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Antitrust Law - Clayton Act - Offensive Use of the Pass-on Theory

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ANTITRUST LAW—CLAYTON ACT—OFFENSIVE USE OF THE PASS-ON THEORY—The Supreme Court of the United States has held that the pass-on theory may not be used offensively by an indirect purchaser against an alleged antitrust violator to prove that the indirect purchaser has been injured within the meaning of section 4 of the Clayton Act.

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

Petitioners are manufacturers of concrete block used in building construction in the Greater Chicago area.[1] The concrete block is purchased directly from petitioners by masonry contractors, who submit bids to general contractors for the masonry portions of construction projects. The general contractors in turn submit bids on an entire building project to customers such as the respondents in this case, the State of Illinois, and various local governmental entities in the Greater Chicago area, including counties, municipalities, housing authorities, and school districts.[2]

An antitrust treble-damage action was brought by the respondents under section 4 of the Clayton Act,[3] charging that the petitioners had violated section 1 of the Sherman Act[4] by conspiring to fix the price of concrete block,[5] allegedly resulting in overcharges of an

1. Illinois Brick Co. v. Illinois, 431 U.S. 720, 726 (1977). In 1973, the United States had filed a criminal indictment against the same block manufacturers, charging that they had violated § 1 of the Sherman Act by conspiring to fix the price of concrete block. A plea of *nolo contendere* was accepted in the criminal case. United States v. Ampress Brick Co., No. 73 CR 312 (N.D. Ill. Mar. 23, 1973).

2. 431 U.S. at 726. Because the respondents received the concrete block only after it had already passed through two separate levels in the chain of distribution, they were indirect purchasers. The majority of the building project contracts were awarded pursuant to competitive bidding based on plans and specifications setting forth the amount and type of concrete block required for each project. The bids from the general contractors to their customers included the cost of the concrete block purchased from the manufacturer or masonry contractor. Illinois v. Ampress Brick Co., Inc., 536 F.2d 1163, 1164 (7th Cir. 1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

3. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . 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."

4. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1970), provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . ."

5. Under § 1 of the Sherman Act, a combination formed for the purpose of fixing prices in interstate or foreign commerce has been held to be a per se restraint of trade. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

amount in excess of three million dollars.[6] Petitioner manufacturers moved for summary judgment against all respondents who did not purchase the concrete block directly from petitioners, contending that as a matter of law only direct purchasers could sue for the alleged overcharge.[7] The district court granted petitioners' motion, holding that indirect purchasers such as respondents incurred injuries too remote and inconsequential to provide standing to sue the alleged antitrust violators.[8] The Seventh Circuit Court of Appeals reversed, holding that indirect purchasers could recover treble damages for an illegal overcharge if they were able to prove that the overcharge, or some part of it, was passed on to them through the different levels in the distribution chain.[9] The Supreme Court granted certiorari[10] to resolve a conflict among the courts of appeals[11] on whether the restrictions placed on the defensive use of the pass-on theory[12] by *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[13] should be equally applied to the offensive use of the pass-on theory.[14]

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6. 431 U.S. at 727. Because of the treble-damage provision contained in § 4 of the Clayton Act, respondents were actually seeking damages in excess of nine million dollars.

7. *Id.*

8. Illinois v. Ampress Brick Co., Inc., 67 F.R.D. 461, 466-68 (N.D. Ill. 1975), *rev'd*, 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

9. 536 F.2d at 1167.

10. 429 U.S. 938 (1976).

11. *Compare* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971), *aff'g per curiam* Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970) (indirect purchasers' suit alleging that illegal overcharges by manufacturers of plumbing fixtures had been passed on to them was dismissed since plaintiffs did not fit the cost-plus exception to *Hanover Shoe*) *with In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973) (ultimate consumers had standing to bring an action to recover on the theory that unlawful prices charged to consumers' contractors pursuant to suppliers' conspiracy to fix prices were passed on to consumers by contractors), *cert. denied*, 415 U.S. 919 (1974); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971) (passing-on theory could be employed where it was not used as a defense and where wholesalers and retailers sold, in virtually all cases, at cost plus set percentage mark-up), *cert. denied sub nom.* Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971); *and* Illinois v. Ampress Brick Co., Inc., 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

12. For a discussion of the history and meaning of the pass-on theory, see L. SULLIVAN, ANTITRUST § 252 (1977).

13. 392 U.S. 481 (1968) (the Court rejected as a matter of law, except in very limited circumstances, the defensive use of the pass-on theory to defeat a direct purchaser's right to recovery in an antitrust suit).

14. 431 U.S. at 728.

THE DECISION OF THE COURT

In a 6-3 decision, the Supreme Court reversed.[15] Relying upon the rationale in *Hanover Shoe,*[16] Justice White, speaking for the majority, held that the pass-on theory may not be used offensively by an indirect purchaser against an alleged antitrust violator. The Court stated that it reached this result in two steps.[17] First, it concluded that any rule adopted to govern the use of the pass-on theory in antitrust treble-damage actions had to apply equally to both sides. The Court stated that multiple liability would be a serious problem if it permitted the offensive but not the defensive use of pass-on in antitrust treble-damage actions, reasoning that an unqualified recognition of offensive passing-on could result in six-fold or more damages for a single violation.[18] The Court rejected various procedural devices suggested as possible solutions viewing them as inadequate to reduce this risk of duplicative recoveries,[19] and the Court feared that even if some procedural device could be used to bring all potential plaintiffs together in a single action, "the difficulties likely to be encountered in the management of [such] a class action"[20] would make the procedure equally inadequate.[21] In addition, the Court reasoned that the complexity of proof necessary to establish a pass-on of an overcharge, the principal concern in *Hanover Shoe,* would be as great when the plaintiffs introduced the same evidence to prove that the overcharge was passed on to them.[22] Furthermore, the Court stated that it understood *Hanover Shoe* to rest on the presumption that the antitrust laws will be more effectively enforced by permitting only the direct purchaser to recover for an illegal overcharge than "by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show

15. *Id.* Justice White delivered the opinion of the Court, in which Chief Justice Burger and Justices Powell, Rehnquist, Stevens, and Stewart joined. Justice Brennan filed a dissenting opinion, in which Justice Marshall and Justice Blackmun joined. Justice Blackmun filed an additional dissent.

16. *See* notes 35-42 and accompanying text *infra.*

17. 431 U.S. at 728.

18. *Id.* at 730. *See* Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach,* 85 YALE L.J. 626, 649 (1976) [hereinafter cited as Handler & Blechman].

19. 431 U.S. at 731 n.11.

20. FED. R. CIV. P. 23(b)(3)(D).

21. 431 U.S. at 731 n.11.

22. *Id.* at 732.

was absorbed by it."[23] The Court concluded that not allowing the offensive use of the pass-on theory was consistent with this presumption.

In its second step, the Court declined to abandon the construction given section 4 in *Hanover Shoe*[24] absent a clear showing that the effectiveness of the antitrust treble-damage action could be maintained without adopting a rule which would only allow a direct purchaser to recover for an illegal overcharge. In reaching this result, the Court alluded to considerations of stare decisis[25] and to difficulties in apportioning the recovery among all of the potential plaintiffs which would "add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness."[26]

Justice Brennan dissented, rejecting the majority's construction of section 4 of the Clayton Act.[27] He asserted that the broad objectives served by section 4—to compensate persons injured by violations of the antitrust laws and to deter future violations—would be greatly undermined by the Court's holding that section 4 afforded a remedy only to direct purchasers and not to indirect purchasers. Indeed, Brennan argued, when Congress recently enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[28] it acted on the assumption that section 4 gave a cause of action to both direct and indirect purchasers.[29] Furthermore, difficulties in apportioning damages between direct and indirect purchasers were not compelling reasons, as far as Brennan was concerned, for denying indirect

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23. *Id.* at 735.

24. In *Hanover Shoe*, the Court construed § 4 of the Clayton Act to include the direct purchaser in the distribution chain as the party "injured in his business or property." 392 U.S. at 488-89.

25. In decisions involving statutory construction, the principle of stare decisis weighs heavily because Congress has the power to change the court's interpretation of its legislation. 431 U.S. at 736.

26. *Id.* at 737.

27. *Id.* at 748 (dissenting opinion).

28. Pub. L. No. 94-435, 90 Stat. 1383 (1976). This Act authorizes state attorneys general to sue parens patriae to recover damages on behalf of citizens of their various states against antitrust violators.

29. *See* note 77 and accompanying text *infra*. Actually, this legislative enactment allowing state attorneys general to sue parens patriae could be read as an attempt by Congress to show its dissatisfaction with the *Hanover Shoe* result, thereby rebutting the majority's stare decisis argument.

Justice White did not believe that Congress intended to alter the Court's construction of § 4 of the Clayton Act when it enacted the Hart-Scott-Rodino Antitrust Improvements Act. Instead, he stated that it simply created the new procedural device, parens patriae, to enforce *existing* rights of recovery under § 4. 431 U.S. at 733 n.14.

purchasers their day in court.[30] From the deterrence standpoint, Brennan believed that antitrust violators are equally deterred whether they paid damages to direct or indirect purchasers. Finally, Brennan concluded that the risk of multiple liability should not bar all recoveries by indirect purchasers given the procedural devices[31] available to the district court to eliminate this danger in most instances.[32]

THE HANOVER SHOE RATIONALE

The Supreme Court in *Hanover Shoe* expressly rejected as a matter of law, except in very limited circumstances,[33] the defensive use of the pass-on theory to defeat a direct purchaser's right to recovery in an antitrust suit.[34] In reaching this result, the Court employed

30. *Id.* at 759-60 (dissenting opinion). Brennan conceded, however, that despite the broad language of § 4 there is a point beyond which the antitrust violator should not be held liable. In determining who can sue, Brennan stated that the courts have balanced the deterrent and compensatory values of private enforcement against the dangers of excessive litigation and multiple liability and have come up with two standing tests—the "direct injury" test and the "target area" test. The direct injury test focuses on whether the plaintiff's contractual relations with the violator are of such a nature as to insure that the plaintiff has suffered direct injury, whereas the target area test focuses on whether the plaintiff is within the foreseeable zone of harm created by the defendant's violation. Brennan concluded that "if the broad language of § 4 means anything, surely it must render the defendant liable to those within the defendant's chain of distribution." *Id.* For a detailed discussion of the two standing tests, see Comment, *Mangano and Ultimate Consumer Standing: The Misuse of the Hanover Doctrine*, 72 COLUM. L. REV. 394, 396-404 [hereinafter cited as *Misuse of Hanover Doctrine*]. *But 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, 179-83 (1971) (author asserts that the tests thus far developed by the courts are inadequate to determine whether indirect purchasers should be allowed to recover) [hereinafter cited as McGuire].

31. *See* notes 55-72 and accompanying text *infra*.

32. Justice Blackmun, separately dissenting, believed that the majority's decision was "consistent" with its prior application of the pass-on theory, but felt it was "a wooden approach . . . entirely inadequate when considered in the light of the objectives of the Sherman and Clayton Acts." Blackmun expressed the opinion that Congress would now be forced to enact another statute to achieve these objectives. 431 U.S. at 765 (dissenting opinion).

33. The Court cited a "pre-existing 'cost-plus' contract" as an example of when a pass-on defense might be permitted. The existence of such a contract makes it easy to prove that the overcharged buyer has not been damaged by the illegal overcharge. 392 U.S. at 494.

34. *Hanover Shoe* was a private antitrust treble-damage action instituted by a shoe manufacturer against a manufacturer of shoe machinery pursuant to § 4 of the Clayton Act. Hanover claimed that United's policy of only leasing machines and refusing to sell them had increased the cost of Hanover's manufacturing operations, and it sought damages measured by the amount of the alleged overcharge. United, which in an earlier civil action brought by the United States had been found to have monopolized the shoe machinery market, United

three grounds for support.[35] The first basis rested on the theory expressed in *Chattanooga Foundry & Pipe Works v. Atlanta*[36] and *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*,[37] that a violation is complete at the time of the initial injury. As a general rule, a plaintiff in a private treble-damage action under section 4 of the Clayton Act must establish not only a violation, but also that he was "injured in his business or property" by the violation.[38] The plaintiff must show such "injury" through proof of actual pecuniary loss. The Court in *Hanover Shoe,* however, adopted an exception to this general rule when an action is brought by direct purchasers against an antitrust violator in order to recover for alleged illegal overcharges. In such cases, the Court held the "injury" requirement under section 4 of the Clayton Act is satisfied merely by proof of the illegal overcharge, regardless of any subsequent attempts by the injured party to mitigate the injury.[39] The Court concluded, therefore, that

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States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954), contended that Hanover was not injured within the meaning of § 4 because it had passed on any overcharge to its own customers by increasing the prices at which it sold its shoes. 392 U.S. at 487-88.

35. For a thorough and interesting analysis of the three rationales of *Hanover Shoe,* see Comment, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On,* 123 U. PA. L. REV. 976, 979-84 (1975) [hereinafter cited as *The Offensive Use of Passing-On*]; Note, *The Effect of Hanover Shoe on the Offensive Use of the Passing-On Doctrine,* 46 S. CAL. L. REV. 98, 101-06 (1972) [hereinafter cited as *The Effect of Hanover Shoe*].

36. 203 U.S. 390 (1906). The city of Atlanta sued the defendants for treble damages for overcharges on the city's purchases of pipe for its waterworks system. The Court affirmed a judgment in favor of the city for an amount measured by the difference between the price actually paid and what the price would have been had the sellers not combined. The Court reasoned that the city "was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe." *Id.* at 396.

37. 245 U.S. 531 (1918). Shippers brought an action for reparations against a railroad claiming that the railroad had charged unreasonable rates. The railroad argued that the shippers had passed on to their customers any excess over the reasonable rate. In response to the railroad's reply, the Court stated that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step . . . . Their claim accrued at once in the theory of the law and it does not inquire into later events . . . ." *Id.* at 533.

38. *See* Pollock, *Automatic Treble Damages and the Passing-On Defense: The Hanover Shoe Decision,* 13 ANTITRUST BULL. 1183, 1184-91 (1968) [hereinafter cited as Pollock].

39. 392 U.S. at 489. As the Court reasoned in *Hanover Shoe:*

> If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages . . . . It is also clear that if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed . . . . We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than

since the violation is complete at the time of the initial injury, consideration of the pass-on defense would be improper.

The second basis of the *Hanover Shoe* decision was the Court's concern with the economic uncertainties and complexities involved in proving the pass-on of increased costs.[40] The Court believed that even if it could determine the amount of the passed-on overcharge, frequent use of this defense would result in a heavy burden on the judicial system itself. The Court feared that already complex antitrust litigation would be so massive and convoluted as to make the task almost "insurmountable."[41]

The third rationale underlying the *Hanover Shoe* decision was the need to preserve the effective private enforcement of the antitrust laws.[42] The real danger foreseen by the Court was that if the direct purchaser were denied the right to bring such an action, the task of enforcing the antitrust laws would fall upon the party least likely to bring suit—the indirect purchaser. Therefore, unless the first purchaser were allowed to recover even what could amount to a windfall gain, the antitrust violator might be able to escape liability altogether.

Hanover Shoe Does Not Compel the Result in Illinois Brick

In examining the applicability of *Hanover Shoe's* three rationales to the offensive passing-on theory asserted in *Illinois Brick,* the inescapable conclusion is that *Hanover Shoe* should not prohibit it.

First, the *Hanover Shoe* rationale that a violation is complete at the time of the first injury, while valid when dealing with the defensive use of pass-on, fails to take into consideration what subsequently happens to the overcharge.[43] In addition, the *Illinois Brick* Court's interpretation of *Hanover Shoe* does not square with the modern, liberalized approach to standing that has been adopted in antitrust litigation.[44] In fact, commentators in the field have almost

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> the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.

Id.

40. *Id.* at 492-93.

41. *Id.* at 493.

42. *Id.* at 494.

43. For example, in *Illinois Brick,* the illegal overcharge could have led to a nine million dollar recovery by the respondents if they had won. *See* note 6 and accompanying text *supra. See also The Effect of Hanover Shoe, supra* note 35, at 106.

44. *See* note 30 and accompanying text *supra.*

unanimously concluded that, notwithstanding a literal reading of *Hanover Shoe,* section 4 of the Clayton Act should be construed to allow indirect purchasers a chance to recover damages upon a showing that the illegal overcharge was passed on to them.[45]

Second, the complexity of the proof involved would be no greater for the indirect purchaser seeking to prove the pass-on than it is for the direct purchaser proving the original overcharge.[46] Nevertheless, the *Illinois Brick* Court placed great weight on this factor in reaching its decision.[47] In effect, the Court exalted one reason, difficulty of proof, over two seemingly more important considerations underlying the policy behind the antitrust laws, compensation of the victims and deterrence of antitrust violations.[48] Recovery should not be defeated merely because proof of injury has been made difficult.[49]

Third, emphasis in *Hanover Shoe* on effective private enforcement of the antitrust laws will be severely undermined by the Court's decision in *Illinois Brick.*[50] For a variety of reasons, the direct purchaser may be unwilling or unable to pursue a treble-damage action against the antitrust violator.[51] Furthermore, the

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45. *See, e.g., The Offensive Use of Passing-On, supra* note 35; *Misuse of Hanover Doctrine, supra* note 30; McGuire, *supra* note 30. *But see* Handler & Blechman, *supra* note 18, at 638-55.

46. *See* Pollock, *supra* note 38, at 1210. *See also* Brief of Respondents at 29-30, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). In their brief, the respondents relied on Southern Gen. Builders, Inc. v. Maule Indus., Inc., [1973] TRADE CAS. (CCH) ¶ 74,484 (S.D. Fla. 1972) (indirect purchasers were able to prove their financial injury as a matter of fact), and Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967) (jury found that North Dakota had suffered damages as a result of illegal overcharges on metal culverts for highways purchased through general contractors), to show that the federal courts have been able to resolve the factual issues bearing upon whether illegal overcharges were passed on to indirect purchasers.

47. 431 U.S. at 731-33.

48. *See* Brief for United States as *amicus curiae* at 15-21, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) [hereinafter cited as Brief for United States].

49. 431 U.S. at 755-56 (Brennan, J., dissenting). *See also* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265-66 (1946) (while a jury may not render a verdict based on speculation or guesswork, even where the defendant has precluded a more concise computation of damages by his own wrong, the jury should make a just and reasonable estimate of the damage based on relevant data, acting on probable and inferential as well as upon direct and positive proof).

50. 431 U.S. at 749 (Brennan, J., dissenting).

51. Some of the factors that may discourage potential plaintiffs from initiating antitrust litigation are: (1) fear of undermining buyer-seller relationships; (2) fear of protracted litigation involving substantial expenditures of time, money, and effort; (3) fear of reprisals against which the direct purchaser lacks effective remedy; (4) antipathy for the antitrust laws; or (5) difficulties arising in proving an antitrust violation and the amount of damages from such a violation. *See* Wheeler, *Antitrust Treble-Damage Actions: Do They Work?,* 61 CALIF. L. REV. 1319, 1330 (1973); *The Effect of Hanover Shoe, supra* note 35, at 112.

Court's reference in *Hanover Shoe* to indirect purchasers did not imply that they *could not* bring suit, but merely that they would be *unlikely* to bring suit because of the inconsequential amount of damages that they, as individuals, had suffered.[52] As a result of the Court's rejection of the offensive use of the pass-on theory in *Illinois Brick,* the direct purchasers, who have little incentive to sue where the illegal overcharges can be passed to subsequent buyers, are given standing to sue the antitrust violator, while the injured consumers, who usually bear the brunt of the violations, are denied access to the courts.[53] The decision by the Court in *Illinois Brick,* therefore, will severely undermine the effective enforcement of the antitrust laws in the future.

The Problem of Multiple Liability

In rejecting the offensive use of the pass-on theory, the Court in *Illinois Brick* also raised the spectre of multiple liability.[54] The Court's fears of multiple recoveries caused by procedural difficulties or management problems in class action suits should not warrant the complete denial of relief to an injured consumer. Where direct and indirect purchasers bring suit in the same court, it is a simple matter to consolidate the cases and to apportion damages on the basis of each plaintiff's proven injuries.[55]

Therefore, the possibility of multiple liability arises in only two situations: where pending suits by direct and indirect purchasers are in different courts, or where additional suits based on the same violation are filed after a full recovery has already been awarded in the prior suit.[56] In the first situation, the danger of multiple liability can be minimized, if not entirely eliminated, by using procedural devices which will consolidate the separate actions,[57] such as: (1) use

52. *See Misuse of Hanover Doctrine, supra* note 30, at 409.

53. 431 U.S. at 749 (Brennan, J., dissenting).

54. 431 U.S. at 730. *See* notes 18 & 19 and accompanying text *supra.*

55. *See* Fed. R. Civ. P. 42(a). The feasibility of apportioning damages among many plaintiffs has been demonstrated in the antibiotic cases. West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.) (passing-on theory could be employed where it was not used as a defense and where wholesalers and retailers sold, in virtually all cases, at cost plus set percentage mark-up), *cert. denied sub nom.* Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971).

56. *See* Brief for United States, *supra* note 48, at 25.

57. 1 Pt. 2 Moore's Federal Practice Pt. 1, §§ 5.20- .40 (2d ed. 1977).

of the interdistrict transfer power,[58] (2) coordination of pretrial proceedings of cases pending in different districts, (3) transfer of cases to a single district,[59] and (4) transfer of cases by the Judicial Panel of Multidistrict Litigation.[60]

Another procedural device that could be effectively used is interpleader, whereby defendants can bring all claimants into a single forum and require them to litigate *inter se* to determine which party is entitled to whatever damages might be recovered.[61] Since rule interpleader[62] limits the reach of a district court's service of process to the territorial limits of the state in which it sits, the statutory interpleader,[63] with nationwide service of process, should be used. The majority asserted that statutory interpleader would be an impractical alternative because it requires the defendant to post bond for the amount in dispute, which he may be unwilling to do in light of the huge amounts normally claimed in multiple-party treble-damage actions.[64] However, this argument overlooks the fact that the amount of such a bond is dependent upon the discretion of the court and could be set low enough to encourage defendants to invoke its use in potential multiple-party antitrust suits.[65] Thus, under the statutory interpleader procedure, the problem of multiple recoveries would be eliminated because all possible claimants would share in any recovery.[66]

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58. 28 U.S.C. § 1404(b) (1970).

59. *Id.* § 1404(a).

60. *Id.* § 1407. After pretrial transfers by the Panel under this section, cases can be consolidated and transferred to the same district for trial pursuant to 28 U.S.C. § 1404(a). For a more extensive 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).

61. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 74, at 362 (3d ed. 1976).

62. FED. R. CIV. P. 22 provides in pertinent part: "(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability."

63. 28 U.S.C. § 1335 (1970) provides in part:

> (a) The district courts shall have original jurisdiction of any civil action of interpleader . . . if (1) Two or more adverse claimants, of diverse citizenship, . . . are claiming or may claim to be entitled to . . . [the amount in question]; . . . and if (2) the plaintiff has deposited such money or property or has paid the amount . . . into the registry of the court . . . in such amount and with such surety as the court or judge may deem proper . . . .

64. 431 U.S. at 738 n.20.

65. *See* note 63 *supra*.

66. For a discussion supporting the use of statutory interpleader, see *The Effect of Hanover Shoe*, *supra* note 35, at 116-17. *But see* McGuire, *supra* note 30, at 197-98 (discussing other circumstances in which statutory interpleader may be "impractical").

Even though additional suits based on the same violation could be filed after a full recovery has already been awarded in a prior suit, the prospects of multiple liability are remote.[67] The protracted nature of antitrust litigation, combined with the short, four-year statute of limitations,[68] makes it unlikely that direct purchasers will recover before indirect purchasers bring their own action. In addition to the short statute of limitations, the procedures for intervention[69] or compulsory joinder of parties[70] can be invoked to further erode the possibility of multiple recoveries.[71] Finally, the doctrines of res judicata and collateral estoppel may be available to the courts in certain circumstances as possible solutions to the multiple liability problem.[72]

Impact of Illinois Brick

The broad language of section 4 of the Clayton Act extends to "*[a]ny person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ."[73] However, it is apparent that the Court's decision in *Illinois Brick*, denying indirect purchasers a chance to prove that they have been injured by an antitrust violation, is a regrettable retreat from its earlier decisions interpreting section 4 more broadly.[74] Furthermore, the majority's opinion clearly flies in the face of congressional purpose in enacting the Hart-Scott-Rodino Antitrust Improvements Act[75] to give ultimate consumers an effective forum in which to bring their claims for antitrust violations.[76] Indeed, in adopting this

67. *See* Brief for United States, *supra* note 48, at 26-28.

68. 15 U.S.C. § 15b (1970). The statute provides in pertinent part: "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued."

69. Fed. R. Civ. P. 24.

70. Fed. R. Civ. P. 19.

71. For a discussion advocating the use of the procedural devices of intervention and compulsory joinder, see McGuire, *supra* note 30, at 197-202.

72. *See In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974). For a contrary view on the use of res judicata and collateral estoppel as remedial devices, see Handler & Blechman, *supra* note 18, at 649-50.

73. 15 U.S.C. § 15 (1970) (emphasis added).

74. *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 7 (1958) ("preferential routing" agreements were declared unlawful as unreasonable restraints of trade under § 1 of the Sherman Act).

75. *See* note 28 and accompanying text *supra*.

76. *See* 431 U.S. at 764 n.23 (Brennan, J., dissenting). While the Antitrust Improvements Act had not been enacted at the time this treble-damage action was commenced, it provided

legislation authorizing state attorneys general to sue parens patriae on behalf of citizens of their various states, Congress acted on the premise that section 4 *did* give a cause of action to indirect purchasers.[77] Although *Illinois Brick* may be construed to prevent indirect purchasers from recovering, it is still too early to foresee the possible ramifications of the Court's decision, not only on the enforcement of the Antitrust Improvements Act, but also on the effective private enforcement of antitrust laws in general.

Conclusion

With its narrow interpretation of *Hanover Shoe*, the *Illinois Brick* Court departs from the Court's prior policy of giving the antitrust laws a broad reading to insure their effective enforcement, moving instead to one that will severely undermine such enforcement. As a result of the Court's decision in *Illinois Brick*, Congress may once again be forced to take action by enacting yet another statute, this time expressly allowing indirect purchasers to bring a private treble-damage action against an antitrust violator.[78]

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an excellent means for determining congressional intent when the case reached the Supreme Court.

77. *Id.* at 749 (Brennan, J., dissenting). Rep. Rodino, a sponsor of the Act, 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.

122 Cong. Rec. H10,295 (daily ed. Sept. 16, 1976). Congress accepted the holding of the Court of Appeals for the Ninth Circuit in *In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973) (ultimate consumers had standing to bring an action to recover on the theory that unlawful prices charged to consumers' contractors pursuant to suppliers' conspiracy to fix prices were passed on to consumers by contractors), *cert. denied*, 415 U.S. 919 (1974), as correctly stating the law in the area at the time. *See* S. Rep. No. 803, 94th Cong., 2d Sess. 42-43 (1976).

78. As Justice Blackmun so cogently stated in *Illinois Brick*: "One regrets that it takes so long and so much repetitious effort to achieve, and have this Court recognize, the obvious congressional aim." 431 U.S. at 766 (Blackmun, J., dissenting).