**Loyola Consumer Law Review**

Volume 3 | Issue 1 Article 6

1990

# The United States Supreme Court Denies Consumers, as Indirect Purchasers, Standing to Sue Under the Clayton Act

Mira Djordjic

# Recent Cases

## THE UNITED STATES SUPREME COURT DENIES CONSUMERS, AS INDIRECT PURCHASERS, STANDING TO SUE UNDER THE CLAYTON ACT

In ***Kansas and Missouri v. Utilicorp United Inc.***, ___ U.S., ___ 110 S.Ct. 2807 (1990), the United States Supreme Court held that only utility companies, as direct purchasers, have standing to sue gas suppliers who allegedly violated the Clayton Act by overcharging the utility companies for natural gas. In so holding, the Supreme Court excluded the utilities' customers from the definition of an injured party under the Clayton Act.

### Background

Utilicorp United, Inc. ("Utilicorp"), an investor-owned public utility company, purchased over-priced natural gas from a pipeline company. Utilicorp, another utility company and several gas purchasers (collectively "the utilities") sued a pipeline company and five gas production companies (collectively "the suppliers") in the United States District Court for the District of Kansas. The utilities claimed that the suppliers had violated the Clayton Act ("Act"), 15 U.S.C. § 15 (1988), through a price inflation conspiracy with respect to natural gas. Section 4 of the Act authorizes any person injured by an antitrust violation to sue for treble damages. Clayton Act § 4, 38 Stat. 731, 15 U.S.C. § 15 (1988). In accordance with the Act, the utilities sought to recover treble damages for the amount of the overcharge and the decrease in sales which resulted from the overcharge.

The States of Kansas and Missouri ("the States") brought separate actions in the district court against the same suppliers. As *parens patriae* on behalf of indirect purchasers, those persons residing within Kansas and Missouri who had purchased the over-priced gas from any of the utility companies, the States alleged the same violations under the Act. The States also represented state agencies, municipalities and other political subdivisions which had purchased gas from the producers. The district court consolidated all the actions.

In response, the producers claimed that the utilities lacked standing to sue under § 4 of the Act because they had suffered no injury, as required under the Act. The utilities' customers had paid the entire amount of the alleged overcharge, as the utilities had "passed through" these charges to their customers.

The utilities moved for a partial summary judgment in response to defendant's claim that the utilities lacked standing. In accordance with *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the district court dismissed the States' *parens patriae* claims because only the utilities, as direct purchasers from the producers, suffered injury under § 4 of the Act. The district court interpreted *Hanover Shoe* and *Illinois Brick* as holding that although a direct purchaser may pass through to its customers the full overcharge derived from a purchase from an antitrust violator, only the direct purchaser suffers the antitrust injury. Accordingly, the States, as *parens patriae* of the indirect purchasers, did not have standing to sue under the Act.

On interlocutory appeal of the district court's decision, the court of appeals affirmed the district court and held that *Hanover Shoe* and *Illinois Brick* required the dismissal of the *parens patriae* claims. The United States Supreme Court granted *certiorari* to decide whether the States had standing to sue under § 4 of the Act.

### *Hanover Shoe* and *Illinois Brick* Apply

Before the United States Supreme Court, the States made three arguments in support of their claim that the utilities' customers had standing to sue under § 4 of the Act. First, the States claimed that the holdings in *Hanover Shoe* and *Illinois Brick* should not be extended to this case because the reasoning behind those decisions did not apply to regulated public utility cases.

The States conceded that the utilities' customers, like the consumers of the over-priced goods in *Hanover Shoe* and *Illinois Brick*, are indirect purchasers because they did not transact business directly with the alleged antitrust violators. Nevertheless, the States claimed that the instant case can be distinguished from *Hanover Shoe* and *Illinois Brick*. In the present case, the utilities passed on the entire overcharge to the consumers, whereas in *Hanover Shoe* and *Illinois Brick*, the direct purchasers passed on only part of the alleged overcharge to the consumers. The States argued that the concerns which motivated the Court in *Hanover Shoe* and *Illinois Brick*, specifically, the difficulty of apportionment, the risk of multiple recovery and the decreased incentives for antitrust enforcement did not exist in this case, where the direct purchasers passed on the entire overcharge to their customers.

### The Apportionment Problem

The States asserted that an apportionment problem exists when a court must determine the amount of overcharge absorbed by the direct purchaser and the amount of overcharge absorbed by the indirect purchaser. According to this definition, the States argued that no apportionment problem existed in this case because the customers paid the entire overcharge in accordance with state utility commission tariff schedules. The commission maintained public files recording the volume and price of gas sold to the consumers. The States reasoned that they could accurately prove customer injury from the commission's files. Therefore, the States argued that the customers should be allowed to sue for the entire overcharge while the utilities should be allowed to sue only for lost business damages.

The Supreme Court disagreed and stated that the States oversimplified the apportionment problem. The Court found that an apportionment problem would exist even where the utilities passed on the entire overcharge to the consumers; if the utilities raised their prices to pass on costs to consumers, market forces might prevent the utilities from raising their prices again to increase profits. Thus, the Court found that the utilities would still be injured by the overcharge to the extent that they would have raised prices for profit or other purposes in the absence of the overcharge.

The Court reasoned that in order to avoid an apportionment problem, the indirect purchaser would have to prove that the direct purchaser would not have raised its prices before the alleged overcharge. However, proving the direct purchaser's pricing intentions would be extremely difficult. A court would not only have to determine the extent of market limitations affecting utility price increases prior to the overcharge but would also have to determine the price increase levels permitted by state regulators. A court would have to establish that state regulators would have only permitted a rate increase corresponding to the illegal overcharge amount in order to conclude that a utility suffered no injury from the overcharge. Therefore, the Court concluded that an apportionment problem still existed because it would be nearly impossible to determine whether and by how much the utilities would have raised their prices absent the alleged overcharge.

In addition, the Court found that questions of timing would further complicate the apportionment of overcharge damages between a direct and an indirect purchaser. Namely, a lag may exist between the time when the producers pass on an overcharge to the utilities and the time when the utilities pass on an overcharge to the customers. The utilities would bear the cost of this lag time, and therefore, would suffer some injury due to the overcharge. In addition, the difficulty of proving exactly when and how much of the overcharge was passed on would further complicate the apportionment of the overcharge between the utilities and the consumers.

#### Risk of Multiple Recovery

The States also asserted that no risk of multiple recovery existed. The States sought damages for the amount of the overcharge, and the utilities sought damages for lost sales due to the overcharge. However, the Court stated that allowing the States to remain in the case would further the existing confusion of multiple parties and competing claims without providing any benefit since state regulatory law in Kansas and Missouri may require that the utilities give a portion of their § 4 recovery to their customers.

#### Decreased Antitrust Enforcement

In addition, the States claimed that the concern in *Hanover Shoe* and *Illinois Brick* that suits by indirect purchasers would diminish vigorous antitrust law enforcement did not exist here. Rather, the States asserted that relying on direct purchaser actions in utility cases would fail to promote antitrust enforcement. In support of their argument, the States noted that utilities lacked incentive to bring § 4 actions, since utilities may pass on their costs to customers and they also may have to pass on to customers the § 4 damages they have recovered.

However, the Court rejected the States' argument. The Court noted that utilities still may be prompted to bring § 4 actions because of the possibility that state regulators will not allow them to pass on overcharges to their customers. In addition, the Court found that utilities would not have to pass on their entire damages to their customers since utilities received treble damages under § 4. The Court also noted that utilities maintained a successful record of diligently bringing § 4 actions. For these reasons, the Court concluded that utilities did not lack incentive to sue overcharging suppliers.

Additionally, the Court cited several reasons why indirect purchaser actions may fail to promote antitrust enforcement: indirect purchasers may not possess the requisite expertise to bring § 4 actions; state attorneys general may be reluctant to bring smaller or speculative harm suits on behalf of consumers; and state attorneys general may only bring *parens patriae* actions on behalf of state residents. In conclusion, the Court noted that some of the concerns underlying *Hanover Shoe* and *Illinois Brick* did not apply as strongly in the instant case. However, the importance of the general rule which gave only direct purchasers standing to sue justified the Court's decision not to undermine the rule by creating exceptions. The Court thus held that § 4 of the Act denied the States, as *parens patriae* of indirect purchasers, standing to sue.

#### Cost-Plus Contract Exception Inapplicable

The States contended that the cost-plus contracts exception suggested in *Illinois Brick* should apply to this case. In *Illinois Brick,* the Court noted that an exception to the direct purchaser rule exists when a customer must buy a fixed quantity of a product regardless of

(continued on page 22)

## Clayton Act Standing
(continued from page 21)

price under a contractual agreement. In this situation, the overcharge can be determined in advance without the complications of market forces of supply and demand. Namely, the direct purchaser will pass on the entire overcharge to its customer who is required to buy a fixed quantity of a product regardless of price. The States argued that because state tariff schedules required the utilities to pass through costs to consumers, the cost-plus contract exception applied.

However, the Court stated that a cost-plus contract situation did not exist in this case, despite the state regulation of public utilities. The utilities did not sell to their customers under a pre-existing cost-plus contract; the customers did not agree to purchase a fixed quantity of gas. In addition, the Court emphasized that under a cost-plus contract, a direct purchaser bears no portion of the overcharge and therefore suffers no injury under the Act. In contrast, in this case, the utilities had no guarantee of an established profit, and indeed they may have suffered a portion of the overcharge. Therefore, the Court held that although a cost-plus exception may exist, such an exception did not apply to the utilities in the instant case.

### Hart-Scott-Rodino Does Not Apply

Finally, the States contended that § 4C of the Hart-Scott- Rodino Antitrust Improvements Act of 1976 ("HSR Act"), 90 Stat. 1394, as amended, 15 U.S.C. § 15c (1980), allowed the States to sue on behalf of the consumers notwithstanding their indirect purchaser status. The Court rejected this argument and reiterated its statement in *Illinois Brick* that § 4C of the HSR Act did not create any new substantive liability. Section 4C merely created a new procedural device whereby state attorneys general could bring *parens patriae* actions on behalf of injured direct purchasers.

### The Dissent

The dissent premised its entire argument on the assumption that the utilities passed through the entire overcharge to their customers. The dissent contended that the majority should have decided this case based on this assumption because one of the utilities admitted this assumption, and both the district court and the court of appeals ruled according to this assumption. Assuming that a complete pass-on occurred, the dissent argued that none of the concerns present in *Illinois Brick* existed here, and therefore, the majority's dependance on *Illinois Brick* was misplaced. The dissent suggested that the majority should have followed the explicit language of § 4 which permitted recovery to those injured by antitrust violations without distinguishing between classes of customers.

First, the dissent stated that no apportionment problem existed which would support the majority's decision. Noting that public utilities are regulated, the dissent reasoned that there existed a complete pass-through of the overcharge because the utilities would undoubtedly pass through as much of the overcharge as permitted by law. In addition, the dissent found that the amount of such overcharge could have been determined easily from the customers' utility bills; the utility bills would have stated how much gas a customer bought at the illegal price. The dissent also stated that the majority's concern over the problem of proving whether the utilities would have raised their rates absent the overcharge is a problem which arises in many antitrust cases; courts frequently separate price increases related to anticompetitive conduct from those related to legitimate conduct.

Second, the dissent described the majority's concern with timing difficulties with respect to apportionment as speculative. The dissent found that regardless of the delay of the utilities in passing through the overcharge, the customers would inevitably pay for the overcharge.

Third, the dissent contended that granting standing to indirect purchasers where a complete pass-through of an overcharge existed would not decrease enforcement of antitrust laws because the indirect purchasers could easily discover the injury. In addition, the utilities have no incentive to seek damages for the amount of the illegal overcharge, since its injury only consists of a loss in sales rather than a loss of the entire amount of the overcharge. Thus, according to the dissent, in light of the evidence of a complete pass-through of the overcharge, the apportionment concerns of the majority did not compel dismissal of the States' claim.

Finally, the dissent stated that the multiple liability problem which existed in *Illinois Brick* did not exist here. Therefore, the problem of multiple liability could not justify the majority's decision. The dissent reasoned that where a complete pass-through existed there was no problem of multiple liability because the utilities and the States requested separate and distinct damages. The utilities sought damages for lost sales, whereas the States sought damages for the amount of the overcharge. Therefore, the dissent determined that since none of the concerns which existed in the *Illinois Brick* case existed here, the States had standing to sue under § 4 of the Act.

**Mira Djordjic**

## NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT PARTIALLY PREEMPTS DEFECTIVE DESIGN CLAIM

In ***Pokorny v. Ford Motor Company,*** 902 F.2d 1116 (3d Cir. 1990), the United States Court of Appeals for the Third Circuit held that the National Traffic and Motor Vehicle Safety Act ("Safety Act") preempted a common law liability claim against a van manufacturer for failure to equip its vans