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Casenotes: Antitrust — Clayton Act Section 4 — Standing — Supreme Court Holds That Only Direct Purchasers Have Standing to Bring Treble Damage Suit under Section 4 of Clayton Act. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)

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CASENOTES

ANTITRUST — CLAYTON ACT SECTION 4 — STANDING — SUPREME COURT HOLDS THAT ONLY DIRECT PURCHASERS HAVE STANDING TO BRING TREBLE DAMAGE SUIT UNDER SECTION 4 OF CLAYTON ACT. *ILLINOIS BRICK CO. v. ILLINOIS,* 431 U.S. 720 (1977).

I. INTRODUCTION

On June 9, 1977, in *Illinois Brick Co. v. Illinois,*[1] the United States Supreme Court denied indirect purchasers[2] the right to recover damages from manufacturers or producers who have engaged in illegal price-fixing. The Court held that, as a general rule,[3] only direct purchasers may bring a treble damage suit under section 4 of the Clayton Act,[4] thereby severely restricting the potential scope of liability for antitrust violators. Three days after the decision the response of American corporations to *Illinois Brick* was exemplified in Exxon Corporation's announcement that it would no longer sell its fuel products directly to consumers, but rather only through distributors.[5] It is apparent that American corporations may now use *Illinois Brick* as a shield to place themselves beyond the reach of consumer treble-damage suits simply by selling their products through distributors.

Prior to the *Illinois Brick* decision, the treble-damage suit had increasingly become "one of the surest weapons for effective enforcement of the antitrust laws,"[6] which were referred to in 1933 by Chief Justice Hughes as a "charter of freedom."[7] Since 1960, the number of private antitrust suits filed in the United States District Courts has more than trebled in volume.[8] Between 1970 and 1975 civil antitrust actions rose 54 percent,[9] and by the close of the fiscal year ending June 30, 1977, increased a further 14.6 percent.[10] Of the

1. 431 U.S. 720 (1977).
2. For the purposes of this Casenote a direct purchaser is defined as one who purchases directly from a manufacturer or other producer. An indirect purchaser is one who purchases from a middleman.
3. The Court recognized two narrow exceptions to its holding. The first exception is where the direct purchaser has a pre-existing cost-plus contract with the indirect purchaser. 431 U.S. at 735-36. The second exception to the general prohibition of the use of the pass-on theory by an indirect purchaser arises when "the direct purchaser is owned or controlled by its customer." *Id.* at 736 n.16. *See* Stotter & Co. v. Amstar Corp., 46 U.S.L.W. 2503 (3d Cir. April 4, 1978). *See generally* 56 N. CAR. L. REV. 341, 347-48 (1978).
4. 15 U.S.C. § 15 (1976).
5. Petition for Rehearing at 7, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
6. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965).
7. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933).
8. 1976 Administrative Office of the United States Courts, Ann. Rep. 124.
9. *Id.* at 125.
10. 1977 Administrative Office of the United States Courts, Ann. Rep. 99.

1,689 antitrust suits filed during fiscal year 1977,[11] private antitrust cases totaled 1,611,[12] or approximately 52 times the number of criminal antitrust cases filed.[13] The disproportionately low number of criminal filings indicates that the treble damage action is an indispensable supplement to government enforcement of the antitrust laws.[14] As one legal commentator has observed, "the private antitrust suit is a curious combination of public regulatory and private compensatory law."[15] The restrictions imposed upon indirect purchasers by *Illinois Brick* will certainly result in a curtailment of the treble-damage remedy as an effective mechanism for enforcement of the antitrust laws and private redress for antitrust violations.

II. PRIVATE SUITS UNDER THE CLAYTON ACT

Private antitrust suits are authorized by section 4 of the Clayton Act, which provides in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold damages by him sustained."[16] Thus, in order to maintain a cause of action under section 4, a person[17] must show (1) a violation of the antitrust laws, (2) an injury[18] to his "business or property,"[19] and (3) a causal connection between the violation and the injury.[20]

11. *Id.* These filings were the highest number recorded in seventeen years, except for 1962 when 1,739 of the 2,039 cases filed involved the electrical equipment industry. *Id.*
12. *Id.* at A-17 (Table C-3).
13. Author's calculations.
14. *See In re* Pittsburgh & Lake Erie R.R. Co. Sec. & Antitrust Litigation, 387 F. Supp. 906, 908 (E.D. Pa. 1974). *See generally* Wham, *Antitrust Treble-Damage Suits: The Government's Chief Aid in Enforcement,* 40 A.B.A.J. 1061 (1954).
15. Comment, *Antitrust Enforcement by Private Parties: Analysis Of Developments In The Treble Damage Suit,* 61 YALE L.J. 1010, 1011 (1952).
16. 15 U.S.C. § 15 (1976). The purpose of the treble damage provision was to create a force of "private attorneys general" to enforce the antitrust laws. Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972). In addition to the treble damage remedy, injunctive relief is authorized by § 16 of the Clayton Act. 15 U.S.C. § 26 (1976).
17. The Supreme Court has recently held that a foreign nation is a person within the meaning of § 4 of the Clayton Act, and thus is entitled to sue for treble damages under the antitrust laws when it has been injured in its business or property. Pfizer, Inc. v. Government of India, 98 S. Ct. 584 (1978).
18. A person who, because of price-fixing, pays more for a product is deemed to be injured in his business or property. *See* Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 396 (1906).
19. "Business or property" means commercial interests or enterprises. Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 264 (1972). *Compare* Reiter v. Sonotone Corp., 435 F. Supp. 933, 935-37 (D. Minn. 1977) *with* Weinberg v. Federated Dep't Stores, Inc., 426 F. Supp. 880, 881-85 (N.D. Cal. 1977) *and* Gutierrez v. E. & J. Gallo Winery Co., 425 F. Supp. 1221, 1222-26 (N.D. Cal. 1977). For a discussion of the "business or property" requirement, *see generally* Blackford, *"Business Or Property" Entitled To Protection Under Section 4 Of The Clayton Act,* 26 MERCER L. REV. 737 (1975).
20. *See generally* Monroe, *Alternative Courses of Action Available To Persons Injured Under The Antitrust Laws,* 34 OHIO STATE L.J. 465 (1973).

Despite the apparent simplicity of the language of section 4, the federal courts have labored over the "injury" and "causation" requirements in ascertaining whether a particular litigant has a justiciable claim. This has been an attempt to balance the value of private antitrust enforcement against the dangers of multiple liability, excessive litigation, and consequential claims.[21] Out of these labors, two basic standards have developed to determine whether a plaintiff is within the scope of section 4, and thus has standing to sue.[22] These standards have been labeled as the "direct-injury" and "target area" tests.[23] The tests employ different analytical techniques.[24] Under the "direct-injury" approach, the courts focus on the relationship between the plaintiff and the alleged antitrust violator. Under the "target area" test, the courts focus on the plaintiff's relationship to the area of the economy allegedly injured by the offender.

A. *"Direct-Injury" Test*

The "direct-injury" test was first formulated in 1910 in *Loeb v. Eastman Kodak Co.*[25] Loeb, a stockholder and unsecured creditor of a corporation, brought a treble damage suit alleging that the defendant, by means of an illegal monopoly, destroyed the business of the corporation thereby causing him to suffer a total loss on his stock investment and creditor claims. In holding that the plaintiff lacked standing to sue, the court reasoned that "the injury complained of was *directed* at the corporation and not the individual stockholder. Hence any injury which he received . . . was *indirect,* remote and consequential."[26] The rationale underlying the *Loeb* decision was that court's fear of a possible multiplicity of suits brought by other creditors of the corporation.[27]

Subsequent decisions employing the "direct-injury" test have interpretated *Loeb* to deny standing to plaintiffs who did not have direct contractual or competitive relations with the antitrust offender.[28] In effect, these courts have imposed a privity require-

21. Comment, Mangano *And Ultimate-Consumer Standing: The Misuse Of The* Hanover *Doctrine,* 72 COLUM. L. REV. 394, 397 (1972).
22. The question of standing to sue evolved from the "case or controversy" requirement of Article III of the United States Constitution. *See generally* Flast v. Cohen, 392 U.S. 83 (1968).
23. *See generally* Note, *Standing To Sue In Private Antitrust Litigation: Circuits In Conflict,* 10 INDIANA L. REV. 532 (1977).
24. *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 126 (9th Cir.), *cert. denied sub nom.* Morgan v. Auto. Mfrs. Ass'n, 414 U.S. 1045 (1973).
25. 183 F. 704 (3d Cir. 1910).
26. *Id.* at 709 (emphasis added).
27. *Id.*
28. *E.g.,* Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727 (3d Cir. 1970), *cert. denied,* 401 U.S. 974 (1971) (shareholder of corporation denied standing to sue for loss resulting from injury to corporation); SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), *cert. denied,* 395 U.S. 943 (1969) (licensor of patent lacked

ment.[29] This restrictive interpretation of standing to sue prevailed for some forty-five years.

B. "Target Area" Test

In 1955, a more equitable and flexible test of standing to sue, labeled the "target area" test, was conceived, which came to be adopted by the majority of the lower federal courts. Under the "target area" test, the courts focus on whether the plaintiff was "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[30] The test is "essentially a measure of remoteness of injury resulting from antitrust violations."[31]

The leading case defining the "target area" test is *Karseal Corp. v. Richfield Oil Corp.*[32] In *Karseal,* the plaintiff manufactured a car polish, which it sold to enfranchised regional distributors, who in turn re-sold to independent gas stations. Defendant Richfield entered into exclusive dealings contracts with approximately 2,965 service station operators that restricted them from purchasing any products other than those designated by Richfield. As a result, Karseal's distributors were unable to sell to these stations. Although the distributors suffered a "direct" injury, Karseal brought a treble-damages suit against Richfield, alleging that Karseal's sales of polish to its "distributors were and have been substantially diminished with the . . . proximate result that plaintiff has sustained damage to its business and property."[33] In holding that Karseal had standing to sue, the court found a causal relationship between the alleged injury and the antitrust violation, stating:

> To say to a manufacturer of wax that he may have the protection of the antitrust laws in private litigation if he hires salesmen for his product, and not have such protection if he decides to contract with a distributor, would be an unequal application of the law . . . .
>
> . . . .
>
> We conclude that Karseal . . . is "within that area of the economy which is endangered by a breakdown of competi-

standing where royalty losses caused by injury to licensee); Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied,* 372 U.S. 907 (1963) (suppliers denied standing when their distributors directly injured); Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir. 1956) (lessor of lessee whose business was injured lacking standing although rent based on a percentage of lessee's receipts); Coast v. Hunt Oil Co., 195 F.2d 870 (5th Cir.), *cert. denied,* 344 U.S. 836 (1952) (partner in injured partnership denied standing).

29. Pollock, *Standing To Sue, Remoteness of Injury, and the Passing-On Doctrine,* 32 A.B.A. ANTITRUST L. J. 5, 14 (1966).
30. Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952).
31. Reiter v. Sonotone Corp., 435 F. Supp. 933, 935 (D. Minn. 1977).
32. 221 F.2d 358 (9th Cir. 1955).
33. *Id.* at 361.

> tive conditions in a particular industry;" . . . that Karseal was within the target area of the illegal practices of Richfield; that Karseal was not only hit, but was aimed at, by Richfield.[34]

Nine years later, the Ninth Circuit Court of Appeals developed the "target area" test further by incorporating a "foreseeability" concept. In *Twentieth Century Fox Film Corp. v. Goldwyn,*[35] the court stated that under the "target area" test, the "plaintiff must show that, whether or not then known to the conspirators, plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy."[36] Although "foreseeability" has not been uniformly accepted by courts which have applied the "target area" test,[37] this approach is consistent with the Supreme Court's policy mandate that the "purposes of the antitrust laws are best served by insuring that the private action will be an everpresent threat to deter anyone contemplating business behavior in violation of the antitrust laws."[38]

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34. *Id.* at 364-65.
35. 328 F.2d 190 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964).
36. *Id.* at 220.
37. *See* Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972). Although the Second Circuit has adopted the rubric of the "target area" test, it has rejected the foreseeability formula in determining standing to sue. Instead, the court strictly follows the language of *Karseal, see* text accompanying note 32 *supra,* and looks to whether the plaintiff was "aimed at" by the alleged antitrust violator. *Id.* As a result, the second and ninth circuits, while employing the "target area" test, have reached different conclusions on the determination of standing in cases involving similar fact situations. *Compare* Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073 (9th Cir. 1970), *cert. denied,* 402 U.S. 923 (1971), *with* Fields Productions, Inc. v. United Artists Corp., 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd per curiam,* 432 F.2d 1010 (2d Cir. 1970), *cert. denied,* 401 U.S. 949 (1971). For discussion of "target area" test as applied by the second circuit, *see* Note, *Standing To Sue In Private Antitrust Litigation: Circuits In Conflict,* 10 INDIANA L. REV. 532, 536-38 (1977).
38. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

The courts of appeals for the first,[39] second,[40] fourth,[41] fifth,[42] seventh,[43] eighth,[44] and ninth[45] circuits have generally applied the "target area" test to determine standing, although at times their analytical processes are unclear.[46] The third[47] and tenth[48] circuits employ the "direct-injury" test. The sixth circuit has rejected both tests in favor of more liberal standing requirements.[49]

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39. *See, e.g.,* Carroll v. Protection Maritime Ins. Co., 512 F.2d 4, 9 (1st Cir. 1975) (although *Carroll* court did not pass on issue of standing, it indicated, in dictum, that "target area" test is proper approach). *But see* Miley v. John Hancock Mutual Life Ins. Co., 148 F. Supp. 299 (D. Mass.), *aff'd per curiam,* 242 F.2d 758 (1st Cir.), *cert. denied,* 355 U.S. 828 (1957); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956).
40. *E.g.,* Commerce Tankers Corp. v. National Maritime Union of America, 553 F.2d 793, 801 (2d Cir. 1977); Long Island Lighting Co. v. Standard Oil Co. of Cal., 521 F.2d 1269 (2d Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972).
41. *E.g.,* South Carolina Council of Milk Products, Inc. v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied,* 385 U.S. 934 (1966); Midway Enterprises, Inc. v. Petroleum Mkg. Corp., 375 F. Supp. 1339 (D. Md. 1974).
42. *E.g.,* Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313 (5th Cir. 1976); Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967).
43. *E.g.,* Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957); General Beverage Sales Co.-Oshkosh v. East Side Winery, 396 F. Supp. 590, 596 (E.D. Wis. 1975).
44. *E.g.,* Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966).
45. Blackenship v. Hearst Corp., 519 F.2d 418 (9th Cir. 1975); *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir.), *cert. denied sub nom.* Morgan v. Auto. Mfrs. Ass'n, Inc., 414 U.S. 1045 (1973); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955).
46. For example, one district court opinion explained the "target area" test in the following language:

> [S]tanding to sue under Section 4 is strictly limited to those individuals who have been *directly* injured by the alleged violation of the antitrust laws. This is known as the "target area" doctrine.
>
> . . . .
>
> Under the "target area" doctrine, it is not necessary to find that plaintiff is in direct competition with defendants, or that there is a direct contractual relationship between them . . . nor under that doctrine is it necessary to prove that it must have been one of defendants' purposes to injure this particular plaintiff.

Johnson v. Ready Mix Concrete Co., 318 F. Supp. 930, 932 (D. Neb. 1970) (citations omitted; emphasis in original).

47. *E.g.,* Pitchford v. PEPI, Inc., 531 F.2d 92 (3d Cir. 1975), *cert. denied,* 426 U.S. 935 (1976); Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727 (3d Cir. 1970), *cert. denied,* 401 U.S. 974 (1971); Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910). *But cf.* Drysdale v. Florida Team Tennis, Inc., 410 F. Supp. 843, 847–48 (W.D. Pa. 1976) (holding, under both "direct-injury" and "target area" tests, that professional tennis player had standing to sue under § 4 of Clayton Act).
48. *E.g.,* Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied,* 411 U.S. 938 (1973).
49. In Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975), the sixth circuit applied the general standing test adopted by the United States Supreme Court in Ass'n of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970). Under this test the plaintiff must show (1) injury in fact and (2) that he was within the zone of interests to be protected by the statute. 397 U.S. at 152–53.

Although the Supreme Court has not yet had occasion directly to consider either the "direct-injury" or "target area" tests, it has consistently reiterated that the private antitrust remedies should be afforded a liberal interpretation, and until *Illinois Brick* had consistently rejected attempts to limit the standing of private litigants to sue under the antitrust laws.[50] For example, in *Radovich v. National Football League,*[51] the Court stated:

> Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party . . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.[52]

C. Hanover Shoe

In 1968, the Court further encouraged private antitrust enforcement by its decision in *Hanover Shoe, Inc. v. United Shoe Machinery Co.,*[53] ruling that an antitrust defendant could not assert as a defense that the plaintiff-claimant had passed-on illegal overcharges to its customers. *Hanover Shoe* involved a treble-damage suit brought against a shoe machinery manufacturer by a shoe manufacturer. The plaintiff alleged that United had monopolized the shoe industry, in violation of section 2 of the Sherman Act,[54] by leasing but refusing to sell its shoe machinery.[55] Plaintiff sought to recover damages incurred by the leasing arrangement based upon "the difference between what it paid United in shoe machine rentals and what it would have paid had United been willing . . . to sell those machines."[56] As a defense, United contended that the plaintiff had suffered no legally cognizable injury because it had passed on the illegal overcharges to its customers in the form of increased prices for its shoes.[57] The Court rejected United's passing-on defense, holding:

> [W]hen a buyer shows that the price paid by him for materials purchased for use in his business is illegally high

50. *See, e.g.,* Radiant Burners, Inc. v. People Gas, Light & Coke Co., 364 U.S. 656 (1961); Radovich v. National Football League, 352 U.S. 445 (1957); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).
51. 352 U.S. 445 (1957).
52. *Id.* at 453-54 (footnote omitted).
53. 392 U.S. 481 (1968).
54. 15 U.S.C. § 2 (1976).
55. The district court found that Hanover would have purchased the shoe machinery from United had it been given the opportunity to do so. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 487 (1968).
56. *Id.* at 484.
57. *Id.* at 487-88.

and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4.

. . . [T]he buyer is equally entitled to damages if he raised the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high.[58]

The underlying rationale of the *Hanover Shoe* ruling was twofold. First, the Court emphasized that the peculiarly complicated factual context of the passing-on defense asserted by United would present "insurmountable" difficulties of proof which would "require additional long and complicated proceedings involving massive evidence and complicated theories."[59] In short, the Court's belief that it would be virtually impossible for United to demonstrate the passing on and accordingly show damage to the plaintiff's customers evidenced a concern for judicial economy and efficiency. As a subsequent lower court decision framed the problem facing the *Hanover Shoe* Court:

In effect, United Shoe was asking the trial court to determine that overpayments on machine leases had been converted into price increases on shoes. In other words, the court would have had to speculate as to the effect on an illegally inflated portion of plaintiff's overhead costs on the price of plaintiff's own manufactured product, which is affected not only by overhead costs, but also by competition in separate wholesale and retail markets.[60]

Second, the *Hanover Shoe* decision stressed the need to preserve the private antitrust remedy as an effective mechanism of enforcing the antitrust laws. The Court reasoned that recognition of United's passing-on defense would, in effect, allow United to retain the fruits of its illegality because no one would be available to bring suit against it:

[I]f buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, 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

58. *Id.* at 489.
59. *Id.* at 492-93.
60. Boshes v. General Motors Corp., 59 F.R.D. 589, 594 (N.D. Ill. 1973).

against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.[61]

Hanover Shoe concerned the right of direct purchasers to recover treble damages. At no point in its decision, however, did the *Hanover Shoe* Court indicate that the presence of intermediaries would operate as a bar to recovery by indirect purchasers. In fact, the Court recognized the right of indirect purchasers to sue for injuries caused by antitrust violations when it reasoned, in support of its rejection of United's passing-on defense, that the interests of the indirect purchasers in *Hanover,* the buyers of single pairs of shoes, were *de minimus,* and hence they would be unlikely to sue.[62]

The *Hanover Shoe* decision was a pragmatic one. Its dual purpose was primarily to protect the courts from protracted litigation where the question of proof of passing-on would, at best, be highly speculative, and secondarily to encourage rather than limit private antitrust enforcement.[63] It noted, without suggesting a solution, the problems of proof attendant to passing-on claims.

The decision can hardly be viewed as a blanket prohibition of the defensive use of passing-on. In concluding its analysis of United's asserted pass-on defense, the Court recognized that there were situations where the defense could be raised. The Court stated that the use of the pass-on defense would be permitted when the overcharged buyer had a pre-existing 'cost-plus' contract which made it easy to prove that he had not been damaged.[64] When viewed in this light, it is apparent that the *Hanover Shoe* decision was rooted in the problems of proof which the pass-on defense presented. A subsequent lower court decision aptly pointed out that "[t]he thrust of *Hanover Shoe* is not the destruction of the passing-on defense but its restriction to situations which are easily provable."[65]

*D. Post-*Hanover Shoe *Decisions*

In *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.,*[66] indirect purchasers brought treble-

61. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968) (emphasis in original).
62. *Id.* at 489. *See* text accompanying note 56 *supra.*
63. One legal commentator has suggested that the reasons offered by the *Hanover* Court for rejecting United's passing-on defense were interrelated: "the Court's emphasis on the problems of proof reflected its concern that the attempt to establish a pass-on would so bog down the litigation process as to undermine the efficacy of the private enforcement mechanism." Comment, Mangano *And Ultimate-Consumer Standing: The Misuse Of The* Hanover *Doctrine.* 72 COLUM. L. REV. 394, 408 (1972).
64. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968).
65. Obron v. Union Camp Corp., 355 F. Supp. 902, 907 (E.D. Mich. 1972), *aff'd,* 477 F.2d 542 (6th Cir. 1973).
66. 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971). *See generally* Comment,

damages suits against manufacturers of plumbing fixtures to recover damages for illegal overcharges caused by the defendants' conspiracy to fix prices of certain plumbing fixtures. The district court held that the plaintiffs' failure to answer interrogatories justified dismissal of the action.[67] The district court, however, was anxious to reach the substantive questions involved in the case and, relying on *Hanover Shoe,* held that the plaintiffs' claims could be dismissed on alternative grounds of "insurmountable difficulties of proof."[68] The Third Circuit Court of Appeals affirmed on the grounds that "it was within the district court's sound discretion to dismiss the actions . . . solely for inexcusable failure to answer interrogatories."[69] In *dictum,* it also agreed with the district court's interpretation of *Hanover Shoe.*[70]

Nonetheless, the trend of lower federal court decisions following *Hanover Shoe* was clearly in the direction of permitting offensive use of the pass-on principle by indirect purchasers.[71] The bellweather case is *In Re Master Key Antitrust Litigation.*[72] *Master Key* involved a treble damage suit brought against manufacturers of hardware by government plaintiffs who purchased indirectly through building contractors hardware components used on doors of buildings. The plaintiffs alleged that the manufacturers had engaged in a price-fixing conspiracy which resulted in illegal overcharges, and that the illegal overcharges had been passed on to them in the price they had to pay to purchase the buildings. In denying defendant's motion for summary judgment, the district court held that the rejection of the passing-on defense in *Hanover Shoe* did not preclude the offensive use of passing on by indirect purchasers in attempting to prove their damages. The court reasoned that the defendant's interpretation of

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Mangano *And Ultimate-Consumer Standing: The Misuse Of The* Hanover *Doctrine,* 72 COLUM. L. REV. 394, 404-414 (1972) (general criticism of district court's decision in *Mangano*).

67. *Id.* at 18-19.

68. *Id.*

69. 438 F.2d at 1188.

70. *Id.*

71. *See* Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976); Illinois v. Ampress Brick Co., 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); *In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom.* Standard Oil Co. v. Alaska, 415 U.S. 919 (1974); Lefrak v. Arabian American Oil Co., 405 F. Supp. 597 (E.D.N.Y. 1975); Carnivale Bag Co., Inc. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287 (S.D.N.Y. 1975); Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973); *In re* Master Key Antitrust Litigation, [1973-2] Trade Cases (CCH) ¶ 74,680 (D. Conn. 1973); Southern General Builders, Inc. v. Maule Industries, Inc., [1973-1] Trade Cases (CCH) ¶ 74,484 (S.D. Fla. 1972); *cf.* West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied sub nom.* Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971) (holding indirect purchasers, retail consumers of antibiotic drugs, entitled to participate in settlement against drug manufacturer). *Contra,* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971), *aff'g* Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970).

72. [1973-2] Trade Cases (CCH) ¶ 74,680 (D. Conn. 1973).

Hanover Shoe, as denying indirect purchasers the right to sue for antitrust violations, was erroneous. It commented that "the 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 and its underlying rationale on its head."[73]

A year after *Hanover Shoe,* the Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*[74] reaffirmed the need to lower the antitrust plaintiff's burden of proof in order to prevent an antitrust violator from escaping liability merely because of the difficulty in ascertaining the precise measure of damages which he had caused. The Court instructed lower courts to "observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff . . .; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts."[75]

In the same Term, the Court also decided *Perkins v. Standard Oil Company of California,*[76] a treble damage suit involving injuries allegedly resulting from defendant's price discriminations in the sale of gasoline and oil in violation of section 2 of the Clayton Act.[77] The Court there held that a claimant can recover damages for an antitrust violation "regardless of the 'level' in the chain of distribution on which the injury occurs," provided he can show "a causal connection between the price discrimination . . . and the injury suffered."[78] As to the question of damages, the Court went on to say that the ultimate conclusion as to the sufficiency of the evidence to support an inference of causation is for the jury to determine.[79]

In *Perkins,* the "direct injury" approach to section 4 of the Clayton Act was implicitly undermined, if not rejected, by the Court. The Ninth Circuit Court of Appeals had concluded that "fourth level" price discrimination was not proscribed by section 2 of the Clayton Act, focusing on the indirect commercial relationship between the claimant and the defendant.[80] In reversing, Justice Black, speaking for the Court, admonished the court of appeals that the direct-indirect "limitation is wholly artificial and is unwarranted by the language or purpose of the Act."[81] Justice Black reasoned that

73. *Id.* at 94,978-79.
74. 395 U.S. 100 (1969).
75. *Id.* at 123.
76. 395 U.S. 642 (1969).
77. 15 U.S.C. § 13 (1976).
78. Perkins v. Standard Oil of Cal., 395 U.S. 642, 648 (1969).
79. *Id.*
80. 396 F.2d 809 (9th Cir. 1968), *rev'd,* 395 U.S. 642 (1969).
81. 395 U.S. 642, 648 (1969).

"the competitive harm done . . . is certainly no less because of the presence of an additional link in this particular distribution chain from the producer to the retailer,"[82] and reversal was grounded on a "target area" quote from *Karseal*.[83]

III. ILLINOIS BRICK

A. *The Decision*

In 1975, the State of Illinois and seven hundred local government entities brought a treble damage suit against eleven concrete manufacturers in the United States District Court for the Northern District of Illinois. The plaintiffs alleged that the defendants conspired to fix the prices of concrete block in violation of section 1 of the Sherman Act,[84] resulting in illegal overcharges to the plaintiffs.[85] Only four of the plaintiffs purchased the blocks directly from the defendants.[86] The remaining plaintiffs were indirect purchasers, most of whom had purchased from contractors through competitive bid awards.[87]

At the trial level, defendants moved for summary judgment[88] against all plaintiffs who were not direct purchasers, contending that, as a matter of law, they lacked standing to sue because they were indirect purchasers.[89] In support of their motion, defendants relied on *Hanover Shoe*.[90] Defendants argued that the *Hanover Shoe* rationale applies not only as a limitation on the use of the pass-on defense by an antitrust violator against a direct purchaser's claim but, conversely, also prohibited the indirect purchaser from using the pass-on offensively against the alleged antitrust violator.

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82. *Id.*
83. *Id.* at 649. *See In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir.), *cert. denied sub nom.* Morgan v. Auto. Mfrs. Ass'n, Inc., 414 U.S. 1045 (1973); text accompanying notes 32-34 *supra.*
84. 15 U.S.C. § 1 (1976).
85. Illinois v. Ampress Brick Co., 67 F.R.D. 461, 463 (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). Plaintiffs alleged that the overcharges passed on to them were in excess of $3 million. Illinois Brick Co. v. Illinois, 431 U.S. 720, 727 (1977). Only 7% of the plaintiffs, however, were able to state the cost of the concrete block used in their construction projects. *Id.* at 727 n.6.
86. 67 F.R.D. at 463.
87. *Id.*
88. FED. R. CIV. P. 56. On a motion for summary judgment, the moving party has the burden of showing the absence of a genuine issue as to all material facts, and the facts are viewed in the light most favorable to the opposing party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). *See generally* 6 MOORE'S FEDERAL PRACTICE ¶ 56.15[3] (1976). Additionally, the Supreme Court has cautioned that summary judgment "should be used sparingly in complex antitrust litigation." Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962); *accord,* Donlan v. Carvel, 209 F. Supp. 829, 831 (D. Md. 1962).
89. 67 F.R.D. at 463-64.
90. Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

Although the district court rejected defendants' interpretation of *Hanover Shoe,* it nonetheless granted summary judgment.[91] In reaching its decision, the court created a distinction between two different types of indirect purchasers,[92] the "final consumer"[93] and the "ultimate consumer."[94] Classifying the plaintiffs as "ultimate consumers,"[95] the court concluded that "as to *ultimate* consumers, their injuries are too remote and consequential to provide legal standing to sue against the alleged antitrust violator."[96]

The United States Court of Appeals for the Seventh Circuit, employing the "target area" test,[97] reversed in a unanimous opinion.[98] The court held that the plaintiffs, whether they be indirect purchasers or ultimate consumers, had standing to maintain the action on the ground that "they were within the area of the economy which defendants reasonably could have or did foresee would be endangered by the breakdown of competitive conditions."[99] The court also held that the plaintiffs could recover treble damages if they could prove that the overcharge was passed on to them through the chain of distribution.[100]

The Supreme Court granted certiorari to resolve the conflict between the third circuit's 1971 decision in *Mangano,*[101] and the ninth circuit's decision in *In Re Western Liquid Asphalt Cases.*[102] On June 9, 1977, the Court by a six to three margin,[103] reversed the

91. 67 F.R.D. at 468.
92. *Id.* at 466–67. This dichotomy was suggested by a legal commentator in Comment, Mangano *And Ultimate-Consumer Standing: The Misuse Of The* Hanover *Doctrine,* 72 COLUM. L. REV. 394, 395 (1972).
93. Final consumer is one who "acquires the goods in the same condition as originally made and sold by the manufacturer." Illinois v. Ampress Brick Co., 67 F.R.D. 461, 466 (N.D. Ill. 1975), *rev'd,* 536 F.2d 1163 (1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
94. Ultimate consumer is one "who obtains a finished product from a middleman that has altered or added to the goods received from the manufacturer." *Id.*
95. The court's classification of the plaintiffs as "ultimate consumers" was based on the fact that the concrete blocks were ultimately incorporated into buildings. The court's application of a talismanic label, however, seems illusory, as a concrete block is just as much a concrete block when it arrives at a construction site as it is when it leaves the hands of the manufacturer.
96. 67 F.R.D. at 468 (emphasis in original).
97. The court also utilized the general standing test adopted by the Supreme Court in Ass'n of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970). *See* note 49 *supra.*
98. Illinois v. Ampress Brick Co., 536 F.2d 1163 (1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
99. *Id.* at 1167 (citation omitted).
100. *Id.* at 1165.
101. *See* text accompanying notes 66–70 *supra.*
102. 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom.* Standard Oil Co. v. Alaska, 415 U.S. 919 (1974) (indirect purchasers of asphalt who purchased through contractors granted standing to sue suppliers for illegal overcharges passed on through contractors).
103. In the majority were the Chief Justice and Justices White (author of the opinion), Powell, Rehnquist, Stevens and Stewart. Justice Brennan authored a dissent, in which Justices Blackmun and Marshall concurred. Justice Blackmun filed a separate dissenting opinion.

Ninth Circuit Court of Appeals, holding that the offensive use of pass-on was not consistent with *Hanover Shoe*'s restrictions on the defensive use of pass-on.[104]

B. Rationale Of The Decision

In speaking for the majority, Justice White offered three reasons in support of the Court's holding that indirect purchasers may not assert overcharges passed on to them through the chain of distribution. First, consistency required the Court to follow *Hanover Shoe,* and thus to hold direct purchasers to be injured to the full extent of the overcharge.[105] Second, to allow the offensive use of pass-on would create massive evidentiary problems that 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 thereby "add whole new dimensions of complexity to treble-damage suits."[106] Third, "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants."[107]

Justice White's second and third reasons reiterated concerns he had expressed nine years earlier when speaking for a unanimous court in *Hanover Shoe.* In *Hanover Shoe,* he had been concerned with the problems of proof inherent in the court's task of tracing the effects of an illegal overcharge to direct purchasers on the prices consumers ultimately paid. In *Illinois Brick* this concern over problems of proof had ripened into concern over the far greater apportionment complexities that the offensive use of passing-on would introduce.[108]

The significant increase in antitrust litigation during the interim may have been an underlying reason for the Court's decision. The *Illinois Brick* majority was undoubtedly aware of, and presumably alarmed by, the rapid expansion of treble-damages suits and class actions, and the congested state of the lower courts' dockets.[109] The Court may well have been motivated to stem the tide

104. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
105. *Id.* at 728.
106. *Id.* at 737.
107. *Id.* at 730.
108. *See* Denver v. American Oil Co., 53 F.R.D. 620, 637 (D. Colo. 1971) (district court judge expressed concern that a class action by indirect purchasers "might be an accountant's paradise, but it would be a court's purgatory").
109. Fiscal Year 1972 was the first year for which the Administrative Office of the United States Courts compiled and tabulated statistics on class actions filed under Federal Rule 23. As of June 30, 1972, pending civil antitrust class actions totalled 308. *See* 1972 Administrative Office of the United States Courts, Ann. Rep. 189 (Table 54). Of those, 231 cases had been transferred under The Multidistrict Litigation Act. *See* 28 U.S.C. § 1407 (Supp. IV 1974). By June 30, 1976, pending cases in this category totalled 471, and a year later, 514. *See* 1976 Administrative Office of the United States Courts, Ann. Rep. 215 (Table 40), and 1977 Ann. Rep. 123 (Table 31). 1976 new filings totalled 190, and 1977 new filings

of litigation, particularly in the vulnerable area of multiparty suits involving complex problems of proof and allocation of damages. By limiting the availability of the treble-damage remedy to direct purchasers, both the size and numbers of classes would be reduced, and the complex problems of proof, which involve tracing a manufacturer's overcharge through the distribution chain and allocating damages in protracted apportionment proceedings, would be eliminated. The majority may have felt that such benefits outweighed any negative impact the decision might have on antitrust enforcement policy.[110]

Justice White also remained convinced of the inequity of exposing a defendant to pass-on claims asserted by indirect purchasers while precluding the defendant from asserting a pass-on defense; mutuality required that offensive passing-on be barred.[111] He reasoned, moreover, that unless the treble-damage remedy was restricted to direct purchasers, both a direct purchaser and a whole series of indirect purchasers might recover treble damages for the same illegal overcharge, and thus subject a defendant to multiple liability.[112] Unwilling to overrule *Hanover Shoe,* the majority opted to reject pass-on claims and asserted that the antitrust laws would be more effectively enforced by concentrating full recovery in the direct purchaser.[113]

Although the Court distinguished between "the question of which persons have been injured by an illegal overcharge for the purposes of § 4" and a denial of standing,[114] the decision in effect denies standing to indirect purchasers, even though they have actually been injured, by prohibiting them from asserting pass-on claims. As a result, an indirect purchaser is now precluded from proving his injury.

The majority opinion in *Illinois Brick* admittedly does not demonstrate the same concern for consumer protection that had been implicit in the *Hanover Shoe* Court's unanimous decision,

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totalled 235, for a one year percentage increase of 23.68%, as calculated by the author. The percentage increase over the five year period 1972-1977 was 66.88%, which figure correlates closely with the 68% increase in treble-damage suits during the 1970-1977 period. *See* text accompanying notes 9 and 10 *supra.*

110. *See* 46 U. CIN. L. REV. 875 (1977), wherein the author describes the impact of *Illinois Brick* on the scheme of enforcement envisioned by Congress as anomolous, and says that the decision cannot be rationalized within the framework of traditional antitrust enforcement policy.

111. 431 U.S. 720, 728-35 (1977). Neither *Hanover Shoe* nor *Illinois Brick,* by themselves or read together, completely reject either offensive or defensive use of passing-on. *See* Note, *Recovery by Indirect Purchasers and the Functions of Antitrust Treble Damages,* 55 TEXAS L. REV. 1445 (1977) (contains thoughtful and cogent analysis of *Illinois Brick,* and discusses narrow exceptions to Court's general prohibition of passing-on).

112. 431 U.S. at 730-31.

113. *Id.* at 745-47.

114. *Id.* at 728 n.7.

which Justice White left for Justice Brennan to express on behalf of the minority.

In a vigorous dissent, Justice Brennan condemned the Court's decision to limit the treble-damages remedy only to persons who purchase directly from an antitrust violator as a "regrettable retreat" from the broad objectives of compensation and deterrence set out in section 4 of the Clayton Act.[115] He criticized the majority's radical departure from its long-standing policy of encouraging vigorous private enforcement of the antitrust laws,[116] and chided the majority for disregarding the Court's past warnings against adding "requirements to burden the private litigant beyond what is specifically set forth by Congress in the antitrust laws."[117] He pointed out that our economic system is largely based upon a chain of distribution, and that the Court's decision "severely undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement."[118] Justice Brennan asserted that direct purchasers who act as middlemen would not want to jeopardize their business relations with their suppliers by suing them, so long as the middlemen could pass on the illegal overcharges to others in the chain of distribution.[119] By precluding an indirect consumer, who actually suffers, from maintaining suit, antitrust violators would go unpunished and victims would remain uncompensated.

Justice Brennan regarded the estimation of the overcharge passed on to an indirect purchaser, and the amount of his damage, which so concerned Justice White, as being no different and no more complicated than estimating what the middleman's selling price would have been absent the violation.[120] He also discounted the risk of multiple liability, stating that existing procedural mechanisms were sufficient virtually to eliminate that danger,[121] and contended that there were "sound reasons for treating offensive and defensive passing-on cases differently."[122] Justice Blackmun, concurring in the Brennan dissent, decried as a "wooden approach" the majority's insistence on consistency with *Hanover Shoe.* Justice Blackmun viewed *Hanover Shoe* as compelling a conclusion in favor of indirect purchasers who could demonstrate injury.[123]

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115. *Id.* at 748-49 (Brennan, J., dissenting).
116. *Id.*
117. *Id.* at 755-56 (quoting Radovich v. National Football League, 352 U.S. 445, 454 (1957)).
118. *Id.* at 749 (Brennan, J., dissenting).
129. *Id.*
120. *Id.* at 758-59.
121. *Id.* at 761.
122. *Id.* at 753.
123. *Id.* at 765-66 (Blackmun, J., dissenting).

IV. CONCLUSION

Although the decision in *Hanover Shoe* showed a greater concern for enforcement of the antitrust laws, the *Illinois Brick* decision was equally pragmatic. In *Illinois Brick,* the court adhered to the rationale of *Hanover Shoe,* both in permitting direct purchasers to recover and in rejecting offensive passing-on as inconsistent with the restrictions imposed by *Hanover Shoe* on defensive passing-on. It found mutuality preferable to the myriad procedural problems it foresaw if a contrary result were reached.

There is a certain parallelism between *Illinois Brick* and *Loeb v. Eastman Kodak Co.*[124] Justice White's concern over multiplicity of suits echoes the *Loeb* court's concern. The "direct dealing" requirement to show injury and therefore standing to sue is reminiscent of the "direct-injury" test first enunciated in *Loeb* sixty-seven years earlier and the privity requirement developed through subsequent cases. The "target area" test of standing to sue is rejected, despite its apparent acceptance by the *Perkins* Court only eight years earlier.[125]

It seems likely that Congress may accept Justice White's invitation to amend section 4 of the Clayton Act, if it disagrees with the result in *Illinois Brick.*[126] Bills have been introduced in both the House of Representatives[127] and the Senate[128] to amend section 4 of the Clayton Act to permit recovery by indirect consumers. Unless such corrective legislation is enacted, it would appear that the availability to consumers of the treble-damages remedy has been severely curtailed.

William F. Ryan, Jr.

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124. 183 F. 704 (3d Cir. 1910).
125. Perkins v. Standard Oil Co. of California, 395 U.S. 642 (1969).
126. 431 U.S. 720, 733-34 n.14 (1977).
127. H.R. 11942, 95th Cong., 2d Sess. (1978).
128. S. 1874, 95th Cong., 1st Sess. (1977).