Committee of the Judicial Conference on Rules of Practice and Procedure and have been so for about 5 years, and (5) I was a member of the drafting committee on

Class Actions of the National Conference of Commissioners on Uniform State Laws.

I intend that my remarks be limited to the areas where I may have some special knowledge. My remarks are premised on the following considerations: (1) a recognition of a congressionally expressed desire to have an effective antitrust enforcement program; (2) a belief that an effective enforcement program should be kept as inexpensive and efficient as possible, and (3) a belief that an effective enforcement program must take into account that there are limits to what a court can do.

I see first *Hanover* and now *Illinois Brick* as cases that tend to bring sanity to the private enforcement of antitrust laws. *Hanover* eliminated a major obstacle to the effectiveness of antitrust enforcement. A passthrough defense not only was often successful, but even when it might not be asserted effectively, the details that it introduced into the trial so cluttered a trial that the litigants gave up because of inability of factfinders to deal with the accounting connected with the economics of trade. The proposed legislation would undo this improvement in the effectiveness of antitrust enforcement.

MORE EFFECTIVE ANTITRUST ENFORCEMENT

The holding in *Illinois Brick*, it seems to me, is equally consistent with effective antitrust enforcement. The economics of passthrough to establish the right to sue makes the plaintiff's claim extremely difficult to prove. The allocation of damages between direct and indirect purchasers is formidable and I am sure in many cases impossible. I have seen it suggested that few cases are ever attempted without participation of direct purchasers. Antitrust enforcement would be more effective in such cases if only direct purchasers were involved.

Let me explain what I mean when I say that antitrust enforcement will be more effective if only direct purchasers are involved. I think that most persons will agree that the most effective and efficient enforcement programs are those that prevent wrongful acts from taking place. It is only if wrongful acts are not deterred or prevented that the problem arises of compensating victims for injuries suffered. This is as true in the antitrust civil area as it is in the criminal law. Legal systems attempt to prevent wrongful conduct before that conduct takes place by deterrence.

To achieve the goal of deterring civil antitrust violations, it is absolutely essential that there be effective civil actions against violators. These actions must be kept relatively simple and straightforward. To add complications and difficulties to the process by which antitrust violators are made to disgorge wrongfully obtained profits will have the effect of lessening the deterrence value of private antitrust actions.

ACTUAL PARTY INJURED SHOULD NOT BE COMPENSATED

I recognize that there is another idea present in the currently proposed legislation that is being considered by the subcommittee. That is the idea that the actual party injured should be the party that is compensated by private antitrust recoveries. The realities of antitrust litigation, however, lead me to the conclusion that the individual, indirect purchasers would not be recompensed very much by these suits.

Certainly I would hesitate to seriously weaken the deterrent effect of relatively simple and uncomplicated civil actions for the minimal benefit of having what would probably amount to small if not negligible recoveries to individual consumers. What there is of recoveries would, no doubt, be substantially used up by the increased costs of complex litigation and other expenses such as costs of notice and administration of the distribution of recoveries.

The beneficiaries of the proposed legislation will be, one, antitrust defendants, through the use of the passthrough defense; and, two, lawyers and State attorneys general, because the only real way to enforce the antitrust laws will be by class actions on behalf of the many consumers.

The fees will become large because of the extraordinary difficulty in obtaining and marshaling the proofs in a complicated antitrust case. The cases will languish in the courts because neither the plaintiff nor the defendant will feel that they are ready for trial and the courts, burdened as they are with criminal and other civil cases, will look across and beyond the complicated class actions. So instead of a plain, speedy remedy, easily proved, the parties will find it necessary to settle and, I would guess, in many instances for many fewer dollars than would have been recovered had the remedy been simple and straightforward without passthrough. I cannot emphasize too much the complications added to the presentation of the case by dealing with hundreds or thousands of people rather than one or two. The complications are not materially lessened by the use of representative parties. There are problems of identification, problems of competition for lead position, the complications of accounting, the expense of notice, the additional hearings in court, the involvement of the court in the protection of class members, and finally the fact that, because of all of the complications and expense and the desire to avoid trial, the matter is settled often too cheaply, often with de minimis results for the consumer.

If the goal of Congress is to bring about compliance with the antitrust laws, the approach of remedial legislation should be, it seems to me from the view of the judge, to make the law simpler and more direct to enforce and to encourage those who have a substantial direct stake to aid in its enforcement. My observations are that direct purchasers do not hesitate to assert antitrust claims, either directly or by way of defense to other actions. The direct purchasers have much more of an incentive to pursue the claims than do indirect consumers. The stake of the individual claimant is larger. Although passthrough of the added cost is attempted, all parts of the merchandising chain lose from the added cost that comes from the antitrust violation.

Let me turn my attention to an even more critical problem involved in the effort to reintroduce passthrough into the law. A court is a very limited institution. Recognition of this fact is essential because the effectiveness of any enforcement program depends on the agencies through which the enforcement is sought. It does little good to a class of persons to be given rights for the enforcement of which there is not adequate provision. A Federal court consists of the judge assisted by two law clerks and one secretary. In a given trial the court also often includes 6 or 12 jurors and lawyers, who in turn are assisted by accountants and economists. The accountants and econo-

mists attempt to assist the lawyers to understand what is happening. The lawyers, in turn, attempt to prove what they understand is happening and to assist the judge and the jurors to understand the myriad facts and the interaction of theory. Then either the jurors or the judge or both have to decide all or specific parts of the case.

PROOF OF PASSTHROUGH IS DIFFICULT

Jurors are quite capable of making rough cuts at justice. They may even be more capable than certain judges at this task, but they are not capable of following detailed, minute accounting and economic theory involved in the passthrough defense and neither are most judges. It is no answer to say, and I underscore it is no answer to say, that few antitrust cases are tried—they are settled—and so we shouldn't worry about this defect in the system. Often the reason they are settled is because the parties know this defect. Bargaining is not based on a fair application of the law. What is needed is to recognize the intellectual shortcomings of the system and devise the rules to work within these constraints. It seems to me that is exactly what the Supreme Court has done in *Hanover* and *Illinois Brick*. The proofs are simple and the theory not complex. The thrust of what I am saying is that *Illinois Brick* and *Hanover* have provided rules that, one, encourage direct purchasers to help enforce the antitrust laws; two, help the courts to do their job by making the issues and proofs simple; and, three, recognize that the enforcement policy should be kept as inexpensive and efficient as possible.

I would urge that you allow the rules that have been finally defined in these two cases to settle in and to determine how they work before you embark upon a drastic program of revision as suggested by the proposed legislation. Thank you very much.

Senator THURMOND. Thank you, judge. I would like to ask this question of you. Would you mind commenting on the effect, if any, of S. 1874 on the parens patriae provisions of the Hart-Scott-Rodino Antitrust Act of 1976?

Judge JOINER. I think the statute, as I understand it, would tend to reinforce the parens patriae statute which was passed a year or so ago.

Senator THURMOND. Do you have any comment with regard to the subcommittee draft? Have you had an opportunity to see that?

Judge JOINER. I had a draft dictated to me over the phone. I was told only that it was under consideration. Let me check it.

In any action under section 4, 4A, or 4C, the fact that a person or the United States is not in privity with the defendant shall not bar (or otherwise limit) recovery. In any action under sections 4, 4A, or 4C the defendant shall be entitled to prove as a partial or complete defense to a damage claim that the plaintiff has passed-on to others some or all of what would otherwise constitute injury.

The amendments made by this act shall apply to any action commenced under sections 4, 4A, or 4C(a)(1) of the Clayton Act (15 U.S.C. 15, or 15C(a)(1)), which was pending on June 9, 1977, or filed thereafter.

I think this draft does not solve the problems to which I have addressed myself any more than the original draft which I saw, the proposed law before you. This draft tends, I think, to permit the passthrough defense before we really find out whether or not the direct purchasers can and will assist in the enforcement of the antitrust laws

and whether the simple and direct method of doing it will be the effective way of doing it rather than the complicated way of the class action and the parens patriae legislation.

MINORITY PROPOSALS TO LIMIT S. 1874 TO PRICE FIXING

Senator THURMOND. I want to hand you a new proposal and ask whether you would mind commenting on this. After you have studied it further, you may comment on it, or if you wish to do so at this time.

[The proposed minority version and commentary follows:]

[A proposal which would limit the application of the proposed Clayton Act amendment to price fixing situations would also help eliminate the problems attendant in proving the existence of actual damage and the amount of injury to indirect purchasers. Such an amendment would be accomplished as follows by inserting after the word "injured" in Section 4 of the Clayton Act:]

> . . . injured in fact, directly in his business or property by anything forbidden in the antitrust laws, or injured in fact, indirectly in his business or property by any contract combination or conspiracy to fix prices, ...

[This same language could be substituted in the proposed amendment to sec. 4A of the Clayton Act.]

Section 4C(a)(1) could also be amended to read:

> Any attorney general of a state may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State,—to secure [treble damages] for injury in fact sustained directly by such natural persons to their business or property by reason of any violation of the Sherman Act, or indirectly by such natural persons to their business or property by a reason of any contract, combination or conspiracy to fix prices.—

[In addition to the foregoing, a further amendment to the Clayton Act which would reduce the possibility of multiple recoveries against the same defendants and would limit the risk of windfall recoveries to plaintiffs who have not been injured would read as follows:]

> It shall be a defense in any action for damages brought hereunder that overcharges directly resulting from violations of the antitrust laws have been passed on to subsequent purchasers in the chain of distribution.

Judge JOINER. Might I take it with me and write you in response to this? Would that be satisfactory?

Senator THURMOND. That would be all right.

Senator KENNEDY. Yes, that would be fine.

Judge JOINER. I would like to do that if I may.

Senator THURMOND. That would be all right.

WILL THE DIRECT PURCHASE BE RELUCTANT TO SUE?

The subcommittee has heard testimony from several witnesses that direct purchasers are reluctant to sue because they do not wish to antagonize their suppliers. Has this been your experience?

Judge JOINER. The experience of an individual Federal judge is somewhat limited. You have a limited number of cases which come before you.

I tried to look back at the cases involving antitrust violations which have come before me, and I think in all the cases which have come before me direct purchasers have been involved in one way or another, as parties. There may have been some consumers as well. In many cases direct purchasers were the only persons involved.

I must tell you that about half of these cases were cases in which the antitrust claim was made by way of defense to another claim which was made against the direct purchaser, so I think that cannot count too heavily because it becomes defensive at that point. However,

I have not found in the history of the cases which have been before me that direct purchasers were in any way inhibited in suing, but I don't know how many have never appeared in court. I have no way of judging that.

Senator THURMOND. Thank you.

Possibly Chairman Kennedy has a number of questions he would like to propound at this time.

Senator KENNEDY. Thank you, Senator Thurmond.

I am somewhat puzzled with regard to the thrust of your argument that we ought to wait and see how this recent decision is borne out rather than pass legislation which would effectively reverse the *Illinois Brick* case. It seems to me the courts, prior to *Illinois Brick*, in dealing with these complex issues had no real problems. Why will it be so intolerable to go back prior to *Illinois Brick*?

PROBLEMS WITH PRIVATE CLASS ACTIONS

Judge JOINER. My assessment is that they have not dealt with them very effectively in the class action concept. The class actions themselves have proven to be less than an effective way of dealing with them. The parens patriae legislation has been a help in that respect because it has brought in a specific method of proof in connection with some of these complicated problems and it has centered responsibility in a responsible officer to bring the lawsuit.

However, when we attempt to have them enforced simply by way of the individual class members acting as representatives for other persons, I think this has not been a very effective way of doing it.

Senator KENNEDY. I recognize there have been problems with class action suits. That is a somewhat different kettle of fish, is it not, than what we are talking about. Who will be able to recover?

Judge JOINER. It is a different kettle of fish except that as a general proposition you do not find the ultimate consumer with sufficient economic interest to assert a claim on his own behalf. You have to aggregate and gather together a number of claims in order to make it worthwhile for anyone to spend the time of investigation and the time of hiring help, representatives, and so forth, and lawyers in order to make it worthwhile. Whereas if you deal with the one, two, or three direct purchasers from the antitrust violator I think you have in one person a larger economic force and you have a way there of compensating him for the effort which would be put in because he is going to get a recovery, triple the recovery, of all the differences in the charges which have been made.

WINDFALL TO DIRECT PURCHASER

Senator KENNEDY. Even though he might not be the one who is injured?

Judge JOINER. I think there could be some windfalls involved in cases of this kind, but it would be, I suppose, in payment for his assistance in connection with the enforcement of the antitrust laws.

Senator KENNEDY. As a judge, how do you react to a windfall?

Judge JOINER. My guess is that one of the settling in processes will be efforts to disgorge those windfalls at some later stage by people who think they have a significant interest in those windfalls.

Senator KENNEDY. Does that not put you right back where you were?

Judge JOINER. That in and of itself would put us back.

Senator KENNEDY. How does your recommendation help us very much, then?

Judge JOINER. My recommendation helps because then we get the law enforced and we get the deterrent value to begin with of the enforcement. I think these people will sue. I think there will be suits. I think there will be recoveries. I think there will be determinations by factfinders and not minimal settlements or nominal settlements or even middle ground settlements.

Senator KENNEDY. Even though these people in most instances are dependent upon their suppliers. We have had very substantial testimony to that effect, that most of these direct purchasers are those who have longstanding relationships with their suppliers and they will be extremely reluctant to go against them to interrupt the flow of commerce, merchandise, or relationships which have been built up throughout the years.

You still think as a matter of your experience that direct purchasers will sue their primary supplier?

Judge JOINER. I think this not likely to happen. I speak from the fact that I can recall a case, two or three anyway, where this particular thing, the suits, did come about. I think there is some reluctance on the part of the seller to cut off a supplier on the ground that he is being sued by the supplier, particularly involving antitrust violations, because that will nail the coffin in a little harder, I think, if the supplier were cut off. I think the suppliers are protected pretty well by the law as it stands.

Senator KENNEDY. You didn't really mean that *Illinois Brick* is strengthening the parens patriae provisions, did you?

ILLINOIS BRICK UNDERCUTS PARENS PATRIAE

Judge JOINER. Not at all. I think *Illinois Brick* tends to undercut parens patriae. The question I answered was this, the proposed legislation, consistent with parens patriae. I thought this legislation would tend to bring back into parens patriae more than it would exist under *Illinois Brick*.

Senator KENNEDY. Your response was that you feel the *Illinois Brick* decision basically undercut parens patriae?

Judge JOINER. It does. I am a believer in parens patriae myself. When you can center responsibility for an action of that kind you tend to avoid many of the problems that you have in connection with the class action—not all of them but many of the more difficult problems which you have in the class action. If you can draft legislation which would save the parens patriae provision without requiring in any sense the enforcement through class actions and without getting into the complications of dividing up the costs in every instance between the direct purchasers and the indirect purchasers, I would think that would be the best of all solutions.

Senator KENNEDY. You are very much aware that the State attorneys general, without exception, have supported the change, reversal of *Illinois Brick*. As you well understand, they represent a wide philosophical background. I don't know whether you have any reaction to that, do you? Do you think protection to the consumer is undercut?

Judge JOINER. I would expect this to be true. If I were an attorney general, I would take the position, I think logically and thoughfully, that I could do this job effectively and more effectively than others could do it, and I think they take the position because they quite accurately read *Illinois Brick* as cutting severely into what was attempted to be accomplished by the parens patriae legislation. It does achieve many other great goals. If you can save that part of it, I think you might be able to provide a system which would be better than simply without the parens patriae at all and allow the law to stand as it is.

Senator KENNEDY. How would you react, in light of your concern regarding the orderly process of the courts, to restoring that authority within the States attorney general and permitting them to bring these cases?

Judge JOINER. Only permitting them to do it?

Senator KENNEDY. I am trying to think of where we can go. I have a position myself about which I feel strongly. I am also a practical person who has been listening to you and wondering whether you can guide us so we can find a middle ground which deals not only with the administration but also the injustices and unfairness in failing to permit those who have been injured to recover.

Judge JOINER. I personally would be in favor of trying to give the State attorneys general significant responsibility in terms of private enforcement of the antitrust law, giving them significant responsibility in connection with the enforcement on behalf of consumers and not providing the additional machinery for the determination of how you divide up all of the increased costs and damages between the ultimate consumer and direct purchasers and so forth. This does not solve many of the problems to which I address myself. I think. Those are still complicated problems and they will be very difficult ones for courts to solve. I think the Supreme Court is right, even though they are not on the trial court, that these present very difficult proof problems and very difficult problems for judges and juries to try to figure out. Although I have dealt with economic models, there are great shortcomings to economic models in trying to solve these problems.

Senator KENNEDY. Thank you very much.

Senator THURMOND. Judge, I believe the attorneys general joined in the *Illinois Brick* case and took an opposite position from the decision handed down——

Judge JOINER. Is that *Illinois Brick*?

Senator THURMOND. Did they take a position opposite that which was handed down by the Supreme Court? I refer to the State attorneys general.

Judge JOINER. The State attorneys general would think that *Illinois Brick* cuts into their authority to bring actions. Is that your question?

Senator THURMOND. The Supreme Court took an opposite view, did they not?

Judge JOINER. I am not sure I understand your question, Senator.

Senator THURMOND. I understood 40 attorneys general joined the attorney general of Illinois regarding this matter.

Judge JOINER. In the Supreme Court.

Senator THURMOND. In the Supreme Court, yes.

Judge JOINER. I do not know that fact.

Senator THURMOND. But the Supreme Court went against their position.

Judge JOINER. Yes; all right.

Senator THURMOND. Is that correct?

Judge JOINER. I don't know the number, but a significant number did join, showing there was a significant number of amicus briefs filed.

Senator THURMOND. Anything further? [No response.]

Thank you very much, Judge. Again we want to express our appreciation to you for your appearance here this morning and the testimony you have given.

Judge JOINER. Thank you for inviting me, sir.

[The prepared statement of Judge Charles W. Joiner follows:]

PREPARED STATEMENT OF JUDGE CHARLES W. JOINER

Thank you for the invitation to express my views on *Illinois Brick Company* v. *Illinois* and the proposed legislation dealing with its holding. I shall limit my comments to what I understand to be the thrust of that legislation. The permitting of the claim of pass-through as a defense to the antitrust litigant [overruling *Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation*, 392 U.S. 481 (1968)] and the permitting of consumers who have been overcharged by the direct purchaser from the antitrust violator (the overcharges having been passed through) to sue for the antitrust violation, overruling *Illinois Brick Company* v. *Illinois*, —— U.S. —— (June 9, 1977).

I speak from the background of a judge interested in the efficient administration of justice: 1. I have been a federal district judge for 5 years; 2. I was a member of the Judicial Conference Advisory Committee on Civil Rules for about 9 years; 3. I was a member of the Judicial Conference Advisory Committee on the Rules of Evidence; 4. I am a member of the Standing Committee of the Judicial Conference on Rules of Practice and Procedure and have been so for about 5 years, and 5. I was a member of the drafting committee on Class Actions of the National Conference of Commissioners on Uniform State Laws.

I intend that my remarks be limited to the areas where I may have some special knowledge. My remarks are premised on the following considerations: 1. A recognition of a congressionally expressed desire to have an effective antitrust enforcement program; 2. A belief that an effective enforcement program should be kept as inexpensive and efficient as possible, and 3. A belief that an effective enforcement program must take into account that there are limits to what a court can do.

I see first *Hanover* and now *Illinois Brick* as cases that tend to bring sanity to the private enforcement of antitrust laws. *Hanover* eliminated a major obstacle to the effectiveness of antitrust enforcement. A pass-through defense, not only was often successful, but even when it might not be asserted effectively, the details that it introduced into the trial so cluttered a trial that the litigants gave up because of inability of factfinders to deal with the accounting connected with the economics of trade. The proposed legislation would undo this improvement in the effectiveness of antitrust enforcement.

The holding in *Illinois Brick*, it seems to me, is equally consistent with effective antitrust enforcement. The economics of pass-through to establish the right to sue makes the plaintiff's claim extremely difficult to prove. The allocation of damages between direct and indirect purchasers is formidable and I am sure in many cases impossible. I have seen it suggested that few cases are ever attempted without participation of direct purchasers. Antitrust enforcement would be more effective in such cases if only direct purchasers were involved.

Let me explain what I mean when I say that antitrust enforcement will be more effective if only direct purchasers are involved. I think that most persons will agree that the most effective and efficient enforcement programs are those that prevent wrongful acts from taking place. It is only if wrongful acts are not deterred or prevented that the problem arises of compensating victims for injuries suffered. This is as true in the antitrust civil area as it is in the criminal law. Legal systems attempt to prevent wrongful conduct before that conduct

takes place by deterrence. To achieve the goal of deterring civil antitrust violations, it is absolutely essential that there be effective civil action against violators. These actions must be kept relatively simple and straightforward. To add complications and difficulties to the process by which antitrust violators are made to disgorge wrongfully obtained profits will have the effect of lessening the deterrence value of private antitrust actions.

I recognize that there is another idea present in the currently proposed legislation that is being considered by the subcommittee. That is the idea that the actual party injured should be the party that is compensated by private antitrust recoveries. The realities of antitrust litigation, however, lead me to the conclusion that the individual, indirect purchasers would not be recompensed very much by these suits. Certainly I would hesitate to seriously weaken the deterrent effect of relatively simple and uncomplicated civil actions for the minimal benefit of having what would probably amount to small if not negligible recoveries to individual consumers. What there is of recoveries would, no doubt, be substantially used up by the increased costs of complex litigation and other expenses such as costs of notice and administration of the distribution of recoveries.

The beneficiaries of the proposed legislation will be 1. antitrust defendants (through the use of the pass-through defense), and 2. lawyers and state attorneys general, because the only real way to enforce the antitrust laws will be by class actions on behalf of the many consumers. The fees will become large because of the extraordinary difficulty in obtaining and marshaling the proofs in a complicated antitrust case. The cases will languish in the courts because neither the plaintiffs nor the defendant will feel that they are ready for trial and the courts burdened as they are with criminal and other civil cases will look across and beyond the complicated class action. So instead of a plain, speedy remedy, easily proved, the parties will find it necessary to settle and, I would guess, in many instances for many fewer dollars than would have been recovered had the remedy been simple and straightforward without pass-through.

I cannot emphasize too much the complications added to the presentation of the case by dealing with hundreds or thousands of people rather than one or two. The complications are not materially lessened by the use of representative parties. There are problems of identification, problems of competition for lead position, the complications of accounting, the expense of notice, the additional hearings in court, the involvement of the court in the protection of class members, and finally the fact that, because of all of the complications and expense and the desire to avoid trial, the matter is settled often too cheaply, often with de minimis results for the consumer.

If the goal of Congress is to bring about compliance with the antitrust laws, the approach of remedial legislation should be, it seems to me from the view of the judge, to make the law simpler and more direct to enforce and to encourage those who have a substantial direct stake to aid in its enforcement. My observations are that direct purchasers do not hesitate to assert antitrust claims, either directly or by way of defense to other actions. The direct purchasers have much more of an incentive to pursue the claims than do indirect consumers. The stake of the individual claimant is larger. Although pass-through of the added cost is attempted, all parts of the merchandising chain lose from the added cost that comes from the antitrust violation.

Let me turn my attention to an even more critical problem involved in the effort to reintroduce pass-through into the law. A court is a very limited institution. Recognition of this fact is essential because the effectiveness of any enforcement program depends on the agencies through which the enforcement is sought. It does little good to a class of persons to be given rights for the enforcement of which there is not adequate provision. A Federal court consists of the judge assisted by two law clerks and one secretary. In a given trial the court also often includes 6 or 12 jurors and lawyers, who in turn are assisted by accountants and economists. The accountants and economists attempt to assist the lawyers to understand what is happening. The lawyers, in turn, attempt to prove what they understand is happening and to assist the judge and the jurors to understand the myriad facts and the interaction of theory. Then either the jurors or the judge or both have to decide all or specific parts of the case.

Jurors are quite capable of making rough cuts at justice. They may even be more capable than certain judges at this task, but they are not capable of following detailed, minute accounting and economic theory involved in the pass-through defense and neither are most judges. It is no answer to say and I underscore it is no answer to say that few antitrust cases are tried (they are settled), and so we shouldn't worry about this defect in the system. Often the reason they are settled is because the parties know of this defect. Bargaining is not based on a fair application of the law.

What is needed is to recognize the intellectual shortcomings of the system and devise the rules to work within these constraints. It seems to me that is exactly what the Supreme Court has done in *Hanover* and *Illinois Brick.* The proofs are simple and the theory not complex.

The thrust of what I am saying is that *Illinois Brick* and *Hanover* have provided rules that (1) encourage direct purchasers to help enforce the antitrust laws, (2) help the courts to do their job by making the issues and proofs simple, and (3) recognize that the enforcement policy should be kept as inexpensive and efficient as possible. I would urge that you allow the rules that have been finally defined in these two cases to settle in and to determine how they work before you embark upon a drastic program of revision as suggested by the proposed legislation.

Senator THURMOND. Our next witness will be Ross D. Young, Jr., from the firm of McMurray & Pendergast, Washington, D.C., representing the National Association of Manufacturers.

Step forward, Mr. Young.

Mr. YOUNG. Thank you, sir.

Senator THURMOND. Do you want to put your statement in the record or do you wish to read it?

Mr. YOUNG. I would like to read it, sir.

Senator THURMOND. You may proceed.

STATEMENT OF ROSS D. YOUNG, JR., REPRESENTING THE NATIONAL ASSOCIATION OF MANUFACTURERS, ACCOMPANIED BY RICHARD D. GODOWN, GENERAL COUNSEL, NAM

Mr. YOUNG. I appreciate this opportunity, Senator, to appear here on behalf of the National Association of Manufacturers. I am Ross D. Young, of the Washington, D.C., law firm of McMurray & Pendergast, as you just stated. I am here to express the association's views and to some extent my own personal views on S. 1874, which, as has been pointed out, is a bill to amend section 4 of the Clayton Act and in essence nullify the recent *Illinois Brick* decision. I am accompanied by Mr. Richard D. Godown, the general counsel for the National Association of Manufacturers.

I would like to point out, if it is all right with you, Mr. Godown might answer some questions or interject some of his ideas. He has had considerably more experience than I have in these matters. Indeed, I think he testified in parens patriae a year or two ago.

The subcommittee has heard extensive testimony. You just listened to Judge Joiner, on this proposition. Hopefully I can add a little something, or perhaps I can interject some ideas which might be helpful.

My credentials are slightly different from those who have appeared before and as far as I can ascertain those who will appear here today. My legal career since I graduated from the University of Virginia in 1951 has been almost entirely aimed at antitrust en-

forcement. I spent a little over 20 years at the Federal Trade Commission and during this time the vast majority of my work was involved in antitrust litigation and investigation. I tried a number of antitrust cases over the years and my interest in this area of the law has always been high. Indeed it began when I was in law school. Calling attention to *Illinois Brick*, apparently that decision by the Supreme Court came as somewhat of a surprise to many people. However, it appears to me to be a logical extension of the development of antitrust case law from earlier cases through *Hanover Shoe*.

ILLINOIS BRICK DECISION WILL NOT DECREASE ANTITRUST ACTIONS

We must recognize that the Congress and the American public have uniformly since 1890 philosophically embraced antitrust as a national economic policy. The courts have consistently acted as referee in this area and endeavored to keep enforcement within practical bounds. My concern here, based on my litigation experience, is that treble-damage actions will proliferate in intensity to a point that our court system will be clogged with the Frankenstein monsters referred to by Judge Lumbard in one of the *Eisen* cases.

I note from experience that antitrust litigation is extremely difficult work and time-consuming.

The principal target of those not directly involved is the timelag in antitrust litigation. Again and again we hear of new ideas. I have heard of them all my life. We hear of new procedures and new disciplines which will speed up this all important litigation. In my opinion none have worked. In my opinion none will work. The complexty of these cases, which invariably involves entire industries, must be contended with. There is no way to shorten this process.

I personally am not convinced that it should be shortened. It always has occurred to me that the genius in our system of law enforcement may well lie in the delay. The courts have tackled this problem over the years. In my opinion it is a practical problem. To ignore the problem and blithely sail ahead could be disastrous. It is axiomatic that the Congress should be extremely careful in overturning judicial precedent and decisions. This course of legislative action could get to be a habit with unfortunate effects on our constitutional system of government.

There seems to be some feeling, which I pick up not only from the media but from reading testimony in this case, that due to *Illinois Brick* there will be a diminution of private treble-damage actions. I do not agree with this.

In earlier testimony the Assistant Attorney General of the United States pointed out before this subcommittee that in recent years private actions have outnumbered Government suits by a factor of more than 10. It is my opinion that this escalation of private suits will continue with or without the bill under consideration, S. 1874. I would also like to point out—and I don't mean to lapse into the vernacular—but at the present time antitrust is fashionable. The antitrust bar is extremely active, and let's be practical and face it, it is onto a good thing.

A mere day-to-day reading of the country's newspapers, the Wall Street Journal, points up the tremendous interest of the business community in antitrust enforcement. The business community has always

had that interest, but in all honesty I feel that today it is higher than ever.

The development of the law in this field is extensive and sophisticated. Law schools, as we all know, are today producing young attorneys at a tremendous rate. They are producing some very fine young attorneys, many of those very fine young attorneys being interested in antitrust enforcement. I know from experience, for example, that last year the Federal Trade Commission had 2,500 applications for 100 jobs. I was heavily involved in the recruiting process and I can assure you that many of the people that were hired by the Federal Trade Commission last year were outstanding.

A substantial number of treble-damage suits have been brought by direct purchasers. I have no figures before me but it might be as high as 90 percent. The incentive to these suits is not only to some extent tax-free dollars but in my opinion the corporate community also has a desire to enforce the antitrust laws.

The business community is competitive enough and aggressive enough to use the antitrust laws for its own benefit. Let's face it, without the antitrust laws, a large portion of the American business community would have no business. The argument that has been put forward that direct purchasers will not sue in my opinion is fallacious. It is contradicted by past history if nothing else. It is my opinion that any bill that is passed at the present time which will overturn *Illinois Brick* and tamper with the fabric of decades of court decisions should be given careful consideration and study.

The pace at which Congress is moving causes me worry. Frankly, I would prefer to have the dust settle before presenting the American Bar and the Federal court system with additional legislation to digest. The recent amendments to the antitrust laws, parens patriae and the like, are in the process of being digested.

ILLINOIS BRICK WILL NOT HURT PARENS PATRIAE

Parens patriae is obviously in its infancy. I seriously doubt that *Illinois Brick* will kill that baby. Justice White's opinion in the *Illinois Brick* case, as I read it, presented no frontal attack on parens patriae. Indeed, it occurs to me that the door was left open at the Supreme Court level for an in-depth judicial interpretation of this new law. I fail to see any logical basis for a judicial interpretation of parens patriae which would be contrary to the will of the Congress as set forth in the 1976 Antitrust Improvements Act.

At the very least, considerable thought should be given to the scope of the present bill under consideration. Addressing myself to the present bill and to several drafts which I have seen—I am not sure I have seen them all—it occurs to me that there is increased probability to litigation exposure as a result of the legislation under consideration. This legislation could well be the genie in the antitrust bottle. *Illinois Brick* involved price fixing, a per se violation of the Sherman Act.

I ask the question, what about the other areas of antitrust which lurk around every corner: tie-ins, reciprocity, mergers, price discrimination, exclusive dealing, territorial division, monopoly, patent misuse, and, as I point out, what I refer to as the sleeping giant, section 5 of the Federal Trade Commission Act. This outlaws all

unfair methods of competition. The entire history, both legislative and court decisions, has shown a steady march forward toward antitrust enforcement. An expansion of antitrust into various fields has been consistent.

I personally foresee no slackening of this historical process. Indeed the vigor of this subcommittee over the years supports this proposition. I feel that this bill would create substantive right where none exists today.

As pointed out in the *Illinois Brick* decision by Justice White, the bill here related to the decision appeared to me to present a serious problem of multiple liability. It is not beyond the realm of possibility that a defendent would be faced with three or more, treble-damage lawsuits at one time or at different times. Any party in the chain of distribution could sue for treble damages under the pending bill. The cost of administration and legal fees will be tacked on obviously.

It is also obvious that if these Frankenstein monsters appear, and they will appear, the whipping boy may well be the American business community, but I would like to point out that in my opinion the ultimate loser will be the American consumer. I can foresee we are headed toward a breakdown in antitrust enforcement. The "big case" will become the "huge case."

It occurs to me from a practical viewpoint there must be some outer limit to the size of these complicated matters. I would like to point out one or two other things. The principal impact of antitrust enforcement, including treble damages, has historically fallen on our large corporate enterprises. I have always agreed with this antitrust enforcement policy. However, I would like to point out that the medium-sized and small corporations are not immune from antitrust actions. The dangers of multiple liability, the big case increased exposure, large legal fees, the well-being of the medium and small corporations, should be seriously considered. It is difficult, if not impossible, to tailor an antitrust record to fit the pocketbook of the small and medium-sized businessman. It would be unfortunate to have the present bill, S. 1874, end up as a bankruptcy statute.

The bill under consideration in my opinion will take us beyond *Illinois Brick*. I feel antitrust exposure will be expanded. In my opinion this is not the time for legislative action. It is a time for reflection.

I feel that the present law or laws should be allowed to develop along the lines of parens patriae and we should follow a path of sensible use of judicial machinery.

The National Association of Manufacturers is opposed to the enactment of S. 1874, and in all honesty I am personally opposed to the enactment of S. 1874 at this time. We understand that there might very well be additional language under consideration of which we are not aware. If possible, we would like to comment on it at some point in time, perhaps in the future, perhaps we can help you today.

Senator THURMOND. I will hand you a proposal which you might want to study and give us your comments as soon as you can for the record.

Mr. YOUNG. Would you like me to read it now?

Senator THURMOND. If you want to comment later, it might be preferable. You might want to consider it in more depth.

I have a number of questions here I would like to ask.

Have you ever been involved in a treble-damage case?

Mr. YOUNG. No, sir, I have not. My entire career has been antitrust enforcement.

Senator THURMOND. Why do you feel that the *Illinois Brick* is a logical extension of antitrust development?

Mr. YOUNG. In my opinion, Senator, over the years the courts have taken a practical approach to this problem as a referee, as pointed out in my statement. I feel that the majority of the Supreme Court in *Illinois Brick* looked at it as a practical matter and felt that, taking the practicality of a situation under consideration, they sincerely felt that the *Illinois Brick* decision would make for more vigorous antitrust enforcement, and in my opinion the courts over the years have always taken this approach, pro-antitrust. However, they look upon it from a practical viewpoint, and I see that the case went up with several different opinions from Federal circuits. However, looking at the entire fabric of the case law it occurs to me that this was a logical extension of what the Supreme Court had done over the years.

Senator THURMOND. Why do you feel our court system will become clogged with Frankenstein monsters?

Mr. YOUNG. The cases which are presently pending, and I point out, I am not a treble-damage expert, but based on my experience in heavy litigation I feel the courts are clogged now, clogged with large and complicated cases. They will be more clogged with huge and more complicated cases. The breakout of the damages, if you will, through all of the lines of distribution, appears to me to be a tremendous problem to thrust onto the Federal court system at this time. I think that the laws are complicated enough as they now stand, and they will certainly be more complicated under the bill presently under consideration.

Senator THURMOND. How is the taxpayer or consumer affected?

Mr. YOUNG. Senator, my feeling about that is that the consumer will be affected if we have a breakdown in antitrust enforcement.

My experience at the Federal Trade Commission over the years has shown me that initially, when I started in this business 26 years ago, cases were large and complicated. They have gotten larger and larger and more complicated. There must be an outer limit where we can stop these cases from turning into these monsters, because if we do not get to the end of the road the consumer never will be helped.

Senator THURMOND. The minority seems to say that parens patriae will be affected by *Illinois Brick*. You state otherwise. Why?

Mr. YOUNG. Yes, sir. As Judge Joiner pointed out—to a limited extent, he didn't say this but I do—parens patriae will be affected by *Illinois Brick*. However, I do not think that parens patriae is dead. I think those cases should be brought, they will be brought. I think one of those cases eventually will get to the Supreme Court and the Supreme Court will rule on a parens patriae case.

The way I read *Illinois Brick*, the door was left open. If only you read the footnote the door was left open for a parens patriae case. That is what the majority said. The minority seemed to think, if you read between the lines, parens patriae was dead. I do not agree. I think it had a minimal effect on parens patriae. I personally would prefer to wait and see what the Supreme Court will do with parens patriae.

Senator THURMOND. How would you restrict S. 1874 to prevent overexposure?

Mr. YOUNG. It occurs to me that *Illinois Brick* was a price-fixing case. Price fixing is a per se violation of the Sherman Act. The business community knows that. You could initially, if you feel that legislation is absolutely necessary, you could certainly restrict your present bill to price fixing. You could also restrict your present bill to criminal violations. You could restrict the present bill to per se violations of the Sherman Act. I fear that the way it is set up there are no restrictions at all. It occurs to me you are setting it up so every Tom, Dick, and Harry can enforce the antitrust laws. I am against that.

Senator THURMOND. Counsel has some questions.

Mr. BOIES. You said in your statement that you felt that the escalation of private treble-damage suits will continue whether or not we passed S. 1874.

Mr. YOUNG. Yes, I did.

Mr. BOIES. I take it, then, you would disagree that passage of S. 1874 would result in a lot of new suits.

Mr. YOUNG. No. Passage of the bill would cause more suits.

Mr. BOIES. You think there would be more private treble-damage suits if we passed S. 1874?

Mr. YOUNG. Obviously.

Mr. BOIES. You think those additional suits would aid antitrust enforcement?

Mr. YOUNG. I didn't hear you.

Mr. BOIES. Do you think that those additional private treble-damage suits would aid in antitrust enforcement?

Mr. YOUNG. I do not. You are laying that against the system. I am afraid the system will begin to break down. I don't see where we are beyond the practical place at this point. It occurs to me philosophically you can overdo anything, and I am not saying that at some point in time I would sit here and say something different. I hope I make myself clear.

EFFECT ON PARENS PATRIAE

Mr. BOIES. Let me cover one other area. You mentioned the parens patriae legislation. I believe you said that in your view the *Illinois Brick* decision had a minimal effect on the parens patriae statute?

Mr. YOUNG. Yes. The decision knocks out the indirect purchaser. I didn't say it had no effect but I would prefer to see it develop, and it could very well be that it would be minimal. I would like to point out one more thing that came to mind as I sat here. I also would like to say that Mr. Godown testified against parens patriae, so I am speaking for myself. As far as parens patriae is concerned, I think it is a good thing. It is a good concept, you understand. However, I think we should see how it works.

Judge Joiner pointed out another aspect which just ran through my mind sitting back there. If you are going to pass some legislation aimed at *Illinois Brick*, why not utilize parens patriae, use that approach, put the legislation there rather than just willy-nilly laying it out for everybody to utilize section 4 of the Clayton Act? That is just a thought that ran through my mind. I had not thought about it. The judge brought it up.

Mr. Boies. You said *Illinois Brick* would knock out the parens suits where the consumers were indirect purchasers.

Mr. Young. That is my understanding. I could be wrong. I read the case four or five times. It is rather complicated.

Mr. Boies. I think that is fair reasoning. Do you have a judgment as to whether ultimate consumers would usually be indirect purchasers? In other words, is it not a fact that in most cases the ultimate consumer is an indirect purchaser; that is, he does not purchase directly from the manufacturer?

Mr. Young. I would think so. It sounds like commonsense to me.

Mr. Boies. So that would mean that in most cases, where the ultimate consumer is an indirect purchaser, the *Illinois Brick* case would prevent a parens suit on behalf of those ultimate consumers.

Mr. Young. Under parens patriae?

Mr. Boies. Yes.

Mr. Young. Yes. That is the law of the case as we said in law school.

Mr. Boies. That is all I have, Mr. Chairman.

Senator Thurmond. I want to thank you for coming forward and testifying at this time. I appreciate your presence. I thank you, too, Mr. Godown.

Mr. Young. Thank you, Senator.

[The prepared statement of Ross D. Young, Jr. follows:]

Prepared Statement of Ross D. Young, Jr.

I am Ross D. Young, Jr., of the Washington. D.C. law firm of McMurray and Pendergast. I am appearing here today on behalf of the National Association of Manufacturers and appreciate this opportunity to present NAM's views on S. 1874, a bill to amend Section 4 of the Clayton Act which would nullify the recent *Illinois Brick* decision. I am accompanied by Richard D. Godown, NAM general counsel and we both will be glad to answer any questions the subcommittee might have. NAM is a voluntary membership organization comprised of 13,000 corporations, small, medium and large, almost all of whom would be affected directly or indirectly by this legislation.

The subcommittee has heard extensive testimony on this proposition and hopefully I can add a little something new. At the least perhaps I can interject one or two new ideas. I realize the difficulty due, not only the previous hearings before the subcommittees in July 1977, but also to the extensive and in depth approach taken by the subcommittee on hearings on S. 1284 in May and June 1975.

My credentials are slightly different from previous witnesses. My legal career has been heavily weighted on the side of antitrust enforcement. I spent 20 years in enforcement bureaus of the Federal Trade Commission. The vast majority of my activities involved antitrust investigation and litigation. I have been a member of the private bar for a few months. Based on a 20-year commitment to public service in the area under consideration, I feel that my thoughts on this subject will be of interest to the subcommittee.

Although the *Illinois Brick* decision came as a surprise to many, it appears to be a logical extension of the development of antitrust case law from earlier cases through *Hanover Shoe.* Recognizing that the Congress and the American public have uniformly from 1890 forward philosophically embraced the antitrust tool as a national economic policy, the courts have consistently acted as referee in this area and endeavored to keep enforcement within practical bounds. My concern, based on litigation experience, is that treble damage actions will proliferate in number and complexity to a point that our court system will be clogged with the "Frankenstein monster(s)" referred to by Judge Lumbard in *Eisen* II. [319 F.2d, at 572]. I knew from experience that antitrust litigation is extremely difficult work and time-consuming. The principle target of those

not directly involved is the timelag in antitrust litigation. Again and again we hear of new ideas, new procedures and new disciplines which will speed up this all-important litigation. None have worked. None will work. The complexity of these cases, which invariably involves entire industries, must be contended with. The principles inherent in our legal system must be adhered to. There is no way to shorten the process. I, personally, am not convinced that it should be shortened. It may well be that the genius in the system is the delay.

As to the monetary aspects of the big case, I am a neophyte. The government pay check was always the same. It is obvious, however, that the costs of antitrust litigation are enormous. Someone has to pay these bills. It is not enough, nor is it fair, to point the finger at the corporate community. The taxpayer is always involved, if only indirectly.

The courts have tackled this problem over the years. It is a *practical* problem. To ignore the problem and blithely sail ahead could be disasterous. It is axiomatic that the Congress should be extremely careful in overturning judicial precedent and decisions. This course of legislative action could get to be a habit with unfortunate effects on our constitutional system of Government.

There seems to be some feeling that *Illinois Brick* will result in a diminution of private treble damage actions. I disagree. The Assistant Attorney General of the United States pointed out in his testimony before the subcommittee that in recent years private actions have outnumbered Government suits "by a factor of more than 10." In my opinion this escalation of priavte suits will continue, *with or without* S. 1846. At the present time antitrust is fashionable. The antitrust bar is well aware of the fact that it is on to a good thing and a mere day to day reading of the *Wall Street Journal* points up the interest of the business community in antitrust enforcement. The development of the law in this field is extensive and sophisticated. Law schools are producing young attorneys at an astounding rate. Antitrust interest is at an all-time high. Last year (1976) the Federal Trade Commission had 2500 applications for 100 attorney positions. From experience, I can assure you that a substantial number of these people were outstanding.

A substantial number of treble damage suits have been brought by direct purchasers. The incentive is tax-free dollars, plus a desire to enforce the antitrust laws. The business community is certainly competitive enough and aggressive enough to utilize the antitrust laws to its own benefit. The legal profession is delighted to make its services available. Let's face it, without the antitrust laws a large portion of the American business community *would have no business*. The argument that direct purchasers will not sue is fallacious. It is contradicted by past history.

In addition, we have the additional safeguard of stockholders' derivative actions. With stockholders looking over their shoulders, corporate executives will think twice prior to ignoring their obligations to shareholders. The tool is available to force litigation if necessary.

In my opinion, any bill that is passed which will overturn *Illinois Brick* and tamper with the fabric of decades of court decisions should be given careful consideration and study. The pace at which the Congress is moving gives me cause for worry. Frankly, I would prefer to have the dust settle before presenting the American Bar and the courts with additional legislation to digest. The recent amendments to the antitrust laws are presently in the process of being digested. For example, the FTC has spent months promulgating premerger notification rules and procedures. We will certainly have court decisions in this area. *Parens patriae* is in its infancy. I seriously doubt if *Illinois Brick* will kill the baby.

Justice White's opinion presented no frontal attack on *parens patriae*. Indeed, the door was left open for an in-depth judicial interpretation of the new law. I fail to see any logical basis for a judicial interpretation of *parens patriae* which would be contrary to the will of Congress as set forth in the 1976 Antitrust Improvements Act of 1976.

At the very least, considerable thought should be given to the scope of the present bill.

Increased probability to litigation exposure as a result of the legislation under consideration could well be the genie in the antitrust bottle. *Illinois Brick* involved price-fixing, a *per se* violation of the Sherman Act which hopefully, even the most unsophisticated businessman is aware of. What about those other areas

of antitrust which lurk under every bush: tie-ins, reciprocity, mergers, price discrimination, exclusive dealing, territorial division, monopoly, patent misuse, plus the sleeping giant, section 5 of the Federal Trade Commission Act which outlays all "unfair methods of competition." It is not enough to say that these types of business activities are not included or *technically* will not fit the overall scheme of treble damage antitrust enforcement. The entire history, both legislative and court decisions, has shown a steady march forward toward antitrust enforcement. An expansion of antitrust into various fields of endeavor and various business activities has been consistent. I foresee no slackening of this historical process. Indeed, the vigor of the subcommittee over the years supports this proposition. I fear that this bill would create substantive right where none exist today. Pending court clarification of the present situation, we appear to be walking through a mine field filled with antitrust disasters.

The bill presents a serious problem of multiple liability. It is not beyond the realm of possibility that a defendant would be faced with three (or more) treble-damage law suits at one time or at different times. Any party in the chain of distribution could sue for treble damages. The cost of administration and legal fees will be tacked on. The difficulties now being faced by the insurance industry regarding enormous verdicts in favor of plaintiffs should give pause for thought. It is obvious that if the "Frankenstein monster" appears, while the whipping boy will be the American business community, the ultimate loser will be the American consumer. The "ill-gotten gain" will be returned many times over. I foresee a breakdown in antitrust enforcement. The "big case" will become the "huge case." There must be an outer limit to these complicated matters. As an example, the number of people who would have a stake in *Hanover Shoe* staggers the imagination. *Eisen* contemplated the prospective class to include some six million individuals, institutions and intermediaries. Are we now to conclude that Congress intends to provide a remedy for all injuries, no matter how consequential, which might possibly flow from antitrust violations? This would seem to be the philosophy of *parens patriae*. I have no problem with this *philosophy*, however, the practical aspects of this problem appear to be insurmountable.

The principal impact of antitrust enforcement, including treble-damage actions, has historically fallen on our large corporate enterprises. I have always agreed with this enforcement policy. However, the medium size, and the small corporations are not immune from antitrust action. The dangers of multiple liability, the "big case," increased exposure, coupled with large legal fees to the well-being of the medium and small corporations should be seriously considered. It is difficult, if not impossible to tailor an antitrust record to fit the pocketbook of the small and medium size businessman. It would be unfortunate to have S. 1874 end up as a bankruptcy statute. Antitrust enforcement philosophy would make a full turn by having corporations with their backs to the financial wall, qualify as *failing corporations* under Section 7 of the Clayton Act!

The bill under consideration will take us beyond *Illinois Brick*. Antitrust exposure will obviously be expanded. This is not the time for legislative action. It is a time for reflection. The law should be allowed to develop along the lines of *parens partiae*. We should follow a path of sensible use of judicial machinery. The National Association of Manufacturers is opposed to the enactment of S. 1874.

We understand that additional language of a substantive nature is being considered by the subcommittee. We would appreciate the opportunity to comment at the appropriate time.

Senator THURMOND. Our next witness was to be Mr. Samuel W. Murphy, Jr. However, representatives of the Attorney General's Office of Virginia have a timeschedule problem. Mr. Murphy is yielding his place to them. I now call Mr. John Young, Mr. Samuel Gillespie, and Mr. Julian Carper, from the Attorney General's Office of Virginia. You gentlemen may proceed.

STATEMENT OF HON. JOHN H. YOUNG, ASSISTANT ATTORNEY GENERAL, COMMONWEALTH OF VIRGINIA, ACCOMPANIED BY JESSE SAMUEL GILLESPIE, JR., AND JULIAN F. CARPER

Mr. YOUNG. I am John Hardin Young, assistant attorney general of the Commonwealth of Virginia. I appreciate the opportunity to be here today at the hearings on S. 1874 which, if enacted, would overturn *Illinois Brick Co.* vs. *Illinois* 45 U.S.L.W. 4611 (1977).

STATE OF VIRGINIA SUPPORTS S. 1874

Unfortunately the attorney general of Virginia, Anthony F. Troy, was unable to be with us today, but I am accompanied by two Virginia citizens, Julian F. Carper of Frederick County, Va., and a Jesse Gillespie of Richmond, Va. I shall not take up the subcommittee's time retracing the reasons why the Commonwealth of Virginia believes S. 1874 is necessary both for the States and consumers. I think our views have been more than adequately covered by representatives of the National Association of Attorneys General and by the acting assistant attorney general for the antitrust division, John H. Shenefield.

CONSUMERS ARE INJURED

I do, however, want to reinforce what has previously been said to this subcommittee with regard to recovery by consumers in antitrust cases. One of the areas of our economy where antitrust violations are most felt is in the consumer class. Often price-fixing agreements have involved goods which are purchased by a large number of consumers. Frequently, goods involve consumer staples or necessary items, such as drugs.

The claim of each consumer may be relatively small, but when the claims of each are aggregated, the total overcharge to consumers is high. Under the present state of law consumers have no effective way to recover. In most cases consumers have purchased the relative goods, not directly from the antitrust violator, but from a retailer. *Illinois Brick*, by holding that only direct purchasers may recover, takes from the consumer any possibility of recovery in future cases. This means not only that individual consumers are without a remedy for their injury, but also that the antitrust violator realizes a windfall from his illegal activity. One of the most successful cases brought on behalf of consumers was the tetracycline antitrust litigation, in which the Virginia Attorney General's office actively participated. In the second stage of allocation alone, we distributed over $800,000 to Virginia consumers. Individual claims ranged from over $8,000 to just a few dollars. The Commonwealth of Virginia in the total litigation recovered over $1.4 million. Two of the individuals who received recoveries in the tetracycline antitrust litigation are here today.

With the subcommittee's permission I would like now to have Messrs. Carper and Gillespie tell you their story and about their recoveries in the *Tetracycline* case.

STATEMENT OF JULIAN F. CARPER, FREDERICK COUNTY, VA.

Mr. CARPER. My name is Julian Carper. I am a lifelong resident of Middletown, Va., which is located about 12 miles south of Winchester in the beautiful Shenandoah Valley. I appreciate the opportunity to be able to appear before your subcommittee this morning and to recite to you briefly my personal experience and that of members of my family. We have been involved in circumstances which I think are relevant to the legislation which is before your subcommittee today.

I am the parent of one son. He was born on November 19, 1950. From the day we brought him home from the hospital until early youth he was confronted with an illness which even our local doctors were unable to diagnose and treat. For a number of years he was on antibiotic drugs because he constantly carried a temperature. He would get nauseated. He was constantly having problems. There were many days that our family doctor visited the home as often as three times a day. As long as he was taking the antibiotics and they were in his system, he seemed to do fairly well. However, he constantly carried a temperature which they were unable to discover or know how to get rid of. As soon as the antibiotics got out of his system we had the very same experience. This went on, Senator, for years. It was not only a problem for his mother and me—and I happened to work away from home because my office was located in Richmond—it created a very serious burden on the whole family.

The drugs were extremely expensive. The first year that he was entered into school, he lost 78 days from school. His physical weight went from 63 to 47 pounds. He got to the point where it was a matter of life or death. Finally he was directed to a very able and competent pediatrician in Richmond who was able to send him to the medical college to have the necessary blood tests taken. They finally diagnosed his condition as a gamma globulin deficiency, and from that day on he took a shot every 2 weeks of the gamma globulin which was furnished and which the doctor was able to provide through the Red Cross. This was sent in to our family doctor and he got it every 2 weeks for a period of 3 years. After receiving this medicine over a period of time his body started to react and manufacture its own antibodies. His problem seemed to be subsiding somewhat. During this period I saw a notice in the paper by the Virginia Attorney General's Office of an antitrust suit.

RECOVERY OF OVERCHARGE

On July 30 I addressed a letter to the clerk of the U.S. district court, and there I pointed out my experience and that of my family. As a result of this notice I obtained from my local druggist the total amount of drugs that I had used during this period of years which amounted to over $1,200. I was part of this class action suit. As a result I was able to recover some of the additional costs which had been levied against us during the crisis in our family situation.

I feel, then, that my concern as an individual, having had experience with the problem to which this legislation is addressed, and being associated and concerned with the interest and welfare of thousands of

working people in Virginia who are likewise consumers, I hope that I never have the need for this personally again. However, for those who may, I would certainly encourage very thoughtful consideration on this question. Thank you.

Senator THURMOND. Very well, Mr. Gillespie.

STATEMENT OF J. SAMUEL GILLESPIE, JR., RICHMOND, VA.

Mr. GILLESPIE. I am J. Samuel Gillespie, and I am from Richmond. Va.

ULTIMATE CONSUMER IS ONE WHO IS HURT

I am here, as Mr. Young and as Mr. Carper are, because I was one of the participants with the Commonwealth of Virginia in the tetracycline antitrust litigation several years ago. I was a participant because in 1952 my eldest son was determined to have a serious kidney disease. The treatment for this disease required 12 years of daily doses of a tetracycline derivative. At the time of the suit I was able to document expenses of approximately $1,600 for the antibiotic. In the suit I recovered $1,120. I appreciate the opportunity to make this observation to the subcommittee. I believe that the ultimate consumer who really pays the final bill is the one who has been hurt in the chain of transactions, not the retailer and not the wholesaler. I think that the ultimate consumer, the person who does pay that final bill, is the one who has been hurt and he is the one who needs some avenue of recompense. Thank you.

Senator THURMOND. Anything further?

Mr. YOUNG. The only other thing is this: Mr. Carper has some documents he would like to submit for the record with regard to his transactions and the recovery he received from the Commonwealth.

Senator THURMOND. Anything else?

Mr. YOUNG. No, Senator.

Senator THURMOND. I have a proposal here. Would you take it with you and let us have your comments later?

Mr. YOUNG. I shall be glad to take it back and discuss it with the attorney general and other attorneys general and come back to you with a position on it.

Senator THURMOND. We want to thank you gentlemen for your presence here and your testimony.

Mr. YOUNG. Thank you.

Mr. GILLESPIE. Thank you.

Mr. CARPER. Thank you.

Senator THURMOND. Our next witness will be Mr. Samuel W. Murphy, Jr., Donovan, Leisure, Newton & Irvine, New York City, representing the American Cyanamid Co.

You have a rather long statement. I wonder whether you would wish to put the entire statement in the record and just highlight it here or emphasize points you especially want us to hear.

Mr. MURPHY. That is what I would like to do with your permission.

Senator THURMOND. Without objection, the entire statement will be placed in the record.

You may proceed.

STATEMENT OF SAMUEL W. MURPHY, JR., DONOVAN, LEISURE, NEWTON & IRVINE, NEW YORK CITY, REPRESENTING AMERICAN CYANAMID CO.

Mr. MURPHY. I have had 24 years experience in the trial of antitrust cases, primarily on the defense side. I would like to note that my firm represented the plaintiff in the *Hanover Shoe* case and that I have been counsel for American Cyanamid Co. in the tetracycline litigation, about some aspect of which you just heard.

I am here at the suggestion of my client, but I would like to say to you, Senator, that what I have to say and what is in my prepared statement represents my views and not any position formulated for me by my client. In view of the statements which were just made, I would like to say something about the tetracycline litigation. I guess what I really would like to do is to make two observations.

One is that the first gentleman who spoke after the assistant attorney general, while he had serious and legitimate concern, I am sure he also recognizes that had my client not invented the first broad spectrum antibiotic the year before his son was born his experience might have been even more tragic.

Second, I would like to say that while we paid a potful of money in settlement in that tetracycline litigation, no court has ever determined that the defendants, the manufacturers of those drugs, fixed the prices of them or engaged in a conspiracy of any other nature. Indeed, in the cases whiche have been litigated, a criminal case in the Southern District of New York, a Federal Trade Commission case, and an antitrust consumer class action in the Eastern District of North Carolina, the defendants were acquitted of all conspiracy charges.

Senator, I would like to acknowledge, while I am expressing my own views, that there is one provision in this proposed legislation which has a direct effect on a pending case that I am handling for Cyanamid, one of their remaining tetracycline damage cases brought by the United States, pending out in district court in Minneapolis.

RETROACTIVITY CLAUSE

The provision to which I refer is the one which would make the legislation retroactive if adopted. That seems to me an unfair thing to do, just as a general proposition. I would hope that this subcommittee would delete that clause, no matter what it does with the rest of the legislation, as the Congress with the parens patriae bill deleted the retroactive provision. It seems to me not only unfair but perhaps unconstitutional for the U.S. Government to change the rules of the game in its own favor halfway through a lawsuit.

Senator, I would like to make two points, and I want to say I would welcome being interrupted by questions because I do not want to take too much of your time. I want to talk about what is on your minds rather than what is on mine. The two points I want to make are: My experience teaches me, as it has taught Judge Joiner, that Justice White was entirely correct in the basic premise that he rested his *Illinois Brick* decision on and as I read it.

Senator THURMOND. You agree with Judge Joiner's testimony today?

CONSUMERS WILL BURDEN COURT SYSTEM

Mr. MURPHY. I agree with portions of it. I agree with that portion of his testimony, Senator, in which he supports Justice White's conclusion allowing all indirect purchasers into court to claim some proportionate share of the damage, assuming an antitrust violation, will so overburden the courts, which are already seriously overburdened, that it will not enhance the enforcement of the antitrust laws but will impede the enforcement of those laws.

I would urge this subcommittee not to throw the conclusion of Justice White and five of his associates out of the window without empirical evidence that his premise is wrong. I suggest to you that sufficient investigation would come up with empirical evidence that his conclusion is correct. What the legislation this subcommittee has before it would accomplish, as I understand it, would be the following:

It would allow into court, seeking to prove damages, everyone in the chain of manufacture and distribution, assuming we are talking about an antitrust violation at the manufacturer levels. We would have intermediate manufacturers, we would have wholesalers, we would have retailers, we would have the consumers, and my experience has shown we will also have the people who insure the consumers. The question in that kind of litigation is not simply where did the injury rest, assuming the injury to be 100, but what portion of the injury rested at what stage of that chain. Senator, that seems to me to require looking into people's heads and otherwise engaging in speculative analysis based on terribly complicated evidence which will have the unnecessary effect of just bogging down the litigation.

DIFFICULT TO DETERMINE PASS ON

It is difficult enough nowadays to try an antitrust case. They seem to be inherently complicated. They seem to be inherently protracted. It is a major undertaking to try to determine whether there has been a violation, and if there has been a violation what the price would have been without it. That takes a lot of work and a lot of time. You heard the judge explain the problems this presents to him. If on top of that you have to determine what the intermediate people, the middle men, the intermediate manufacturers would have done in other circumstances, I think you have an impossible task.

I assume the people between the manufacturer and the consumer will not do business at a loss, and to some extent he may pass on some of the injury he has sustained, but I do not believe we can assume that he passes it all on, and that is what causes the problem. I think there is empirical evidence that they do not pass it along. I can give two examples, Senator, in the pharmaceutical industry. Years ago, when the price of penicillin at the manufacturers' level went through the floor, it remained unchanged for years at the retailers' level. There was no passon by the retailer of his savings. To the extent that is relevant here I think it demonstrates there may not be a passon.

Second, there was a study done in 1970, a citation of which I would be glad to give the staff, which showed that there were 36 significant economic variables which affected a retail druggist's decision about how much to mark up a given drug. What we are talking about here

is legislation which would require proof affecting each of those 36 significant variables.

Finally, I want to encourage the subcommittee to keep in mind that what we are talking about is the problem of handling difficult proof in the context of a jury trial. Both sides have the right to try these cases with a jury. You cannot assume both sides will waive that right. Trying to do that with juries multiplies the problem very considerably.

The tetracycline litigation has been held out to you by previous witnesses. It was by the witness who just preceded me. It was referred to as an example that these types of cases can be handled. The main reason I was willing to come down here is that to me it is an example of what is bad about this legislation.

The tetracycline litigation in one form or another has been in the Federal courts for 20 years. It has been in the Southern District of New York, the Second Circuit, the District of Minnesota, the Eighth Circuit, Eastern District of North Carolina, and the Fourth Circuit, and it is not over yet. It has taken an enormous amount of judicial time. The attorney general of Virginia is certainly correct when he describes that from his point of view it is a successful case. We paid him a substantial amount of money.

But, Senator, that was as part of a settlement. If the parties settle one of these cases and are willing to try to make the settlement work, as we were with respect to the State of Virginia and other States, you can accomplish almost anything. You can work things out by agreement among the parties, without having to take the time of the judicial machinery, who gets what. We tried some of those cases in Minneapolis, and I would like to just dwell on that for just a moment because I think it is a good example of the problem with this legislation.

If all indirect as well as direct interests are allowed to come into the courtroom, in order to protect them against each other, and the defendants against multiple recovery, you have to have them all in one trial. Originally in the tetracycline litigation we had 166 cases. Every single one of them, I think, was brought as a class action. Had you tried to try that litigation all at once, it would have killed us all, including the judge, and it would have brought the judicial system in one district to an entire halt. We almost did that in trying six cases. We tried 6 cases at once with 2 juries: 24 jurors in separate jury bodies. The trial lasted 18 months. Most of the cases were settled during the course of the trial, and after 18 months it ended in a mistrial. Senator, if that happens with relatively few cases, it boggles the mind to think what would happen in a really big case.

The first draft of the subcommittee bill which I saw was entitled something like " a bill to restore the effective enforcement of the antitrust law." My personal view is that antitrust laws are being enforced effectively right now. The antitrust business is booming. However, I think that every witness who has been before this subcommittee who has had practical experience has agreed with Justice White that this legislation will not advance the effective enforcement of the antitrust law.

I think that what the proponents of the legislation are really talking about is a concept of social fairness. I think the proponents of the legislation would have to concede that this would not enhance the

enforcement of the antitrust laws, but isn't it fair that if the consumer bears some part of the burden of the injury he should get some portion of the recovery?

CONGRESS SHOULD NOT TELL COURTS THAT CONSUMER SHOULD RECOVER

Senator, I don't think that that is a task that the Congress ought to impose on the courts. I challenge the premise of the fairness argument. I think those who advance it assume that the people in the middle are not injured. But if you talk to the people in the middle, at least when they are in the courtroom against you, they deny that. They say they are injured. In the *Hanover Shoe* and *Illinois Brick* decisions the Supreme Court pointed out how they are injured. Even so, passing that, in the *Eisen* case the second circuit said the judicial machinery just can't handle these cases, the kind of case that would be spawned by S. 1874. In the *Illinois Brick* case the Supreme Court said the same thing.

I suggest to you, Senator, Congress should not force the courts to do what they have said they cannot do, and if the Congress thinks that there is some public interest which requires more protection of consumers than there now is, they ought to look for a different sort of remedy. Thank you, sir.

Senator THURMOND. I have a number of questions I would like to ask you.

WILL DIRECT PARTIES SUE?

Acting Assistant Attorney General John Shenefield and others have testified that the direct purchaser may have passed a substantial part of the overcharge to his customers and therefore may have little intent to bear the risk of litigation. Can you furnish for the record instances of where direct purchasers do have a sufficient incentive to bear the risk of litigation and give examples?

Mr. MURPHY. Yes, sir. I had someone from my office go through the reported decisions of the judicial panel on multidistrict litigation to try to identify cases in which direct purchasers were on the plaintiffs' side. We came up with a list of 43 such cases which have been filed in recent years. We cannot vouch for its entire accuracy because what you would have to do would be to check the pleadings in all of those cases, and we have not had the time to do that. I shall make that list available to the staff, but in terms of a few specific examples, Senator.

Our own litigation, the tetracycline litigation, is a good example of that. We were sued by retailers. We were sued by wholesalers. We were also sued by hospitals, all direct purchasers. Also in our case States were frequently direct purchasers. In the ampicillin litigation, that is direct purchaser litigation. In the sugar litigation, direct purchasers have sued.

Senator, let me add something to that. I think that the class action device is the answer to Assistant Attorney General Shenefield's concern, because what happens nowadays is that one direct purchaser brings suit as a class action, and that presents all the other direct purchasers with the problem of deciding whether they want to opt out of the class action. To the extent that the direct purchaser is a publicly held corporation they do not dare.

I read Mr. Kohn's testimony before this subcommittee. He is an experienced a fellow on the plaintiffs' side as anybody else I know, and I agree with him that direct purchasers do sue, will sue, and will sue effectively.

CONGRESS SHOULD ACT SLOWLY

Senator THURMOND. Mr. Pollock, a prominent antitrust lawyer, stated S. 1874 represents a hasty and dangerously simplified reaction to a group of complex problems which the Supreme Court addressed in *Illinois Brick* and its adoption might well compound those problems in ways perhaps unanticipated by the drafters. What are your comments on that?

Mr. MURPHY. I entirely agree with that. It seems to me Judge Joiner's suggestion is the way this should be approached. Let these cases settle in and let the law develop for a period of time before Congress monkeys with it.

Senator THURMOND. Mr. Pollock also stated that giving more careful thought on these questions raised by *Illinois Brick* is essential before any responsible determination can be made as to whether any further changes should be made and, if so, which one should be made in the Nation's basic antitrust legislation. How do you respond to that comment?

Mr. MURPHY. I agree with that, sir.

Senator THURMOND. Mr. Frederick Rowe stated:

> In short, the court was convinced that the antitrust laws would be more effectively enforced by concentrating full recovery for the overcharge in the direct purchasers than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it. In this way, commercial parties in direct dealings with each other would have strong incentives for antitrust compliance, since any antitrust violation may be redressed by the first buyer through a treble-damage recovery which is neither complicated nor diluted by a host of competing claimants.

Would you have any comments on that?

Mr. MURPHY. I think that is both correct and a correct analysis of the *Illinois Brick* case.

Senator THURMOND. Would it be your position that effective enforcement itself provides a measure of fairness to consumers because effective enforcement is a deterrent to violation of the laws and does protect consumers from ever suffering inqury in the first place?

Mr. MURPHY. Yes, sir, I would agree with that.

Senator THURMOND. We have a proposal here. Would you mind taking this and comment either now or after you have studied it? Perhaps you would like to study it, comment on it, and send the comment to us for the record.

Mr. MURPHY. Yes, sir, I shall do that.

Senator THURMOND. There is a vote. Mr. Boies, you may proceed with the witness.

After counsel completes his questions, we will be through with you and we want to thank you for your testimony.

The next witness will then be Mr. Neil Bernstein. He can come forward following your appearance and let counsel proceed with the hearing until I return.

EFFECT ON PARENS PATRIAE

Mr. Boies [presiding]. Mr. Murphy, do you agree with Judge Joiner that the *Illinois Brick* decision substantially undercuts the parens patriae legislation passed last session?

Mr. Murphy. I think that question is about to be resolved in litigation out on the west coast. Before responding to your question directly, I would like you to know that my firm, among others, is a party to a motion on the west coast, a parens patriae action brought by the State of Washington, in which they take the position you describe.

Mr. Boies. The position that the *Illinois Brick* decision undercuts the parens patriae legislation?

Mr. Murphy. The exact argument in the motion, as I understand it, is that the State attorney general does not have standing to bring the parens patriae action because the people he is representing do not have a cause of action as a result of the *Illinois Brick* case. As a lawyer I would have to agree with you that while I would want to see what will happen in the courts, the *Illinois Brick* decision gives defendants in some parens patriae actions if they are manufacturers, an important weapon.

I believe that there will be cases—I would not characterize them as many or few—in which the parens patriae device will be useful, as where there may be price fixing by supermarkets, liquor stores, or gasoline chains, or a host of people from whom consumers do buy directly. It is not only original manufacturers who violate the antitrust law.

NO PARENS PATRIAE ACTIONS SHOULD BE TAKEN ON BEHALF OF PURCHASERS

Mr. Boies. At least where you have violations by original manufacturers, ordinarily the consumers would not be purchasing directly from the manufacturer, and consequently parens suits on behalf of those consumers would be barred by *Illinois Brick.*

Mr. Murphy. That would be my view, yes, sir.

Mr. Boies. You mentioned that you had identified 43 cases in reviewing the multidistrict litigation docket where direct purchasers had sued. Did you identify any cases where indirect purchasers had sued?

Mr. Murphy. First I want you to understand that I am not in the position to represent that all 43 of those cases are direct purchaser cases. They seemed to be. We have not taken the time to go through the record. I am confident, although it was not the question I asked of the people who did the research, that many of those cases are indirect purchase cases and I am equally confident that in most cases both direct and indirect purchasers sue.

Mr. Boies. You mentioned the ampicillin and sugar litigation as being situations where direct purchasers sued. Is it not also the case that indirect purchasers sued in those litigations?

Mr. Murphy. Oh, yes. Mr. Boies, that is one of the problems I see with this kind of suit that your proposed legislation is concerned with. You cannot look at it as a class of purchasers or distributors against a group of manufacturers. You are going to have five, six, or seven tiers in the chain of distribution all in the courtroom, and the problems are going to include problems as among those people just as much as they will be problems as between those people and the defendants.

SHOULD PARENS ACTIONS ON BEHALF OF DIRECT PURCHASERS BE ALLOWED

Mr. Boies. Do you agree with Judge Joiner's view that it would be desirable at least to permit State attorneys general to sue in behalf of ultimate consumers even if perhaps private class actions were not permitted?

Mr. Murphy. I think that would be unfair.

Mr. Boies. In other words, you think we ought to allow both to sue if we are to allow either to sue?

Mr. Murphy. You are asking me as a matter of my personal view and without having really thought of it? I don't think you can cut the people in the middle of the distribution chain out. They have just as good a claim as the consumers. They would say better.

Mr. Boies. You would be in favor of allowing everyone to sue if we made the decision to allow ultimate consumers to sue, or at least to have State attorneys general——

Mr. Murphy. I am not willing to go that far.

Mr. Boies. What is your view about that, if you have one?

Mr. Murphy. On exactly what question?

Mr. Boies. On whether or not the State attorneys general should be able to sue on behalf of ultimate consumers under parens.

Mr. Murphy. My basic view is that only direct purchasers should be allowed to sue, as the *Illinois Brick* decision holds.

If the question you are asking me is, suppose Congress has made up its mind willy-nilly that it will reverse *Illinois Brick*, then how far should it go? I suppose I would have to say the way it should go is to let everybody sue, let everybody try to prove, passon both offensively and defensively, and that will be a field day for lawyers.

Mr. Boies. That was the rule that existed prior to the *Illinois Brick* decision, was it not?

Mr. Murphy. I don't agree with that. When the Supreme Court decides something they are deciding what the law is. Maybe that is a little fictional, but the Supreme Court didn't pass legislation on June 9 or whatever day it was, and it was the position of defendants in every litigation I know of that indirect purchasers didn't have a cause of action.

Mr. Boies. At least the drug companies believed there was substantial chance that the direct purchasers had a cause of action to pay out $100 million.

Mr. Murphy. The drug companies believed the risk to which they were exposed were risks they could not afford to run.

FTC ACTION AGAINST AMERICAN CYANAMID

Mr. Boies. Incidentally, just for the record, you mentioned the cases in which the drug companies have been successful, and you mentioned the Federal Trade Commission action.

Is it not a fact that American Cyanamid and Pfizer were found guilty of an unfair trade practice in violation of section 5 of the Federal Trade Commission Act because of fraud on the patent office. Is that correct?

Mr. Murphy. My point was, as I am sure you understood, that the statements which were made to you by the gentlemen from Virginia were premised on their part that the drug companies had fixed the

prices they were paying for it, at artifically high and unreasonable levels. In every case, including the Federal Trade Commission case, the Government has failed to prove that allegation.

Mr. Boies. But is it not a fact that all this bill would do would be to give consumers a right to have their day in court on the issue? It does not legislate every defendant is automatically guilty.

Mr. Murphy. No, but I cannot help but think there is an unfortunate willingness on the part of those proposing that kind of remedy to think that the manufacturers are guilty. I think it would give the consumers their day in court and it would give the retailers their day in court and it would give the insurance companies their day in court, and the problem. Mr. Boies, is that they all have their day in the same court. I realy believe—although I represent a pharmaceutical company and I suppose in your view that may affect my credibility in saying this—you cannot try that kind of a case without either on the one hand running roughshod over the due process rights of the plaintiffs as well as the defendants or, on the other hand, bringing that court's business to a complete standstill.

SHOULD CONSUMERS BE ALLOWED TO RECOVER

Mr. Boies. One more question. Do you see any way to allow consumers to recover antitrust injuries where they are indirect purchasers and do not have the kind of practical problems that you say you see in this bill? Is there any way to allow consumers to recover an antitrust injury where they are indirect purchasers or do we have to say to the people from Virginia and others like them that they do not get their day in court because of practical problems?

Mr. Murphy. I think that is what you should say. It is not a new concept in the law. It goes way back to the old common law that the injury stops with the first person injured.

But to respond directly to your question, I think it was Professor Handler who suggested a way of dealing with this, which is some kind of mechanism which would create a fund against which consumers who believed they were injured would submit claims, and it would be handled administratively.

I have not really thought a great deal about this. If the subcommittee ever starts moving in that direction, I would be happy to be of such help as I can be. However, I suppose you can do that in a Government case by having the court at the conclusion of the case have some sort of an ancillary hearing in which it determines whether there was an overcharge, and, if so, how much it was, and perhaps give the defendant or the defendants the election of paying that into the fund and being immunized from treble-damage actions or exposing themselves to treble-damage actions.

Mr. Boies. Wouldn't that have the same kind of practical problems you foresee in terms of allocations?

Mr. Murphy. It would not be in the courts. That is my concern as a practicing lawyer.

Mr. Boies. Thank you.

Mr. Chumbris. While we have you here I thought we would get the benefit of your judgment on this statement made this morning by Mr. Shenefield before the House Judiciary Committee. In his opening

statement he refers to the bill pending before the House and the Senate. I quote:

The bill would permit all persons who are injured in fact by an antitrust violation to recover for those injuries.

Now I read from the footnote:

As discussed below, we understand that the bill is not intended to alter existing law regarding those injuries that are so remote or unrelated to the purposes of the antitrust laws as to preclude recovery of damages. [See *Brunswick Corporation* v. *Pueblo Bowl-O-Matic*, 45 ULSW 418, January 25, 1977.]

We also assume that it is not intended to alter existing standing requirements for plaintiffs not directly in the chain of distribution. [See, e.g., *Loeb* vs. *Eastman Kodak Company*, 183 F. 704, Third Circuit 1910; *Mulvey* vs. *Samuel Goldwyn Productions*, 433 F. 2d 1073, Ninth Circuit, 1970; cert. denied, 402 U.S. 923 1971].

Moreover, we do not read the bill as in any way limiting recoverable damages to the amount of the overcharge.

Since he has already testified before us, I would like to ask your comment on what he has stated this morning before the House committee.

Mr. MURPHY. I cannot comment on the last sentence you read. I don't understand what he is talking about. As to the first two, I could not disagree more. I didn't want to take your time in saying so because you have been so patient, all of you, but one problem I have with this legislation is that it seems to me that if you open the door, as the legislation would, you are opening it to everybody. You are going to have people who would otherwise be thought to be remote, as Mr. Shenefield put it, coming in. If they are indirect they are entitled to the benefit of the bill.

Another draft I saw says that privity is not the test and they will have the benefit of the bill.

Second, I strongly disagree with his point that this legislation does not have anything to do about standing. The reason I disagree with it is that I don't think there is any subject which is less understood by courts and private bars than the subject of standing. I don't understand it. I don't know of anybody who really does. Standing, remoteness, and injury are all closely related concepts. When courts use those words I think they use them interchangeably.

There is an enormous article in a very recent issue of the Yale Law Journal, very learned and exotic, having to do with the question of standing. It discusses *Illinois Brick* in that connection. It comes to the bizarre conclusion that standing is so complicated a question that a judge ought not to decide it until the trial is all over. I think Mr. Shenefield is wrong. I think this proposed legislation, if adopted, would have a major impact on the question of who has standing to sue and its impact would be almost everybody.

Mr. CHUMBRIS. Thank you very much.

Mr. SNEEDEN. Have you had a chance, Mr. Murphy, to look at the document entitled subcommittee draft, which was the draft Senator Thurmond referred to earlier with regard to the majority of the subcommittee following the S. 1874 hearings?

Mr. MURPHY. I think so. They are the two numbered paragraphs?

Mr. SNEEDEN. Yes. Would you care to make any comment concerning the subcommittee draft?

Mr. MURPHY. I don't read it as being materially different or better than the original. It is a little more clear in spelling out that the authors intend the passon to be defensive as well as offensive, but the first sentence which introduces the notion of privity I think is even less clear than the original draft I saw. I really don't understand the reason for the use of that word since I don't think the *Illinois Brick* case had anything to do with privity.

Mr. SNEEDEN. Thank you, sir.

Mr. BOIES. I have nothing further.

[The prepared statement of Samuel W. Murphy follows:]

PREPARED STATEMENT OF SAMUEL W. MURPHY, JR., ESQ.

I appreciate the opportunity to be heard on the proposed legislation, S. 1874, which is aimed at overturning the Supreme Court's recent decision in the *Illinois Brick Co.* case, as well as its earlier decision in the *Hanover Shoe* case.

I am a partner in the New York law firm of Donovan, Leisure, Newton & Irvine, which has been actively engaged in the trial of antitrust cases for many years, including the *Hanover Shoe* case, in which we represented the plaintiff, and the endless tetracycline litigation, in which we represent one of the defendants. I have myself spent 25 years in active antitrust litigation of all types, and have been chief trial counsel for American Cyanamid Company in the tetracycline antitrust litigation since 1969. I appear here today on behalf of Cyanamid and also as a trial lawyer concerned with the problems and difficulties involved in litigation antitrust damage cases.

The problems addressed by the Supreme Court in its *Illinois Brick* decision are of major concern to all who are interested, or involved, in litigation of antitrust damage claims. We start on common ground, for there is no dispute that judicial administration of such actions should be aimed at effective deterrence of anitrust violations and compensation of those injured to the greatest extent possible. Taken as a generalization, it is hard to quarrel with the proposition that every person which may have suffered some injury as a result of an antitrust violation should have his day in court to prove and recover such damages as he may. But, it seems to me there is room for substantial and good-faith dispute about the means of attaining that end, and that the practicalities of antitrust litigation in the courtroom have not been given sufficient consideration by the proponents of this litigation.

More specifically, this subcommittee should not assume, or conclude, without considerable further evidence and analysis that the Federal courts can try cases involving the claims of millions of indirect, as well as thousands of direct purchasers, without either riding roughshod over the rights of the parties or placing an insupportable burden on our already creaking judicial machinery. I seriously question whether they can. The dimensions and nature of such damage claims are inherently complex, raise exceedingly difficult problems of proof, present serious risks of multiple recovery, and place enormous and staggering burdens upon the judiciary and the parties.

While the *Illinois Brick* decision certainly is not a perfect solution from all points of view, it does meet head-on the real problems of trial practice and judicial administration which are posed by this sort of complicated big case. The majority opinion is an accommodation of the various considerations involved and may well assist—rather than inhibit—achievement of the general objectives of antitrust damage actions.

I urge this subcommittee not to rush ahead with legislation to overturn the *Illinois Brick* decision, but to take a more careful look at the probable effects which any legislation may have on the burdens of the courts and the complexity of this type of litigation—and perhaps even to give the law a chance to develop further on its own. The results of hasty passage of this legislation may be quite the opposite of that intended, by creating such a procedural thicket of competing, remote and speculative damage claims and theories as to make it far more difficult for anyone to recover in future trials.

Proponents of the proposed legislation seem to discount the complexity and judicial problems involved. Some have suggested that these problems, as well as risks of multiple recovery, are more imaginary than real. I disagree. These are not phantom problems. I submit that this subcommittee should not ignore them or proceed on the assumption that some innovative judges will later devise procedures to deal with them in an efficient and fair manner.

I believe that the experience over the past 10 years in the tetracycline litigation can provide some empirical data upon which your legislative judgments on these matters can be based. We have been surprised that during the July hearings before this subcommittee references were made to that litigation as a case study of how problems of proof, allocation of damages and prevention of multiple recovery could be expeditiously and efficiently handled. In our view, the record of that litigation supports the opposite conclusion.

THE TETRACYCLINE DAMAGE LITIGATION EXPERIENCE

This litigation at one time comprised 166 cases, most of them brought as large class actions, seeking damages upon the charge that an alleged conspiracy among five pharmaceutical companies to monopolize and fix prices on tetracycline and other broad spectrum antibiotic drug products had resulted in unlawful overcharges, which allegedly injured each of the suing plaintiffs and the class members they represented. It has continued for over ten years with extensive pretrial, trial, appellate, and settlement proceedings, and the government litigation upon which the private cases were based goes back to the summer of 1958. A few cases still remain, and the end is not quite in sight. The litigation has placed enormous burdens on the judiciary and the parties involved. Most of it has been disposed of by settlement, rather than trial, and the defendants have paid over $250 million in settlements to compromise the staggering damage claims asserted against them.

Before getting into some of the details of that litigation which we believe have a direct bearing on this subcommittee's concerns, I note two general points as background.

First, although the tetracycline litigation had its inception almost twenty years ago in antitrust proceedings brought by the Government, there has never been a final adjudication that the defendants engaged in the antitrust conspiracy with which they were charged. In the several cases which have been tried on the merits, the defendants have prevailed and the charges dismissed. In the FTC proceeding (*In re American Cyanamid Co., et al.*, FTC dkt. 7211) which continued from 1958 to 1969, the final result was dismissal of all antitrust conspiracy charges against all defendants, although, as to Pfizer and Cyanamid, the Commission concluded that their actions in the Patent Office constituted unfair methods of competition under the standards of Section 5 of the FTC Act [63 FTC 1947, 1862–63; 72 FTC 623, 688–90]. In 1973, following the Second Circuit's reversal of a 1967 conviction in the first trial of the Government's criminal case (*United States* vs. *Chas. Pfizer & Co.*, 426 F. 2d 32, 437 F. 2d 957), the District Court for the Southern District of New York, after a second trial on the record of the first, dismissed the Government's case as not having been supported by the evidence (367 F. Supp. 91). In 1974, after a lengthy trial on the violation issues in the class action suit brought by the State of North Carolina, the District Court for the Eastern District of North Carolina entered its decision and judgment dismissing the plaintiff's charges (*North Carolina* vs. *Chas. Pfizer & Co.*, 384 F. Supp. 265). That dismissal was affirmed by the Fourth Circuit (537 F. 2d 67).

Second, for those who assume that the difficult problems of adjudicating multitudes of direct and indirect claims can be somehow resolved if only counsel and the courts would apply some imagination and effort, I point out that we did not suffer on that score in the tetracycline litigation. Over the lengthy course of proceedings there was an unprecedented amount of legal talent, imagination, resourcefulness, inspiration and perspiration expended by counsel and the courts in attempting to deal with the problems presented. Among the literally hundreds of experienced antitrust counsel were many of the country's leading plaintiffs' lawyers, as well as attorneys general of many states. In addition, we had two judges, the Hon. Inzer Wyatt and the Hon. Miles W. Lord, who worked exceedingly hard and who were not reluctant to try novel concepts and procedures. As a result, numerous highly innovative and imaginative procedures were proposed for consideration; many were adopted.

THE CASES BROUGHT AND DAMAGE CLAIMS ASSERTED

Most of the damage cases were brought following the 1967 conviction on the first trial of the Government's criminal case, which was later reversed. Claims for damages were asserted by every conceivable level in the chain of distribution and even beyond and outside that chain, by remote persons who contended that part of the alleged overcharge was passed on to them. For the convenience of the subcommittee, I have prepared a schedule, which I submit with my testimony, outlining the various cases filed and the ultimate disposition of each.

Cases were brought by retail pharmacies and drug wholesalers as class actions on behalf of all such purchasers in the United States. Cases were brought by private hospitals as class actions. Every state (except Nevada) brought its own action on behalf of itself and for classes of all consumers and governmental purchasers within the state. Insurance companies sued, as a class, for damages allegedly sustained as a result of payments and reimbursements made under medical and health insurance plans for consumer purchases. Blue Cross and similar entities throughout the country also sued for alleged damages. Union welfare trust funds brought suits, as class actions, for damages allegedly sustained for premiums and payments they made to insurance companies, Blue Cross and related health plans. The Federal Government also sued for damages, not just for alleged overcharges on its purchases, but for monies it allegedly had paid out to states and hospitals under Medicaid, Medicare and other public assistance programs. In addition, there were damage actions filed by individual consumers, dispensing physicians, alleged competitors and even foreign governments.

That was only part of the matter. Antibiotics are also used for veterinary purposes and as animal feed supplements. Thus, a number of cases, which proceeded as class actions, were brought in this area. Included were claims for damages asserted by wholesaler, distributor, feed mills, feed lot operators, veterinarians, and groups of poultry, cattle, swine and mink raisers.

The total damage exposure in all these cases was well up into the billions of dollars. For example, in just one of the 166 cases, the class action brought by the State of California, the treble damage claims asserted were approximately $280 million. Each plaintiff proceeded on the theory that it had been very substantially damaged, and that it could prove such damages as a matter of fact.

SOME PROCEDURES EMPLOYED IN THE TETRACYCLINE LITIGATION

1. Transfer

It has been suggested that any problems of multiple recovery and proper allocation of damages among various plaintiffs can be resolved if all of the cases and potential claimants are brought together in one court for coordinated or consolidated procedures.

The tetracycline cases had been filed in Federal courts throughout the country. Pursuant to the procedures Congress provided in 28 U.S.C. section 1407, the Judicial Panel on Multidistrict Litigation, commencing in 1969, transferred all of them to one court for coordinated and consolidated pretrial proceedings (*e.g.*, 299 F. Supp. 1404, 303 F. Supp. 1056, 309 F. Supp. 155, 320 F. Supp. 586). Originally, the cases were consolidated in the Southern District of New York. In 1971 Judge Miles Lord, who had replaced Judge Wyatt on the nonsettling cases, transferred the actions under 28 U.S.C. 1404(a) to the District of Minnesota for purposes of a consolidated trial (*Pfizer, Inc.* v. *Lord*, 447 F. 2d 122 (2d Cir. 1971)).

Despite the consolidations of the various claims in one court (both for pretrial and trial), no procedures were ever developed to adjudicate—in a way which in our view would preserve the rights of each party to a fair trial—the merits of the numerous damage claims with respect to each other and with respect to defendants.

2. Pretrial motions and request for rulings

During the lengthy pretrial proceedings, defendants made repeated motions seeking dismissal in whole, or in part, of claims of various plaintiffs on the ground that they had not suffered "injury" within the meaning of section 4 of the Clayton Act. Motions for summary adjudication were made against claims of such indirect claimants as insurance companies, union welfare trust funds, consumers, the Federal Government's reimbursement claims, and other similar

claims. With one exception, all such motions were unsuccessful. *See, e.g.*, 333 F. Supp. 311 (S.D.N.Y. 1971). The only dismissal defendants obtained was against the claims of indirect purchasers (such as farmers) of the product when purchased as but one ingredient in finished animal feed supplement products. That single dismissal was based upon a stipulation defendants made on the record that, if their motion to dismiss those remote claimants were granted, they would not thereafter attempt to assert the "passon" defense in the numerous actions which had been brought by prior, direct and indirect, purchasers of animal feed antibiotics. [*See* 333 F. Supp. at 312.]

Without an *Illinois Brick* rule, the legitimacy of plaintiffs' direct and indirect damage claims can rarely be adjudicated on pretrial motions for dismissal or summary judgment because complex fact questions as to "passon" usually will be be involved, and the courts are understandably reluctant to decide such questions on a summary basis prior to trial.

Illinois Brick has the great advantage of permitting pretrial adjudication of most claims except for those of direct purchasers, and thus speeding the ultimate conclusion of the litigation. The only material facts necessary for such pretrial rulings will be those determining whether the claims are based on direct purchases or fall within the limited exception to that rule for some cost-plus type contracts. Those facts can be easily ascertained by limited discovery prior to trial.

3. Consolidated trial

Since pretrial procedures are usually inappropriate to adjudicate the factually involved damage claims of indirect and remote purchasers in the absence of an *Illinois Brick* type rule, they will have to be disposed of by trial unless they are earlier settled. In order to minimize the risk of multiple recovery on overlapping claims when there are numerous indirect as well as direct purchasers, such trial would probably have to be a consolidated one. We had a consolidated trial in the tetracycline litigation, and the result of that experience persuades that such consolidated trials cannot be fairly maintained.

In fall 1974, over defendants' objections, but with the plaintiffs' concurrence, Judge Lord commenced a consolidated trial of six of the cases then remaining—the United States case, the insurance company class action, the union trust fund class action, an action by a California hospital benefit entity, and cases brought by two alleged competitors. The trial was particularly innovative because it was tried to two juries at the same time. It continued for about 18 months, when the court declared a mistrial and at a time when the end of trial was still nowhere in sight. Plaintiffs had not even completed the introduction of evidence on common issues of liability, let alone their separate damage claims, and as Judge Lord pointed out in declaring the mistrial, the Government was then only "beginning to get into its main cause of action . . ." Because large amounts of evidence were relevant to only some of the cases and not to others, and because of the complexity of the issues involved, it was, in our view, highly unlikely that one, or even two juries, could have fairly decided the issues necessary for proper verdicts in each of the cases on the basis of the relevant evidence.

The aborted consolidated trial we had was not nearly so complex, nor of the magnitude, it might have been if it had also been necessary to try the 49 statewide consumer class actions (or any number of them) and the nationwide classes of retailers, wholesalers and private hospitals. I just cannot imagine how any such consolidated trial could have proceeded; I don't think that anyone who had ever set foot in a courtroom could support the idea that a fair trial could ever take place with such a complex, judicially-created monstrosity.

SETTLEMENT AND DISPOSITION OF CASES

With the magnitude of all of the claims being asserted in the various actions, defendants faced risks of exposure to possible damages of staggering dimensions, up in the billions.

The normal uncertainties inherent in any trial were magnified many times in the tetracycline litigation by the dimensions, complexity and novelty of numerous issues presented by the large number of cases which were brought. In the circumstances, settlement appeared to be the most prudent and acceptable way to dispose of the litigation.

Thus, early in the coordinated proceedings, in 1969, the defendants made an offer of $120 million for a so-called "global settlement" of most of the claims being asserted against them. That initiative was only partially successful, re-

sulting in a compromise and settlement of the claims of most of the retailers and wholesalers in the country and the large class actions brought by 42 of the states on behalf of their consumers and governmental entities. [*See*, 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd., 440 F. 2d 1079, 2d Cir. 1971).] In effectuating that settlement, counsel for plaintiffs developed complex plans of allocation of the settlement fund among the various claimants. While such allocation may have worked in the nonadjudicative procedures of settlement, where all parties strove to attain an acceptable compromise of all the claims involved, it is certainly not, as suggested by some, an example of how overlapping and conflicting claims among direct and indirect purchasers might be fairly handled in an adjudicative trial context, in which the first responsibility of each counsel must be to do his level best to win his own case. As it was, some of the direct purchasing retailers opposed the allocation made to them in the settlement plan, and opposed the plan actively and at length in the district court (314 F. Supp. 710, at 744–47), and on appeal (440 F.2d 1079, at 1084–89 (2d Cir. 1971), *cert. denied*, 404 U.S. 871).

As the pretrial and consolidated trial proceedings continued over the years, other cases and groups of cases were settled. Thus, in 1971, the actions by Blue Cross entities and a nationwide class of private hospitals were disposed of by settlement. *Hartford Hospital* vs. *Chas. Pfizer & Co.*, 52 F.R.D. 131 (S.D.N.Y. 1971)). Later, in 1975–76, most of the other cases were settled. A total of almost $250 million was paid by defendants from 1969 to 1976 in the various settlements. The only damage case litigated to a conclusion on the merits was the *North Carolina* class action in which defendants prevailed.

SOME GENERAL FACTORS WHICH SHOULD BE CONSIDERED

Based on the record of actual experience in the tetracycline case and other cases, there are several general factors which I urge this subcommittee to consider:

1. Antitrust trial proceedings seem to be inherently complex, difficult and protracted. It is not unusual for a trial just on the issue of violation to last several months and in some instances for more than one year. I suggest that there is a serious question of just how much more complex these cases can be made (as by permitting "pass-on" evidence to be used offensively and defensively) without making them unworkable as a practical matter.

2. In addition, there are enormous problems of judicial manageability of class actions, particularly when the class members are numerous and did not deal directly with the defendants. Some courts have indicated that large class actions present so many problems of administration and manageability, that the burdens imposed are not worth the judicial costs involved. E.g., *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *aff'd.* 417 U.S. 156 (1974). On this score, the subcommittee should note that in the more than ten years since rule 23 has been on the books, and although numerous antitrust damage cases have been brought as class actions, not one has yet proceeded to a judgment, after trial, on issues as to liability and damages.

3. One should not expect that all plaintiffs and all defendants will normally waive their Constitutionally protected jury trial rights in such litigation. *Beacon Theatres Inc.* v. *Westover*, 359 U.S. 500 (1959). Thus, the damages issues in cases involving numerous direct and indirect purchasers cannot be handled by administrative or summary procedures, or by the procedures which have been devised to achieve an equitable compromise on settlement. While I have heard several suggestions on proposed procedures for bringing large numbers of putative claimants together in one court, I have not heard anyone make any realistic proposal which deals with how the rights of all—including those of defendants as well as those of each of the claimants—can be adjudicated in the context of a fair jury trial, or trials, as is preserved under the Constitution.

4. Over the past ten years, there has been a substantial increase in the number of antitrust damage actions filed. With the increasing number of settlements and awards of generous attorneys fees there have been an increasing number of actions filed on behalf of indirect and remote purchasers, usually as class actions. It seems to me that if legislation is enacted overturning *Illinois Brick* and providing a clear expression of congressional intent that every person who may have been injured, directly or indirectly, may recover something, notwithstanding proof of "passon," there will be a substantial increase in the number of such suits, and imaginative plaintiff's counsel will see that they are brought as class actions on behalf of all who might be said to have a colorable claim. If those ac-

tions aren't disposed of by settlement, the judiciary will be faced with enormous problems presented by the claims of large classes of claimants representing every conceivable level of the line of distribution and even further remote claimants. Each claimant will be asserting both that he sustained injury from an allegedly unlawful overcharge passed on to him and that he did not pass it on to others even further down the line. The theories and proof as to such indirect claims will probably conflict with those of other claimants who will assert that the brunt, or all, of any unlawful overcharge was sustained by them. Mr. Justice White's *Illinois Brick* opinion fairly sets forth, in my view, the complex nature of proof which would be relevant and necessary on these difficult matters [Slip opinion, pp. 9–10, 16–21]. It seems to me not at all unreasonable to suppose that the burdens which would be imposed on the judiciary, and on the parties as well, would surely impede over-all antitrust enforcement and be inconsistent with the objectives of private treble damage actions.

5. This subcommittee should give consideration to the fact that defendants in antitrust cases are not always guilty of the violations which plaintiffs allege. Our concepts of fairness, as well as the presumption of innocence, mandate such recognition. That fact finds generous support in the records of trials of antitrust cases. Plaintiffs, including the U.S. government, do not always support their allegations with proof, and defendants often win at trial when all the facts and evidence are in. Consequently, the Congress should not be hasty to take action which may so increase the costs, difficulties and risks of an antitrust defense as to compel settlements.

All litigation is uncertain. Where numerous cases with complex factual issues are involved, the uncertainties and risks are magnified. Where the possible exposure is in the millions, or hundreds of millions, and even in the billions of dollars, the risks are so great that a businessman sometimes cannot reasonably afford to run them, even when the chances of an unfavorable adjudication may seem relatively slight. *Illinois Brick* has the very considerable merit of introducing some degree of certainty which should enable both sides to such litigation to make more informed and equitable assessments concerning the substance and value of the damage claims asserted.

6. The risk of multiple recovery is not a hobgoblin conjured up by defendants. Where there are claims asserted by numerous indirect and direct purchasers, the risks are real. An action on behalf of a class of direct purchasers could go to trial with the plaintiffs asserting that at least 90 percent of an alleged unlawful overcharge was sustained by them, with only 10 percent or less passed on to subsequent purchasers. At trial, there would undoubtedly be substantial and complex evidence presented with respect to the "passon" issues. The jury could return a verdict that the evidence convinced them that 90 percent of overcharge was sustained in fact by those direct purchasing plaintiffs. Thereafter, at a subsequent trial on a case brought by a class on indirect purchasers, the jury in that case could return a verdict holding that 60 percent of the overcharge was passed-on to, and sustained by, the plaintiff indirect purchasers. Subsequent cases involving trials of claims of other indirect purchasers could repeat these inconsistent results. The overlapping and multiple recoveries of the various plaintiffs would be magnified by the fact that antitrust damage awards are trebled.

Each direct and indirect plaintiff would insist that it had a right, under the law, to prove its own claims to the jury on the evidence it developed in its case, and not be bound or limited by results of other cases in which it was not involved. Its right to a jury that would support that position. Collateral estoppel would not apply from the jury's determination in the first case as against the plaintiffs in the subsequent cases. For collateral estoppel to be effective, the party to be estopped must have had a full and fair opportunity to litigate the factual question at issue. [*Blonder-Tongue Laboratories, Inc.* v. *Univ. of Illinois Foundation*, 402 U.S. 313 (1971).]

Other than an *Illinois Brick* type rule, the only way to avoid such results is to have a consolidated trial in which all claimants have an opportunity to be heard and present their cases, and thus be bound by the jury's determination on the "passon" issues. Any such massive, complex trial, however, would be wholly inconsistent with the requirements of a fair trial.

7. There has been criticism of the *Illinois Brick* decisions on two main grounds: a. that first purchasers are unlikely to sue and hence the *Illinois Brick* rule will have adverse effect upon the deterrence objectives which private damage actions are intended to serve: and b. that consumers will not be compensated for the injuries they suffered by antitrust violations.

a. The record does not support the proposition that first purchasers are lax in asserting rights to damages. In most, if not all, of the major antitrust damage litigations over the past 10 years, actions have been prosecuted by direct purchasers. Prior to that period, the majority of all damage cases were brought by first purchasers. Thus, in the electrical equipment litigation of the sixties, almost all of those cases were brought by direct purchasers. I also note that some of the largest direct purchasers in the country are state, federal and local governmental entities who are represented by attorneys with a high level of interest and actively in antitrust enforcement.

Moreover, the class action provisions of F. R. Civ. P. 23 have a significant effect in this area. Even if only a handful of direct purchasers in an industry are motivated to initiate damage actions, such suits are usually brought as class actions on behalf of all others similarly situated. Only one direct purchaser is needed for such a classwide suit. Publicly held corporations, sensitive to their obligations to stockholders, would be reluctant to elect to "opt-out" of such classes. Thus, as a practical matter, there will be substantial assertion of claims by direct purchasers, particularly with the incentives of the *Illinois Brick* rule which affords first purchasers all of the unlawful overcharge.

b. *Illinois Brick* does not do away with suits on behalf of individual consumers. Such actions may still proceed, as class actions and in *parens patriae* suits, where the consumer has purchased directly from a price fixer or other antitrust violator. But where the consumer's alleged injury is indirect, and is claimed to have been passed on to him by prior purchasers, he cannot recover. As a practical matter, the consumer's right to recover in such situations has always been so remote that it was theoretical, at best. To the best of my knowledge, in the history of the Federal antitrust laws, there has never been a case in which an indirect purchasing consumer has obtained a judgment of money damages upon a trial of the merits of his claim. The only recoveries by indirect purchasing consumers have been by settlements.

Even if we assume as a possibility that someday there may be a class action or other proceeding on behalf of indirect purchasing consumers which proceeds through a long, tortuous, and complex course to adjudicate money damages in favor of those consumers, and such judgment is upheld on appeal as meeting all the basic fundamentals of a fair trial, I submit that the small amount of money damages that might subsequently trickle down to the individual consumer is simply not worth the burdens it would generally impose on the efficient and fair administration of the damage provisions of the antitrust laws. The deterrence and compensation objectives of those antitrust laws would be better served by eliminating the problems of adjudicating indirect claims at all levels, by providing that direct purchasers can recover the entire unlawful overcharge, without regard to any issues of "pass-on." That, of course, is the result of *Illinois Brick* and *Hanover Shoe*.

Mr. SNEEDEN. Our next witness is Prof. Neil Bernstein. Professor Bernstein.

STATEMENT OF NEIL BERNSTEIN, PROFESSOR, WASHINGTON UNIVERSITY, ST. LOUIS, MO.

Mr. BERNSTEIN. I have provided a prepared written statement to the subcommittee. It would be my preference not to read that statement but merely to highlight some of the aspects of it. I would ask that the entire statement be included as part of the record, however.

Mr. SNEEDEN. Without objection, it will be included.

Mr. BERNSTEIN. My name is Neil Bernstein. I am presently a professor of law at Washington University in St. Louis. I have been on the legal staff of A.T. & T. which normally we would consider to be on the defense side of this question. I have served as senior antitrust attorney for the then-Attorney General and now Senator John Danforth over on the other side, and I was a consultant to the National Association of Attorneys General last year, and I have been a consultant to a

variety of private firms and private businesses on both sides of the antitrust fence, and I presently sit right on top of that fence. I have, therefore, a somewhat varied approach to this kind of problem. I emphasize that I am here only on my own behalf and not on behalf of anybody who ever has or presently employs me.

In my statement I did not comment on specific legislation. I indicated that I had seen four pieces of legislation relating to this question and I wanted to limit myself to the broader question of whether legislation should be passed which does overrule both *Hanover Shoe* and *Illinois Brick*, or what we are calling the *Illinois Shoe* decision by merging them together.

I will state briefly with respect to both S. 1874 and the subcommittee draft that I feel they are far broader than legislation to overrule the results of these two decisions and that they do raise a host of possible questions, such as whether they apply to mergers, and whether they give a right to sue to franchisers, lessors, patentees, licensees, and a whole variety of people who have attempted with limited success to show injury.

S. 1874 SHOULD BE MORE SPECIFIC

Mr. Shenefield indicated it is his assumption the bills will not get into those kinds of problems. It is my preference that we do not get into those kinds of problems but the legislation should be clearly and specifically drafted. As far as I am concerned, this legislation is not so drafted and it is unacceptable for that reason. It is just bad drafting, quite frankly, to make a bill which is not explicit and hope that somehow the courts will treat it as explicit legislation. As far as I am concerned, we should focus attention on the very limited context in which both *Hanover Shoe* and *Illinois Brick* arose, which is price fixing and chain of distribution situations—suits by people in the chain of distribution for a price-fixing conspiracy—and the legislation should limit itself to that situation.

I have been provided with a draft of another piece of legislation which talks about actions in which the claim is that a payment for purchase or lease of goods or services was enhanced by reason of a violation. I don't know whether that is the legislation which has been passed out this morning I would say that that is an improvement on the other pieces of legislation but still does not explicitly limit itself to the areas covered by both *Hanover Shoe* and *Illinois Brick*.

I also want to make it clear at the outset that we get into a lot of questions of fact and empirical questions. I have not done lengthy empirical studies and I am reluctant to make empirical conclusions without having done a study. I can give you only impressions and raise some questions. The major empirical question we have here has to do with whether direct purchasers sue or won't sue? I don't know the explicit answer to that. I don't think anyone has done enough research to answer that. The closest I have been able to find is Handler's work which indicates they have sued and there is no reason to assume they will not continue to sue.

The basic points I want to make are these: First of all, there is no doubt in my mind that any reversal of *Hanover Shoe* and *Illinois Brick* would increase the complexities and the costs of private anti-

trust litigation. That is not to say that the problems would be insuperable but merely that they would become costly. When we decide whether we will get any benefit from this, the benefit has to be compared with the cost.

Turning to that benefit for the moment, in my opinion there would be no benefit but there would be detriments. The Supreme Court decision is based upon the premise that in the area of people who may be injured by price-fixing conspiracies, the direct purchasers represent the most efficient possible plaintiffs. I think this is a reasonable position, and I think it is a position that my own experience tends to support. More often than not it is the direct purchaser who knows what is happening. If people are further down the line, they really don't know whether the price of a component that went into the product that was ultimately distributed to them was fixed or not. It is the direct purchaser, if it is anybody, who has knowledge of what really went on. I believe in most of the cases which arise in the real world the direct purchaser is hurt, and is hurt sufficiently to be willing to litigate if it is feasible for him to do so.

A lot of attention has been focused on the abstract problem of the industrywide conspiracy with price inelastic demand where injury is fully passed on. The economists can speak knowledgeably with regard to that situation but it is rare in the real world.

It has been my experience that frequently I have been contacted by direct purchasers who feel that they have been victimized by their suppliers. They are interested in suing. However, the crucial question to them always is how much are they going to have to lay out to bring this lawsuit.

When you tell them that they should not look at only that but they should look at the possibility that some day the lawsuit may be over and they may collect a lot of money, that is of lesser interest to them. That is the pot of gold at the end of the rainbow. They are willing to sue only if they can afford the initial outlay, which even today, after *Illinois Brick*, is extensive in the situations I have been involved in where they want to sue big companies. I assume those are the situations where there would be most attention.

If I were consulting small companies today and legislation reversed *Illinois Brick* and *Hanover Shoe*, I would have to tell those small companies that you can be sure that defendant is going to raise the defenses, (1) I didn't do anything; (2) if I did do anything, it didn't hurt you, and (3) if it did hurt you, you passed it on to somebody else. It will cost a lot of money to get any kind of ultimate determination on any one of those three issues. The only result is going to be to discourage direct purchasers from suing, and I think that is unfortunate.

I also point out that the Government should worry more about passon, governmental entities. Very often they are not the ultimate purchaser.

The court pointed out in *Illinois Brick* that a lot of purchases by the State of Illinois were for buildings that the State rented, and in those situations the tenants may have been the ultimate purchaser, and the State of Illinois may be unable to recover because it passed

on the increased cost to the tenants. The tenants may, in turn, have been welfare tenants, so they may have passed on the cost to the Federal Government.

Then you have taxpayers. You have all kinds of people here who can have things passed on to them, and if these issues could be raised in every case brought for private recovery, you are going to discourage private litigation in my opinion. This is recognized in everyone's mind. You clearly and unquestionably are going to discourage private litigation by the direct purchaser, which in my opinion is the person who is the one we want to sue most of all because he is the best possible suer most of the time.

INDIRECT PURCHASERS MAY BE ALLOWED TO RECOVER

I also want to emphasize that the *Illinois Brick* decision does not mean that indirect purchasers cannot recover for their damages at all under any circumstances. There are a lot of avenues left open by *Illinois Brick* which can be explored on behalf of indirect purchasers. To give you a few, the court itself has always acknowledged an exception on a cost-plus contract. The court added a second exception in *Illinois Brick* where the direct purchaser is owned or controlled by its customer.

I like that word "controlled." If I were representing an indirect purchaser, I think I could make a lot of good arguments. For example, it would be my position that if I told the purchaser what to buy I controlled him and, therefore, I am entitled to sue. That may be right. It may be wrong. However, only the Supreme Court can tell us. Right now that is open.

I also would point out that the only thing the Supreme Court has decided is that the suit for damages must be brought in the name of the direct purchaser. It does not mean indirect purchasers cannot sue in the name of the direct purchaser if the direct purchaser refuses to do so. It does not mean that they can't use subrogation to stand in the shoes of the direct purchaser. It does not mean that you cannot, that an indirect purchaser cannot, use a derivative suit to compel a direct purchaser to sue or bring a suit in the name of the direct purchaser.

More important, it does not mean that a prudent customer cannot write into his contract either a commitment by the direct purchaser to sue or an assignment of the right to sue to the customer, and I would expect that knowledgeable lawyers in this area are going to add that as boilerplate to their contracts. All it means is that somehow the lawsuits must involve the direct purchaser in fact or in theory, which is not a bad result, which is not an insuperable result, and which is not a serious handicap to indirect purchasers who have an incentive to sue. It will have to be some form of a cooperative effort.

GOVERNMENT AND PARENS CASES COULD BE DIFFERENTLY TREATED

Injunctions are still open for injured parties. In that connection, also, the court has a final footnote which can be read to acknowledge the possibility of special rules for parens patriae litigation.

That brings me to what is my final point, which is that I believe that the category of Government purchases and parens patriae litigation are special categories, have separate problems which can and should dealt with separately. I think if you are dealing with a situation where people are selling to the Government, and by the government I mean Federal, State, and local, you might say in that situation that the Government is the most efficient suer, and consequently an exception can be drawn without much difficulty for the Government as a purchaser and for State attorneys general under parens patriae. This has been discussed briefly this morning. I feel proud that I wrote it into my direct statement before it even came up. I think that is a reasonable position. I think there is a public interest in making sure that Government expenditures are compensated. It comes out of our tax money.

I think parens patriae represents a policy decision to allow extraordinary recovery under those circumstances. I think these are reasonable positions that can be dealt with separately.

In all other areas it is my opinion that the present *Illinois Brick* and *Hanover Shoe* rules, given the exceptions we have to acknowledge are there, are the fairer result than the results which would come about by a wholesale reversal of those decisions.

Thank you.

Mr. SNEEDEN. Thank you, Professor.

When Senator Thurmond opened the hearings he raised a number of questions in his opening statement. You hit some of them indirectly in your comments, but I would like to put some of those questions to you directly and see whether we can have your comments on them.

Mr. BERNSTEIN. Let me just add that I indicated in my direct statement that this is a very, very tough question. I am not here as America's super expert but I shall do the best I can.

Mr. CHUMBRIS. You are doing a good job.

Mr. BERNSTEIN. Thank you.

Mr. SNEEDEN. Should the *Illinois Brick* decision be reversed, what effect do you see on enforcement of the antitrust laws?

Mr. BERNSTEIN. It was my opinion that it would reduce private antitrust enforcement because direct purchasers know they will have to fight about whether or not they passedon. Even the States and Federal Government and local governments will have to worry about that.

If you are thinking about class actions under rule 23, a class action has to be manageable, and the common issues have to predominate over the individual issues. I think if you allow a passing-on defense completely up and down the line, you are going to make class actions much more difficult than they are today, and therefore you will lose that.

Class actions have both been blessed and criticized. In the proper sphere a class action is a worthwhile venture but in the proper sphere they are not going to be effective if you do not continue the *Hanover Shoe: Illinois Brick* rule. I think it will also hurt defendants because the exposure will be too great. Therefore, the net result, as near as I can figure it, is that you are only going to allow for the mammoth law-

suit which never can be tried and where everybody will square off on these pretrial questions of injury, manageability, and if it is ever docketed for trial it will have to be settled.

MULTIPLE RECOVERY

Mr. SNEEDEN. Some witnesses addressed the subject of multiple liability as a problem. Would you comment on that?

Mr. BERNSTEIN. Only to indicate that if there is a six times or nine times recovery of the same injury that is unacceptable. I would agree there are mechanisms for minimizing the possibilities of multiple recovery, and it may not be a great problem. I think the Supreme Court indicated in its decision that it is not acceptable in any context, and I think it is a problem. I don't know how great a problem it is but I cannot share the notion that these people are rascals and the statute of limitations is only 4 years and if they get hit two or three times trebled, whatever they were caught doing for 4 years it is probably not all that they stole, anyway, so it is no big deal. I don't accept that justification at all.

I think multiple recovery for the same injury is unacceptable in any context, including this one, and I think we should do everything we can throughout the system to minimize it.

Mr. SNEEDEN. I have nothing further.

CLASS ACTION STUDY

Mr. CHUMBRIS. During this summer we have received in our office, I am sure the majority has as well, a study by the Department of Justice Antitrust Division reviewing class actions, reviewing them to see whether there should be changes.

In view of that study by the Department of Justice would you consider it wise that since questions have been raised in the *Illinois Brick* case that we should look into this issue as well, as well as looking into the enlarging or narrowing of the class actions as they are now under the laws and rules of the court?

Mr. BERNSTEIN. I don't understand what you mean by "this issue."

Mr. CHUMBRIS. The bill pending before us.

Mr. BERNSTEIN. Yes. It was very easy for me to think of letting my feelings on this issue tend to get mixed up with my feelings about class actions and my feelings about parens patriae. I think they must be separated. However, you must always be aware that reversal of *Hanover* and *Illinois Brick* will have an effect upon class actions. As I indicated, in my judgment the effect would be to make them harder. You should be aware of that effect both in looking at class actions and looking at this legislation.

Mr. CHUMBRIS. Thank you very much.

PARENS PATRIAE

Mr. BOIES. Do I take it from what you have said that you are in agreement with Judge Joiner that it would be desirable to permit, at a minimum, State attorneys general to sue on behalf of ultimate consumers even where those ultimate consumers are indirect purchasers?

Mr. BERNSTEIN. Two things. It is permissible for Congress to make a special category there. In my own opinion I would be comfortable

with permitting those suits where I would not permit suits by any other indirect purchasers. I think there is a special public interest here. I think there is a minimum danger of abuse because having had contact with the State attorneys general I tend to believe they are responsible people and they would bring that litigation under only appropriate circumstances. I am favorably inclined toward permitting a suit under the parens patriae power on behalf of consumers even though they may be indirect purchasers.

My present judgment would be to say that they would join with direct purchasers and sue as a unit, and somehow there should be one suit brought by direct purchasers and the attorney general under parens patriae. This is not only out of fairness but also because the direct purchasers have the knowledge. If you can combine the knowledge of the direct purchasers with the litigation incentive of the attorneys general under the parens patriae power, then I think you have an effective litigating unit.

Mr. BOIES. You are not suggesting, though, that the State attorneys general should wait until the direct purchaser has brought suit?

Mr. BERNSTEIN. That is the issue I have not thought out. My reaction is that the attorneys general would be providing the leadership role and the direct purchasers would be able to join in and recover their damages there.

Mr. BOIES. Join if they wanted to?

Mr. BERNSTEIN. Yes, if they wanted to.

Then you have the other problem of having 50 State attorneys general. How will you coordinate that effort? That is one of the inherent problems of parens patriae.

Mr. BOIES. But you don't believe those problems of parens patriae would be insuperable? I take it that what you are saying is that you support having the power in the parens patriae for State attorneys general to sue on behalf of ultimate consumers.

Mr. BERNSTEIN. I have trouble because at this moment I cannot tell you whether the problems of parens patriae with or without *Illinois Brick* are insuperable. I think we have to have a lot more experience before we can come to any conclusion as to whether that is a workable bill in its present form or whether it will have some problems that will have to be revised.

Mr. BOIES. Whether what is a workable bill, the parens bill?

Mr. BERNSTEIN. The parens patriae, whether experience will show we need changes.

Mr. BOIES. Experience shows we will have to make at least one change if State attorneys general will be able to sue on behalf of the purchaser.

Mr. BERNSTEIN. Yes; even if we didn't have that, I am not sure we would not find it necessary to make other changes.

SUITS BY INDIRECT PARTIES

Mr. BOIES. You mentioned in your testimony the possibility of an indirect purchaser suing by subrogation, suing in the name of the direct purchaser, or having an assignment of right. You even mentioned a derivative suit.

Mr. BERNSTEIN. Yes.

Mr. BOIES. Aren't all of those procedures sort of indirect ways of letting indirect purchasers sue? Why should we bother with those kinds of legal formalities? Why not just let the indirect purchaser sue directly?

Mr. BERNSTEIN. There is a distinction. Let me put it in different terms meaningful to me, and if they are not meaningful to you I will apologize to you.

One way of looking at this is to say the Supreme Court has created a property right in the right to sue for damages. It has vested that property right in the direct purchaser. That to me is the *Illinois Brick* decision. OK. Now, it is like any other property right. It is assignable. It is alienable.

It can be garnished, or subrogated. However, there is only one property right to sue, and there can be only one lawsuit for any sale. That lawsuit must be brought in the name of the direct purchaser. That is different from saying that the direct purchaser can sue, the wholesaler can sue, the retailer can sue, the converter can sue, the customer can sue, which is where you run into the problem. It is the proliferation problem that the Supreme Court has eliminated.

Mr. BOIES. Let me follow up on that. You note in your statement that you were a senior antitrust attorney when Senator Danforth was attorney general in Missouri.

Mr. BERNSTEIN. Yes.

SHOULD CONSUMERS BE ALLOWED RECOVERY

Mr. BOIES. Senator Danforth testified on this bill. One of the things he said was that he felt it was very important that individual consumers injured have a right of action. I take it that you disagree with Senator Danforth.

Mr. BERNSTEIN. Absolutely not. I never would disagree with Senator Danforth.

Mr. BOIES. Senator Danforth is one of the cosponsors of this legislation so if you never disagree with Senator Danforth maybe we can shorten this discussion.

Mr. BERNSTEIN. I would see protecting ultimate consumers primarily through the parens patriae authority. The State attorney general is vested with the obligation to protect them if they are natural persons, which is really all we are talking about. If a large corporation is an ultimate consumer of a product, I think that presents a different question.

Mr. BOIES. Some were probably incorporated and might not qualify as natural persons under the law.

Mr. BERNSTEIN. That was a policy decision made not to protect them under parens patriae. I agree with that.

Mr. BOIES. It does not mean they cannot sue in their own right.

Mr. BERNSTEIN. No. (1) They might be allowed to sue in the name of the direct purchaser, or (2) cooperate with the direct purchaser, or (3) they may be allowed to recover from the fund if they can identify their injuries. In the antibiotic cases we talked about they could identify their injury. In those cases there are mechanisms for recovery.

I think what we are concerned about, what I think Congress should be concerned about, is ostensibly giving money to the ultimate con-

sumers which actually go to accountants, lawyers, and economists. I discussed this with my friends in the economics department. The thought of testifying on passon they look to a future of luxury as to what this would mean. I think you have experience with passing welfare legislation to benefit the poor and benefiting primarily the structure which supervises the poor. That is a serious problem.

I can say personally I am involved in a consumer class action on behalf of a class that is not an antitrust case but a class made up of 450,000 people. We have a trial court liability, a judgment in our favor for $9 million. We are now fighting over the question of who has to identify the class and decide how that money is to be distributed because if we have to locate and allocate that money to the 450,000 people in the class that will take the $9 million. We will have nothing to distribute to them. That is a problem you get into. That is one of those things the Supreme Court was concerned about. You don't want to have recovery that is simply lost in transaction costs where it is all dissipated in trying to find out who should get what is left.

I think the best thing we can do for consumers is just to use the mechanism of parens patriae and to allow them to sue indirectly where they have sufficient damages to cooperate with the direct purchaser.

Mr. Boies. Thank you very much.

Senator Thurmond. Have you had a chance to study the draft bill which the subcommitte staff has been working on?

Mr. Bernstein. I am not sure. I have examined a document marked "subcommittee draft" and also S. 1874, both of which I find to be much too broad. I would mention an article mentioned earlier today, an article by Burger and Bernstein. Bernstein is not related to me incidentally.

This has to do with the issue of standing, which is in the April 1977 Yale Law Journal. They get into the question of all of the kinds of claims which have been made to being injured and all the kinds of cases where they have arisen. I mentioned a few of them: licensors, patentees, et cetera.

Both of these bills are too broad and open up too many other areas which I do not think Congress intends to open up by this legislation. I have seen another one which may or may not be the one passed out this morning. This uses language about where payment was enhanced by reason of a violation of the antitrust laws.

Quite frankly, I don't know what that language means. I have thought about, for example, the *Hanover Shoe* case which is an interesting one. *Hanover Shoe* was complaining because United Shoe leased them a machine and would not sell it to them. They claim they could have bought the machine and would have had a lower cost ultimately than by having to lease it. I would say that *Hanover Shoe* was not claiming injury because their payment for purchase or lease was enhanced by reason of the violation, but I don't know.

That langauge, it seems to me, attempts to go in the right direction but I don't think it accomplishes the purpose. If you have a different bill I don't know what it is. I obviously can't comment on it.

Senator Thurmond. Does S. 1874 and the substitute solve the problems of the possibility of duplicative recovery and multiple liability?

Mr. Bernstein. I don't think it can eliminate the problem. I think

that the Supreme Court was concerned about the problem. The Supreme Court correctly said the problem can be minimized, but even as minimized it is unacceptable. I don't think that the bill itself affects that. The only way you can eliminate that is to separate out the right to sue from the right to be compensated from any judgment, and I think it is helpful to distinguish between those.

There are people who we will not allow to sue because that is inefficient, but we will allow them to participate in the results of a suit if someone else sues. That kind of an approach is the only way you can avoid multiple or duplicative occurrences. These bills do not help that if it is a problem.

Senator THURMOND. Have you had occasion to see the last proposal here?

Mr. BERNSTEIN. I would have to look at it to say yes or no.

Senator THURMOND. I wish you would look at that.

Mr. BERNSTEIN. If it is the one I have seen——

Senator THURMOND. If you wish time to prepare a response, that is all right.

Mr. BERNSTEIN. This is new. I would like an opportunity to comment on it in writing.

Senator THURMOND. That would be fine. You can comment in writing and get it to us for the record.

Mr. BERNSTEIN. I would be happy to.

[See appendix for material referred to above:]

Mr. BOIES. In your testimony you said that in situations where there was price inelasticity, those are likely to be cases where you are most likely to utilize parens patriae. Is that right?

Mr. BERNSTEIN. That is my understanding, where the demand is price inelastic then the seller has the maximum opportunity to pass on the overcharge. In those situations the direct purchaser may even mark it up if he chooses to do so. He doesn't even need it. He can just charge willy-nilly.

Mr. BOIES. Isn't it likely to be the case that products which consumers need the most, such as antibiotic drugs, are likely to be products which are going to be highly price inelastic?

The people who testified from Virginia did not have much choice about getting antibiotics for their children. They would pay the price no matter what it was.

Mr. BERNSTEIN. I think there are extreme situations. The things that consumers need most, I don't know. To me you are talking about food, clothing, and shelter. I don't consider demand for specific items of food, clothing, and shelter to be pricing inelastic. Obviously when you talk about medicine you are talking about a unique situation. As I indicated, when you talk about many of the things that the Government buys, I think this is more characteristic of Government purchasing than consumer purchasing.

S. 1874 WOULD LEAD TO FEWER LAWSUITS

Mr. BOIES. In your prepared statement you indicated there would be fewer cases if the *Illinois Brick* case were overruled?

Mr. BERNSTEIN. That is my best judgment, that there are fewer direct purchasers who would feel they could afford to sue, and if they

could not sue, the net result would be that they would not be replaced by indirect purchasers suing. That is a judgment strictly.

Mr. BOIES. So I take it you disagree with what Mr. Murphy was saying. He said he thought there would be a lot of additional suits if the *Illinois Brick* decision were overruled.

Mr. BERNSTEIN. Yes; I disagree with him. From my standpoint in talking to potential clients, they are worried about the cost of a lawsuit. Many of them are people I have encouraged to sue.

However, when they realize what kind of a layout of your own money you have to make if you are going to bring an antitrust suit against one of the top corporations in the country today, and you will have to have discovery, you will ask them to see all the files relating to this, and they will send over the files in trucks. That is standard operating procedure. There is nothing wrong with that. You will have to trace down witnesses, take their depositions all over the country. The plaintiffs go away.

If you say you are also going to get involved in discovery and litigation over who bore the cost in the chain of distribution, you have raised the cost barrier and you will exclude some of the few cases that get over today.

Mr. BOIES. Though I take it that it is clear from history of tetracycline litigation and other cases that is not an insuperable problem. Indirect purchasers many times do sue.

Mr. BERNSTEIN. Obviously people sue and people will sue whether the legislation is passed on defeated. We are merely trying to say under which circumstances are you more likely to have the suit. Where you concentrate it in a small group of people and say these are the ones who can sue and they can sue for everything, or whether you say everybody who thinks they are injured by anything a company did, take a shot at suing. Which way are you likely to have more suits?

In my judgment it would be the former.

Mr. BOIES. Thank you. I appreciate your views.

EFFECT ON SMALL BUSINESS

Senator THURMOND. Are you in a position to give an opinion as to what effect these bills would have on small business?

Mr. BERNSTEIN. It is difficult for me to respond. I have had trouble trying to answer the question as to whether this would be a proplaintiffs bill or a prodefendants bill. I don't even know that.

I think it will exclude small business from any involvement in antitrust. I don't think they can afford to sue and I don't think they can afford to be sued. It will raise the whole antitrust cost barrier to something which can involve only mammoth kinds of situations, and I think it will make it harder for small businesses to protect themselves if they are injured under the antitrust laws or to defend themselves if they are accused under the antitrust laws. I don't know.

Mr. BOIES. To followup that answer, because I find that a little confusing——

Mr. BERNSTEIN. I am not surprised.

Mr. BOIES. You say you think the barrier would be raised for small businesses. Is it not the case that prior to the *Illinois Brick* decision, when indirect purchasers and different people in the distribution

chain could all sue, as happened in tetracycline, most of the plaintiffs were relatively small concerns?

For example, in the *Tetracycline* case most of the people suing at the various levels were relatively small businesses, even if you leave aside the individuals. They were small retailers who bought directly or indirectly from jobbers or retailers?

Mr. BERNSTEIN. Here is the main difference, it seems to me. Under *Hanover Shoe* the defendant could not raise the defense of passing-on, and consequently a direct purchaser could sue knowing that he would not have to meet that issue.

If you pass this legislation, that will be raisable, and it will be raised, because a competent defense lawyer will raise it as a matter of reflex. In every case where he is sued by a customer you can always allege passing-on, and that is a new development which would follow this legislation that was not present at least since the *Hanover Shoe* decision.

Mr. BOIES. But courts in the *Tetracycline* case dealt with the question of passing-on, and indeed in the handouts that Mr. Murphy submitted for the record and which he testified about he discussed the case of *West Virginia* vs. *Pfizer and Company*, a case in the second circuit court of appeals. There the court was specifically dealing with the question of how much could the drugstores recover and how much had they passed on to other people and hence could not recover.

Drugstores were asking for $40 million and ended up, as I recollect, getting $3 million or $4 million because the court held they passed on everything else.

However, that didn't stop the individual drugstores or other small companies from suing. In fact, the list Mr. Murphy gave us has about 20 pages with 5 or 6 small companies per page.

Mr. BERNSTEIN. As I indicated, nothing will dry up litigation either way. I am not sure whether you have a list of everybody who ultimately submitted a claim.

Mr. BOIES. These are suits. This is a list of companies which sued and cases were either settled or litigated.

Mr. BERNSTEIN. All right. The issues we are talking about are not issues which are impossible for courts to deal with.

A court can hear evidence on anything, including the number of redheaded people on the moon. It can say the plaintiff said there were 16 million. The defendant said there were 48 million. The defendant's evidence appears to be correct. I give judgment.

I serve a lot of time as a labor arbitrator. I have to make decisions in that area where I don't know the answer. I have to guess. However, that is my job and I guess to the best of my ability. If you tell the court you will have to litigate passing-through, they will litigate it and tell you the retailers absorbed $16 million and passed on $4 million. However, they may well have made some heroic assumptions to get those figures. I am afraid that first of all it would be very expensive to answer those questions; second, the answer you get will be guesswork in most situations.

Mr. BOIES. I appreciate your views.

Senator THURMOND. Anything further?

[No response.]

We want to thank you for your presence here and the testimony you have given.

Mr. BERNSTEIN. I want to thank the subcommittee and the members for the kindness, especially inasmuch as you delayed lunch to hear me out fully.

[The prepared statement of Prof. Neil Bernstein follows:]

STATEMENT OF NEIL N. BERNSTEIN

My name is Neil N. Bernstein. I am professor of law at Washington University, in St. Louis, Missouri. I have been practicing and teaching law for 20 years, with special emphasis on antitrust. For 6 of those years, from 1961–67, I served on the legal staff of the American Telephone and Telegraph Company in New York. For one year, from mid-1974 to mid-1975, I served as senior antitrust attorney to the attorney general of the State of Missouri, now Senator John Danforth. In 1976, I was appointed as a consultant on antitrust to the National Association of Attorneys General. However, the opinions that I present today are strictly my own and do not in any way reflect the views of any organization with whom I have been, or am presently, affiliated.

It will be my purpose here today to discuss generally the wisdom of congressional action that would overturn the Supreme Court's decisions in *Hanover Shoe* and *Illinois Brick*. I do not intend to comment specifically on any particular bill now pending before this subcommittee. I am aware of at least four bills that have been proposed along these lines which very radically in their approaches. I would point out only that each succeeding bill appears to be lengthier and more complex than the bills which preceded it. I think that is a recognition of the difficulties that are inherent in this area.

I wish at the outset to indicate several qualifications on my testimony. First of all, I think it important for everyone to recognize that the problem involved in this hearing is one of the most complicated and confusing in the entire antitrust area. I do not hold myself out as a super expert with total mastery of all the ramifications and subleties that must be evaluated.

Second, I have not had the opportunity to do the extensive empirical research that is necessary to develop reliable data on which to base answers to the myriad of considerations. Therefore, I consider my testimony as primarily designed to raise certain issues for your consideration rather than to present a compendium of definitive answers. However, it is important to emphasize the areas in which a great deal of empirical research should be done before any legislative proposal is enacted.

Third, I am not taking the position that *Illinois Brick* is a sound decision that should not be modified in any way. On the contrary, I have serious problems with the Court's holding primarily because of the overbreadth of the language used by the majority. To my way of thinking, the Court approached a delicate surgical problem with a fire hatchet. To some extent, this was a reflection of the limitations inherent in the judicial process. Courts can only resolve questions before them and declare one side or the other to be the victor. Congress, on the other hand, has broad investigative tools and can make distinctions and qualifications that are beyond the functions of the courts. I am primarily concerned today because the legislative intent that has manifested itself thus far seems to involve the use of the same fire hatchet approach, the only difference being that the areas of destruction has been shifted 180 degrees. This, it seems to me, is most unfortunate.

In its *Illinois Brick* decision, the Supreme Court barred suits under the antitrust laws by indirect purchasers in most situations in order to bring about the following results: 1. To eliminate the risk of duplicative recovery; 2. To reduce evidentiary complexities and uncertainties; 3. To avoid undermining the effectiveness of treble damage actions; 4. To encourage private actions by the likeliest plaintiffs, and 5. To minimize the portion of any recovery that must be expended for legal and administrative costs rather than utilized to more fully compensate injured victims.

The critics of *Illinois Brick* have attacked the decision primarily on three grounds: First, the critics contend that the Supreme Court's decision bars recovery by ultimate consumers who bear the brunt of the injury in many instances; instead, the uninjured middlemen collects a windfall. Secondly, the critics con-

tend that the Supreme Court's decision diminishes private enforcement because the middlemen who are direct purchasers might not sue if their injury is not great and they prefer to avoid alienating their suppliers. And third, the critics emphasize the serious impact of the decision on the efforts of governmental entities to sue to recover their damages or to utilize the newly enacted parens patriae authority.

It is my conclusion that overruling *Hanover Shoe* and *Illinois Brick* would be an overreaction to the negative aspects of the *Illinois Brick* decision and would cause more harm than good in antitrust enforcement. I agree with the proposition that elimination of the *Illinois Brick* rule without a corresponding adjustment of *Hanover Shoe* would lead to immorally punitive results. But I am strongly opposed to any decision to abolish the *Hanover Shoe* rule, either in all antitrust litigation or in price fixing cases. I believe that too much attention has been focused on the very limited number of cases which involved industrywide price fixing conspiracies where consumer demand for the product involved is relatively inelastic. However, it is my belief that the bulk of the private antitrust cases, the grist for the antitrust mill if you will, do not involve such limited circumstances. In most cases, I believe, the direct purchasers are the logical and proper parties to bring the suit. Usually they are the only parties who have sufficient knowledge of the underlying facts. Moreover, they have probably been forced to bear the major portion of any injury themselves, and were able to pass only a small portion of the injury on to their customers.

I have, over the years, advised a number of companies that were in this precise situation. They felt that they had been injured by anticompetitive practices of their suppliers and they were interested in bringing antitrust cases to recover their damages. In my experience, such parties are primarily concerned about the amount of money it will take to finance their litigation. They want to know how much they must expend of their own monies at the outset. The fact that at some unknown future date they may find a rainbow with a pot of gold is a lesser factor in their consideration. The decision to sue or not to sue usually is based upon the initial outlay that must be made from their present assets.

There is no doubt in my mind that overruling *Hanover* and *Illinois* would materially increase the cost that presently discourages much litigation. A conscientious lawyer would find it necessary to advise his clients that in almost every situation involving a purchase by a party other than an ultimate consumer, the defendant would be expected to raise a defense of passing on. The raising of this defense would materially lengthen the discovery time, and expense, and also the overall litigation costs. These increases would increase the number of small and middle-sized businesses who find it economically unfeasible to sue even though they have been injured by an antitrust violation.

Revival of the passing on issue would also diminish the feasibility of class action litigation by injured businesses. There has been much criticism of globular class action suits as unwieldy, unmanageable, and a form of legalized blackmail. Nevertheless, in its proper sphere, the class action represents a useful vehicle for an injured plaintiff to share the costs of litigation with other similarly situated parties. However, if *Hanover Shoe* is overruled, and the passing defense is made freely available, individual questions of ultimate impact would predominate over the common issues, making it almost impossible for a group of injured purchasers to successfully sue as a class.

I would point out also that the revival of the passing on defense could create a serious problem for governmental plaintiffs as well. Many of the purchases by governmental entities are for facilities that are ultimately financed by user charges, such as waterworks, municipal utilities, hospitals, transportation facilities and the like [*Illinois Brick* was such a case.] Passing on would be a viable defense in these situations. Secondly, an increasing portion of the expenditures of state and municipal governments are reimbursed by payment from the Federal Government. Passing on could be raised in those situations as well. There are also instances in which Government facilities are financed by the issuance of bonds or special assessments. Might not passing on be raised there as well?

The overruling of *Hanover Shoe* and *Illinois Brick* would not be a one-way street redounding solely to disadvantage of potential plaintiffs. Potential defendants could find themselves loathe to litigate meritorious defenses because of the possible exposure they could face if they were unsuccessful. Ultimately, private antitrust enforcement would be limited to mammoth cases entailing a

lengthy series of pre-trial skirmishes which leave the pretrial loser with no alternative but to surrender when the trial becomes imminent. This, it seems to me, is not what the laws and the judicial system were designed to bring about.

Second, there is not doubt in my mind that the Supreme Court is correct in concluding that an overruling of *Hanover Shoe* and *Illinois Brick* would bring an additional substantial layer of complexity into already overly complex antitrust litigation, and would require a material increase in the resources that must be expended by all parties and the judicial system before any one piece of litigation can be concluded. We must recognize that the proposed legislation would allow standing not only to the direct purchaser and the ultimate consumer, but also to all intermediate parties involved in the distribution of the goods or services involved. The presence of these intermediate parties would materially increase cost and complexity, even though there is no reason to believe that they have borne more than a trivial portion of the injury occasioned by any antitrust violation. It is true that all of this complexity is controllable, but it is controllable only at a cost. I do not believe that the benefits which would flow from a revival of the passing on issue would be sufficient to justify these costs.

Third, it is my opinion that the present movement to overturn *Hanover* and *Illinois Brick* seriously underestimates the ingenuity of the legal profession to develop new strategies that will minimize and perhaps eliminate for all practical purposes some of the objectionable consequences of those decisions. It is important to remember that the cost plus exception first mentioned in *Hanover Shoe* was explicitly recognized in *Illinois Brick* along with a second exception for situations where the direct purchaser is owned or controlled by its customer. These exceptions provide fertile opportunities for lawyers to devise new arguments to permit suits by indirect purchasers. Such arguments had been utilized successfully in a number of lower court cases prior to the *Illinois Brick* decision. Moreover, the *Illinois Brick* decision is nothing more than a holding that any lawsuit for damages resulting from an antitrust violation must be brought in the name of the direct purchaser from the violator. This holding does not preclude the resort to a host of well-recognized legal devices to enable indirect purchasers to recoup their damages.

For example, if the direct purchaser is unwilling to sue, indirect purchasers may compel a lawsuit in his name by a remedy akin to the stockholders' derivative suit or some variation on the doctrine of subrogation. In addition, if the direct purchaser does elect to sue and is successful, indirect purchasers may be able to gain a portion of the recovery under well-accepted constructive trust theories. These are but a few of the devices that are available and are as of this moment largely unexplored. There is no reason to believe that the bar will not show the same innovation and imagination in this area that it has shown in many other areas when faced with a seeming roadblock from the courts or Congress. In addition, the Court's holding was limited to actions for damages and did not construe section 16 of the Clayton Act, which governs suits for injunctive relief. Section 16 presents yet another avenue of relief that may still be open to injured consumers. Finally, there is language in the majority's opinion in *Illinois Brick* which can be read to support the proposition that parens patriae lawsuits are in a separate category amenable to different treatment than normal civil litigation under section 4. This possibility merits further exploration.

This brings me to my final comment, which is to raise the question whether the problems of local, State and Federal Governments are not special ones that should be dealt with separately. Governmental purchases are more likely than private to involve demands which are price inelastic—roads, prisons and schools are built when they are needed, not when the price is right. Actions by governmental entities are also entitled to special consideration because such purchases are financed largely by taxes that are borne by the entire society. Moreover, governmental officials, at least in theory, can be expected to exercise a higher degree of responsibility and to avoid litigation that is without merit. Finally, Congress by enacting the parens patriae legislation has placed an important new rule on the state attorneys general to protect the interests of consumers within their states.

I would therefore consider it appropriate for Congress to react directly and specifically to the concerns that have been expressed about the effects of *Illinois Brick* on litigation in the name of the Government. Legislation could be drafted to permit governmental entities as ultimate consumers to recover their damages

out of any recovery and to allow the state attorneys general to fully utilize their parens patriae authority on behalf of natural indirect purchasers. This result could be effected without eliminating *Hanover Shoe* and *Illinois Brick* as the prevailing rule for all private litigation between business entities and between all other parties suing under the antitrust laws. Such an approach, it seems to me, is all that is needed to strike a fair and reasonable balance between the considerations that underlie the *Hanover Shoe* and *Illinois Brick* decisions and the considerations which have stirred their critics.

For these reasons, I am opposed to any wholesale reversal of the Supreme Court's *Hanover Shoe* and *Illinois Brick* decisions. I feel both the majority of the Court and the Court's critics share an identical concern—to enhance the effectiveness of private antitrust suits to the maximum extent possible. I feel that in the majority of civil antitrust cases, especially those strictly between private parties, the Supreme Court's decisions will lead to the most desirable results. Many of the problems in those cases are amenable to solution through exceptions and alternatives that these decisions have not precluded. In the areas where the *Hanover* and *Illinois* rules may create undue hardships, which are primarily the areas of governmental purchases and parens patriae authority, I feel that a limited and qualified exception can be made without the great harm that would result from a total overturning of these decisions.

I thank you for your time and attention.

Senator THURMOND. I believe those are all the witnesses we have this morning.

The subcommittee now stands adjourned.

[Whereupon, at 12:55 a.m., the subcommittee adjourned.]

APPENDIX

95TH CONGRESS
1ST SESSION

S. 1874

IN THE SENATE OF THE UNITED STATES

JULY 15 (legislative day, MAY 18), 1977

Mr. KENNEDY (for himself, Mr. DANFORTH, and Mr. MORGAN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To restore effective enforcement of the antitrust laws.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That section 4 of the Clayton Act (15 U.S.C. 15) is
4 amended by inserting "in fact, directly or indirectly," im-
5 mediately after "injured".
6 SEC. 2. Section 4A of the Clayton Act (15 U.S.C. 15a)
7 is amended by inserting "in fact, directly or indirectly,"
8 immediately after "injured".
9 SEC. 3. Section 4C(a)(1) of the Clayton Act (15
10 U.S.C. 15c(a)(1)) is amended by inserting "in fact" in

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1 the first sentence immediately after "injury", and by insert-
2 ing ", directly or indirectly," immediately after "sustained".
3 SEC. 4. The amendments made by sections 1, 2, and 3
4 of this Act shall apply to any action commenced under sec-
5 tions 4, 4A, or 4C(a)(1) of the Clayton Act (15 U.S.C.
6 15, 15a, or 15c(a)(1)), which was pending on June 9,
7 1977, or filed thereafter.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ILLINOIS BRICK CO. ET AL. *v.* ILLINOIS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 76-404. Argued March 23, 1977—Decided June 9, 1977

Respondents, the State of Illinois and 700 local governmental entities, brought this antitrust treble-damages action under § 4 of the Clayton Act alleging that petitioners, concrete block manufacturers (which sell to masonry contractors, which in turn sell to general contractors, from which respondents purchase the blocks in the form of masonry structures) had engaged in a price-fixing conspiracy in violation of § 1 of the Sherman Act. Petitioners, relying on *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, moved for partial summary judgment against all plaintiffs that were indirect purchasers of block from petitioners, contending that only direct purchasers could sue for the alleged overcharge. The District Court granted the motion, but the Court of Appeals reversed, holding that indirect purchasers such as respondents could recover treble damages for an illegal overcharge if they could prove that the overcharge was passed on to them through the intermediate distribution channels. *Hanover Shoe* held that generally the illegally overcharged direct purchaser suing for treble damages, and not others in the chain of manufacture or distribution, is the party "injured in his business or property" within the meaning of § 4. *Held:*

1. If a pass-on theory may not be used defensively by an antitrust violator (defendant) against a direct purchaser (plaintiff) that theory may not be used offensively by an indirect purchaser (plaintiff) against an alleged violator (defendant). Therefore, unless *Hanover Shoe* is to be overruled or limited, it bars respondents' pass-on theory. Pp. 6–13.

(a) Allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants, since even though an indirect purchaser had already recovered for all or part of an overcharge passed on to him, the direct purchaser would still automatically recover the full amount of the overcharge that the indirect

purchaser had shown to be passed on, and, similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount. Overlapping recoveries would certainly result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatsoever. Pp. 7–8.

(b) The Court's perception in *Hanover Shoe* of the uncertainties and difficulties in analyzing price and output decisions "in the real economic world rather than an economist's hypothetical model," applies with equal force to the assertion of pass-on theories by plaintiffs as it does to such assertion by defendants. Pp. 8–9.

(c) Because *Hanover Shoe* would bar petitioners from using respondents' pass-on theory as a defense to a treble-damages suit by the direct purchasers (the masonry contractors), *Hanover Shoe* must be overruled (or narrowly limited), or it must be applied to bar respondents' attempt to use this pass-on theory offensively. Pp. 12–13.

2. *Hanover Shoe* was correctly decided and its construction of § 4 is adhered to. Pp. 13–22.

(a) Considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation. P. 13.

(b) Whole new dimensions of complexity would be added to treble-damages suits, undermining their effectiveness, if the use of pass-on theories under § 4 were allowed. Even under the optimistic assumption that joinder of potential plaintiffs would deal satisfactorily with problems of multiple litigation and liability, § 4 actions would be transformed into massive multiparty litigations involving many distribution levels and including large classes of ultimate consumers remote from the defendant. The Court's concern in *Hanover Shoe* with the problems of "massive evidence and complicated theories" involved in attempting to establish a pass-on defense against a direct purchaser applies *a fortiori* to the attempt to trace the effect of the overcharge through each step in the distribution chain from the direct purchasers to the ultimate consumer. Pp. 13–19.

(c) Attempts to carve out exceptions to *Hanover Shoe* for particular types of markets would entail the very problems that *Hanover Shoe* sought to avoid. Pp. 19–21.

(d) The legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under § 4, *Hawaii* v. *Standard Oil Co. of California*, 405 U. S. 251, 262, is better served by holding direct purchasers to be injured to the full extent of the over-

charge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it. Pp. 21–22.

536 F. 2d 1163, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined. BLACKMUN, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 76-404

Illinois Brick Company et al., Petitioners, *v.* State of Illinois et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 9, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), involved an antitrust treble-damage action brought under § 4 of the Clayton Act [1] against a manufacturer of shoe machinery by one of its customers, a manufacturer of shoes. In defense, the shoe machinery manufacturer sought to show that the plaintiff had not been injured in its business as required by § 4 because it had passed on the claimed illegal overcharge to those who bought shoes from it. Under the defendant's theory, the illegal overcharge was absorbed by the plaintiff's customers—indirect purchasers of the defendant's shoe machinery—who were the persons actually injured by the antitrust violation.

In *Hanover Shoe* this Court rejected as a matter of law this defense that indirect rather than direct purchasers were the parties injured by the antitrust violation. The Court held

[1] Section 4 of the Clayton Act, 15 U. S. C. § 15, provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

that, except in certain limited circumstances,[2] a direct purchaser suing for treble damages under § 4 of the Clayton Act is injured within the meaning of § 4 by the full amount of the overcharge paid by it and that the antitrust defendant is not permitted to introduce evidence that indirect purchasers were in fact injured by the illegal overcharge. 392 U. S., at 494. The first reason for the Court's rejection of this offer of proof was an unwillingness to complicate treble-damage actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge. *Id.*, at 492–493.[3] A second reason for

[2] The Court cited, as an example of when a pass-on defense might be permitted, the situation where "an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged. . . ." 392 U. S., at 494. See *infra*, at 12–13.

[3] The Court explained the economic uncertainties and complexities involved in proving pass-on as follows:

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

barring the pass-on defense was the Court's concern that unless direct purchasers were allowed to sue for the portion of the overcharge arguably passed on to indirect purchasers, antitrust violators "would retain the fruits of their illegality" because indirect purchasers "would have only a tiny stake in the lawsuit" and hence little incentive to sue. *Id.*, at 494.

In this case we once again confront the question whether the overcharged direct purchaser should be deemed for purposes of § 4 to have suffered the full injury from the overcharge; but the issue is presented in the context of a suit in which the plaintiff, an indirect purchaser, seeks to show its injury by establishing pass-on by the direct purchaser and in which the antitrust defendants rely on *Hanover Shoe*'s rejection of the pass-on theory. Having decided that in general a pass-on theory may not be used defensively by an antitrust violator against a direct purchaser plaintiff, we must now decide whether that theory may be used offensively by an indirect purchaser plaintiff against an alleged violator.

I

Petitioners manufacture and distribute concrete block in the Greater Chicago area. They sell the blocks primarily to masonry contractors, who submit bids to general contractors for the masonry portions of construction projects. The general contractors in turn submit bids for these projects to customers such as the respondents in this case, the State of Illinois and 700 local governmental entities in the Greater Chicago area, including counties, municipalities, housing authorities, and school districts. See 67 F. R. D. 461, 463 (ND Ill. 1975); App. 16–48. Respondents are thus indirect purchasers of concrete block, which passes through two separate levels in the chain of distribution before reaching respondents. The block is purchased directly from petitioners by masonry

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complicated proceedings involving massive evidence and complicated theories." (Footnote omitted.)

contractors and used by them to build masonry structures; those structures are incorporated into entire buildings by general contractors and sold to respondents.

Respondents brought this antitrust treble-damage action under § 4 of the Clayton Act, alleging that petitioners had engaged in a combination and conspiracy to fix the prices of concrete block in violation of § 1 of the Sherman Act.[4] The complaint alleged that the amounts paid by respondents for concrete block were more than $3 million higher by reason of this price-fixing conspiracy. The only way in which the antitrust violation alleged could have injured respondents is if all or part of the overcharge was passed on by the masonry and general contractors to respondents, rather than being absorbed at the first two levels of distribution. See 536 F. 2d 1163, 1164 (1976).[5]

Petitioner manufacturers moved for partial summary judgment against all plaintiffs that were indirect purchasers of concrete block from petitioners, contending that as a matter of law only direct purchasers could sue for the alleged overcharge.[6] The District Court granted petitioners' motion, but the Court of Appeals reversed, holding that indirect purchasers such as respondents in this case can recover treble damages

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[4] Section 1 of the Sherman Act, 15 U. S. C. § 1, provides in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

[5] Private treble-damage actions brought by masonry contractors, general contractors, and private builders were settled, without prejudice to this suit. 536 F. 2d, at 1164.

[6] The responses to petitioners' interrogatories indicated that only four of the plaintiffs purchased concrete block directly from one of the petitioners. 67 F. R. D., at 463. Only 7% of the 700 public entities named as plaintiffs were apparently able to state the cost of the concrete block used in their building projects. Brief for Petitioners 5 n. **. In the only example cited to us by the parties, the cost of the concrete block was reported as less than one-half of one percent of the total cost of the project. *Id.,* at 21 n. *.

for an illegal overcharge if they can prove that the overcharge was passed on to them through intervening links in the distribution chain.[7]

We granted certiorari, — U. S. — (1977), to resolve a conflict among the courts of appeals [8] on the question whether the offensive use of pass-on authorized by the decision below is consistent with *Hanover Shoe*'s restrictions on the defensive use of pass-on. We hold that it is not, and we reverse. We reach this result in two steps. First, we conclude that whatever rule is to be adopted regarding pass-on in antitrust damage actions, it must apply equally to plaintiffs and defendants. Because *Hanover Shoe* would bar petitioners from using re-

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[7] The District Court based its grant of summary judgment against the indirect purchaser plaintiffs not on the ground that this Court's construction of § 4 in *Hanover Shoe* barred their attempt to show that the masonry and general contractors passed on the overcharge to them, but rather on the ground that these indirect purchasers lacked standing to sue for an overcharge on one product—concrete block—that was incorporated by the masonry and general contractors into an entirely new and different product—a building. 67 F. R. D., at 467–468. Although the Court of Appeals held that these indirect purchasers did have standing to sue for damages under § 4, it agreed with the District Court's reading of *Hanover Shoe*. 536 F. 2d, at 1164–1167. Because we find *Hanover Shoe* dispositive here, we do not address the standing issue, except to note, as did the Court of Appeals below, 536 F. 2d, at 1166, that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4. See Handler and Blechman, Antitrust and the Consumer Interest: The Fallacy of *Parens Patriae* and A Suggested New Approach, 85 Yale L. J. 626, 644–645 (1976).

[8] Compare *Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F. 2d 1187 (CA3 1971), aff'g *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 50 F. R. D. 13 (ED Pa. 1970), with *In re Western Liquid Asphalt Cases*, 487 F. 2d 191 (CA9 1973), cert. denied, 415 U. S. 919 (1974); *West Virginia* v. *Chas. Pfizer & Co., Inc.*, 440 F. 2d 1079 (CA2), cert. denied, 404 U. S. 871 (1971), and the decision below, 536 F. 2d 1163.

spondents' pass-on theory as a defense to a treble-damage suit by the direct purchasers (the masonry contractors),[9] we are faced with the choice of overruling (or narrowly limiting) *Hanover Shoe* or of applying it to bar respondents' attempt to use this pass-on theory offensively. Second, we decline to abandon the construction given § 4 in *Hanover Shoe*—that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party "injured in his business or property" within the meaning of the section—in the absence of a convincing demonstration that the Court was wrong in *Hanover Shoe* to think that the effectiveness of the antitrust treble-damage action would be substantially reduced by adopting a rule that any party in the chain may sue to recover the fraction of the overcharge allegedly absorbed by it.

II

The parties in this case agree that however § 4 is construed with respect to the pass-on issue, the rule should apply equally to plaintiffs and defendants—that an indirect purchaser should not be allowed to use a pass-on theory to recover damages from a defendant unless the defendant would be allowed to use a pass-on defense in a suit by a direct purchaser. Respondents, in arguing that they should be allowed to recover by showing pass-on in this case, have conceded that petitioners should be allowed to assert a pass-on defense against direct purchasers of concrete block, Tr. of Oral Arg. 33, 48; they ask this Court to limit *Hanover Shoe*'s bar on pass-on defenses to its "particular factual context" of overcharges for capital goods used to manufacture new products. *Id.*, at 41; see *id.*, at 36, 47–48.

Before turning to this request to limit *Hanover Shoe,* we consider the substantially contrary position, adopted by our dissenting Brethren, by the United States as *amicus curiae,* and by lower courts that have allowed offensive use of pass-on,

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[9] See *infra*, at 11–13.

that the unavailability of a pass-on theory to a defendant should not necessarily preclude its use by plaintiffs seeking treble damages against that defendant.[10] Under this view, *Hanover Shoe's* rejection of pass-on would continue to apply to defendants unless direct and indirect purchasers were both suing the defendant in the same action; but it would not bar indirect purchasers from attempting to show that the overcharge had been passed on to them. We reject this position for two reasons.

First, allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants. Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed-on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount. The risk of duplicative recoveries created by unequal application of the *Hanover Shoe* rule is much more substantial than in the more usual situation where the defendant is sued in two different lawsuits by plaintiffs asserting conflicting claims to the same fund. A one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications—and therefore of unwarranted multiple liability for the defendant—by *presuming* that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff; over-

[10] *Post*, at 6–7 (BRENNAN, J., dissenting); *post*, at —— (BLACKMUN, J., dissenting); Brief for United States as *amicus curiae* 4–6, 15–21; Tr. of Oral Arg. 50–54, 57–60; *West Virginia* v. *Chas. Pfizer & Co., Inc.*, 440 F. 2d 1079, 1086–1088 (CA2), cert. denied, 404 U. S. 871 (1971); *Boshes* v. *General Motors Corp.*, 59 F. R. D. 589, 592–598 (ND Ill. 1973); *In re Master Key Antitrust Litigation*, 1973-2 CCH Trade Cases ¶ 74,680, at 94,978 (Conn.); *Carnivale Bag Co., Inc.* v. *Slide-Rite Mfg. Corp.*, 395 F. Supp. 287, 290–291 (SDNY 1975). See also Brief for State of California as *amicus curiae* 6–12.

lapping recoveries are certain to result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatsoever. As in *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 264 (1972), we are unwilling to "open the door to duplicative recoveries" under § 4.[11]

Second, the reasoning of *Hanover Shoe* cannot justify unequal treatment of plaintiffs and defendants with respect to the permissibility of pass-on arguments. The principal basis

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[11] In recognition of the need to avoid duplicative recoveries, courts adopting the view that pass-on theories should not be equally available to plaintiffs and defendants have agreed that defendants should be allowed to assert a pass-on defense against a direct purchaser if an indirect purchaser is also attempting to recover on a pass-on theory *in the same lawsuit. E. g., In re Western Asphalt Cases,* 487 F. 2d 191, 200–201 (CA9 1973), cert. denied, 415 U. S. 919 (1974); *West Virginia* v. *Chas. Pfizer & Co., Inc., supra,* at 1088. See also Comment, Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On, 123 U. Pa. L. Rev. 976, 995–998 (1975); Comment, Mangano and Ultimate-Consumer Standing: The Misuse of the *Hanover* Doctrine, 72 Colum. L. Rev. 394, 410 (1972); Brief for United States as *amicus curiae* 25. Various procedural devices, such as the Multidistrict Litigation Act, 28 U. S. C. § 1407, and statutory interpleader, 28 U. S. C. § 1335, are relied upon to bring indirect and direct purchasers together in one action in order to apportion damages among them and thereby reduce the risk of duplicative recovery. These procedural devices cannot protect against multiple liability where the direct purchasers have already recovered by obtaining a judgment or by settling, as is more likely (and as occurred here, see *supra,* n. 5); acknowledging that the risk of multiple recoveries is inevitably increased by allowing offensive but not defensive use of pass-on, *e. g.,* Comment, 123 U. Pa. L. Rev., *supra,* at 994, proponents of this approach ultimately fall back on the argument that it is better for the defendant to pay six-fold or more damages than for an injured party to go uncompensated. *E. g.,* Comment, 72 Colum. L. Rev., *supra,* at 411; Tr. of Oral Arg. 58 ("a little slopover on the shoulders of the wrongdoers . . . is acceptable"). We do not find this risk acceptable.

Moreover, even if ways could be found to bring all potential plaintiffs together in one huge action, the complexity thereby introduced into treble-damage proceedings argues strongly for retaining the *Hanover Shoe* rule. See Part III, *infra.*

for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions "in the real economic world rather than an economists' hypothetical model," 392 U. S., at 493, and on the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom.[12] This perception that the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damage proceedings applies with no less force to the assertion of pass-on theories by plaintiffs than to the assertion by defendants. However "long and complicated" the proceedings would be when defendants sought to prove pass-on, *ibid.*, they would be equally so when the same evidence was introduced by plaintiffs. Indeed, the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution. The demonstration of how much of the overcharge was passed on by

[12] That this rationale was more important in the decision to bar the pass-on defense than the second reason—the concern that if pass-on defenses were permitted indirect purchasers would lack the incentive to sue and antitrust violators would retain their ill-gotten gains, see *supra*, at 3, is shown by the fact that the Court recognized an exception for pre-existing cost-plus contracts, which "mak[e] it *easy to prove* that [the direct purchaser] has not been damaged." 392 U. S., at 494. (Emphasis added.) The amount of the stake that the customers of the direct purchaser have in a lawsuit against the overcharger is not likely to depend on whether they buy under a cost-plus contract or in a competitive market, but the Court allowed a pass-on defense in the former situation because the pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser. See Note, The Effect of Hanover Shoe on the Offensive Use of the Passing-On Doctrine, 46 So. Cal. L. Rev. 98, 108 (1972).

the first purchaser must be repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff.[13]

It is argued, however, that *Hanover Shoe* rests on a policy of ensuring that a treble-damage plaintiff is available to deprive antitrust violators of "the fruits of their illegality," *id.*, at 494, a policy that would be furthered by allowing plaintiffs but not defendants to use pass-on theories. See, *e. g.*, *In re Western Liquid Asphalt Cases,* 487 F. 2d 191, 197 (CA9 1973), cert. denied, 415 U. S. 919 (1974); Brief for United States as *amicus curiae,* 4–6, 12–13, 17–19.[14] We do

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[13] Offensive use of pass-on by the last purchaser in the distribution chain is simpler in one respect than defensive use of pass-on against a direct purchaser that sells a product to other customers. In the latter case, even if the defendant shows that as a result of the overcharge the direct purchaser increased its price by the full amount of the overcharge, the direct purchaser may still claim injury from a reduction in the volume of its sales caused by its higher prices. This additional element of injury from reduced volume is not present in the suit by the final purchaser of the overcharged goods, where the issue regarding injury will be whether the defendant's overcharge caused the plaintiff to pay a higher price for whatever it purchased. But the final purchaser still will have to trace the overcharge through each step in the distribution chain. In our view, the difficulty of reconstructing the pricing decisions of intermediate purchasers at each step in the chain beyond the direct purchaser generally will outweigh any gain in simplicity from not having to litigate the effects of the passed-on overcharge on the direct purchaser's volume.

[14] We are urged to defer to evidence in the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94–435, 90 Stat. 1383, 1394–1396 (1976), that Congress understood *Hanover Shoe* as applying only to defendants. *Post,* at 9–11 (BRENNAN, J., dissenting); Brief for 49 States as *amici curiae* 14–15, n. 6; Brief for United States as *amicus curiae* 14–15, and n. 12. The House Report (apparently viewing the issue as one of standing, cf. *supra,* n. 7) endorsed the Ninth Circuit's view of "the pro-enforcement thrust of *Hanover Shoe*" in *In re Western Liquid Asphalt Cases, supra,* and criticized lower court decisions barring pass-on arguments by plaintiffs. H. R. Rep. No. 94–499, 94th Cong., 1st Sess., 6 n. 4 (1975). In addition, one of the sponsors of this legislation, Representative Rodino, clearly assumed that the issue of

not read the Court's concern in *Hanover Shoe* for the effectiveness of the treble-damage remedy as countenancing unequal application of the Court's pass-on rule. Rather, we

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offensive use of pass-on under § 4 would be resolved favorably to plaintiffs by this Court. See 122 Cong. Rec. H10295 (daily ed., Sept. 16, 1976).

Congress made clear, however, that this legislation did not alter the definition of which overcharged persons were injured within the meaning of § 4. It simply created a new procedural device—*parens patriae* actions by States on behalf of their citizens—to enforce existing rights of recovery under § 4. The House Report quoted above stated that the *parens patriae* provision "creates no substantive liability"; the relevant language of the newly enacted § 4C (a) of the Clayton Act tracks that of existing § 4, showing that it was intended only as "an alternative means . . . for the vindication of existing substantive claims." H. R. Rep. No. 94-499, *supra*, at 9. "The establishment of an alternative remedy does not increase any defendant's liability." *Ibid.* Rep. Rodino himself acknowledged in the remarks cited above that this legislation did not create a right of recovery for consumers where one did not already exist.

We thus cannot agree with the dissenters that the legislative history of the 1976 Antitrust Improvements Act is dispositive as to the interpretation of § 4 of the Clayton Act, enacted in 1914, or the predecessor section of the Sherman Act, enacted in 1890. *Post*, at —. The cases cited by MR. JUSTICE BRENNAN, *post*, at 17-18, n. 24, to support his reliance on this legislation all involved specific statutory language that was thought to clarify the meaning of an earlier statute. *E. g., Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380-381 (1969) (language in 1959 amendment to § 315 of the Communications Act approved fairness doctrine adopted by FCC under the "public interest" standard of the original Act). Here, by contrast, Congress borrowed the language of § 4 in adding the *parens patriae* section. The views expressed by particular legislators as to the meaning of that language in § 4 "cannot serve to change the legislative intent of Congress 'since the statements were [made] after the passage of the [Clayton] Act.'" *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 132 (1974), quoting *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612, 639 n. 34 (1967).

While we do not lightly disagree with the reading of *Hanover Shoe* urged by these legislators, we think the construction of § 4 adopted in that decision cannot be applied for the exclusive benefit of plaintiffs. Should Congress disagree with this result, it may, of course, amend the section to change it. But it has not done so in the recent *parens patriae* legislation.

understand *Hanover Shoe* as resting on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.

We thus decline to construe § 4 to permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers. In this case, respondents seek to demonstrate that masonry contractors, who incorporated petitioners' blocks into walls and other masonry structures, passed on the alleged overcharge on the blocks to general contractors, who incorporated the masonry structures into entire buildings, and that the general contractors in turn passed on the overcharge to respondents in the bids submitted for those buildings. We think it clear that under a fair reading of *Hanover Shoe* petitioners would be barred from asserting this theory in a suit by the masonry contractors.

In *Hanover Shoe* this Court did not endorse the broad exception that had been recognized in that case by the courts below—permitting the pass-on defense against middlemen who did not alter the goods they purchased before reselling them.[15] The masonry contractors here could not be included under this exception in any event, because they transform the concrete blocks purchased from defendants into the ma-

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[15] In a separate trial pursuant to Fed. Rule Civ. Proc. 42 (b), the District Court held that the defendant shoe machinery manufacturer was not permitted to assert a pass-on defense against its customer. 185 F. Supp. 826 (MD Pa.), aff'd, 281 F. 2d 481 (CA3), cert. denied, 364 U. S. 901 (1960). The District Court indicated that pass-on defenses were barred against "consumers" who use the defendant's product to make their own but not against "middlemen" who simply resell the defendant's product. *Id.*, at 830-831. Both on interlocutory appeal and after trial on the merits, the Court of Appeals affirmed on the basis of the District Court's reasoning. See 392 U. S., at 488 n. 6.

sonry portions of buildings. But this Court in *Hanover Shoe* indicated the narrow scope it intended for any exception to its rule barring pass-on defenses by citing, as the only example of a situation where the defense might be permitted, a pre-existing cost-plus contract. In such a situation, the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case. The competitive bidding process by which the concrete block involved in this case was incorporated into masonry structures and then into entire buildings can hardly be said to circumvent complex market interactions as would a cost-plus contract.[16]

We are left, then, with two alternatives: either we must overrule *Hanover Shoe* (or at least narrowly confine it to its facts), or we must preclude respondents from seeking to recover on their pass-on theory. We choose the latter course.

III

In considering whether to cut back or abandon the *Hanover Shoe* rule, we must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation. See *Edelman* v. *Jordan,* 415 U. S. 651, 671 (1974); *Burnet* v. *Coronado Oil & Gas Co.,* 295 U. S. 393, 406–408 (1932) (Brandeis, J., dissenting). This presumption of adherence to our prior decisions construing legislative enact-

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

ments would support our reaffirmance of the *Hanover Shoe* construction of § 4, joined by eight Justices without dissent only a few years ago,[17] even if the Court were persuaded that the use of pass-on theories by plaintiffs and defendants in treble-damage actions is more consistent with the policies underlying the treble-damage action than is the *Hanover Shoe* rule. But we are not so persuaded.

Permitting the use of pass-on theories under § 4 essentially would transform treble-damage actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness.

As we have indicated, potential plaintiffs at each level in the distribution chain are in a position to assert conflicting claims to a common fund—the amount of the alleged overcharge—by contending that the entire overcharge was absorbed at that particular level in the chain.[18] A treble-damage action brought by one of these potential plaintiffs (or one class of potential plaintiffs) to recover the overcharge implicates all three of the interests that have traditionally been thought to support compulsory joinder of absent and potentially adverse claimants: the interest of the defendant in

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[17] The sole dissenting Justice in *Hanover Shoe* did not reach the pass-on question. 392 U. S., at 513.

[18] In this Part, we assume that use of pass-on will be permitted symetrically, if at all. This assumption of course reduces the substantial risk of multiple liability for defendants that is posed by allowing indirect purchasers to recover for the overcharge passed on to them while at the same time allowing direct purchasers automatically to collect the entire overcharge. See *supra*, at 7–8. But the possibility of inconsistent judgments obtained by conflicting claimants remains nonetheless. Even this residual possibility justifies bringing potential and actual claimants together in one action if possible.

avoiding multiple liability for the fund; the interest of the absent potential plaintiffs in protecting their right to recover for the portion of the fund allocable to them; and the social interest in the efficient administration of justice and the avoidance of multiple litigation. Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 330 (1957). See *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U. S. 102, 110–111 (1968); 7 Wright & Miller, Federal Practice and Procedure, Civil: § 1602 (1972).

Opponents of the *Hanover Shoe* rule have recognized this need for compulsory joinder in suggesting that the defendant could interplead potential claimants under 28 U. S. C. § 1335.[19] But if the defendant, for any of a variety of reasons,[20] does not choose to interplead the absent potential claimants, there would be a strong argument for joining them as "persons needed for just adjudication" under Fed. Rule Civ. Proc. 19 (a).[21] See Comment, Standing to Sue in Antitrust Cases:

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[19] See *supra,* n. 11. Interpleader under Fed. Rule Civ. Proc. 22 (1) often would be unavailable because service of process for rule interpleader, unlike for statutory interpleader, does not run nationwide. See 3A Moore's Federal Practice ¶ 22.04[2].

[20] For example, a condition precedent for invoking statutory interpleader is the posting of a bond for the amount in dispute, 28 U. S. C. § 1335 (a)(2), see 3A Moore's Federal Practice ¶ 22.10, and a defendant may be unwilling to put up a bond for the huge amounts normally claimed in multiple-party treble-damage suits. For a discussion of other circumstances in which statutory interpleader may be "impractical," see McGuire, The Passing-On Defense and the Right of Remote Purchasers to Recover Treble Damages under Hanover Shoe, 33 U. Pitt. L. Rev. 177, 197–198 (1971).

[21] Rule 19 (a) provides in part:

"A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of

The Offensive Use of Passing-On, 123 U. Pa. L. Rev. 976, 998 (1975). These absent potential claimants would seem to fit the classic definition of "necessary parties," for purposes of compulsory joinder, given in *Shields* v. *Barrow,* 17 How. 130, 139 (1854)—

> "[p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it."

See Notes of Adv. Comm. on 1966 Amendments to Rule 19, 28 U. S. C. App., at 7760; 7 Wright & Miller, *supra,* §§ 1604, 1618; 3A Moore's Federal Practice ¶ 19.08. The plaintiff bringing the treble-damage action would be required, under Fed. Rule Civ. Proc. 19 (c), to "state the names, if known," of these absent potential claimants; they should also be notified by some means that the action was pending.[22] Where, as would often be the case, the potential claimants at a particular level of distribution are so numerous that joinder of all is impracticable, a representative presumably would have to be found to bring them into the action as a class. See Fed. Rule Civ. Proc. 19 (d); 3A Moore's Federal Practice ¶ 19.21.

It is unlikely, of course, that all potential plaintiffs could or would be joined. Some may not wish to assert claims to the overcharge; others may be unmanageable as a class; and still others may be beyond the personal jurisdiction of the court. We can assume that ordinarily the action would still proceed,

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the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

[22] See the comment of the Advisory Committee on the 1966 Amendments to Rule 19: "In some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee." 28 U. S. C. App., at 7760.

the absent parties not being deemed "indispensable" under Fed. Rule Civ. Proc. 19 (b). See *Provident Tradesmens Bank & Trust Co.* v. *Patterson, supra.* But allowing indirect purchasers to recover using pass-on theories, even under the optimistic assumption that joinder of potential plaintiffs will deal satisfactorily with problems of multiple litigation and liability, would transform treble-damage actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant. In treble-damage actions by ultimate consumers, the overcharge would have to be apportioned among the relevant wholesalers, retailers and other middlemen, whose representatives presumably should be joined.[23] And in suits by direct purchasers or middlemen, the interests of ultimate consumers are similarly implicated.[24]

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[23] *E. g., Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.,* 50 F. R. D. 13 (ED Pa. 1970), aff'd *sub nom. Mangano* v. *American Radiator & Standard Sanitary Corp.,* 438 F. 2d 1187 (CA3 1971) (suit against manufacturers of plumbing fixtures on behalf of all homeowners in the United States). There often will be more levels of distribution or manufacture between the defendant and the ultimate consumers than the two levels (masonry and general contractors) in this case. For example, in *Mangano, supra,* the plaintiffs included homeowners who had bought used rather than new homes and who therefore had to show that each time their houses changed hands the sellers passed on part of the plumbing manufacturers' original overcharge. 50 F. R. D., at 19–20, 25–26. Treble-damage suits by ultimate consumers against any of the manufacturers of industrial raw materials or equipment that have been charged in recent government price-fixing suits would involve not only several levels within a distribution chain, but also several separate chains of distribution; for example, chromite sand is used to make ingots, ingots are used to make steel, and steel is used to make consumer products. Handler and Blechman, *supra,* at 640 n. 77, and see *id.,* 636–637 (citing Justice Department price-fixing suits against defendants far removed from consumers).

[24] *E. g., Donson Stores, Inc.* v. *American Bakeries Co.,* 58 F. R. D. 481 (SDNY 1973) (motion to intervene by a putative class of 20 million consumers of bread in treble-damage action against bread manufacturers).

There is thus a strong possibility that indirect purchasers remote from the defendant would be parties to virtually every treble-damage action (apart from those brought against defendants at the retail level). The Court's concern in *Hanover Shoe* to avoid weighing down treble-damage actions with the "massive evidence and complicated theories," 392 U. S., at 493, involved in attempting to establish a pass-on defense against a direct purchaser applies *a fortiori* to the attempt to trace the effect of the overcharge through each step in the distribution chain from the direct purchaser to the ultimate consumer. We are no more inclined than we were in *Hanover Shoe* to ignore the burdens that such an attempt would impose on the effective enforcement of the antitrust laws.

Under an array of simplifying assumptions, economic theory provides a precise formula for calculating how the overcharge is distributed between the overcharged party (passer) and its customers (passees). *If* the market for the passer's product is perfectly competitive; *if* the overcharge is imposed equally on all of the passer's competitors; and *if* the passer maximizes its profits, then the ratio of the shares of the overcharge borne by passee and passer will equal the ratio of the elasticities of supply and demand in the market for the passer's product.[25]

Cf. Handler and Blechman, *supra*, at 653 (arguing that the effect of legislation authorizing States to bring treble-damage actions on behalf of their citizens, see *supra*, n. 14, will be to interject claims on behalf of large classes of consumers into treble-damage suits brought by middlemen). Thus in this case the plaintiff housing authorities, App. 20, presumably have passed on part of the alleged overcharge to their tenants and subtenants, who would have to be brought into the suit before damages could be fairly apportioned.

[25] An overcharge imposed by an antitrust violator or group of violators on their customers is analytically equivalent to an excise tax imposed on the violator's product in the amount of the overcharge. The effect of such an overcharge can be calculated using the economic theorems for the incidence of an excise tax. See Schaeffer, Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis, 16 Wm. & Mary L. Rev. 883, 887, 893 (1975), and sources cited in *id.*, at 887 n. 21.

Even if these assumptions are accepted, there remains a serious problem of measuring the relevant elasticities—the percentage change in the quantities of the passer's product demanded and supplied in response to a one percent change in price. In view of the difficulties that have been encountered, even in informal adversary proceedings, with the statistical techniques used to estimate these concepts, see Finkelstein, Regression Models in Administrative Proceedings, 89 Harv. L. Rev. 1442, 1444 (1973), it is unrealistic to think that elasticity studies introduced by expert witnesses will resolve the pass-on issue. We need look no further than our own difficulties with sophisticated statistical methodology that were evident last Term in *Gregg* v. *Georgia,* 428 U. S. 153 (1976), and its companion cases. See *id.,* at 184–185 (plurality opinion); 233–236 (MARSHALL, J., dissenting); *Roberts* v. *Louisiana,* 428 U. S. 325, 354–355 (WHITE, J., dissenting).

More important, as the *Hanover Shoe* Court observed, 392 U. S., at 493, "in the real economic world rather than an economist's hypothetical model," the latter's drastic simplifications generally must be abandoned. Overcharged direct purchasers often sell in imperfectly competitive markets. They often compete with other sellers that have not been subject to the overcharge; and their pricing policies often cannot be explained solely by the convenient assumption of profit maximization.[26] As we concluded in *Hanover Shoe, id.,* at 492, attention to "sound laws of economics" can only heighten the awareness of the difficulties and uncertainties involved in determining how the relevant market variables would have behaved had there been no overcharge.[27]

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[26] Thus, in the instant case respondents have offered to prove that general and masonry contractors calculate their bids by adding a percentage markup to the cost of their materials, Brief for Respondents 20–23, rather than by attempting to equate marginal cost and marginal revenue as required by an explicit profit-maximizing strategy.

[27] MR. JUSTICE BRENNAN in dissent argues that estimating a passee's damage requires nothing more than estimating what the passer's price

It is quite true that these difficulties and uncertainties will be less substantial in some contexts than in others. There have been many proposals to allow pass-on theories in some of these contexts while preserving the *Hanover Shoe* rule in others. Respondents here argue, not without support from some lower courts,[28] that pass-on theories should be permitted for middlemen that resell goods without altering them and for contractors that add a fixed percentage markup to the cost of their materials in submitting bids. Brief for Respondents 9–30; Tr. of Oral Arg. 36–48. Exceptions to the *Hanover Shoe* rule have also been urged for other situations in which most of the overcharge is purportedly passed on—for example, where a price-fixed good is a small but vital input into a much larger product, making the demand for the price-fixed good highly inelastic. Compare *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 50 F. R. D. 13 (ED Pa. 1970), aff'd *sub nom. Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F. 2d 1187 (CA3 1971), with *In re Master Key Antitrust Litigation*, 1973–2 Trade Cas.

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would have been absent the violation, and suggests that apportioning the overcharge throughout the distribution chain is "no different and no more complicated" than the initial task of estimating the amount of the overcharge itself. *Post*, at 11–12, and n. 14. But as the dissent recognizes, *id.*, at 2 n. 3, unless the indirect purchaser is at the end of the distribution chain it can claim damages not only from the portion of the overcharge it absorbs but also from the portion it passes on, which causes a reduction in sales volume under less than perfectly inelastic demand conditions. See *supra*, at 10 n. 13. The difficulties of the task urged upon us by the dissenters cannot be so easily brushed aside.

In any event, as we understand the dissenters' argument, it reduces to the proposition that because antitrust cases are already complicated there is little harm in making them more so. We disagree.

[28] See, *e. g.*, *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710, 745–746 (SDNY 1970), aff'd, 440 F. 2d 1079 (CA2), cert. denied, 404 U. S. 871 (1971); *Boshes* v. *General Motors Corp.*, 59 F. R. D. 589, 597 (ND Ill. 1973).

¶ 74,680 (Conn.). See Schaeffer, Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis, 16 Wm. & Mary L. Rev. 883, 918–925 (1975).

We reject these attempts to carve out exceptions to the *Hanover Shoe* rule for particular types of markets.[29] An exception allowing evidence of pass-on by middlemen that resell the goods they purchase of course would be of no avail to respondents, because the contractors that allegedly passed on the overcharge on the block incorporated it into buildings. See *supra,* at 12. An exception for the contractors here on the ground that they purport to charge a fixed percentage above their costs would substantially erode the *Hanover Shoe* rule without justification. Firms in many sectors of the economy rely to an extent on cost-based rules of thumb in setting prices. See Scherer, Industrial Market Structure and Industrial Performance 173–179 (1970). These rules are not adhered to rigidly, however; the extent of the markup (or the allocation of costs) is varied to reflect demand conditions. *Id.,* at 176–177. The intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits thus are not spared the litigants.

More generally, the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility to proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same "massive evidence and complicated theories" into treble-damage proceedings, albeit at a somewhat higher level of gen-

[29] We note that supporters of the offensive use of pass-on, other than litigants in particular cases, generally have not contended for a halfway rejection of *Hanover Shoe* that would permit offensive use of pass-on in some types of market situations but not in others. See, *e. g.,* Tr. of Oral Arg. 57 (United States as *amicus curiae*); Note, The Defense of "Passing On" in Treble Damage Suits Under the Antitrust Laws, 70 Yale L. J. 469, 476, 478 (1961); commentators cited in n. 11, *supra.*

erality. As we have noted, *supra,* at 12, *Hanover Shoe* itself implicitly discouraged the creation of exceptions to its rule barring pass-on defenses, and we adhere to the narrow scope of exemption indicated by our decision there.

The concern in *Hanover Shoe* for the complexity that would be introduced into treble-damage suits if pass-on theories were permitted was closely related to the Court's concern for the reduction in the effectiveness of those suits if brought by indirect purchasers with a smaller stake in the outcome than that of direct purchasers suing for the full amount of the overcharge. The apportionment of the recovery throughout the distribution chain would increase the overall costs of recovery by injecting extremely complex issues into the case; at the same time such an apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group. Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs. This additional uncertainty would further reduce the incentive to sue. The combination of increasing the costs and diffusing the benefits of bringing a treble-damage action could seriously impair this important weapon of antitrust enforcement.

We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws, see, *e. g., Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U. S. 134, 139 (1968), supports our adherence to the *Hanover Shoe* rule, under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge. We recognize that direct purchasers sometimes may refrain from bringing a treble-damage suit for fear of disrupting relations with their suppliers.[30] But on balance, and until there are clear direc-

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[30] See, *e. g., In re Western Liquid Asphalt Cases, supra,* at 198; Wheeler,

tions from Congress to the contrary, we conclude that the legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under § 4, *Hawaii* v. *Standard Oil Co. of California,* 405 U. S. 251, 262 (1972), is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations. Of course, as MR. JUSTICE BRENNAN points out in dissent, "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation." *Post,* at 13. But § 4 has another purpose in addition to deterring violators and depriving them of "the fruits of their illegality," *Hanover Shoe, supra,* at 494; it is also designed to compensate victims of antitrust violations for their injuries. *E. g., Brunswick Corp.* v. *Pueblo Bowl-O-Mat,* — U. S. —, — (1977). *Hanover Shoe* does further the goal of compensation to the extent that the direct purchaser absorbs at least some and often most of the overcharge. In view of the considerations supporting the *Hanover Shoe* rule, we are unwilling to carry the compensation principle to its logical extreme by attempting to allocate damages among all "those within the defendant's chain of distribution," *post,* at 14, especially because we question the extent to which such an attempt would make individual victims whole for actual injuries suffered rather than simply depleting the overall recovery in litigation over pass-on issues. Many of the indirect purchasers barred from asserting pass-on claims under the *Hanover Shoe* rule have such a small stake in the lawsuit that even if they were to recover as

Antitrust Treble-Damage Actions; Do They Work?, 61 Calif. L. Rev. 1319, 1325 (1973).

part of a class, only a small fraction would be likely to come forward to collect their damages.[31] And given the difficulty of ascertaining the amount absorbed by any particular indirect purchaser, there is little basis for believing that the amount of the recovery would reflect the actual injury suffered.

For the reasons stated, the judgment is reversed and the case remanded for further proceedings consistent with this opinion.

So ordered.

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[31] Commentators have noted that recoveries in treble-damage actions aggregating large numbers of small claims often have failed to compensate the individuals on behalf of whom the suits have been brought. *E. g.*, Handler, The Shift from Substantive to Procedural Innovation in Antitrust Suits—the Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 9-10 (1971); Wheeler, *supra,* at 1339; Kirkham, Complex Civil Litigation—Have Good Intentions Gone Awry?, 70 F. R. D. 199, 206-207 (1976).

The dissenting opinion of MR JUSTICE BRENNAN appears to suggest that the 1976 *parens patriae* legislation, see *supra,* n. 14, provides an answer to this problem of compensating indirect purchasers for small injuries. *Post,* at 17 n. 23. Quite to the contrary, the Act "recognizes that rarely, if ever, will all potential claimants actually come forward to secure their share of the recovery," and that "the undistributed portion of the fund . . . will often be substantial." H. R. Rep. No. 94-499, *supra,* at 16. The portion of the fund recovered in a *parens patriae* action that is not used to compensate the actual injuries of antitrust victims is to be used "as a civil penalty . . . deposited with the State as general revenues," Clayton Act § 4E (2), enacted by the 1976 Act, or "for some public purposes benefiting, as closely as possible, the class of injured persons," such as reducing the price of the overcharged goods in future sales. H. R. Rep. No. 94-499, *supra,* at 16. That Congress chose to provide such innovative methods of distributing damages awarded in a *parens patriae* action under newly enacted § 4C of the Clayton Act does not eliminate the obstacles to compensating indirect purchasers bringing traditional suits under § 4.

SUPREME COURT OF THE UNITED STATES

No. 76-404

Illinois Brick Company et al., Petitioners, v. State of Illinois et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 9, 1977]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN join, dissenting.

Respondent, the State of Illinois, brought this treble-damage civil antitrust action under § 4 of the Clayton Act on behalf of itself and various local governmental entities in the Greater Chicago area charging that an overcharge in the price of concrete blocks used in the construction of public buildings was made by the petitioners, manufacturers and sellers of concrete block, pursuant to a price-fixing conspiracy in violation of § 1 of the Sherman Act, 15 U. S. C. § 1 (1970).[1] Section 4 broadly provides that "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained. . . ."

Decisions of the Court defining the reach of § 4 have been consistent with its broad objectives: to compensate victims of antitrust violations and to deter future violations. The Court has stated that § 4 "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . [but] is comprehensive in its terms and coverage, protecting all who are made vicitms of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc.* v.

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[1] The blocks were sold to various general and special contractors who had successfully bid to construct public buildings. The State was thus an indirect purchaser of the blocks.

American Crystal Sugar Co., 334 U. S. 219, 236 (1948).[2] Today's decision that § 4 affords a remedy only to persons who purchase directly from an antitrust offender is a regrettable retreat from that line of cases. Section 4 was clearly intended to operate to protect individual consumers who purchase through middlemen. Indeed, Congress acted on the premise that § 4 gave a cause of action to indirect as well as direct purchasers when it recently enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1383, 1394-1395, and authorized state attorneys general to sue *parens patriae* to recover damages on behalf of citizens of their various States.

Today's decision flouts Congress' purpose and severely undermines the effectiveness of the private treble-damage action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution.[3] In these instances, the Court's decision frustrates both the compensation and deterrence objectives of the treble-damage action. Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the

[2] There is of course a point beyond which antitrust defendants should not be held responsible for the remote consequences of their actions. See the discussion in Part III, *infra*, at 16-17.

[3] The portion of an illegal overcharge that a direct purchaser can pass on depends upon the elasticity of demand in the relevant product market. If the market is relatively inelastic, he may pass on a relatively large portion. If demand is relatively elastic, he may not be able to raise his price and will have to absorb the increase, making it up by decreasing other costs or increasing sales volume. It is extremely unlikely that a middleman could pass on the entire cost increase. But rarely would he have to absorb the entire increase. R. Posner, Antitrust Cases, Economic Notes, and Other Materials, 147-149 (1974).

ultimate consumers. This frustration of the congressional scheme is in no way mandated by *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968). To the contrary, the same considerations that *Hanover Shoe* held required rejection of the defendant's argument there, that because plaintiff had passed on cost increases to consumers in the form of higher prices defendant should be relieved of liability—especially the consideration that it is essential to the public interest to preserve the effectiveness of the private treble-damage action—requires affirmance of the decision below construing § 4 to authorize respondents' suit.

I

In *Hanover Shoe, supra*, the Court held that a defendant in a treble-damage action could not escape liability, except in very limited circumstances,[4] by proof that the plaintiff had passed on illegal overcharges to others farther along in the chain of distribution.[5] The defendant in *Hanover Shoe*, United Shoe, argued that Hanover was not entitled to recover damages because the increased price it had paid for United's equipment[6] had in turn been reflected in the increased price at which Hanover had sold its shoes to the consuming public. The Court held that several reasons supported its conclusion

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[4] The opinion recognizes that "there might be situations—for instance when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he had not been damaged—when the considerations requiring that the passing-on defense not be permitted in this case would not be present." *Id.*, at 494.

[5] *Hanover Shoe*, did not involve the consumers of the plaintiff's shoes, to whom the overcharge allegedly was passed. United's passing-on argument is referred to as "defensive" passing on. The State's position, seeking recovery of illegal overcharges allegedly passed on to it and its citizens, is referred to as "offensive" passing on.

[6] Hanover alleged that United monopolized the shoe machinery industry in violation of § 2 of the Sherman Act by its practice of leasing but refusing to sell its shoemaking machinery.

that this defense was not available to United despite "the argument that sound laws of economics require" its recognition. First, the Court followed earlier cases holding that the "victim of an overcharge is [immediately] damaged within the meaning of Section 4 to the extent of that overcharge." 392 U. S., at 491. The particularly apt precedent supporting this proposition was *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531 (1918),[7] where a pass-on defense had been rejected because of "[t]he general tendency of the law, in regard to damages at least, . . . not to go beyond the first step," and the court's belief that "[t]he carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum . . . ." 245 U. S., at 533–534. In other words, the requirement of privity between plaintiff and defendant was a reason to deny defendant the pass-on defense, since otherwise the defendant would be able to profit by his own wrong. *Hanover Shoe* cannot be read, however, as limiting actions to parties in privity with one another. That was made clear in *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 648 (1969), decided the next Term, a price discrimination case in which the Court traced an illegal overcharge through several levels in the chain of distribution, ultimately holding that a plaintiff seeking to recover damages need show only a "causal connection between the price discrimination in violation of the [antitrust laws] and the injury suffered . . . . If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury." *Darnell-Taenzer* does, however, support *Hanover Shoe*'s denial of the pass-on defense for the other reasons relied upon in *Hanover*

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[7] In *Darnell-Taenzer*, shippers brought suit for reparations against a railroad claiming that the railroad had charged unreasonable rates. The railroad argued that the shippers had in turn passed on to their customers any excess over the reasonable rate.

Shoe: the difficulty of proving and quantifying a pass-on, and the role of the treble-damage action as the most effective means of antitrust enforcement. 392 U. S., at 492–494.

The Court correctly discerned that the difficulty of reconstructing hypothetical pricing decisions,[8] would aggravate the already complex nature of antitrust litigation since pass-on defenses would become commonplace whenever the chain of distribution extended beyond the plaintiff. This would lessen the effectiveness of the treble-damage action, since ultimate consumers individually often suffer only minor damages and therefore have little incentive to bring suit. Limiting defendants' liability to the loss of profits suffered by direct purchasers would thus allow the antitrust offender to avoid having to pay the full social cost of his illegal conduct in many cases in which indirect purchasers failed to bring suit. Consequently,

> "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." 392 U. S., at 494.

Hanover Shoe thus confronted the Court with the choice, as had been true in *Darnell-Taenzer,* of interpreting § 4 in a way that might overcompensate the plaintiff, who had certainly

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[8] "[T]he impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether had one fact been different . . . he would have chosen a different price . . . ." 392 U. S., at 492. The Court further observed that it is equally difficult to ascertain "what effect, if any, a change in a company's price will have on its total sales"; and it is all but impossible to demonstrate 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." *Id.,* at 492–493. See generally *Posner, supra,* n. 3, at 147–149.

suffered some injury, or of defining it in a way that underdeters the violator by allowing him to retain a portion of his ill-gotten overcharges. The Court chose to interpret § 4 so as to allow the plaintiff to recover for the entire overcharge. This choice was consistent with recognition of the importance of the treble-damage action in deterring antitrust violations.[9] But *Hanover Shoe* certainly did not imply that an indirect purchaser would not also have a cause of action under § 4 when the illegal overcharges were passed on to him.

Despite the superficial appeal of the argument that *Hanover Shoe* should be applied "consistently," thus precluding plaintiffs and defendants alike from proving that increased costs were passed along the chain of distribution, there are sound reasons for treating offensive and defensive passing-on cases differently. The interests at stake in "offensive" passing-on cases, where the indirect purchasers sue for damages for their injuries, are simply not the same as the interests at stake in the *Hanover Shoe*, or "defensive passing-on" situation. There is no danger in this case, for example, as there was in *Hanover Shoe,* that the defendant will escape liability and frustrate the objectives of the treble-damage action. Rather, the same policies of insuring the continued effectiveness of the treble-damage action and preventing wrongdoers from retaining the spoils of their misdeeds favor allowing indirect purchasers to prove that overcharges were passed on to them. *Hanover Shoe* thus can and should be limited to cases of defensive assertion of the passing-on defense to antitrust liability,

[9] The pass-on defense in *Hanover Shoe* was asserted by a defendant against whom a prima facie case of liability had already been made out. The Clayton Act provides that "a final judgment . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws . . . shall be *prima facie* evidence against such defendant . . . ." 15 U. S. C. § 16 (a) (1970). The Government had secured a judgment against United in *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 195 (Mass. 1953), aff'd, *per curiam,* 347 U. S. 521 (1954).

where direct and indirect purchasers are not parties in the same action.[10] I fully agree with the observation that

> "[t]he attempt to transform a rejection of a defense because it unduly hampers antitrust enforcement into a reason for a complete refusal to entertain the claims of a certain class of plaintiffs seems an ingenious attempt to turn the decision [in *Hanover Shoe*] and its underlying rationale on its head."

In re Master Key Antitrust Litigation, 1973-2 Trade Cas. ¶ 74,680, at 94, 978-979 (Conn. 1973).

II

A

Today's decision goes far to frustrate Congress' objectives in creating the treble-damage action. Treble-damage actions were first authorized under § 7 of the Sherman Act, 26 Stat. 210 (1890). The legislative history of this section shows that it was conceived primarily as a remedy for "[t]he people of

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[10] Commentators almost unanimously conclude that, despite *Hanover Shoe,* § 4 should be construed to authorize indirect purchasers to recover upon proof that increases were passed on to them. See, *e. g.,* Comment, Standing to Sue in Antitrust Cases: The Offensive Use of Passing-on, 123 U. Pa. L. Rev. 976 (1975); Comment, Mongano and Ultimate Consumer Standing: The Misuse of the Hanover Doctrine, 72 Colum. L. Rev. 394 (1972); Note, The Effect of Hanover Shoe on the Offensive Use of the Passing-On Doctrine, 46 Calif. L. Rev. 98 (1972). But see Handler and Blechman, Antitrust and the Consumer Interest: The fallacy of Parens Patriae and a Suggested New Approach, 85 Yale L. J. 626, 638-655 (1976). In addition, most courts have read *Hanover Shoe* as not preventing indirect purchasers from attempting to prove that they have been injured. See, *e. g., Yoder Bros., Inc.* v. *California-Florida Plant Corp.,* 537 F. 2d 1347 (CA5 1976); *In re Western Liquid Asphalt Cases, supra; Illinois* v. *Bristol-Myers Co.,* 470 F. 2d 1276 (DC 1972); *West Virginia* v. *Chas. Pfizer & Co., Inc.,* 440 F. 2d 1079 (CA2 1971), cert. denied *sub nom. Cotler Drugs, Inc.* v. *Chas. Pfizer & Co., Inc.,* 404 U. S. 871; *In re Master Key Antitrust Litigation,* 1973-2 CCH trade Cases ¶ 74,680 (Conn. 1973).

the United States as individuals," especially for consumers. See, *e. g.*, 21 Cong. Rec. 1767 (1890) (remarks of Sen. George); see *id.*; at 2612 (Sens. Teller and Raegan), 2615 (Sen. Coke), 2640 (Sen. Sponner); *id.*, at 4140 n. 10.[11] In the Clayton Act of 1914, Congress extended the § 7 remedy to persons injured by "any violation of the antitrust laws." See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 45 U. S. L. W. 4138 (Jan. 25, 1975), citing H. R. Rep. No. 627 63d Cong., 2d Sess., 13 (1914). These actions were conceived primarily as "open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered."[12] *Id.*, at 4140, quoting 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb); see, *e. g., id.*, at 9079 (Rep. Volstead), 9270 (Rep. Carlin), 9414–9417, 9466–9467, 9487–9499. See also the House debates following the conference committee report. *Id.*, at 16274–16275 (Rep. Webb), 16317–16319 (Rep. Floyd).

The Court has interpreted § 4 broadly, this in recognition of the plainly stated congressional objective, *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 4 (1958), that the private treble-damage action play a paramount role in the enforcement of the fundamental economic policy of the Nation, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 130–131 (1969); *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311, 318 (1965), and has concluded that "[t]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-

[11] A further indication of Congress' desire to create a remedy for all persons, including consumers, even though their individual injuries might be comparatively slight, was the elimination of the jurisdictional amount requirement for antitrust actions. See 21 Cong. Rec. 2612, 3148, 3149 (1890) (remarks of Sen. Sherman).

[12] The fact that damages are trebled both aids deterrence and provides the incentive of compensation, since it encourages suits for relatively minor injuries.

present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life Mufflers, Inc.,* v. *International Parts Co.,* 392 U. S. 134, 139 (1968). The federal courts have accordingly been cautioned "not [to] add requirements to burden the private litigant beyond what is specifically set forth by Congress in the [antitrust] laws," *Radovich* v. *National Football League,* 352 U. S. 445, 454 (1957), and express approval has been given the "tendency of the courts to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights." *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U. S. 251, 265–266 (1946). See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* 130–131; *Perma Life Mufflers, Inc.* v. *International Parts Co., supra; Hanover Shoe, Inc.* v. *United Shoe Machinery Corp., supra,* at 494. And *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U. S. 656, 660 (1961), emphasized that to plead a cause of action under § 4 "allegations adequate to show a violation and . . . that the plaintiff was damaged thereby, are all the law requires."

B

The recently enacted Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1383, 1394–1395, was expressly adopted to create "an effective mechanism to permit consumers to recover damages for conduct which is prohibited by the Sherman Act, by giving state attorneys general a cause of action [to sue as *parens patriae* on behalf of the States' citizens] against antitrust violators." S. Rep. No. 94–803, 94th Cong., 2d Sess., 6 (1976). Title III of the new Act overruled the holding of *Hawaii* v. *Standard Oil Co.,* 405 U. S. 251 (1972), that the Clayton Act does not authorize a State to sue for damages for an injury to its general economy allegedly attributable to a violation of the antitrust laws. The Senate Report accompanying the new Act expressly

found that "[t]he economic burden of most antitrust violations is borne by the consumers in the form of higher prices for goods and services." S. Rep. No. 94-803, 94th Cong., 2d Sess., 39 (1976), and it is clear that the new Act is intended to provide a remedy for injured consumers whether or not they purchased directly from the violator. The Senate Report states, at p. 42:

> "A direct cause of action is granted the States to avoid the inequities and inconsistencies of restrictive judicial interpretation[s]. . . . Section 4C is intended to assure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to manageability [of class actions], *standing, privity, target area, remoteness, and the like.*" [13]

Rep. Rodino, a sponsor, stated during the House debates:

> "[A]ssuming the State attorney general proves a violation, and proves that an overcharge was 'passed on' to the consumers, injuring them 'in their property'; that is, their pocketbooks—recoveries are authorized by the compromise bill whether or not the consumers purchased directly from the price fixer, or indirectly, from intermediaries, retailers, or middlemen. The technical and procedural argument the consumers have no 'standing' whenever they are not 'in privity' with the price fixer,

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[13] Congress rejected earlier Court of Appeals and District Court decisions erecting standing barriers to suits by indirect purchasers and chose instead to pattern the Act "after such innovative decisions as *In re Liquid Asphalt Cases,* 487 F. 2d 191 (9th Cir. 1973); *In re Master Key Litigation,* 1973 Trade Cases ¶ 74,680 and 1975 Trade Cases ¶ 60,377 (DC Conn.); *Illinois* v. *Ampress Brick Co.,* 1975 Trade Cases ¶ 60,295 (DC Ill.) [this case below]; *Carnival Bag Co.* v. *Slide Rite Mfg.,* 1975 Trade ¶ 60,370 (S. D. N. Y.); *In re Antibiotics Antitrust Actions,* 333 F. Supp. 278 (S. D. N. Y. 1971); and *West Virginia* v. *Charles Pfizer & Co.,* 440 F. 2d 1079 (2d Cir. 1971)." Congress accepted these decisions as correctly stating the law. H. R. Rep. No. 94-499, 94th Cong., 2d Sess., 44 (1976).

and have not purchased directly from him, is rejected by the compromise bill. Opinions relying on this procedural technicality . . . are squarely rejected by the compromise bill." 16 Cong. Rec. H10295 (daily ed. Sept. 16, 1976).

It is difficult to see how Congress could have expressed itself more clearly. Even if the question whether indirect purchasers could recover for damages passed on to them was open before passage of the 1976 Act, and I do not believe that it was, Congress' interpretation of § 4 in enacting the *parens patriae* provision should resolve it in favor of their authority to sue. Indeed, the House Report accompanying the bill actually referred to the opinion of the District Court in this case as an example of the correct answer. *Supra,* n. 13. The Court's tortuous efforts to impose a "consistency" upon this area of the law that Congress has so clearly rejected is a return to the "legal somersaults and twistings and turnings" of the Court's earlier opinions that ultimately led to the passage of the Clayton Act in 1914 to salvage the ailing Sherman Act. See 51 Cong. Rec. 9086 (1914) (remarks of Rep. Kelly).

III

Hanover Shoe correctly observed that the necessity of tracing a cost increase through several levels of a chain of distribution "would often require additional long and complicated proceedings involving massive evidence and complicated theories." 392 U. S., at 493. But this may be said of almost all antitrust cases. *Hanover Shoe* itself highlights this unavoidable complication, which requires the plaintiff to prove a probable course of events which *would have occurred* but for the violation.[14] In essence, estimating the amount of

[14] In *Hanover Shoe,* the measure of damages was the difference between the amount Hanover paid for the lease and the amount it *would have paid* had United agreed to sell the machinery. It has been suggested that the burden of demonstrating a pass-on may be no more difficult or speculative

damages passed on to an indirect purchaser is no different and no more complicated than estimating what the middleman's selling price would have been, absent the violation. See *ante,* at 10 n. 13.

Nor should the fact that the price-fixed product in this case (the concrete block) was combined with another product (the buildings) before resale operate as an absolute bar to recovery. It may well be true, as the State claims, that the cost of the block was included separately in the project bids and therefore can be factored out from the price of the building with relative certainty. In any case, this is a factual matter to be determined based on the strength of the plaintiff's evidence.[15] See, *e. g., In re Western Liquid Asphalt Cases,* 487 F. 2d 191 (1973). Admittedly, there will be many cases in which the plaintiff will be unable to prove that the overcharge was passed on. In others, the portion of the overcharge passed on may be only approximately determinable. But again, this problem hardly distinguishes this case from other antitrust cases. Reasoned estimation is required in all antitrust cases, but "while the damages [in such cases] may not be determined by mere speculation or guess, it will be enough if the evidence shows that the extent of the damages as a matter of just and reasonable inference, although the result may be only approximate." *Story Parchment Co.* v. *Patterson Paper Co., supra,* at 563. See also *Bigelow* v. *RKO Radio Pictures, Inc., supra,* at 266; *Eastman Kodak Co.* v. *Southern Photo Materials Co., supra,* at 379. Lack of precision in apportioning damages between direct and indirect purchasers is thus plainly not a

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than the plaintiff's initial task of proving an overcharge in the first instance. See Pollock, *Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Decision,* 13 Antitrust Bull. 1183, 1210 (1968).

[15] One commentator has suggested that, in deciding whether to permit recovery by indirect purchasers in a particular case, courts should consider the number of intervening hands the product has passed through and the extent of its change in the process. P. Areeda, Antitrust, Analysis: Problems, Text, and Cases 75 (2d ed 1974).

convincing reason for denying indirect purchasers an opportunity to prove their injuries and damages. Moreover, from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation. Antitrust violators are equally deterred whether the judgments against them are in favor of direct or indirect purchasers. *Hanover Shoe* said as much. The Court's decision recognized that some plaintiffs would recover more than their due, but concluded that the necessity of assuring that *some one* recover and thus deter future violations and prevent the antitrust offender from profiting by his illegal overcharge outweighed any resulting injustice.[16]

I concede that despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable. See, *e. g., Brunswick Corp.* v. *Pueblo Bowl-O-Mat, supra; Hawaii* v. *Standard Oil Co., supra.* Courts have therefore developed various tests of antitrust "standing," not unlike the concept of proximate cause in tort law, to define that point. The definition has been variously articulated, usually in terms of two tests. The more restrictive test focuses on the directness of the injury;[17] the more liberal, and more widely accepted, on whether the plaintiff is within the "target area" of the defendant's violation.[18] But if the broad language of

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[16] This holding is consistent with the Court's continuing concern for the effectiveness of the treble-damage action, which has been sustained even when the plaintiff was "no less morally reprehensible than the defendant" with whom he had conspired. *Perma Life Mufflers, Inc.* v. *International Parts Corp., supra,* 392 U. S., at 139.

[17] See, *e. g., Loeb* v. *Eastman Kodak Co.,* 183 F. 704 (CA3 1910).

[18] Earlier this Term, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra,* disallowed a treble-damage recovery, stating that in order to recover antitrust plaintiffs must prove "*antitrust injury,* which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the defendant's] acts unlawful. *Id.,* Slip op., at 11. At least one court of appeals has rephrased the target area test in terms of whether the injury to the plaintiff is a reasonably forseeable consequence of the defendant's illegal conduct. *Mulvey* v. *Samuel Goldwyn Productions,* 433 F. 2d 1073 (CA9 1970), cert. denied, 402 U. S. 923 (1971).

§ 4 means anything, surely it must render the defendant liable to those within the defendant's chain of distribution. It would indeed be "paradoxical to deny recover to the ultimate consumer while permitting the middlemen a wind fall recovery." P. Areeda, Antitrust Analysis: Problems, Text, and Cases 75 (2d Ed. 1974).

IV

I acknowledge some abstract merit in the argument that to allow indirect purchasers to sue, while, at the same time, precluding defendants from asserting pass-on defenses in suits by direct purchasers, subjects antitrust defendants to the risk of multiple liability. But as a practical matter, existing procedural mechanisms can eliminate this danger in most instances. Even though, as the Court says, no procedure currently exists which can eliminate the possibility entirely, *ante*, at 8 n. 11, the hypothetical possibility that a few defendants might be subjected to the danger of multiple liability does not, in my view, justify erecting a bar against all recoveries by indirect purchasers without regard to whether the particular case presents a significant danger of double recovery. The "double recovery" specter was argued in the Congress that passed the Hart-Scott-Rodino Act, and was rejected. The Senate Report recorded the Act's purpose to codify the holding of the Court of Appeals for the Ninth Circuit in *In re Western Liquid Asphalt Cases, supra:*

> "We therefore see no problem of double recovery, and we believe that if this difficulty should arise in some other connection, the district court will be able to fashion relief accordingly. In addition to the court's control over its decree, numerous devices exist. We note that the consolidation of cases, which has already occurred, is one means of averting duplicitous awards. The short, four-year statute of limitations is another; later suits, after final judgment herein, are unlikely. 15 U. S. C. § 15b. In other cases, it may be that statutory interpleader, 28

U. S. C. § 1335, could be used by antitrust defendants to avoid double liability. If necessary, special masters may be appointed to handle complex cases. Finally, there are the doctrines of res judicata and collateral estoppel and procedures for compulsory joinder. The day is long past when courts, particularly federal courts, will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages.

"We would prefer to place the burden of proving apportionment upon appellees, rather than deny all recovery to appellants. Such a burden would be the consequence of appellees' illegal acts, not appellants' suits. Where the choice is between a windfall to intermediaries or letting guilty defendants go free, liability is imposed. *Hanover Shoe, supra,* 392 U. S. at 494. So, too, between ultimate purchasers and defendants." S. Rep. No. 94–803, 94th Cong., 2d Sess., 44 (1976), quoting 487 F. 2d, at 201 (citation omitted).

Moreover, the possibility of multiple recovery arises in only two situations: (1) where suits by direct and indirect purchasers are pending at the same time but in different courts; and (2) where additional suits are filed after an award of damages based on the same violation in a prior suit.[19] In the first situation, the Brief for the United States *Amicus Curiae* cogently points out that district courts may make use of the alternatives suggested by the *Manual for Complex Litigation,* 1 Pt. 2 Moore's Federal Practice: Manual for Complex Litigation: District Courts may use the interdistrict transfer power created by 28 U. S. C. § 1404 (b), coordinate pretrial proceedings of cases pending in different districts, or transfer cases to a single district pursuant to § 1404 (a). In addition,

[19] If direct and indirect purchasers bring suit in the same court, the cases may be consolidated and damages allocated in accordance with Fed. Rule Civ. Proc. 42 (a). See *West Virginia* v. *Chas. Pfizer & Co., Inc.,* 440 F. 2d 1079 (CA2 1971).

the Judicial Panel on Multidistrict Litigation is empowered by 28 U. S. C. § 1407 to transfer cases involving common questions of fact to any district for coordinated pretrial proceedings upon its determination that the transfer "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions." After pretrial transfers under this section, cases can be consolidated and transferred to the same district for trial pursuant to the transfer power under § 1404 (a).[20] A further device mentioned in *Western Liquid Asphalt* is statutory interpleader under 28 U. S. C. § 1335 (1970), by which the defendant can bring all potential plaintiffs into the same court and require them to litigate *inter se* to determine their appropriate shares of the total recovery.[21]

True, there is a greater hypothetical danger of multiple recovery where suits are independently instituted after an earlier suit based on the same violation has proceeded to judgment.[22] But even here the likelihood that defendants will be subjected to multiple liability is, as a practical matter, remote. The extended nature of antitrust actions, often

[20] For a discussion of this process, see Note, The Judicial Panel and the Conduct of Multidistrict Litigation, 87 Harv. L. Rev. 1001 (1974); Comment, The Experience of Transferee Courts Under the Multidistrict Litigation Act, 39 U. Chi. L. Rev. 588 (1972).

[21] Petitioner suggests that interpleader may be an impractical alternative for some defendants, since it requires a defendant to complicate the suit by bringing in ultimate consumers and to post bond for the amount in controversy. See 28 U. S. C. § 1335 (a)(2) (1970). Although § 1335 clearly places a burden upon defendants who elect to use it in order to avoid potential multiple liability, that burden is not unique to antitrust cases, and Congress has clearly indicated that it considers the burden justified. See S. Rep. No. 94-803, 94th Cong., 2d Sess., 44 (1976), *supra*.

[22] The problem of potential multiple recoveries is not present in this case. All suits against petitioners were filed in the Northern District of Illinois. Petitioners never sought consolidation under Fed. Rule Civ. Proc. 42 (a) and stipulated in settlements with direct purchasers that the settlement would not affect the rights of indirect purchasers.

involving years of discovery, combines with the short four-year statute of limitations to make it impractical for potential plaintiffs to sit on their rights until after entry of judgment in the earlier suit.

The Court today regretably weakens the effectiveness of the private treble-damage action as a deterrent to antitrust violations by, in most cases, precluding consumers from recovering for antitrust injuries. For in many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers, acting as middlemen, and ordinarily reluctant to sue their suppliers,[23] pass on the bulk of their increased costs to consumers farther along the chain of distribution. Congress has given us a clear signal that § 4 is not to be read to have the restrictive scope ascribed to it by the Court today. I would follow the congressional understanding and therefore would affirm.[24]

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[23] The opinion for the Court "recognize[s] that direct purchasers sometimes may refrain from bringing a treble-damage suit for fear of disrupting relations with their suppliers," but concludes that "on balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." *Ante,* at 21–22. But the intent of Congress in enacting the *parens patriae* provision of the 1976 Act was clearly to provide a mechanism to permit recovery by consumers, and this purpose is not furthered by a rule that will keep most consumers out of court.

The Court's opinion further observes that "many of the indirect purchasers barred from asserting pass-on claims . . . have such a small stake in the lawsuit that even if they were to recover as part of a class, only a small fraction would be likely to come forward to collect their damages." *Id.*, at 22. Yet it was precisely because of judicially perceived weaknesses in the class action as a device for consumer recovery for antitrust violations that Congress enacted the *parens patriae* provision of the 1976 Act.

[24] Abundant authority sanctions deference to congressional indications

in subsequent legislation regarding the congressional meaning in earlier acts worded consistently with that meaning. *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380 (1969); *FHA* v. *The Darlington, Inc.*, 358 U. S. 84, 90 (1958); *United States* v. *Stafoff*, 260 U. S. 477, 480 (1923); *N. Y. & Norfold RR* v. *Peninsular Exchange*, 240 U. S. 34, 39 (1916). Although it is true, as the Court's opinion states, *ante*, at 10–11, n. 14, that the post-enactment statements of "particular legislators" who participated in the enactment of a statute cannot change its meaning, see *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 132 (1974), quoting *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612, 639 n. 34, in this case, the House and Senate Reports accompanying the amendments to § 4 of the Clayton Act clearly reveal the 94th Congress' interpretation of that section as permitting the kind of consumer action which the Court now prohibits. Moreover, it is no answer to this to say that the new *parens patriae* provision will not in all cases directly compensate indirect purchasers, *ante*, at 24 n. 31, for it is clear that despite the difficulty of distributing benefits to such injured persons the new Act authorizes recovery by the State on their behalf.

SUPREME COURT OF THE UNITED STATES

No. 76-404

Illinois Brick Company et al., Petitioners, *v.* State of Illinois et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 9, 1977]

MR. JUSTICE BLACKMUN, dissenting.

I regard MR. JUSTICE BRENNAN's dissenting opinion as persuasive and convincing, and I join it without hesitation.

I add these few sentences only to say that I think the plaintiffs-respondents in this case, which they now have lost, are the victims of an unhappy chronology. If *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), had not preceded this case, and were it not "on the books," I am positive that the Court today would be affirming, perhaps unanimously, the judgment of the Court of Appeals. The policy behind the Antitrust Acts and all the signs point in that direction, and a conclusion in favor of indirect purchasers who could demonstrate injury would almost be compelled.

But *Hanover Shoe* is on the books, and the Court feels that it must be "consistent" in its application of pass-on. That, for me, is a wooden approach, and it is entirely inadequate when considered in the light of the objectives of the Sherman and Clayton Acts. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 tells us all that is needed as to Congress' present understanding of the Acts. Nevertheless, we must now await still another statute which, as the Court acknowledges, *ante*, at 11 n. 14, the Congress may adopt. One regrets that it takes so long and so much repetitious effort to achieve, and have this Court recognize, the obvious congressional aim.

RESOLUTION

ILLINOIS BRICK CASE

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
71st Annual Meeting
Indianapolis, Indiana
June 14, 1977

WHEREAS, the states are major consumers and spend billions of dollars each year on the procurement of goods and services for the delivery of state government services; and

WHEREAS, the antitrust laws have heretofore been used aggressively by the states to recover tax dollars and by other antitrust plaintiffs and consumers to recover damages from pricefixers and other violators of these laws; and

WHEREAS, the United States Supreme Court has decided in *Illinois Brick Company v. Illinois*, No. 76-404, that the states may pursue antitrust claims except in rare instances only against entities from which they have purchased directly; and

WHEREAS, the effect of that decision will be to render states unable to recover tax dollars from pricefixers and other violators from which they have purchased indirectly; and

WHEREAS, the decision may severely diminish the effectiveness of the *parens patriae* provision of the Hart-Scott Rodino Antitrust Improvements Act of 1976.

THEREFORE, BE IT RESOLVED THAT:

1. This Association urges the Congress immediately to enact and the President to sign into law legislation amending the antitrust laws to enable states and other antitrust plaintiffs and consumers to maintain suits against pricefixers and other violators of the antitrust laws from whom they have purchased goods or services directly or indirectly and otherwise to remove the barrier to effective antitrust enforcement erected by the Supreme Court in the *Illinois Brick* case; and

2. The Association's Washington Counsel is authorized and directed to take all reasonable and appropriate steps to communicate this Association's position to the relevant Senators and Representatives and to the Administration; and

3. The Association requests the chairman of the Antitrust Committee to appoint a special subcommittee to manage the Association's efforts in furtherance to the purposes of this Resolution; and

4. The Association urges the Attorney General of the United States to request the United States Supreme Court to reconsider its decision as it affects purchases by the local, state and federal government.

94-469 O - 77 - 17

LETTER OF SUPPORT FROM THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

JUL 15 1977

The Honorable Edward M. Kennedy
Chairman, Subcommittee on Antitrust
and Monopoly
Senate Committee on the Judiciary
United States Senate
431 Russell Office Building
Washington, D.C. 20510

Dear Chairman Kennedy:

We are writing to you to express our concern over the Supreme Court's recent decision in Illinois Brick v. Illinois, 45 U.S.L.W. 4611 (U.S. June 9, 1977). Pursuant to the authority conferred by 15 U.S.C. §6(f), we urge that early consideration be given to enacting legislation to overturn the result in that case. We agree with the position of the National Association of Attorneys General, as expressed by its Washington counsel, that this decision is "bad news for consumers and taxpayers." Wall Street Journal, June 10, 1977, at 16, col. 1.

As you know, the majority in Illinois Brick held that "indirect purchasers" may not maintain treble damage actions against antitrust law violators, even when overcharges resulting from the violations have been "passed on" to them. The effect of this decision, if allowed to stand, will be to deny injured consumers a needed right to compensation for illegal overcharges. Further, it will frustrate the intent of Congress and permit many antitrust violations to go unchallenged.

As noted in Justice Brennan's dissent, the major purposes of Section 4 of the Clayton Act are to compensate victims of antitrust violations and to deter others from future violations. The Illinois Brick decision, however, would limit recoveries under Section 4 in many instances to middlemen. Since middlemen may not be harmed financially and frequently have longstanding relationships with manufacturers, they have little incentive to pursue their legal remedies. As a result, both major purposes of Section 4 are defeated. This means, in turn, that greater burdens are placed upon the public antitrust enforcement officials.

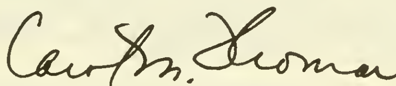
That Congress intended to grant a right of recovery to "indirect purchasers" is further underscored by the legislative history of the recently-enacted Hart-Scott-Rodino Antitrust Improvements Act of 1976. Indeed, the provisions authorizing state attorneys general to sue as _parens patriae_ are premised upon the right of consumers to recover damages for Sherman Act violations.

The majority in _Illinois Brick_ appears to be overly concerned with potential dangers of multiple recoveries against guilty defendants. Certainly there is such a risk, but as the dissent points out, existing procedures keep the risk within acceptable bounds. In our view, the greater risk is that antitrust offenders will be permitted to retain illegally-obtained overcharges.

A similar response can be made to the majority's concern with the difficulties in determining damages, should "indirect purchasers" be permitted to sue. While proof of damages may be made more difficult in some instances, the problems created are not insurmountable, and certainly do not justify leaving injured parties remediless.

In its opinion, the majority acknowledged that Congress might disagree with its decision and suggested that Congress could amend Section 4 of the Clayton Act. We fully support your stated intention to accept this invitation by introducing "legislation to restore to consumers those private rights which the court has...denied them." Washington Post, June 10, 1977, at A-4, col. 2. Such legislation would provide needed assistance to the consumers of this country, who are all too often victimized, without effective recourse, by violations of the antitrust laws.

By direction of the Commission.



(Mr.) Carol M. Thomas
Secretary

STATEMENT OF COUNSEL FOR STATE OF MINNESOTA AS SUBMITTED BY SENATOR HUBERT HUMPHREY

RICHARD BOLLING, MO., CHAIRMAN
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GARRY BROWN, MICH.
MARGARET M. HECKLER, MASS.
JOHN H. ROUSSELOT, CALIF.

JOHN R. STARK,
EXECUTIVE DIRECTOR

Congress of the United States
JOINT ECONOMIC COMMITTEE
(CREATED PURSUANT TO SEC. 5(a) OF PUBLIC LAW 304, 79TH CONGRESS)
WASHINGTON, D.C. 20510

HUBERT H. HUMPHREY, MINN., VICE CHAIRMAN
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ORRIN G. HATCH, UTAH

September 15, 1977

The Honorable Edward M. Kennedy
Chairman
Subcommittee on Antitrust and Monopoly
Room A517
Immigration Building

Attn: Terry Lytle

Dear Ted:

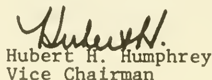
I understand the Subcommittee on Antitrust and Monopoly which you chair completed three days of hearings September 9 on S.1874, A Bill to Restore Effective Enforcement of the Antitrust Laws.

This legislation is of especial concern to the State of Minnesota which has actively invested in enforcement of the antitrust statutes on behalf of her citizens. Therefore, I have requested and received the enclosed analysis from Mr. Paul C. Sprenger, counsel for the State of Minnesota in a pending action, the success of which may depend upon rectification of the Illinois Brick Company decision. The Supreme Court in that case knocked the wind out of effective antitrust remedy by placing the burden for initiating litigation upon the middleman who infrequently suffers the primary injury of price-fixing conspiracies. Additionally, middlemen often have much to lose by alienating suppliers through a suit. Finally, the Supreme Court's interpretation runs counter to direct Congressional intent implicit in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 which permits State attorneys general to sue as *parens patriae* for their citizens who are harmed by illegal conspiracies as final product or service consumers.

I would appreciate it if Mr. Sprenger's statement were included as part of the hearing record on S.1874, thereby sharing his well-considered and cogently argued views with our colleagues.

Thank you, and best wishes.

Sincerely yours,



Hubert H. Humphrey
Vice Chairman

cc: Mr. Paul C. Sprenger

STATEMENT OF PAUL C. SPRENGER
IN SUPPORT OF THE
"BILL TO RESTORE EFFECTIVE
ENFORCEMENT OF THE ANTITRUST
LAWS", S. 1874

As counsel for the State of Minnesota in the consolidated Sugar Antitrust Litigation now pending in the United States District Court for the Northern District of California, and as an active practitioner in the field of antitrust law, I urge the prompt passage of the "Bill to Restore Effective Enforcement of the Antitrust Laws" (S. 1874), in order to accomplish by legislation the reversal of the recent decision of the United States Supreme Court in Illinois Brick Co. v. Illinois, 97 S.Ct. 2061 (June 9, 1977).

The decision of the Supreme Court in Illinois Brick represents a stunning setback for the historic policy of the Nation favoring competition in the marketplace as the appropriate means of determining the availability, distribution and price of goods and services. Virtually everyone interested in antitrust enforcement was shocked at the potential disruption which would be occasioned should pending cases by indirect purchasers be permitted to fall through the cracks in efforts to restore indirect purchasers, generally, to their position prior to Illinois Brick. Specifically, the Office of the Minnesota Attorney General has

expended almost 3,000 hours to date in prosecuting the Sugar Antitrust Litigation over the two years preceding the June 9, 1977 decision. In excess of $23,471.59 has been disbursed by the State of Minnesota as costs in their joint prosecution of the case with other states and private litigants. Trial preparation was perhaps two-thirds completed when the Illinois Brick case intervened. If the law is to revert to its prior status, the time and expense of the State of Minnesota and other indirect purchasers should not be lost in the shuffle in the period between June 9, 1977 and passage of a remedial bill.

The antitrust laws, principally the Sherman and Clayton Acts, have long served to protect such competition from price-fixing, monopolization, and other varieties of trade restraint. In addition to deterring individuals and business firms from engaging in anticompetitive acts and practices and furnishing a means for imposing sanctions on violators, the antitrust laws provide (in Section 4 of the Clayton Act) a civil damage remedy to those who have been injured by anticompetitive conduct. The Illinois Brick decision, if permitted to stand, will have a seriously detrimental effect both on the deterrent function of the antitrust laws and on the remedial function of the laws in providing redress to injured persons.

Until this recent decision it has long been the accepted state of affairs, both as a matter of law and as a matter of the general

understanding and consensus of antitrust lawyers, that anyone (whether an individual or a governmental or business entity and wherever located in the chain of distribution) which could prove that it had been actually injured by an antitrust violation could recover damages from the violator(s) upon satisfying all the elements of the particular antitrust claim - always including proof of (a) violation by the defendant, (b) injury to the plaintiff, (c) causal connection between the violation and the injury, and (d) the amount of the damage. So long as a party was not determined to be too remote from the alleged violation, it was permitted to come into court and attempt to establish its claim. Thus, assuming a manufacturers' conspiracy in restraint of trade in the classic pattern of distribution of a product (manufacturer - wholesaler - retailer -consumer), wholesalers, retailers and consumers could all initiate antitrust cases against the offending manufacturers, each plaintiff asserting that part of the conspiratorial overcharge caused it economic injury. In every case the plaintiff would be obliged to prove, among other things, both that it was in fact injured and the dollar amount of that injury. (No one, to my knowledge, has ever enjoyed an "automatic" recovery in such cases.) This was, I believe, the entirely proper and correct scheme of things as a matter of antitrust law, as a matter of economic policy, as a matter of Congressional intent and as a matter of common sense.

The Supreme Court's decision in Illinois Brick would now limit the set of persons entitled to seek redress of injury caused by antitrust violations to those who purchased the product or service in question directly from an alleged offender, with a narrow band of exceptions. In the example given above, only the wholesalers would be entitled to attempt to prove the elements of a successful antitrust claim against the conspiring manufacturers. Both retailers and consumers, with narrow exceptions, would be left in the cold to nurse their wounds and carry on without being entitled to seek legal redress of their injuries.

The result is bitterly ironic in several respects. First, it precludes the consumer, the person for whose principal benefit the antitrust laws are intended, from seeking redress of violations which have resulted in overcharges to him in nearly all but the rare instances in which he has purchased the product in question directly from the offender (e.g., a retailers' conspiracy). Second, the decision confers the major enforcement role on middlemen, or in the above example, wholesalers. As the average man on the street knows, middlemen customarily pass on all of their costs and and are therefore rarely going to be actually injured by antitrust overcharges occurring at points above them in the chain of distribution. Moreover, such middlemen are typically reluctant to risk termination or interruption of the supply of the product that may result from suing their suppliers, as Mr. Justice Brennan tellingly noted

in his dissenting opinion. With the set of persons entitled to proceed with private antitrust actions thus severely limited, the chilling effect on future antitrust enforcement and the limiting effect on the availability of the remedy are both obvious.

The Illinois Brick decision is also ironic in that the result reached by the Court is taken by the Court to be logically required by the 1968 decision in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 88 S.C. 2224 (1968). The Hanover Shoe decision manifestly rests on a policy basis - a policy of vigorous and effective antitrust enforcement. Illinois Brick now turns Hanover Shoe on its head to create a result distinctly contrary to that same policy. This is a consequence of overattention to logical niceties (in the words of Mr. Justice Blackmun's dissent, "a wooden approach") to the detriment of attention to the clear Congressional intent that victims of antitrust offenses be entitled to obtain, upon proper proof, a damage remedy for injuries imposed upon them.

By barring nearly all indirect purchasers from recovery, Illinois Brick also renders nearly meaningless the Hart-Scott-Rodino Antitrust Improvements Act of 1976. If consumers have no claims, then it accomplishes nothing to authorize state attorneys general to sue as parens patriae to recover the damages incurred by their citizens. In enacting that statute, Congress was naturally proceeding on the contrary premise that consumers injured by antitrust offenses do have a cause of action for damages under the Clayton Act. In fact,

the Supreme Court refers to the Hart-Scott-Rodino Act as a device "to enforce existing rights of recovery under §4". (97 S.Ct. 2061, 2069 n. 14) If consumers' rightys were in fact so attenuated as the Court has now made them, Congress need not have bothered with authorizing attorneys general to proceed to enforce them via the Hart-Scott-Rodino Act.

I specifically wish to urge continued retention in S. 1874 of Section 4, which provides that the amendments to the Clayton Act which would, in effect, eliminate the impact of the Illinois Brick decision would be applicable "to any action commenced under section 4, 4A, or 4C(a)(1) of the Clayton Act, which was pending on June 9, 1977,* or filed thereafter". The pretrial preparation of antitrust cases typically occurs over a period of several years. In the previously-mentioned Sugar Antitrust Litigation, which has proceeded in pretrial development much more rapidly than many similar antitrust actions, many of the cases were filed in early 1975, and the State of Minnesota, in particular, initiated its action on March 26, 1975. It is presently anticipated that the consolidated cases will come to trial in the spring or early summer of 1978. Numerous litigants in scores of pending cases across the country who have been expending substantial amounts of time, effort, and money in the pretrial prepara-

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* The date of the Illinois Brick decision.

tion of their cases, like those in the Sugar cases, should not now be left caught in the middle by a startling Supreme Court decision which is manifestly contrary to the intent of Congress. On behalf of the State of Minnesota, I therefore urge prompt passage of the "Bill to Restore Effective Enforcement of the Antitrust Laws", S. 1874, and specifically urge that Section 4 of the Bill, which applies the amendments to all pending cases not be compromised away but instead be retained in the Bill in order that the parties to long-pending but unadjudicated antitrust cases not be barred from attempting to prove that they suffered injury from an antitrust offense by the Supreme Court's decision in the Illinois Brick case.

SUBMISSION BY DANIEL BERGER, ESQ. ON SIGNIFICANCE OF INDIRECT PURCHASERS

LAW OFFICES
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August 31, 1977

David Boies , Esquire
Antitrust & Monopolies Subcommittee
Room A517
United States Senate
Washington, D.C. 20510

Dear Mr. Boies:

This is a preliminary report on the subject of treble damage actions involving the chain of distribution and passing-on issues. We have examined price-fixing cases brought since 1960. Cases were compiled by using Lexis (legal research computerized system) and Federal Reporter Digests, and CCH Trade Regulation Reporter. Based upon these sources (reported cases only) some fifty-nine price-fixing and monopolization (pass-on) cases have been identified since 1960. These cases may be classified by the type of purchaser as follows: *

(a) 23 cases involved both direct and indirect purchasers;
(b) 21 cases involved direct purchasers only;
(c) 15 cases involved indirect purchasers only.

I. The Significance of Indirect Purchasers as Enforcement Plaintiffs

It may be clearly said that the availability of indirect purchasers suits is extremely significant from the perspective of enforcement. Furthermore, the institution of a direct purchaser rule would be a serious blow to the deterrence of price fixing and enforcement of the antitrust laws generally.

As the figures indicate, more than 3/5 of the cases surveyed so far involved indirect purchasers. In 15 cases only indirect purchasers sued. A direct purchaser rule eliminates any enforcement in these instances. This would

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* A complete list of the case citations is attached. Throughout this report the cases will be referred to by name.

II. The Type of Antitrust Cases Involving Chains of Distribution and Passing-on Issues

All of the cases reviewed alleged violation of Sherman I (price-fixing) and/or Sherman II (attempt to monopolize or monopolization). Generally, the Sherman II cases alleged a conspiracy in an attempt to monopolize. We have not found any cases brought under substantive provisions of the Clayton Act. Conceivably, however, mergers in violation of Clayton §7 could possibly result in elevation of prices at some level of the chain of distribution although no litigated cases seem to exist. Therefore, any legislation should seemingly not preclude the possibility of recovery under the Clayton Act. In any event, such legislation should not be limited to price fixing cases under Section I of the Act since the traditional pattern in which cases involving the chain include Section II violations.

III. Cases Which May be Affected by Illinois Brick

Due to the Illinois Brick decision a number of pending cases involving classes of indirect-direct plaintiffs will be affected. For example, in the Folding Boxes litigation, indirect purchasers have already been dismissed. Other pending major cases include: In re Sugar Industry, In re Plywood Litigation (pending settlement), In re Toilet Seat Litigation, In re Western Liquid Asphalt (pending settlement), In re Anthracite Coal Litigation, Lefrak v. American and Arabian Oil Co. A particularly striking attempt to employ the Illinois Brick rule is the effort by defendants in the Master Key Litigation to reopen a final judgment entered over 6 months ago on the basis of Illinois Brick.

IV. Consolidation

Our study indicates that major price fixing cases have been consolidated before the Judicial Panel on Multidistrict Litigation. For example, In re Plywood Litigation, In re Toilet Seat Antitrust Litigation, In re Western Liquid Asphalt Litigation, In re Master Key Litigation, In re Folding Boxes, In re Sugar Industry, In re Plumbing Fixtures, In re West Coast Bakery. Further investigation will produce additional cases which have been consolidated. The last major cases brought to trial in separate districts were the Electrical Equipment Conspiracy Cases. This was before the creation of the panel.

include major cases such as In re Master Key Litigation which resulted in a $21M settlement after 12 weeks of trial against the master key and lock system industry and smaller price fixing cases such as City of Philadelphia v. Morton Salt Co. which involved a $3-4M settlement.

In 23 cases, both direct and indirect purchasers sued. However, it cannot be said that in these 23 cases a direct purchaser rule would be neutral from a deterrence point of view. In some of these cases, the presence of direct purchasers from the perspective of deterrence was minimal. For example, in Western Liquid Asphalt no class of direct purchasers (contractors and middlemen) was alleged and the number of direct purchasers was insignificant. Similarly, in Illinois Brick, direct purchasers (contractors and middlemen) settled cases on terms favorable to the defendants and at amounts far below even the amount of the alleged illegal overcharge. Thus, without information concerning the number of direct purchasers, the size and scope of the classes, if class treatment was attempted, etc., the mere presence of direct purchasers in these cases cannot be said to be adequate from a deterrence perspective. And, in any event, the large number of indirect purchasers in fact suing in these cases suggests the wide availability of indirect purchasers as enforcement plaintiffs.

As to the 23 cases brought by direct purchasers only, this figure does not by itself carry implications about the relative propensity of direct purchasers to sue in relation to indirect purchasers. A number of the cases classified as involving direct purchasers are analogous to price fixing at the retail level and do not involve chains of distribution or pass-on issues. e.g. Goldfarb v. Virginia State Bar, (purchasers of real estate alleged that lawyers and a State Bar Association violated Sherman I by fixing minimum fee schedules); Weinberg v. Federated Department Stores, (consumer of women's clothing alleged a horizontal price-fixing conspiracy among major retailers). Similarly, some of these cases were brought by state or local government agencies buying directly from defendants in their capacity as end users. e.g. In re Antibiotics (the states as institutional users were direct purchasers from drug manufacturers).

Thus, the most meaningful statistic to emerge from the investigation at this time in over 3/5 of the cases surveyed, indirect purchasers brought suit and were functioning as "private attorneys general".

The increased use of the panel will prevent the possibility of inconsistent judgments in different in districts. Thus, the cases surveyed indicate that the fear of inconsistent judgments voiced in Illinois Brick is unfounded if it is based upon actual experience rather than hypothesis. Moreover, no case has been found in which suit was filed after a settlement, let alone final judgment after trial on the merits.

V. Private Public Enforcement Pattern

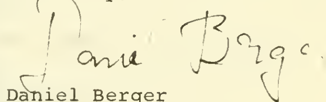
Further investigation is necessary to determine how many cases were filed after government enforcement action. In many instances, we have not determined the outcome of the government enforcement proceedings. However, out of the 59 cases surveyed, 22 were brought after a grand jury indictment or government investigation.

Private treble damage actions thus serve as a deterrent to antitrust violations. Most government cases are ended by consent decrees which are often the precursors of private suits, suggesting that treble damage awards may be the most effective means of insuring disgorgement of the defendant's illegal profits. Moreover, the criminal penalties imposed in government antitrust suits tend to be low. Thus, the availability of treble damage awards as a supplement to government suits enhances the effectiveness of antitrust deterrence. See Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L.J. 809, 848-50 (1977).

Finally, a more definitive report is in the works and will be forwarded to you as soon as possible.

With all best wishes, I am

Sincerely,



Daniel Berger

DB/dls
Enclosure

SUPPLEMENT TO TESTIMONY OF JOHN SHENEFIELD

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

United States Department of Justice
WASHINGTON, D.C. 20530

26 JUL 1977

Honorable Edward M. Kennedy
Chairman, Subcommittee on
Antitrust and Monopoly
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

During my July 21, 1977, testimony before the Subcommittee on Antitrust and Monopoly on S. 1874, a bill that would permit indirect purchasers to recover for antitrust violations, Senator Laxalt requested the number of parens patriae suits filed since the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. To the best of our knowledge three parens cases have been separately filed since the enactment of that law, two in Colorado and one in Maryland. In these cases, the states are representing direct purchasers.

If we can be of any further assistance to you, please let me know.

Sincerely yours,

John H. Shenefield
Acting Assistant Attorney General
Antitrust Division

SUPPLEMENT TO TESTIMONY OF HAROLD KOHN

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DISTRICT OF COLUMBIA BAR

July 21, 1977

Mr. John Runge
Counsel, House Judiciary Committee
B-351-13 Rayburn House Office
Building
Washington, D. C. 20515

Dear Mr. Runge:

In accordance with your request, at the conclusion of my testimony today before the Senate Antitrust Subcommittee, I suggest the following for consideration as possible amendments to Section 4 of the Clayton Act:

I.

Renumber the present paragraph 4, as 4 (1), and add:

> "4 (2). In addition to any other remedy provided herein, any person who claims to have been affected, directly or indirect, with or without any direct business relationship or privity between the claimant and any defendant, as a result of anything forbidden in the antitrust laws, may bring suit in any district court in the United States in which a defendant resides, or is found, or has an agent, without respect to the amount in controversy, to compel

the said defendant to pay into the registry of the Clerk of Court, for subsequent equitable distribution as may be ordered by the district court to persons, including governmental entities, filing claims therein, an amount equal to the total overcharges or underpayments by said defendant or defendants resulting from such violation, trebled, together with the costs of suit, including a reasonable attorneys' fee, but reduced by the amount of any actual payment theretofore made by said defendant to a plaintiff who has brought suit under Sections 4 (1), 4A or 4C."

The amendment may possibly:

(1) retain the certainty now existing under the Illinois Brick case for the benefit of the first purchaser;

(2) avoid any unanticipated effect on other aspects of antitrust case law; and

(3) enable the law to move toward making defendants disgorge the total fruits of their conspiracy, regardless of the ability of a particular claimant or group of claimants to show his particular portion of the total damages.

II.

Another suggestion would be to amend Paragraph 4 to read as follows:

"Any person, including without limitation, indirect purchasers from or sellers to defen-

> dants who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

III.

I think it might also be a good idea to look at the Uniform Commercial Code and the case law in other areas relating to the elimination of privity as a prerequisite for recovery.

I will be happy, of course, to discuss these or any other suggestions with your Committee or the Senate Committee at your convenience.

Sincerely yours,

Harold E. Kohn

HEK/dt

cc: Honorable Edward Kennedy
John Shenefield, Esquire
Mr. Rand McQuinn, Antitrust Division
Mr. Terry Lytle, Subcommittee on Antitrust and Monopoly
Jerry S. Cohen, Esquire

SUPPLEMENT TO TESTIMONY OF FREDERICK ROWE

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July 26, 1977

Hon. Edward M. Kennedy
Chairman, Subcommittee on
  Antitrust and Monopoly
Committee on the Judiciary
United States Senate
431 Russell Senate Office Building
Washington, D.C. 20510

Re: S. 1874

Dear Mr. Chairman:

As referenced in my testimony on S. 1874 on July 21, 1977, this is to confirm that Kirkland & Ellis, which is this firm's Chicago office, is involved in the pending Beef litigation.

Specifically, Kirkland & Ellis represents National Provisioner, Inc. (a news service which reports packers' open market sales) in the consolidated *In re Beef Industry Litigation* (M.D.L. Dkt. 248, N.D. Texas), combining more than a dozen separate lawsuits.

It was a privilege to appear and testify before your Subcommittee.

Very truly yours,

Frederick M. Rowe

FMR/kvc

SUPPLEMENT TO TESTIMONY OF SAMUEL MURPHY

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*ADMITTED TO DISTRICT OF COLUMBIA BAR ONLY

OWEN McGIVERN
ROBERT M ESTES
COUNSEL

September 14, 1977

Emory Sneeden, Esq.
Minority Chief Counsel
Subcommittee on Antitrust
& Monopoly
United States Senate
Room A-517
Washington, D. C. 20510

Re: Hearings on S. 1874

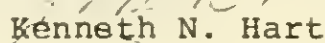
Dear Mr. Sneeden:

During his appearance at the hearings on September 9th before your Subcommittee on proposed legislation to overturn the Illinois Brick decision, my partner, Samuel W. Murphy, Jr., referred to a list prepared by lawyers in our firm of antitrust damage cases in which it appeared that direct purchasers were among the plaintiffs prosecuting claims. For your information, a copy of that list is enclosed.

As explained by Mr. Murphy during his testimony, this listing was prepared solely from reported decisions of the Judicial Panel on Multidistrict Litigation in handling transfers for coordinated proceedings and related matters on multidistrict litigation pursuant to 28 U.S.C. § 1407. Accordingly, its degree of accuracy is limited by the data and information which can be taken from those

decisions. In order to state with a high level of certainty that direct purchasers were or were not asserting damage claims in a certain piece of litigation, one would have to check, in most instances, the pleadings or even the record of discovery in that case. This we have not done. However, it has been our experience that most antitrust litigation coordinated under § 1407 involves claims by numerous direct as well as indirect claimants.

Very truly yours,



Kenneth N. Hart

Enclosure

cc: David Boies, Esq.
Counsel, Subcommittee on
Antitrust & Monopoly
United States Senate
Room A-517
Washington, D. C. 20510
(w/enclosure)

List of Cases

In re Antibiotics Antitrust Actions (tetracycline), 299 F. Supp. 1402 (J.P.M.L. 1968); 297 F. Supp. 1126 (J.P.M.L. 1968)

In re Protection Devices and Equipment, 295 F. Supp. 39 (J.P.M.L. 1968)

In re Concrete Pipe, 303 F. Supp. 507 (J.P.M.L. 1969); 297 F. Supp. 1128 (J.P.M.L. 1968)

In re Gypsum Wallboard, 303 F. Supp. 510 (J.P.M.L. 1969); 297 F. Supp. 1350 (J.P.M.L. 1969)

In re Library Edition of Children's Books, 299 F. Supp. 1139 (J.P.M.L. 1969); 297 F. Supp. 1352 (J.P.M.L. 1968)

In re Scotch Whiskey, 299 F. Supp. 944 (J.P.M.L. 1968)

In re Admission Tickets, 302 F. Supp. 1339 (J.P.M.L. 1969)

In re Western Liquid Asphalt, 303 F. Supp. 1053 (J.P.M.L. 1969)

In re Water Meters, 304 F. Supp. 873 (J.P.M.L. 1969)

In re Photocopy Papers, 305 F. Supp. 60 (J.P.M.L. 1969)

In re Plumbing Fixtures, 308 F. Supp. 242 (J.P.M.L. 1970); 298 F. Supp. 484 (J.P.M.L. 1968)

In re Ampicillin Antitrust Litigation, 315 F. Supp. 317 (J.P.M.L. 1970)

In re IBM, 319 F. Supp. 926 (J.P.M.L. 1970); 314 F. Supp. 1253 (J.P.M.L. 1970); 302 F. Supp. 976 (J.P.M.L. 1970)

In re Refrigerant Gas Antitrust Litigation, 334 F. Supp. 996 (J.P.M.L. 1971)

In re Motion Picture "Standard Accessories" and "Pre-Vues" Antitrust Litigation, 339 F. Supp. 1278 (J.P.M.L. 1972)

In re Hotel Telephone Charge Antitrust Litigation, 341 F. Supp. 771 (J.P.M.L. 1972)

In re Antibiotic Drugs Antitrust Litigation (doxycycline), 355 F. Supp. 1400 (J.P.M.L. 1973)

In re Cessna Aircraft Distributorship Antitrust Litigation, 359 F. Supp. 543 (J.P.M.L. 1973)

In re Mutual Funds Sales Antitrust Litigation, 361 F. Supp. 638 (J.P.M.L. 1973)

In re Clark Oil and Refining Corp., 364 F. Supp. 458 (J.P.M.L. 1973)

In re West Coast Bakery and Flour Litigation, 368 F. Supp. 808 (J.P.M.L. 1973)

In re Holiday Magic Securities and Antitrust Litigation, 368 F. Supp. 806 (J.P.M.L. 1973)

In re Sta-Power Industries Securities and Antitrust Litigation, 372 F. Supp. 1398 (J.P.M.L. 1974)

Bestline Products Securities and Antitrust Litigation, 375 F. Supp. 926 (J.P.M.L. 1974)

In re Plywood Antitrust Litigation, 376 F. Supp. 1405 (J.P.M.L. 1974)

In re Midwest Milk Monopolization Litigation, 379 F. Supp. 989 (J.P.M.L. 1974)

In re Gas Vent Pipe Antitrust Litigation, 380 F. Supp. 799 (J.P.M.L. 1974)

In re Mack Truck Inc. Antitrust Litigation, 383 F. Supp. 503 (J.P.M.L. 1974)

In re Toilet Seat Litigation, 387 F. Supp. 1342 (J.P.M.L. 1974)

In re Amerada Hess Corp. Antitrust Litigation, 395 F. Supp. 1404 (J.P.M.L. 1975)

In re Griseofulvin Antitrust Litigation, 395 F. Supp. 1402 (J.P.M.L. 1975)

In re Beef Industry Antitrust Litigation, 419 F. Supp. 720 (J.P.M.L. 1976)

In re Sugar Industry, 427 F. Supp. 1018 (J.P.M.L. 1977); 405 F. Supp. 1404 (J.P.M.L. 1975); 395 F. Supp. 1271 (J.P.M.L. 1974)

In re Piper Aircraft Distribution System Antitrust Litigation, 405 F. Supp. 1402 (J.P.M.L. 1975)

In re Folding Carton Antitrust Litigation, 415 F. Supp. 384 (J.P.M.L. 1976)

In re Olympia Brewing Co. Antitrust Litigation, 415 F. Supp. 398 (J.P.M.L. 1976)

In re Bristol Bay, Alaska, Salmon Fishery Litigation, 424 F. Supp. 504 (J.P.M.L. 1977)

SUPPLEMENT TO TESTIMONY OF HOWARD ADLER

Chamber of Commerce of the United States
NATIONAL ECONOMIC DEVELOPMENT DIVISION 202-659-6120
1615 H STREET, N.W
WASHINGTON, D.C. 20062

September 22, 1977

Honorable Edward M. Kennedy, Chairman
Subcommittee on Antitrust and Monopoly
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

During the testimony of Mr. Howard Adler before the Subcommittee on Antitrust and Monopoly on July 22, 1977, you asked for the view of the United States Chamber of Commerce with respect to certain basic objectives of S. 1874 (putting aside differences in views as to the choice of language to accomplish these objectives).

Mr. Adler indicated that he perceived three objectives in your bill:

1. Repeal the Illinois Brick rule that only the first purchaser from the antitrust violator can sue.

2. Change the Hanover Shoe rule so as to permit each purchaser to recover only those damages he in fact suffered and has not "passed on" to others.

3. Leave the aggregate potential liability of antitrust violators the same as before.

You asked whether the Chamber supports these objectives of the bill and whether the Chamber is not disturbed by the element of unjust enrichment inherent in the Illinois Brick rule whereby the direct purchaser may recover damages he did not suffer and other damaged parties are denied any recovery at all.

The way private antitrust remedies work has been profoundly affected by the evolution of the class suit and by passage of parens patriae legislation. One effect has been a massive escalation in the complexity of the issues that may be encountered, the costs that may be incurred, and the amounts that may be at stake in private antitrust litigation.

These changes make enormous demands on our judicial system's capacity to manage issues and parties. They confront courts with questions which often cannot be resolved fairly, and involve elaborate proceedings whose costs can themselves be a significant burden on commerce.

The *Hanover Shoe/Illinois Brick* rules are an attempt to reduce the problem to manageable size and shape, at least insofar as price fixing cases are concerned. There may be better ways to do this, but we think it is essential that some form of shortcut of the special problems inherent in this kind of litigation be found. The proposal sought to be embodied in S. 1874 goes in just the opposite direction and would, we think, be a step backward.

If the amount of damage growing out of most antitrust violations could be determined with reasonable confidence, and if an accurate perception were possible of how the burden of these damages is spread among the various people who are touched by it, then the *Hanover Shoe/Illinois Brick* rules might present an unjust enrichment problem. One should not be misled, however, by the simplicity of phrases like "the amount of the overcharge" and "the amount passed on" into thinking that in real life a realistic dollar value for these amounts can ordinarily be determined from the evidence.

In most actual cases, no one can really know what the seller's price would have been absent an alleged conspiracy, or how such changed price would have affected the balance of competitive forces influencing the pricing decisions of others in the chain. In our view, the probability of someone being enriched unjustifiably is about as great if the judiciary attempts to determine the undeterminable as it is if an arbitrary shortcut like *Hanover Shoe/Illinois Brick* is adopted.

Rather than simply erase *Hanover Shoe/Illinois Brick*, we urge the Committee to examine more fundamental ways to improve the system of antitrust remedies, including some of those suggested by Messrs. Handler and Blechman in their testimony. We would like to stress the following problems in the present system:

First, the unacceptable cost which may be imposed on both the parties and the courts by major class suits or *parens patriae* proceedings under the present system. These costs are in the end borne by us all. They will in most cases be all out of proportion to the benefits actually recoverable for individual class members.

Second, our real incapacity to determine the amount or incidence of damages flowing from most antitrust violations with sufficient accuracy to justify these costs. While we may change the shape or incidence of unjustifiable enrichment, there is a real question whether we can cure it.

Third, the proclivity of the present system for forcing unjust settlements. On the one hand, the cost of trying the case may be more than the amount at stake. On the other, the complexity and subjectivity of the issues make the eventual outcome impossible to evaluate, and ordinarily prevent summary disposition of the case at an early stage.

Faced with these circumstances, the defendant, whether innocent or guilty, frequently has no real choice but to pay tribute, and the only real winners are the lawyers. A system which imposes such great burdens on the innocent defendant as well as the guilty one is neither a fair nor an effective means of deterring violation.

Fourth, the need to re-examine the propriety of the rule which trebles damages across the board without reference to the nature or merits of a particular case. This rule was enacted as a means of encouraging private antitrust suits and as a deterrent to violation. It may be justified in the ordinary single plaintiff situation, especially where the antitrust violation is sufficiently clear cut that a defendant's conduct has an air of willfulness about it. Antitrust trials are so complex and uncertain, compared with the amount of actual damage any one plaintiff might hope to recover, that in such cases some added incentive may be needed.

We submit, however, that with the development of the class suit and the authorization of parens patriae actions on behalf of all injured citizens, a rule which simply trebles damages in all cases across the board is no longer appropriate. Trebling of damages should not be needed to encourage private enforcement where the damages recoverable are substantial in relation to the cost of suing. This is especially true since attorneys' fees are separately recoverable.

On the other hand, where separate claims are joined into aggregates that are large even in relation to the defendant's total resources, the punitive element involved in trebling may not always be appropriate and should depend on the circumstances of the particular defendants. For example, the amount of damages others have suffered may or may not be the same as the "enrichment" achieved by defendant through his violation (e.g., they may be nearly the same in a price fixing case but far apart in a merger case).

Damages may also be unrelated to the culpability of defendant's conduct. A blatant violation of a clear and familiar per se rule is one thing; being found guilty at the frontier of the law for conduct not theretofore considered illegal is quite another. An award which, in the name of deterrence, cripples the defendant as a future competitor would not ordinarily be in the public interest. We believe the Committee should consider granting the court discretionary power to determine whether, in the light of such considerations, any multiplying of damages is appropriate.

In summary, the National Chamber urges that the proposal sought to be embodied in S. 1874 not be adopted even if the language problems addressed in our earlier testimony are resolved. Whether or not the Hanover Shoe/Illinois Brick rules are the best possible solution to the problems they address, they are a helpful attempt to shortcut the

unacceptable practical problems of administering a theoretically perfect rule. We urge the Committee to consider a more fundamental review of the present system of private antitrust enforcement.

Such a review seems especially appropriate when we stop to consider that the bill's asserted purpose, equity, should be an impartial concept. Yet, S. 1874 would not bring about the even-handedness so essential to the notion of equity.

Most of the discussion addresses equity for the indirect purchaser, interpreted generally as the consumer. According to the argument, equitable ends are frustrated when allegedly injured consumers are not compensated for losses caused by antitrust violations. There has been very little in the discussions, on the other hand, that acknowledges a legislative obligation to assure equity for defending business firms. This failing, as much as anything else, is a legitimate cause for continued business resistance.

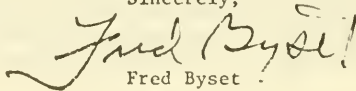
The intimidating use of class actions, which S. 1874 would further encourage, all but denies fairness to the defending firm. Faced with incalculable damage potential, most well-advised firms buy peace through out-of-court settlements, many continuing all the while to protest their innocence.

This result is borne out in a study now in progress by a special subcommittee of the Advisory Committee on Federal Rules of Practice and Procedure of the Judicial Conference of the United States. According to interim results, 115 out of 151 District Court Judges responding to a questionnaire felt that the class action (under Rule 23) "encourages defendants to settle rather than defend on the merits because of the size of their potential liability."

Nineteen of 24 Circuit Court Judges gave the same response. Predictably, private attorneys representing defendants also agreed by a large margin. More significantly, attorneys representing plaintiffs expressed a like thought by a count of 43 to 32.

In these circumstances, where defending firms dare not test their cases on the merits, complete equity is impossible. We submit, therefore, that compensation for allegedly injured consumers is not the only equity issue before the Congress. It should give equally conscientious thought to fairness for defendants. Some curb on class actions must be found to assure that the right to defend is a practical reality and not just legal theory.

Sincerely,



Fred Byset
Executive
Antitrust and Corporate Policy Committee

cc: All Members of Subcommittee on Antitrust and Monopoly

bcc: Peter Chumbris
Emory Sneeden
Michael Glaser

AUG 16 1977

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

ROWLAND F. KIRKS
DIRECTOR

WILLIAM E. FOLEY
DEPUTY DIRECTOR

August 12, 1977

Honorable Strom Thurmond
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Thurmond:

The Chief Justice has asked me to acknowledge receipt of your letter of August 5, 1977, concerning S. 1874 and has directed me to respond concerning the action of the Judicial Conference.

In April 1976, in response to Senator Hruska's request for the Judicial Conference's views upon a similar legislative proposal, S. 1284, 94th Congress:

> The Conference agreed that S. 1284 relating to the antitrust laws involves a policy question for the Congress. The Conference did, however, approve the submission to the Congress of a statement on the workload of the courts in relation to antitrust actions.

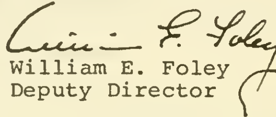
On April 14, 1976, I transmitted that statement to Senator Hruska. A copy is enclosed.

In the 1976 Annual Report of the Director of the Administrative Office (at pp. 122-125) the results of an antitrust "impact study" were presented. A copy of that material is also enclosed.

Given the relatively short period of time which has passed since the Conference acted upon S. 1284, 94th Congress, and since the 1976 "impact study", I believe the enclosed materials can be said to reflect the Conference's views on this matter.

I hope that this material is responsive to your needs. If we can be of further assistance to you, please have a member of your staff notify me.

Sincerely yours,



William E. Foley
Deputy Director

Enclosures

IMPACT STUDY

I. CIVIL CASELOAD

Since 1960 the number of civil cases commenced in the district courts has increased over 100%; 57,800 cases were filed in fiscal year 1960 and 130,597 in 1976. Federal question jurisdiction cases accounted for the greater portion of this increase. Cases involving the United States as a defendant also figured in the rise. Although new statutes and amendatory acts compounded the rising volume, certain categories of cases display an unprecedented swell without apparent relationship to changes in federal law. The tremendous rise in the number of petitions filed by both state and federal prisoners presents an acute example; during the 17 years under study state inmate filings increased an astronomical 1,624% and federal 266%. Chart 1 illustrates what judges know - civil filings mount ceaselessly. Charts 2 through 9 target specific areas in which civil filings changed significantly during this period.

Federal Question and Diversity

On July 25, 1958, pursuant to P.L. 85-554, 72 Stat. 415 (codified at 28 U.S.C. 1331, 1332) the amount in controversy in cases of a Federal question and diversity of citizenship was raised from $3,000 to $10,000. The law provided also that for purposes of such jurisdiction a corporation is deemed a citizen of the state by which it was incorporated and of the state where it has its principal place of business.

This substantial raise in jurisdictional amount was of notable impact on diversity case filings. These numbered 25,709 in fiscal 1958 but fell over 8,000 cases in each of the next years, to 17,342 in 1959 and 17,048 in 1960. From 1962 to 1973 these filings rose evenly to 25,281, an approximate return to the 1958 level. Diversity case filings in fiscal 1976 numbered 31,675, or 24.3% of total civil filings.

Under the raised jurisdictional amount federal question filings, by contrast, dropped inconsequentially for one year. In fiscal 1958 these totaled 12,141 and in 1959 11,889. However, for the preceeding seventeen years these have risen continuously, from 13,175 in 1960 to 56,822 in 1976.

So aggravated has the problem become that remedial legislation has been introduced in both Houses of Congress. S. 3153 would raise the jurisdictional amount to $25,000. H.R. 13219 would abolish entirely diversity of citzenship as a basis of jurisdiction in the federal courts.

Anti-Trust

On Chart 4, spanning fiscal years 1961 to 1963, there is a pronounced "fork" in the graph. In fiscal 1962, 2,050 private anti-trust cases were

EXCERPT - REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - 1976

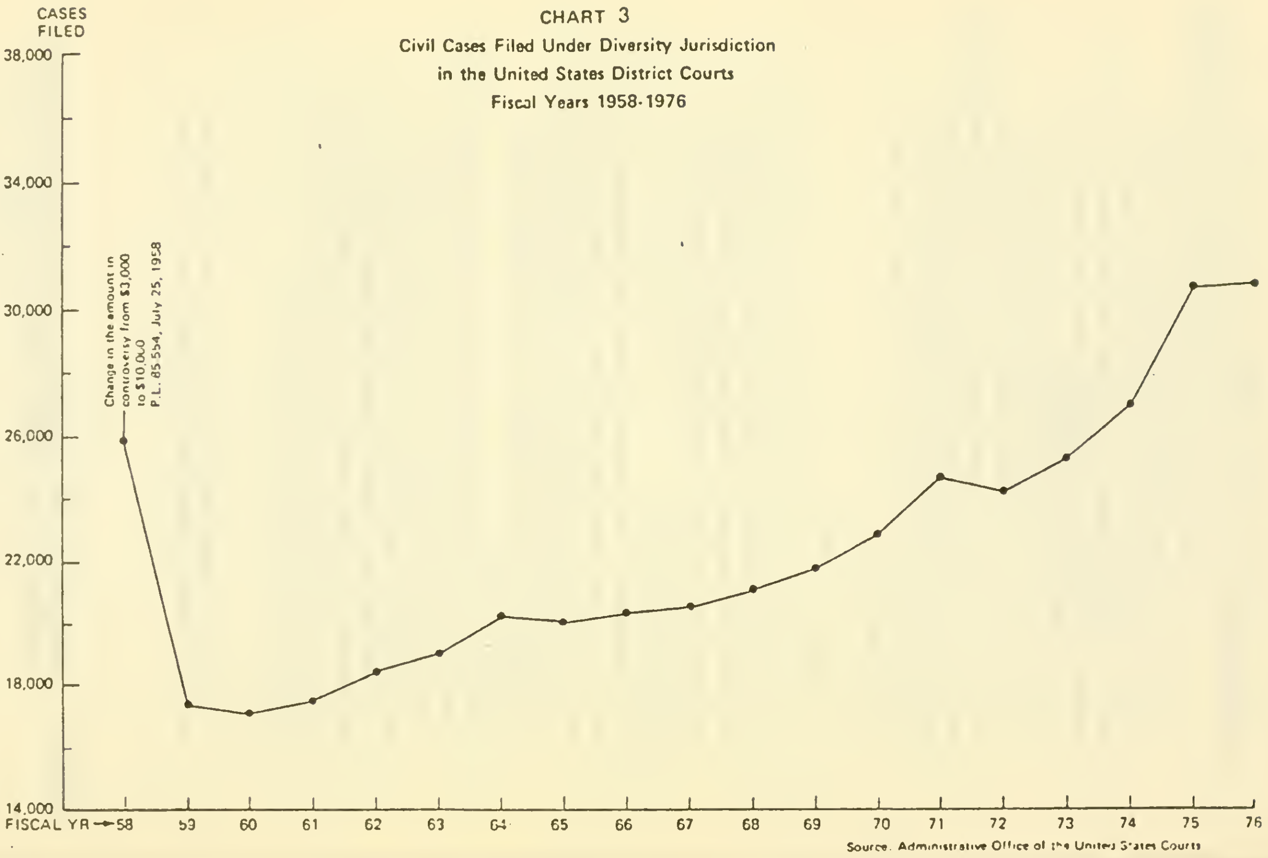


CHART 3
Civil Cases Filed Under Diversity Jurisdiction
in the United States District Courts
Fiscal Years 1958-1976
CASES FILED
38,000
34,000
30,000
26,000
22,000
18,000
14,000
FISCAL YR → 58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
Change in the amount in controversy from $3,000 to $10,000 P.L. 85-554, July 25, 1958
Source: Administrative Office of the United States Courts

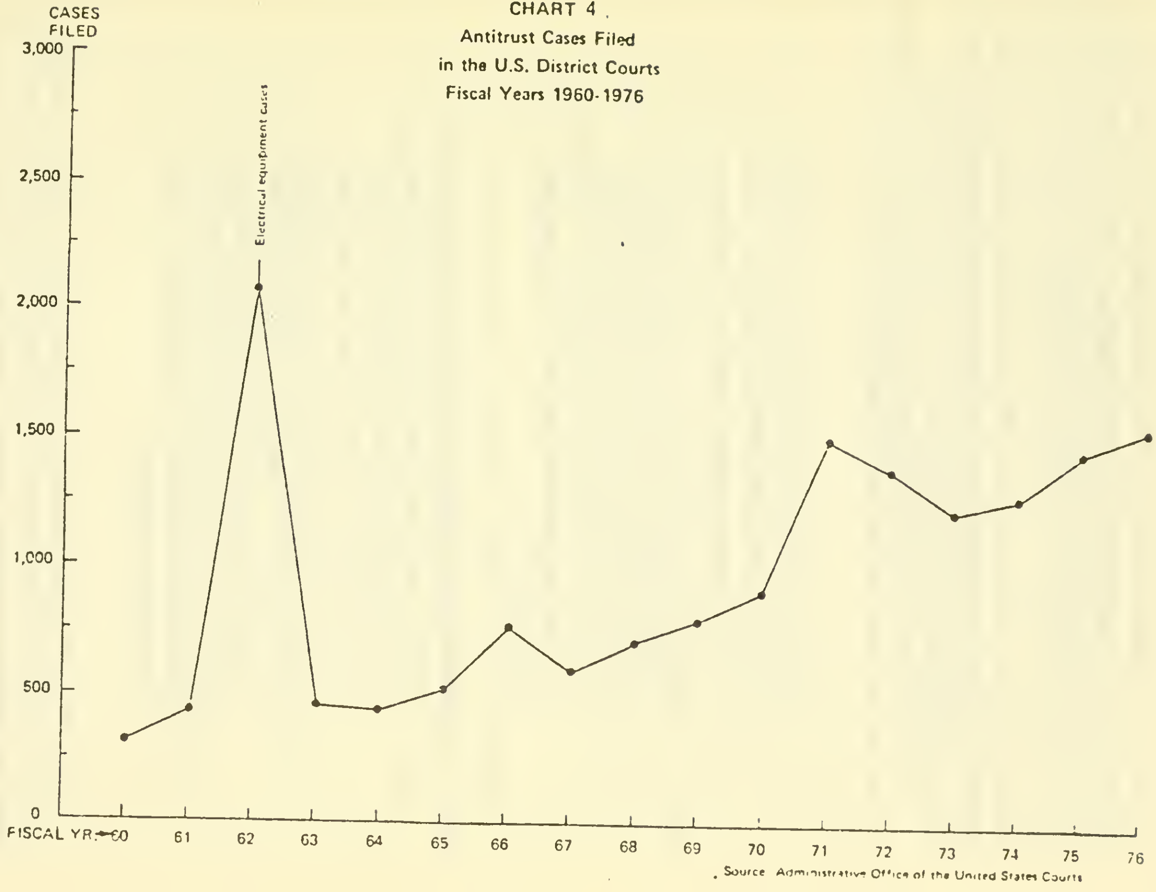


CHART 4
Antitrust Cases Filed
in the U.S. District Courts
Fiscal Years 1960-1976
CASES FILED
3,000
2,500
2,000
1,500
1,000
500
0
FISCAL YR. 60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
Electrical equipment cases
Source: Administrative Office of the United States Courts

commenced as opposed to 378 in 1961, an approximate 440% jump. This phenomenon may be laid solely to the tremendous number of treble damage cases filed against electrical equipment manufacturers subsequent to civil and criminal proceedings in Philadelphia from 1960 to 1961. Of the 2,050 private anti-trust cases initiated, 1,739 were brought against such manufacturers. By 1963 the number of private anti-trust case filings plummeted to 380, a return to their earlier range.

The following statistics were cited in a 1975 report by the General Counsel to the Committee on Court Administration:

> *"There has been a dramatic increase in absolute number of the civil anti-trust cases filed in the Federal Court system; 1,431 civil anti-trust actions were filed in 1975, up 54% from 929 actions in 1970. In the thirteen districts where at least thirty private anti-trust actions were filed, seven show a rise in private anti-trust filings between the years 1973 and 1975, ranging from 3% to 167%."*
>
> *While the absolute number of class action cases filed is quite small, five of those districts have seen their class action anti-trust cases grow strikingly; rising in 1975 to three and four times the level filed in 1973. The figures of pending private anti-trust litigation are also substantial for those districts. Nine of the thirteen districts have grown sharply; seven of those districts reflect an increase in class actions pending ranging from 50% to 1,300%.*

Total anti-trust filings climbed to 1,555 cases in 1976. These cases represented only 1.2% of the total civil filings in that year; however, as a class they probably represent the single most time consuming category of cases handled by the U.S. district courts.

Social Security

The number of Social Security cases filed in the United States district courts, as seen on Chart 5, rose gradually from 1962 to 1965, but subsequently dropped slightly for three years. In 1968 these cases began a second upward swing that continued through fiscal year 1976. The increase was the result of several amendments to the Social Security laws and the enactment

REPORT OF THE GENERAL COUNSEL OF THE

ADMINISTRATIVE OFFICE TO THE

COMMITTEE ON COURT ADMINISTRATION

In connection with the committee's review of S. 1284 relating to the antitrust laws, the General Counsel's Office has prepared the following statement relating to the current workload of the federal courts to which would be added the burdens imposed by S. 1284:

There has been a dramatic increase in absolute number of the civil antitrust cases filed in the federal court system; 1431 civil antitrust actions were filed in 1975, up 54% from 929 actions in 1970.[1/] In the thirteen districts where at least thirty private antitrust actions were filed, seven show a rise in private antitrust filings between the years 1973 and 1975, ranging from 3% to 167%.[2/]

While the absolute number of class action cases filed is quite small, five of those districts have seen their class action antitrust cases grow strikingly; rising in 1975 to

---

1/ See Annual Reports of the Director for cited years.

2/ See attached sheet, p. 3.

three and four times the level filed in 1973.[3/] The figures of pending private antitrust litigation are also substantial for those districts. Nine of the thirteen districts have grown sharply. Seven of those districts reflect an increase in class actions pending ranging from 50% to 1300%.[4/]

In evaluating the impact of further increases in private antitrust action filed in federal courts as a result of this Act, cognizance must be taken of the present critical shortage of judgeships in both the district and circuit courts. In the ten years between 1965 and 1975 the total number of cases filed in appellate courts rose 146%, while only nineteen additional judgeships were provided (an increase of 24%). The number of district court cases docketed rose nearly 60% in the last 10 years.[5/] The present sh rtage of judgeships is calculated at 13 circuit court judgeships and 52 district court judgeships. The estimated cost to adjust this shortage on an annual basis is $2,119,000 and $10,816,000 respectively.[6/]

3/ Id. at 2.

4/ Id.

5/ See Statement of Judge Robert A. Ainsworth, U. S. Court of Appeals, Fifth Circuit, Before the Subcommittee on Monopolies, Regarding Omnibus Judgeship Hearings.

6/ Id. at p. 7 and 8.

The treble damage and notice provisions of this Act appear certain to engender a greater volume of private antitrust litigation. The most significant measure of the ramifications of that higher volume of private antitrust cases is the fact that the median time interval involved in the disposition of a private antitrust litigation is twice the time expended for other civil cases.

The time factor of increased private antitrust litigation, noted above, may seriously affect the processing of criminal caseloads. It is worth noting that several of the districts which entertain most of the private antitrust filings have a higher than average criminal docket. For example, the nationwide criminal cases represent 15.8% of the total pending caseload, yet the Central District of California has had criminal case loads of 33%, 27%, and 31% respectively, in the years 1973-1975.7/ In 1975, four of the thirteen districts which have a high concentration of private antitrust litigation had above average criminal dockets. In 1973 and 1974, more than half of those districts had above average criminal case loads. In sum, the present strain on the already underplenished resources of the judicial system will be further exacerbated by a proliferation of private antitrust litigation. As a consequence, the capability of the courts to meet the mandates of the Speedy Trial Act may be decreased.

7/ Id. at 6.

Besides the increased volume of cases, the Act poses an additional problem for the financial administration of the judiciary. Section 21(b) provides for special masters, economic experts, and other personnel to be appointed by the court to assist in complex antitrust cases. The Act fails to adequately explain the source of funds for these persons. Pursuant to Section 21(c), the compensation and expenses of such masters, experts, and other personnel are to be paid under the provisions of 28 U.S.C. §604. Yet, the courts are not provided the necessary contracting authority by section 604; also there are no available funds from which to make payments to these persons. Taxing the fees against the parties involved in the litigation might be an appropriate resolution of this matter. That procedure is utilized to compensate experts and masters under Rule 53(a) of the Federal Rules of Civil Procedure and also under Rule 706(b) of the Federal Rules of Evidence.

Districts With Thirty or More
Private Antitrust Filings in Fiscal Year 1975
(Data are shown for Fiscal Years 1973-1975)

District	Total Civil Filings			Private Antitrust Filings						Class Action Antitrust Filings[1]		
				1973		1974		1975				
	1973	1974	1975	Number	% of Total	Number	% of Total	Number	% of Total	1973	1974	1975
District of Columbia	2,811	2,003	2,029	34	1.2	63	3.1	30	1.5	7	2	4
Massachusetts	4,091	4,863	5,045	38	.9	27	.6	36	.7	-	1	4
New York, Southern	5,680	5,639	6,282	106	1.9	95	1.7	109	1.7	21	8	16
New Jersey	1,895	1,951	2,244	29	1.5	18	.9	35	1.6	5	2	5
Pennsylvania, Eastern	2,890	3,173	3,539	64	2.2	53	1.7	59	1.7	8	4	8
Pennsylvania, Western	1,271	1,345	1,629	20	1.6	31	2.3	32	2.0	-	2	-
Florida, Southern	2,168	2,031	2,853	23	1.1	36	1.8	59	2.1	6	9	15
Georgia, Northern	2,032	2,668	2,731	12	.6	11	.4	32	1.2	1	2	16
Illinois, Northern	3,395	3,438	4,075	95	2.8	65	1.9	78	1.9	18	3	16
Minnesota	1,131	1,043	1,174	29	2.6	18	1.7	34	2.9	14	2	10
Missouri, Western	1,596	1,657	1,854	39	2.4	25	1.5	33	1.8	1	2	4
California, Northern	2,322	2,647	2,751	81	3.5	76	2.9	94	3.4	7	3	24
California, Central	3,118	3,420	4,202	82	2.6	78	2.3	78	1.8	6	7	2

[1] These cases are included in the private antitrust case filings.

Civil Cases Pending in District Courts
With Thirty or More Private Antitrust Filings in 1975
(Data are Shown for Fiscal Years 1973-1975)

District	Total Civil Cases Pending			Private Antitrust Cases Pending						Class Action Antitrust Cases Pending[1]		
				1973		1974		1975				
	1973	1974	1975	Number	% of Total	Number	% of Total	Number	% of Total	1973	1974	1975
District of Columbia	2,471	1,760	1,741	83	3.4	125	7.1	134	7.7	38	44	44
Massachusetts	6,968	8,945	10,422	90	1.3	92	1.0	93	.9	1	13	14
New York, Southern	10,596	8,582	8,182	263	2.5	234	2.7	209	2.6	45	36	35
New Jersey	2,601	2,801	2,856	41	1.6	40	1.4	50	1.8	1	2	3
Pennsylvania, Eastern	4,303	3,749	3,699	483	11.2	148	3.9	107	2.9	17	17	14
Pennsylvania, Western	1,200	1,250	1,527	41	3.4	53	4.2	61	4.0	2	4	2
Florida, Southern	943	980	1,443	26	2.8	37	3.8	64	4.4	6	11	18
Georgia, Northern	1,321	1,915	2,073	24	1.8	25	1.3	37	1.0	4	4	18
Illinois, Northern	2,683	2,902	3,422	151	5.6	164	5.7	157	4.6	49	62	46
Minnesota	1,101	1,216	1,439	96	8.7	99	8.1	112	7.8	32	48	48
Missouri, Western	1,074	1,147	1,354	60	5.6	69	6.0	70	5.2	3	9	13
California, Northern	2,878	2,840	2,857	304	13.3	274	9.6	207	7.2	8	16	36
California, Central	2,720	3,196	3,692	160	5.9	141	4.4	125	3.4	11	19	3

[1] These cases are included in the private antitrust cases pending.

Percent Change Since 1973 in Private Antitrust Cases Filed and Pending in Thirteen Selected U.S. District Courts

District	Private Antitrust Filings	Class Action Antitrust Filings	Private Antitrust Pending	Class Action Antitrust Pending
	Percent Change 1975 over 1973			
District of Columbia	-11.8	-42.8	61.4	15.8
Massachusetts	-5.3	-	3.3	1,300.0
New York, Southern	2.8	-23.8	-20.5	-22.2
New Jersey	20.7	-	22.0	200.0
Pennsylvania, Eastern	-7.8	-	-77.8	-17.6
Pennsylvania, Western	60.0	-	48.8	-
Florida, Southern	156.5	150.0	146.2	200.0
Georgia, Northern	166.7	1,500.0	54.2	350.0
Illinois, Northern	-17.9	-11.1	4.0	-6.1
Minnesota	17.2	-28.6	16.7	50.0
Missouri, Western	-15.4	300.0	16.7	333.3
California, Northern	16.0	242.9	-46.1	350.0
California, Central	-4.9	-66.7	-21.9	-72.7

Note: These percent changes should be viewed in conjunction with the actual number of cases involved in the comparison as shown in the two previous tables. While some of the percent changes are large, the absolute difference in cases is small. This is particularily true for the percents shown for class action antitrust cases.

94-469 O - 77 - 19

U.S. District Courts
Median Time Intervals From Filing to Disposition in Civil Cases

Fiscal Year	All Civil Cases		Private Antitrust Cases	
	Total Terminated*	Median Time Interval In Months	Total Terminated	Median Time Interval In Months
1973	80,598	10	981	15
1974	79,101	9	1473	23
1975	85,420	9	1341	18

*Excludes land condemnation cases, prisoner petitions and deportation reviews.

U.S. District Courts
Civil Cases Filed Showing
Private Antitrust Cases and Class Action Antitrust Cases

Fiscal Year	Total Civil Filings	Total Private Antitrust Filings		Private Antitrust-Class Actions	
		Number	% of Total Civil Filings	Number	% of Total Civil Filings
1973	98,560	1152	1.2	156	.16
1974	103,530	1230	1.2	113	.11
1975	117,320	1375	1.2	189	.16

Criminal Cases Pending in District Courts
With Thirty or More Private Antitrust Filings in 1975
(Data are Shown for Fiscal Years 1973-1975)

District	Total Criminal Cases Pending					
	1973		1974		1975	
	Number	% of Total*	Number	% of Total*	Number	% of Total*
District of Columbia	761	23.6	362	17.1	399	18.6
Massachusetts	350	4.8	374	4.0	543	5.0
New York, Southern	778	6.8	807	8.6	896	9.9
New Jersey	809	23.7	586	17.3	491	14.7
Pennsylvania, Eastern	268	5.9	267	6.7	267	6.7
Pennsylvania, Western	253	17.4	256	17.0	268	14.9
Florida, Southern	416	30.6	429	30.5	534	27.0
Georgia, Northern	332	20.1	333	14.8	322	13.4
Illinois, Northern	603	18.4	577	16.6	553	13.9
Minnesota	264	19.3	187	13.3	222	13.4
Missouri, Western	324	23.2	395	25.6	298	18.0
California, Nortnern	526	15.5	391	12.1	275	8.8
California, Central	1357	33.3	1184	27.0	1667	31.1

* The average percentage of criminal actions of the total filed is 15.8%.

COST TO THE JUDICIARY OF ESTABLISHING A NEW DISTRICT JUDGESHIP

Appropriation: Salaries of Judges	
Salary of Judge	$ 42,000
Agency contributions for life insurance, health benefits, and the Judicial Survivors Annuity Fund	2,000
Total	44,000
Appropriation: Salaries of Supporting Personnel, The Judiciary	
Salaries:	
Law Clerk, Grade JSP-12	19,386
Secretary, Grade JSP-10	14,824
Crier-Law Clerk, Grade JPS-9	13,482
Courtroom Deputy, Grade JSP-11	16,255
Court Reporter, Ungraded	20,605
Agency contributions for retirement, life insurance, and health benefits	7,448
Total	92,000
Appropriation: Travel and Miscellaneous Expenses, United States Courts	
Travel, Judge and staff	8,000
Library: Initial cost	20,000
Annual cost (second and succeeding years)	(4,000)
General office equipment	6,000 NR
Miscellaneous expenses (communications, supplies, etc.)	6,000
Total (initial cost)	40,000
Total (annual recurring cost)	18,000
Appropriation: Space and Facilities, The Judiciary	
Rental of space and related services	50,000
Appropriation: Expenses, United States Court Facilities	
Furniture and furnishings	16,000 NR
Appropriation: Salaries and Expenses, Administrative Office of the United States Courts	
Salaries and expenses of clerical staff (unit cost based on a ratio of one clerical position to every four new judgeships)	4,000
Grand Totals:	
Initial (first year) cost	$246,000
Annual recurring cost	$208,000

Note: The creation of additional district judgeship also will result in additional petit jury costs of approximately $30,000 per annum.

Appropriation: Salaries of Judges

Item	Amount
Salary of Judge	$ 44,600
Agency contributions for life insurance, health benefits, and the Judicial Survivors Annuity Fund	2,000
Total	46,600

Appropriation: Salaries of Supporting Personnel, The Judiciary

Item	Amount
Salaries:	
Law Clerk, Grade JSP-12	19,386
Law Clerk, Grade JPS-11	16,255
Secretary, Grade JSP-10	14,824
Agency contributions for retirement, life insurance, and health benefits	4,535
Total	55,000

Appropriation: Travel and Miscellaneous Expenses, United States Courts

Item	Amount
Travel, Judge and staff	6,000
Library: Initial cost	20,000
Annual cost (second and succeeding years)	(4,000)
Printing of opinions	6,000
General office equipment	4,000 NR
Miscellaneous expenses (communications, supplies, etc.)	6,000
Total (initial cost)	42,000
Total (annual recurring cost)	22,000

Appropriation: Space and Facilities, The Judiciary

Item	Amount
Rental of space and related services	36,000

Appropriation: Expenses, United States Court Facilities

Item	Amount
Furniture and furnishings	12,000 NR

Appropriation: Salaries and Expenses, Administrative Office of the United States Courts

Item	Amount
Salaries and expenses of clerical staff (unit cost based on a ratio of one clerical position to every four new judgeships)	4,000

Grand Totals:

Item	Amount
Initial (first year) cost	$195,600
Annual recurring cost	$163,600

NR Nonrecurring expense

Prepared Nov. 14, 1975

SENATOR THURMOND'S PROPOSED ALTERNATIVE TO S. 1874

A proposal which would limit the application of the proposed Clayton Act amendment to price fixing situations would also help eliminate the problems attendant in proving the existence of actual damage and the amount of injury to indirect purchasers. Such an amendment would be accomplished as follows by inserting after the word "injured" in Section 4 of the Clayton Act:

> "injured in fact, directly in his business or property by anything forbidden in the antitrust laws, or injured in fact, indirectly in his business or property by any contract combination or conspiracy to fix prices, ..."

This same language could be substituted in the proposed amendment to §4A of the Clayton Act.

Section 4C(a)(1) could also be amended to read:

> "Any attorney general of a state may bring a civil
>
> action in the name of such State, as parens patriae on behalf of natural persons residing in such State, --- to secure [treble damages] for injury in fact sustained directly by such natural persons to their business or property by reason of any violation of the Sherman Act, or indirectly by such natural persons to their business or property by a reason of any contract, combination or conspiracy to fix prices.---"

In addition to the foregoing, a further amendment to the Clayton Act which would reduce the possibility of multiple recoveries against the same defendants and would limit the risk of windfall recoveries to plaintiffs who have not been injured would read as follows:

> "It shall be a defense in any action for damages brought hereunder that overcharges directly resulting from violations of the Antitrust laws have been passed on to subsequent purchasers in the chain of distribution."

COMMENTS FROM SEPT. 9, 1977 WITNESSES ON SENATOR THURMOND'S PROPOSED ALTERNATIVE TO S. 1874

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OWEN McGIVERN
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COUNSEL

September 16, 1977

Honorable Strom Thurmond
United States Senate
Senate Office Building
Washington, D. C. 20510

Re: Hearings of Subcommittee on
Antitrust & Monopoly on S. 1874

Dear Senator Thurmond:

During my appearance before the Antitrust Subcommittee at the September 9th hearings, you invited me to comment on a draft proposed amendment (a copy of which is attached) as a possible legislative alternative to S. 1874. That proposal, as I understand it, would provide that (1) in damage cases based on price fixing, but not in cases where other types of antitrust violations are charged, the Illinois Brick rule would not apply and indirect, as well as direct, purchasers would be permitted to assert claims for damages for such fractions of an unlawful overcharge as may have been absorbed by them; and (2) in cases where indirect and direct purchasers may assert claims arising out of the same alleged overcharge, the Hanover Shoe rule would not apply and defensive pass-on would be permitted to avoid risk of multiple recovery.

1. The Limitation to Price Fixing Cases

I seriously question whether the draft amendment would

reduce appreciably the magnitude and dimensions of the evidentiary and procedural problems and the burdens on the judiciary which would be generated if S. 1874 were enacted and Illinois Brick broadly overruled. As a practical matter, the limitation to price fixing cases would result in the Illinois Brick rule being inapplicable except in a relatively small percentage of the antitrust damage cases that might be brought. Although I have no hard statistics available, I would estimate that the vast majority of all damage cases involve charges of price fixing. In addition, one should not underestimate the ability of imaginative and skilled plaintiff's counsel to cast his case, by appropriate allegations, as a "price-fixing" case. Accordingly, the objections I expressed in my prepared statement and in my testimony as to S. 1874 would be substantially applicable to the draft proposed amendment.

2. Provision for Defensive Use of Pass-On

In my view, and for the reasons set forth in my testimony, evidence as to pass-on of alleged damages should not be permitted either offensively by plaintiffs or defensively by defendants. However, if any legislation is adopted providing that indirect purchasers can assert damage claims for the portion of an illegal overcharge passed on to and absorbed by them, such legislation should also expressly provide that defendants may defend by proof that all or part of an alleged overcharge was in fact passed on to subsequent purchasers down the line of distribution. Because of the Supreme Court's 1968 decision in Hanover Shoe, defensive pass-on cannot now be asserted. Unless the Hanover Shoe rule is abrogated by a specific Congressional enactment -- such as the provision in the proposed draft -- defendants would be subject to risks of multiple recovery if indirect, as well as direct, purchasers were given rights to recover. Moreover it would simply be unjust to afford plaintiffs the right to prove pass-on to support a claim for damages but to deny defendants the right to defend against damage claims by proof that all or part of such alleged damages were passed-on to others down the line.

Very truly yours,

Samuel W. Murphy, Jr.

Samuel W. Murphy, Jr.

Enclosure

cc: Emory Sneeden, Esq.
Subcommittee, Minority Chief Counsel

David Boies, Esq.
Subcommittee, Majority Counsel

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September 27, 1977

Honorable Edward M. Kennedy
Chairman
Subcommittee on Antitrust
and Monopoly
United States Senate
Washington, D. C. 20510

Re: Hearings on S. 1874

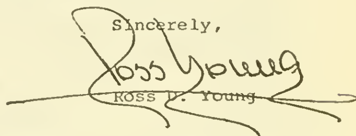
Dear Mr. Chairman:

On September 9, 1977 I appeared before the Subcommittee representing the National Association of Manufacturers. Senator Thurmond requested that I comment on a proposal to limit the language of S. 1874 to price fixing violations.

The National Association of Manufacturers is opposed to S. 1874 or any similar legislation at this time which would modify or change the Supreme Court's decisions in Illinois Brick or Hanover Shoe. We prefer to wait for further judicial interpretation of the law in this area prior to legislative action which may well defeat anti-trust enforcement purposes.

Consequently, it is unnecessary that I comment on Senator Thurmond's proposal.

Sincerely,



Ross D. Young

RDY/mfm

cc: Honorable Strom Thurmond

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
DETROIT, MICHIGAN 48226

CHAMBERS OF
CHARLES W. JOINER
JUDGE

September 22, 1977

The Honorable Edward M. Kennedy
United States Senator
Antitrust and Monopoly Subcommittee
Washington, D.C. 20510

Dear Senator Kennedy:

During my testimony on S-1874, I was asked by Senator Thurmond to comment on a proposal which I had not at that time seen, a copy of which is attached. It was suggested that I write my comments to the Subcommittee.

The first part of the suggestion contains draft language that would permit persons indirectly injured (presumably consumers) to sue for damages for price fixing violations only. The thrust of this amendment does not in any way lessen my criticism of efforts to amend the law. My criticism was directed at the price fixing violation.

Another part of the proposal is to amend the *parens patriae* law to limit the right of the Attorneys General to sue for damages to persons directly injured or to those indirectly injured out of price fixing. As I read the proposal, this would permit the Attorneys General to sue on behalf of direct and indirect purchasers in one lawsuit. When coupled with the next suggestion that the pass through defense be reinstated, the comments made in my testimony are applicable. The action would become extraordinarily complex and antitrust enforcement would suffer.

As indicated in my testimony, my first suggestion is that you permit the dust to settle and see if the antitrust law is enforced by direct purchasers. I believe that it will be. If it is not, then consideration should be given to alternative means of enforcement. In so doing, however, I urge that you not ask the judges and juries to do tasks that they may not be able to do well because of complications introduced by legislation.

My second suggestion is that if it is not possible to avoid amendment at this time, that you permit only the Attorneys General to sue for the indirect violation, but that you do not require him to account to the consumers for the damages that he receives on their behalf. Let these go into the state treasury. This means that double liability could be avoided because the pass through in suits by the Attorney General would not be a defense. He could sue or join in suits by direct purchasers and the direct purchasers and the Attorney General could agree upon how much pass through there was. Thus if the Attorney General sued on behalf of the consumers and direct purchasers or joined in a suit by the direct purchasers, damages could be proved from the sales, etc., and the direct purchasers could be reimbursed for the damages that they have suffered but that the Attorney General on behalf of the state could acquire the damages that were passed through. This would prevent the direct purchasers from becoming unjustly enriched as a result of the action. It would encourage enforcement of the antitrust laws by both direct purchasers and the Attorneys General and it would penalize those who violate the law. The people of the state would be benefited by the damages that would inure to their benefit.

This would introduce some additional complications into the suit but not nearly to the extent of any of the prior suggestions and it would provide full recovery against the wrongdoer. In most instances, I think, the issue as to how much of the increased cost was passed through to the consumer would be agreed to between the direct purchaser and the Attorney General and would not need to be litigated.

The thrust of this suggestion is to transform the *parens patriae* litigation, insofar as it was intended to reimburse consumers, into a type of civil fine (treble damages) against the violators to be enforced by the states' Attorneys General.

The advantages would be (1) the avoidance of the minutia of accounting to the multitude of consumers; (2) the giving to the people of the state the damages for losses incurred by their citizens; (3) the prevention of unjust enrichment of the direct purchaser; (4) the permitting of the direct purchasers to be compensated for their losses not passed through; and (5) the avoidance of complicated class actions on behalf of a multitude of consumers.

I should think that the proofs in such an action would be relatively simple, particularly, if as I believe would be true in most cases, there could be agreement between the Attorneys General and the direct purchasers as to the amounts passed through.

I do believe that the problem of amending the *parens patriae* sections of the law are large. I attempted to sit down and see if it could be done in a simple way and I believe that it could not be done in a simple way. There is much that is now in the law that would have to be eliminated because the present thrust of the law has as its goal not simply the adequate enforcement of the antitrust laws but the reimbursement of the ultimate consumer. This latter aspect, of course, would be removed by this suggestion.

I hope these comments will be of some value to the Subcommittee.

Sincerely yours,

Charles W. Joiner
United States District Judge

cc: The Honorable Strom Thurmond

A proposal which would limit the application of the proposed Clayton Act amendment to price fixing situations would also help eliminate the problems attendant in proving the existence of actual damage and the amount of injury to indirect purchasers. Such an amendment would be accomplished as follows by inserting after the word "injured" in Section 4 of the Clayton Act:

> "injured in fact, directly in his business or property by anything forbidden in the antitrust laws, or injured in fact, indirectly in his business or property by any contract combination or conspiracy to fix prices, ..."

This same language could be substituted in the proposed amendment to §4A of the Clayton Act.

Section 4C(a)(1) could also be amended to read:

> "Any attorney general of a state may bring a civil
>
> action in the name of such State, as parens patriae on behalf of natural persons residing in such State, --- to secure [treble damages] for injury in fact sustained directly by such natural persons to their business or property by reason of any violation of the Sherman Act, or indirectly by such natural persons to their business or property by a reason of any contract, combination or conspiracy to fix prices.---"

In addition to the foregoing, a further amendment to the Clayton Act which would reduce the possibility of multiple recoveries against the same defendants and would limit the risk of windfall recoveries to plaintiffs who have not been injured would read as follows:

> "It shall be a defense in any action for damages brought hereunder that overcharges directly resulting from violations of the Antitrust laws have been passed on to subsequent purchasers in the chain of distribution."

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SCHOOL OF LAW

September 21, 1977

Subcommittee on Antitrust and Monopoly
Committee on the Judiciary
United States Senate
Washington, DC 20510

Gentlemen:

This is in response to your request for my comments on a proposed amendment to S. 1874. That amendment states as its purposes to "limit the application of the proposed...amendment to price fixing situations", and to "help eliminate the problem" attendant in proving the existence of damage and the amount of injury.

I agree with the philosophy reflected by this proposal that any legislative reversal of Hanover Shoe and Illinois Brick should be limited to the price-fixing, indirect purchaser context in which those cases arose. However, I do not believe that the amendment as drafted would sufficiently accomplish that result, for the following reasons:

First, I do not believe the addition of the qualification that the party suing must be injured "in fact" will change the law from the present situation. As other witnesses have pointed out, courts have been accustomed to reading the Clayton Act as if it contained such language.

Secondly, I feel it would be inadvisable to enact legislation that is drafted so as to permit suits by people who are "indirectly" injured, even in the limited price-fixing context. The term "indirect injury" has a well-established meaning in antitrust law and refers to people whose relation is too remote from the wrongs complained of to afford them standing to sue. In the context of a price-fixing conspiracy, persons who could be considered to be "indirectly injured" would include not only indirect purchasers, but also the stockholders, creditors, employees, suppliers, lessors, franchisors and licensors of the direct purchasers. I don't believe the committee wants to expressly sanction suits by all persons in these categories, but that would be a permissibl construction of this proposal.

Finally, I am concerned that the proposal would permit the pass-on defense only for "overcharges directly resulting from violations of the Antitrust Laws". The addition of the word "directly" appears to reflect a legislative intent to permit passing-on to be raised against the direct purchasers but not against middlemen (such as distributors, whole

salers or retailers) who sue for indirect injuries. This interpretation would create a substantial probability of multiple, duplicate recoveries - which I do not believe the committee favors. Certainly, I am personally opposed to duplicate treble-damage recoveries.

For these reasons, I do not recommend adoption of the proposed amendment to S. 1874.

Again, I wish to extend my thanks to the committee for the courteous hearing I was afforded on September 9 and for the opportunity to comment on this proposal.

Very truly yours,

Neil N. Bernstein
Professor of Law

NNB:vm