Antitrust: Consumer Standing After *Reiter v. Sonotone Corp.* and *Illinois Brick Co. v. Illinois*

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INTRODUCTION

The federal antitrust laws authorize a private cause of action for treble damages by "any person" who sustains an injury to "business or property" by reason of an antitrust violation. Specifically, the Clayton Act authorizes the award of treble damages in

1. "The antitrust laws" are defined by Section One of the Clayton Act, 15 U.S.C. § 12, and include four statutes: the Sherman Act, 15 U.S.C. §§ 1-7 (1976); the Clayton Act, 15 U.S.C. §§ 12-27 (1976); the Wilson Tariff Act, 15 U.S.C. §§ 8-11 (1976); and the act amending the Wilson Tariff Act, 15 U.S.C. § 11 (1976). There are at least 67 other federal statutes containing antitrust provisions to which Section Four does not apply. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 376 & n.4 (1958). For example, Section One of the Robinson-Patman Act amended Section Two of the Clayton Act to make it unlawful for any person engaged in commerce, in the course of such commerce, to discriminate in price, services, or facilities, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. 15 U.S.C. § 13(a). Since this section amended the Clayton Act, Section One of the Robinson-Patman Act is an "antitrust law" as defined by Section One of the Clayton Act and a private cause of action does lie for violations. On the other hand, Section Three of the Robinson-Patman Act does not amend the Clayton Act and no private cause of action is authorized by the Clayton Act. Section Three authorizes criminal sanctions for particular discriminatory acts. First, discrimination in discounts and charges are illegal when knowingly not made available by the seller to competitors of the purchaser. Second and third, geographic price discrimination and unreasonably low prices are illegal when made for the purpose of destroying competition or eliminating a competitor. 15 U.S.C. § 13a. Although price discrimination is both criminally punishable under Section Three of the Robinson-Patman Act and subject to a private cause of action under Section Two of the Clayton Act, selling "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor" is subject only to criminal sanctions provided by Section Three of the Robinson-Patman Act and no private cause of action is available.

2. See note 6 infra for a discussion of the meaning of the terms "business or property."

3. 15 U.S.C. § 15 (1976). The Sherman Act, Ch. 647, §§ 1-7, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)), was passed in response to political pressures from farmers and the general public who demanded some control over the "trust-builders" who owned the railroads and operated the "trusts" or monopolies in many consumer-goods industries. It was the widespread belief that these "trusts" forced out smaller competitors by unfair practices and then proceeded to raise prices for consumer goods. Because of the characteristically inelastic demand for such goods, the "trust-builders" were accused of reaping huge profits at the expense of the consumer. The two major political parties reacted to the public outcry in 1888 and constructed platforms with anti-monopoly planks. The new Congress enacted the Sherman Act of 1890. See A. Neale, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 23-28 (1960). The Sherman Act, in general terms, prohibits both unreasonable restraints upon and monopolization of trade and is comprehensive in nature. See
cases when three elements are proven. The plaintiff must establish a violation of the antitrust laws, a resulting injury to business or property, and damages. Regardless of the type of antitrust plaintiff, the antitrust violation and resulting damages are invariably contested issues in the litigation. Consumer plaintiffs, though, have a unique burden in proving injury to business or property, because many courts have held that only direct purchasers with business or commercial property losses can bring an antitrust action. Since consumers ordinarily do not purchase goods directly


4. 15 U.S.C. § 15, provides:
Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

See generally E. TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS (1965) [hereinafter cited as TIMBERLAKE]; J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION (1979); Rogers, Antitrust: Criminal Intent in Antitrust Prosecutions, Collateral Estoppel and Section 5(a) of the Clayton Act, and the Relationship of Standing and Injury in Private Antitrust Suits, 56 CHICAGO-KENT L. REV. 45 (1980). Professor Rogers notes that although the courts could have construed "by reason of" literally and required only factual causation between violation and injury, instead the courts have limited the scope of Section Four by requiring legal causation for standing as well. Two tests have been adopted by various courts. The direct injury test requires privity between the plaintiff and defendant, while the target area test requires that plaintiff's injury occur within the sector of the economy that the defendant's conduct allegedly affected. Id. at 60-61.

15 U.S.C. § 16, provides:
A final judgement or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . as to all matters respecting which said judgement or decree would be an estoppel as between the parties thereto: Provided, that this Section shall not apply to consent judgements or decrees entered before any testimony has been taken . . .

5. These topics are beyond the scope of this article. See generally L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST (1977) [hereinafter cited as SULLIVAN].

6. A person's "business or property" is not defined in the Clayton Act. The phrase, however, has been subject to various judicial interpretations. There is a general consensus that
from a manufacturer nor sustain a business or commercial property loss as a result of their purchase, many have been precluded from recovery under the Clayton Act.

In two recent cases, though, the Supreme Court was presented issues having a direct impact upon a consumer's right to sue under the antitrust provisions. In *Illinois Brick Co. v. Illinois*, the Court firmly endorsed the requirement that an antitrust plaintiff must be a direct purchaser from the alleged violator. More recently, in *Reiter v. Sonotone Corp.*, the Court held that a consumer can bring

"business" includes both a commercial enterprise (see Hawaii v. Standard Oil Co., 405 U.S. 251 (1972); Timberlake, supra note 4, at 20-23; Sullivan, supra note 5, at 770-73) and a person's employment (see Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332, 335 (7th Cir. 1967); Hoopes v. Union Oil Co., 374 F.2d 480 (9th Cir. 1967); Timberlake, supra note 4, at 20-21; Sullivan, supra note 5, at 770-71). The meaning of "property", however, has been the subject of dispute. Some courts have held that "property" refers only to business property and, thus, that consumers lack standing to recover for non-business injuries. Under such rationale, recovery is allowed only for competitive injuries. See, Peller v. International Boxing Club, 227 F.2d 593 (7th Cir. 1955); Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942); Young v. Colonial Oil Co., 451 F. Supp. 360 (M.D. Ga. 1978); Weinberg v. Federated Dept. Stores, Inc., 426 F. Supp. 880 (N.D. Cal. 1977); Smith v. Toyota Motor Sales, U.S.A., Inc., 1977-1 Trade Cas. ¶ 61,251 (N.D. Cal. 1977); Gutierrez v. E. & J. Gallo Winery Co., 425 F. Supp. 1221 (N.D. Cal. 1977); Hamman v. United States, 267 F. Supp. 420 (D. Mont. 1967); Broadcasters, Inc. v. Morristown Broadcasting Corp., 185 F. Supp. 641 (D.N.J. 1960); Image & Sound Service Corp. v. Altec Service Corp., 148 F. Supp. 237 (D. Mass. 1956); Brownlee v. Malco Theatres, 99 F. Supp. 312 (W.D. Ark. 1951); Sullivan, supra note 5, at 771-72 n.3. Other courts have held that "property" is to be given its common and ordinary meaning of anything owned of value. See Bravman v. Bassett Furn. Indus., Inc., 552 F.2d 90 (3d Cir. 1977); Croman Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501 (3d Cir. 1975); In re Master Key Antitrust Litigation, 528 F.2d 5 (2d Cir. 1975); In re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1971); Waldron v. British Petroleum Co., 231 F. Supp. 72 (S.D.N.Y. 1964); Utah Gas Pipelines Corp. v. El Paso Natural Gas Co., 233 F. Supp. 855 (D. Utah 1964); Sullivan, supra note 5, at 771 n.3. Such an interpretation permits consumers to sue for treble damages under the antitrust laws. See De Gregorio v. Segal, 443 F. Supp. 1257 (E.D. Pa. 1978); In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 1977-2 Trade Cas. ¶ 61,639 (C.D. Cal. 1978). The interpretation of "property" became the subject for the Supreme Court's decision in Reiter v. Sonotone Corp., _U.S._, 99 S. Ct. 2326 (1979). See text accompanying notes 47 through 68, infra. Previously, the specific question of consumer standing under Section Four had not been definitely answered by the Supreme Court. Justice Holmes, however, defined "injury to his property" as "a person whose property is diminished by a payment of money wrongfully induced." Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906). Some courts since then have assumed that noncommercial consumers have standing to sue for treble damages under Section Four without discussion. See, e.g., Goldfarb v. Virginia State Bar, 421 U.S. 773, 775-780 (1975) (Court assumed that purchasers of homes had standing to sue for treble damages).

an antitrust action even though the resulting injury to property is not a business or commercial loss.\(^\text{10}\) The result of the two decisions seems to be that a consumer now has standing to sue because of his private property injury, but that he is precluded from recovery because he is not a direct purchaser. Although the two holdings are not in themselves contradictory, a comparison of the two decisions reveals that the Court took diametrically opposed approaches in deciding each.\(^\text{11}\) Those glaring inconsistencies leave the future of the consumer as antitrust plaintiff uncertain.

After an analysis of *Illinois Brick* and *Reiter*, this article will consider the current status of the consumer-plaintiff under Section Four of the Clayton Act. In addition, the alternative to the treble damages remedy, injunctive relief, will be discussed. Finally, proposed remedial legislation will be considered in conjunction with comments on the future of the antitrust consumer-plaintiff.

**ILLINOIS BRICK CO. v. ILLINOIS**

In *Illinois Brick*,\(^\text{12}\) the plaintiffs brought a suit for treble damages against eleven concrete block manufacturers for illegal price-fixing.\(^\text{14}\) The concrete blocks had been sold originally to masonry contractors, who in turn resold them to general contractors.\(^\text{15}\) The general contractors then sold the blocks to the plaintiffs.\(^\text{16}\) In this chain of sales transactions, only the masonry contractor is considered a “direct” purchaser. All subsequent buyers are “indirect” purchasers from the manufacturers. The Illinois Brick Company argued that plaintiffs were not entitled to bring the action, because recovery of treble damages under Section Four of the Clayton Act

10. *Id.* at _, 99 S. Ct. at 2332.
11. See text accompanying notes 69-86 infra.
13. The plaintiffs were the State of Illinois and 700 local government entities.
15. *Id.* at 726.
16. *Id.* The state alleged that the manufacturers had engaged in price-fixing and had conspired to inflate prices by $3 million on cement blocks used in public buildings. The state also alleged that these overcharges were passed on to the plaintiffs through the chain of distribution. Previously, the defendants had entered pleas of no contest to a criminal indictment for price-fixing in violation of the Sherman Act and were then fined $19,850.
is limited to “direct” purchasers. The Supreme Court agreed with the manufacturer.

In reaching its decision, the Illinois Brick Court relied on the “pass-on” rule enunciated in Hanover Shoe v. United Shoe Machinery. Pass-on occurs when a purchaser of an overpriced product recoups his loss by reselling at a higher price to the next buyer. The higher price, then, is passed on in the chain from manufacturer to ultimate consumer. Often, manufacturers charged with price fixing would defensively assert that the direct purchaser lacked standing because he had passed on his economic loss. However, the Hanover Shoe Court reasoned that to permit the pass-on defense would deflate the potential power of the Clayton Act by denying private plaintiffs standing to bring suit. Thus, the prohibition of the defense is designed to encourage private enforcement actions under the Clayton Act.

Although the Illinois Brick Court considered its decision as an

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17. Id. at 727.
18. Id. at 746-48. The district court had granted summary judgment for the defendants. Illinois v. Ampress Brick Co., 67 F.R.D. 461 (N.D. Ill. 1975). The Court of Appeals for the Seventh Circuit reversed, holding that the State was entitled to sue the manufacturers even though it was an indirect purchaser. The court ruled that plaintiffs could recover if they could prove that the overcharges were passed on to them through the distribution chain. Illinois v. Ampress Brick Co., Inc., 556 F.2d 1163, 1165-67 (7th Cir. 1976), rev’d, 431 U.S. 720 (1977).
19. 392 U.S. 481 (1968). In Hanover Shoe, a manufacturer of shoe machinery was sued under Section Four by one of its customers, a manufacturer of shoes, for monopolization in violation of the Sherman Act. The Supreme Court unanimously held that the defendant could not escape liability on the theory that plaintiff had passed on any increased cost to consumers. Instead, the Court held that the direct purchasers could recover the full amount of any overcharge.
20. This is called “defensive use” of passing on. “Defensive use” of passing on occurs when the courts permit a defendant to prove as an affirmative defense that plaintiff has passed on to others some or all of the illegal overcharge, and thus, the plaintiff may not recover for any of the overcharge passed on. “Offensive use” occurs when a court permits a plaintiff who is an indirect purchaser to recover if they can prove that part of an illegal overcharge was passed on to them. See Illinois Brick Co. v. Illinois, 431 U.S. 720, 724-30 (1977). Professor Sullivan has called the pass-on issue as presenting “the most complex problems in antitrust enforcement.” Sullivan, supra note 5, at 787. See generally Note, Antitrust: The Offensive Use of Passing-On, 17 Washburn L. J. 374 (1978); Note, Antitrust - Treble-Damage Action - Hanover Shoe Inc. Rule Bars Offensive Use of Passing-On Doctrine by Indirect Purchaser, 23 Vill. L. Rev. 381 (1978); Note, Debate Over Passing-On Concept in Antitrust Law: Is It Finally Settled?, 15 Houston L. Rev. 199 (1977).
21. 392 U.S. at 494. The Hanover Shoe decision was based on two additional considerations: (1) the Court was unwilling to bring increased complexity to treble damage actions by allowing attempts to prove passing on through extended chains of distribution, and (2) the likelihood that few consumers would sue because of the small size of their individual claims. Id. at 492-93.
extension of the pass-on rule, the pro-enforcement spirit of Hano-
ver Shoe was diminished by the Illinois Brick decision. The Illi-
nois Brick Court aspired to rigid consistency in applying the pass-
on rule.\textsuperscript{22} It concluded that if pass-on is unavailable as a defense for the manufacturer, then it should not be an available offensive tool for the ultimate consumer.\textsuperscript{23} In addition, the Court held that an indirect purchaser cannot be injured in “business or prop-
erty.”\textsuperscript{24} Thus, the ultimate indirect purchasers, who are unable to pass on overcharges, are denied a Clayton Act remedy.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{22} 431 U.S. 720, 728 (1977).
\item \textsuperscript{23} Id. at 730.
\item \textsuperscript{24} “[W]e decline to abandon the construction given §4 in Hanover Shoe - that the overcharged direct purchaser, and not others in the chain of manufacturer or distribution, is the party 'injured in his business or property' within the meaning of the section. . . .” Id. at 728.
\item \textsuperscript{25} The reasoning behind this result has been labeled by Professor Sullivan as a perver-
sion of the Hanover Shoe pro-enforcement rationale. Sullivan, supra note 5, at 791.
\end{itemize}

The Illinois Brick Court did indicate, though, that the indirect purchaser doctrine would not apply in two narrow situations. First, an exception would be made whenever a pre-
existing cost plus contract was involved. 431 U.S. at 735-36. Second, in a footnote the Court created another exception for the situation in which a direct purchaser is controlled by its supplier. Id. at 736 n. 16.

The Court carefully limits the first exception to situations where both the direct-pur-
chaser middleman and his customer enter contracts in which the quantity is fixed and the price is determined by adding to the actual cost of the product the profit based on a percentage of that cost. In such a situation, the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge because its customer is committed to buying a fixed quantity regardless of price. Thus, the “effect of the overcharge is essen-
tially determined in advance.” Id. at 736. Obviously, this exception has little utility for indirect-purchaser consumers because it is highly unlikely that consumers will ever be able to use it to avoid the indirect-purchaser doctrine since consumers do not enter “pre-existing cost-plus contracts.”

\textit{Compare} Mid-West Paper Products Co. v. Continental Group Inc., 596 F.2d 573 (3d Cir. 1979) (the cost-plus contract exception is restricted to situations in which there were pre-existing, fixed-quantity, cost-plus contracts at every level of the distribution chain) \textit{with In re Beef Industry Antitrust Litigation}, 600 F.2d 1148 (5th Cir. 1979) (a functional equivalent to the cost-plus contract exception exists when a plaintiff alleges that there is structural inelasticity of short term supply and rigid formula pricing by intermediaries).

The Illinois Brick Court delineated its second exception to the direct purchaser doc-
trine in footnote 16: “Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer.” 431 U.S. 720, 736 n.16 (1977). The exception is intended to apply to a situation in which free “market forces have been superseded” because one link in the distrib-
ution chain controls another link. This facilitates a determination of whether a pass-on has accrued. There are two cases cited in the footnote by the Court which involve situations in which one level of the distribution chain was controlled by the preceding level. Although lower courts have variously interpreted the meaning of this exception, the majority interpret the word “customer” to mean “supplier.” Thus, the exception would apply for the indirect purchaser where the defendant supplier controls the direct purchaser. See, e.g., Royal Print-
ing Co. v. Kimberly Clark Corp., 621 F.2d 323 (9th Cir. 1980); Mid-West Paper Products
In a lengthy dissent to the *Illinois Brick* decision, three justices contended that the majority opinion was inconsistent with the dual objectives of Section Four to compensate victims of antitrust violations and to deter future violators. The dissenters determined that the legislative history clearly indicates that Section Four was designed as a remedy for all people, especially consumers. Thus, the dissenters believe that the indirect purchaser rule contravenes the clear intention of Congress and effectively forecloses the consumer from a Clayton Act remedy. This is not only a perversion of *Hanover Shoe*, the three justices claim, but a great injustice to the consumer who is ultimately injured by an antitrust violation.

**REITER V. SONOTONE CORP.**

In *Reiter v. Sonotone Corp.*, the Supreme Court was presented the issue of a consumer-plaintiff's standing to bring suit under Section Four in a slightly different context. The decision resolved a long-standing conflict among lower federal courts. Several courts had determined that a consumer was barred from a Clayton Act remedy because he did not suffer a loss to "business or property" as contemplated by Section Four of the Clayton Act. Rejecting the notion that property under the Act could only include business property, the Court refused to impose the requirement that a consumer sustain a commercial loss. This decision to make a Section Four remedy available to the consumer was premised upon many exceptions.

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Even assuming that a consumer plaintiff did prove that a manufacturer controlled a direct purchaser, the exception would not be available in many instances because many distributors or wholesalers sell to independent retail outlets or to other middlemen. Thus, consumers would still purchase from a middleman who is not "owned or controlled" by the defendant manufacturer. The only way for a consumer to invoke the *Illinois Brick* exception would be if the manufacturer owned each link in the distribution chain which sold the product to the consumer. A defendant manufacturer can avoid suit, however, by the simple expedient of adding an additional independent link to the distribution chain.

26. Justice Brennan filed a dissenting opinion in which Justices Marshall and Blackmun concurred. *Id.* at 748.
27. *Id.*
28. *Id.* at 749.
29. *Id.*
30. *Id.* at 749-50, 753.
32. See note 6 supra.
33. See note 6 supra.
of the same compelling arguments found in the Illinois Brick dissent.\textsuperscript{34}

\textit{The Lower Court Decisions}

In May, 1975, Kathleen Reiter filed a class action suit against five hearing aid manufacturers.\textsuperscript{35} The complaint alleged \textit{inter alia} that defendant manufacturers had engaged in vertical\textsuperscript{36} and horizontal\textsuperscript{37} price-fixing\textsuperscript{38} causing consumers to pay artificially high prices for hearing aid products.\textsuperscript{39} The defendants moved for dismissal or, alternatively, for summary judgment on the ground that Reiter and all other consumer purchasers of the class had not been injured in "business or property" as contemplated by Section Four of the Clayton Act.\textsuperscript{40} The district court denied the motion and held that if the purchasers could demonstrate antitrust violations through price manipulation, then an injury to property had been sustained under the Clayton Act.\textsuperscript{41}

Because the issue of consumer standing raised a controversial and significant question of law, it was authorized for interlocutory review by the Court of Appeals for the Eighth Circuit.\textsuperscript{42} That court accepted the appeal and reversed the district court.\textsuperscript{43} The Eighth Circuit held that a consumer who did not sustain a competitive or commercial injury to business or property lacked standing to sue under the Clayton Act.\textsuperscript{44} The court reasoned that the Sherman and

\begin{footnotes}
\item[34] See notes 26 through 30 \textit{supra} and accompanying text.
\item[36] Vertical price-fixing entails illegal agreements between two members of a distribution chain. For example, agreements between a manufacturer and a retail dealer setting minimum or maximum resale prices are vertical price restraints which are illegal under the Sherman Act. See Albrecht v. The Herald Co., 390 U.S. 145 (1968).
\item[37] Horizontal price-fixing involves agreements between two competitors to affect the prices of the goods they are selling. See U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
\item[38] In particular, Reiter alleged that the manufacturers "restricted the territories, customers, and brands of hearing aids offered \ldots and conspired among themselves and with their retail dealers to fix the retail prices of the hearing aids." Reiter v. Sonotone Corp., \textit{U.S.}, 99 S. Ct. 2326, 2329 n.1 (1979).
\item[39] Id. at 2329.
\item[41] 435 F. Supp. 933, 935-38.
\item[42] Id. at 938.
\item[44] 579 F.2d 1077, 1087 (8th Cir. 1978).
\end{footnotes}
Clayton Acts were intended to protect competitive enterprise and, therefore, remedies under those statutes were primarily available for businesses, not consumers. Upon petition, the Supreme Court granted certiorari on the issue.

**The Supreme Court Opinion**

In an unanimous decision, the Reiter Court reversed the Eighth Circuit. Relying on legislative intent, canons of construction, and prior decisions, the Reiter Court echoed the belief of the dissenting justices in *Illinois Brick* that the protection of the antitrust laws should extend to the consumer. The Court noted that Congress has never denied the consumer's right to bring a treble damages action under the Clayton Act. This absence of a specific exclusion was seen as evidence of an intent to extend the protection of the Act to individuals. In addition, after reviewing the legislative history, the Court determined that the phrase "any person" has a "naturally broad and inclusive meaning". Similarly, it concluded the word "property" should have a "broad and inclusive meaning", encompassing the concept of money as property. Thus, under the Court's interpretation, the protection of Section Four is extended to any injury to property, including a loss of money resulting from artificially inflated...
In reaching this decision, the Court also followed the canons of construction which suggest that the disjunctive phrase "business or property" should be divided into two separate meanings.54 The Court reasoned that every word of a statute must be given effect unless the context demands otherwise,55 and in this situation the context does not so demand. Moreover, the Court noted that the legislative record does not reflect the intended scope of these words,56 and there is no indication that the term business should modify the word property.57 Thus, the Eighth Circuit had misconstrued the statute; the word property must be given meaning independent of the word business.58 The Court concluded that an injury to property can be a financial loss, but does not have to be a commercial or competitive loss.59

Additionally, the Reiter Court emphasized that its prior decisions have consistently supported the legislative intent of Congress.60 Previously, the Court had held that the Clayton Act is regarded as comprehensive protection for all victims of antitrust violations.61 Furthermore, the Court noted that it has regarded the treble damages provision of the Clayton Act as an effective "door of justice"62 for every injured party. Thus, the Court reasoned that permitting consumers to sue for money lost because of price-fixing is wholly consistent with the prior decisions.63

**An Open Door for Consumers?**

Despite the unequivocal language in Reiter that the property interests of consumers can and must be protected by the antitrust laws,64 a lingering problem that remains for the injured consumer

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54. *Id.* at 2331.
55. *Id.*
56. *Id.* at 2333.
57. *Id.* at 2331.
58. *Id.*
59. *Id.*
60. *Id.* at 2332.
63. 99 S. Ct. at 2332.
64. *Id.* at 2332-33. The Reiter Court states:

Consumers in the United States purchase at retail more than $1.2 trillion in goods and services annually. 1978 Economic Report of the President 257 (Table B-1). It is in the sound commercial interests of the retail purchasers of goods and services to obtain the lowest price possible within the framework of our competitive private enterprise system. The essence of the antitrust laws is to ensure fair price
is the seemingly inconsistent *Illinois Brick* decision. The *Reiter* Court did not consider the indirect purchaser rule of *Illinois Brick* because that issue was not expressly raised on appeal. Yet consumers in the United States rarely make purchases directly from the manufacturer. Thus, *Reiter* grants a consumer standing to recover treble damages by virtue of her being injured in her property, but *Illinois Brick* requires that purchasers be direct purchasers in order to recover. Consequently, it appears that what *Reiter* gives on the one hand, *Illinois Brick* takes away with the other. This apparent contradiction is only emphasized and not discounted by an examination of the rationale of each case.

**ANALYSIS OF Reiter and Illinois Brick: WERE THEY DECIDED BY THE SAME COURT?**

A close analysis of *Illinois Brick* fails to support the *Reiter* Court's contention that it has interpreted the Clayton Act consistently. Indeed, a careful reading of the two cases reveals that they are diametrically opposed in approach and underlying theory. *Illinois Brick* abounds in concern that indirect-purchaser consumers will plunge the Court into hopeless disarray. The Court feared that actions by indirect purchasers would mushroom into massive multi-party suits attacking every level of distribution. Further-

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65. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 748-49 (1977) (Brennan, Marshall, Blackmun, J.J., dissenting). A reader can quickly verify this statement by reviewing the purchases he or she has made within the last year. A consumer cannot usually buy directly from a manufacturer for two reasons: (1) the manufacturer has an operating policy which provides that sales will not be made to the public, or (2) the consumer cannot meet a "minimum order" quantity that a manufacturer requires for any sales. One exception in which a consumer buys directly from the manufacturer, however, is when the manufacturer owns the entire chain of distribution.

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67. See text accompanying notes 69 through 72 supra.

68. 431 U.S. at 740.

69. See text accompanying notes 47 through 63 supra.

70. 431 U.S. at 729. Only "the overcharged direct purchaser, and not others in the chain
more, the Court was apprehensive of large class action suits by ultimate consumers remote from the defendant.\textsuperscript{71} Hence, the Court construed Section Four very narrowly. It limited recovery to the overcharged direct purchaser by holding that only direct purchasers sustain an injury to business or property. The Court deliberately excluded other purchasers in the chain of distribution.\textsuperscript{72}

In contrast, the \textit{Reiter} Court expressed little concern about overburdened courts and the proverbial floodgates of litigation.\textsuperscript{73} Similarly, the Court did not express alarm that small businesses might be victimized by frivolous suits.\textsuperscript{74} In \textit{Illinois Brick} these considerations dealt the deathblow to the indirect purchaser,\textsuperscript{75} whereas the \textit{Reiter} decision merely calls upon district courts to control these suits with the civil procedure rule governing class actions.\textsuperscript{76} The Court reasoned that under Rule 23,\textsuperscript{77} frivolous suits can be circumvented by denying class certification when it appears consumers are abusing the judicial process by filing spurious treble damage suits.\textsuperscript{78} In addition, the \textit{Reiter} Court called upon Congress to deal with these administrative concerns.\textsuperscript{79}

A more fundamental difference between \textit{Illinois Brick} and \textit{Reiter} is a marked divergence in approach to statutory analysis in the two cases. The \textit{Illinois Brick} Court virtually ignored the statute while developing the indirect purchaser doctrine. The \textit{Reiter} Court, however, relied almost exclusively upon the legislative history and principles of statutory construction. Consequently, the \textit{Reiter} Court determined that Section Four is to be interpreted broadly,\textsuperscript{80} a result inconsistent with the narrow approach of \textit{Illinois Brick}.\textsuperscript{81}

\textsuperscript{71} \textit{Id.} at 740.
\textsuperscript{72} \textit{Id.} at 729.
\textsuperscript{73} “To be sure, these private suits impose a heavy litigation burden on the federal courts; it is the clear responsibility of Congress to provide the judicial resources necessary to execute its mandates.” \textit{Id.} at 2326, 2334 (1979).
\textsuperscript{74} \textit{Id.} at 2334.
\textsuperscript{75} See text accompanying notes 12 through 30 supra.
\textsuperscript{76} 99 S. Ct. at 2334.
\textsuperscript{77} \textit{Fed. R. Civ. P.} 23.
\textsuperscript{78} 99 S. Ct. at 2334.
\textsuperscript{79} \textit{Id.} at 2333. “We must take the statute as we find it. Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging \textit{private} challenges to antitrust violations.” \textit{Id.} at 2333. “[I]t is the clear responsibility of Congress to provide the judicial resources necessary to execute its mandates.” \textit{Id.} at 2334.
\textsuperscript{80} See note 79 supra.
\textsuperscript{81} See notes 70 through 72 supra and accompanying text.
Finally, as discussed, the Reiter Court determined that "business or property" should be given disjunctive meaning consistent with canons of statutory construction and that the plain intent of Congress was to give "property" independent significance. The Court then held that a consumer's money is "property" within the meaning of Section Four. It is interesting to note, however, that since the majority of consumers are indirect purchasers and precluded from suit under Illinois Brick, the Reiter Court's desire to give credence to the statutory language of Section Four is negated by the continued viability of Illinois Brick. "Property" loses its independent and disjunctive meaning when the only remaining plaintiffs who can bring suit are direct purchasers, since they are usually businesses. In effect, then, Illinois Brick causes "business" to modify "property".

Since the Reiter Court refused to consider Illinois Brick, the status of the indirect purchaser consumer is not altogether clear. The principles relied on in Reiter depart drastically from those of Illinois Brick. The Reiter Court, in powerful language, emphasized that the consumer's right to sue for treble damages supersedes the practical considerations which may accompany the granting of consumer standing. This approach more closely parallels the approach of the dissenters in Illinois Brick, both consistently urge a broad interpretation of the Act and insist that the consumer must be afforded the full protection of the antitrust laws.

Future of The Antitrust Consumer-Plaintiff

Because of the glaring inconsistencies in Illinois Brick and Reiter, it is possible that the Court will fully adopt the dissenting analysis in Illinois Brick if given an opportunity. Until that time, however, the consumer remains in a quandry and must rely on alternative remedies or hope for remedial action by Congress.

Other Remedies

In addition to treble damages, the Clayton Act affords the consumer injunctive relief. Section 16 of the Act permits any person to enjoin defendant manufacturers when violations of the antitrust

82. See text accompanying notes 54 through 58 supra.
83. See text accompanying note 53 supra.
84. But see text accompanying note 57 supra. P. N. Marucci.
85. 99 S. Ct. at 2333-34.
laws threaten loss or damage to business or property.\textsuperscript{88} Recently, the Court of Appeals for the Third Circuit allowed indirect purchasers of consumer bags to sue for Section 16 injunctive relief over objections that \textit{Illinois Brick} precluded the suit.\textsuperscript{88}

The Third Circuit deemed \textit{Illinois Brick} inapplicable for several reasons. First, injunctive relief was not an issue before the \textit{Illinois Brick} Court and was never considered.\textsuperscript{90} Second, the Third Circuit found the policy considerations in \textit{Illinois Brick} to be totally inapplicable to injunctive relief. The injunctive remedy does not require an analysis of the pass-on of overcharges and there is no risk of multiple liability. If a defendant manufacturer is enjoined, no further relief will be necessary.\textsuperscript{91} Finally, the Third Circuit noted that there is no need for a symmetrical application of the \textit{Hanover Shoe} rule to defendants and plaintiffs.\textsuperscript{92} Therefore, the court held that the rationale denying an indirect purchaser monetary relief under Section Four does not apply to injunctive relief under Section 16.\textsuperscript{88}

Although indirect consumer-plaintiffs do have recourse to this injunctive relief, the remedy does not act to take away the fruits of a defendant's illegality. Thus, an indirect consumer will not be compensated for past violations. Rather, the remedy acts in a prospective, prophylactic manner to prevent further violations. This

\textsuperscript{88} 15 U.S.C. § 26 (1976) provides:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by, courts of equity. . . .


\textsuperscript{89} \textit{Mid-West Paper Products Co. v. Continental Group}, 596 F.2d 573 (3d Cir. 1979).

\textsuperscript{90} \textit{Id.} at 592.

\textsuperscript{91} \textit{Id.} \textit{See} \textit{Hawaii v. Standard Oil Co.}, 405 U.S. 251 (1972), where the Court stated:

While the United States Government, the governments of each State, and any individual threatened with injury by an antitrust violation may all sue for injunctive relief against violations of the antitrust laws, and while they may theoretically do so simultaneously against the same persons for the same violations, the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one.

\textit{Id.} at 261.

\textsuperscript{92} 596 F.2d 596, 592-94.

\textsuperscript{93} \textit{Id.} at 594. \textit{See also In re Beef Industry Antitrust Litigation}, 600 F.2d 1148 (5th Cir. 1979).
relief might prove valuable to the consumer who purchases goods indirectly from the defendant manufacturer on a regular basis. After an injunction is issued, the consumer will continually benefit because she will purchase the goods at prices that are not artificially high.

Yet a significant drawback to the use of the injunction is that plaintiffs and attorneys will hesitate to expend the great sums of money needed to litigate the issue when there is no payoff of treble damages. Hence, an injunction will probably only be sought by “watchdog” consumer groups, who have the funds and the staff for such efforts, or by a state through a parens patria action.94

Proposed Legislation

Legislation95 has been introduced in both the United States Senate and House of Representatives that would enable consumers, as indirect purchasers, to maintain a treble damages suit. Each bill would amend Section Four of the Clayton Act. For example, the Senate bill96 reverses the Illinois Brick decision and would allow a plaintiff to sue for treble damages when injured in his business or property directly or indirectly by the defendant. In addition, the

94. Parens patria actions were created by Congress in 1976 and expressly provide that a state may sue antitrust violators on behalf of their injured citizens. 15 U.S.C. §§ 15c-15H (1976). Parens patria actions on behalf of indirect purchasers, however, may have been eliminated by Illinois Brick, 431 U.S. at 734 n.14.

95. The inability of indirect purchasers to sue for antitrust violations has given rise to proposed remedial legislation. The United States Senate Committee on the Judiciary recommended on May 8, 1979, a bill to amend Section Four of the Clayton Act to permit indirect purchasers the right to sue for treble damages. S. 300, 96th Cong., 1st Sess. (1979). A similar bill is being considered by the House. See generally Note, Recovery by Indirect Purchasers: Illinois Brick and the Congressional Response, 39 U. PITZ. L. REV. 537 (1978); Note, Congressional Authorization of Indirect Purchaser Treble Damage Claims: the Illinois Brick Wall Crumbles, 47 FORDHAM L. REV. 1025 (1979). See also Note, California Legislature Steers the Antitrust Cart Right Off the Illinois Brick Road, 11 PACIFIC L. J. 121 (1979).

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

Sec. 4(1) In any action under sections 4, 4A, or 4C of the Clayton Act, the fact that a person or the United States has not dealt directly with the defendant shall not bar or otherwise limit recovery.

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

(3) In any class action under section 4 of this Act and Rule 23 of the Federal Rules of Civil Procedure, and in any action under section 4 of this Act by or on behalf of any government, the amount of the plaintiff’s attorney’s fee, if any, shall be determined by the court....
"pass-on" defense, struck down by the Hanover Shoe Court, would be available to defendants to prevent duplicative liability.\(^9\) The pass-on defense would be unavailable, however, to defendants when there are no indirect-purchaser plaintiffs. The proposed amendment is forcefully sponsored by consumer groups, but is strongly objected to by the business community, which wants to limit treble damage liability.\(^8\) If the proposed amendment is

97. Id.


Professor Handler, who testified against the Illinois Brick reversal bill in the Senate Judiciary Committee and its Antitrust and Monopoly Subcommittee, takes the position that to allow indirect purchasers to sue would hurt rather than help antitrust enforcement. A restoration of offensive use of pass-on would allow indirect purchasers the right to sue. The defensive use of passing-on would, according to Handler, undermine suits by direct purchasers. Professor Handler contends that "direct purchasers have historically been the backbone of private antitrust enforcement" and cites the Electrical Equipment, Aluminum Wire and Cable, Brass Tube, Hanover Shoe, Grinnell, and Oil Jobber cases as support for this proposition. In addition, Professor Handler did a study of all antitrust suits pending before the Southern District of New York after Illinois Brick was decided by the Supreme Court. Only three out of 69 suits filed by purchasers of goods and services were indirect purchasers. If this result is extrapolated nationwide, Professor Handler warns that a great majority of the 3,000-plus antitrust suits pending in federal courts could be undermined by the pass-on defense. Handler, Antitrust-1978, 78 Colum. L. Rev. 1363, 1425-7 (1978).

A problem with Professor Handler's statistics is that they do not present a complete picture. He cites decided cases and statistics that 66 of 69 pending cases in the Southern District are brought by direct purchasers in support of his proposition that direct purchasers are the "backbone" of antitrust enforcement. One must remember that these cases are pending after the Illinois Brick Court has decided that only direct purchasers can sue for antitrust violations. The 69 suits do not reflect the indeterminable number of causes of action that were discouraged by the Supreme Court's explicit exclusion of indirect purchasers. The statistics do not reflect the number of cases which were pending and quickly settled after Illinois Brick. In addition, the initiation and eventual success of lawsuits by several direct purchasers does not shed any light on the question of how much more effective antitrust enforcement would be if indirect consumers could sue. The fact remains that there are many more indirect purchasers of a given defendant manufacturer than direct purchasers and the sheer weight of numbers will increase the odds that an illegal antitrust practice will be noticed and attacked. In addition, the fact that the pass-on defense will undermine the total damages recovered by a direct-purchaser plaintiff should not make the antitrust enforcement less effective since the indirect purchasers will recover that which the direct purchasers formerly received even though the direct purchaser passed-on the overcharge.

One commentator lists a number of reasons why direct purchasers will not sue their suppliers. Sole source of supply, no losses to recover if entire overcharge was passed-on, high costs of litigation, and a reluctance to open themselves to discovery which might uncover antitrust violations are some of the reasons why direct purchasers do not sue. Note, Treble Damages and the Indirect Purchaser Problem: Considerations for a Congressional Overturning of Illinois Brick, 39 Ohio St. L. Rev. 343, 371 n.142 (1978).

In Good v. Everett & Jennings, Inc., Civ. 77-3890-R (C.D. Cal.), the plaintiffs are suing a wheelchair manufacturer for monopolization. Not one of the 2,000 direct purchasing distributors has joined the suit because the defendant controls 90 percent of the market and these
passed, an indirect consumer would not need to fall within a narrow *Illinois Brick* exception. Nor would an indirect consumer have to risk expensive litigation in hope that the Supreme Court will overrule *Illinois Brick* with the pro-consumer language it enunciated in *Reiter*. In addition, *Reiter* would take on even greater significance if the amendment passes. The amendment, when read in conjunction with *Reiter*, would assure the availability of treble damages to all consumers, direct and indirect, because consumers are deemed to be injured in their property when they pay artificially high prices.

**CONCLUSION**

The *Illinois Brick* decision created a rigid indirect purchaser doctrine which effectively excludes the consumer from a Clayton Act treble damages remedy. In contrast, the *Reiter* decision reflects the Court's adherence to a broad interpretation of the Act. *Reiter* embraces the idea of the consumer as plaintiff by abrogating the business or commercial loss rule. Unfortunately, *Reiter* may only be a Pyrrhic victory because the consumer must still qualify as a direct purchaser under *Illinois Brick*. Even though the consumer can alternatively sue for injunctive relief, this remedy lacks any financial incentive and is not compensatory.

The *Reiter* Court echoed the consumer-oriented concerns of the dissenters in *Illinois Brick*. Perhaps, when again confronted with the indirect purchaser doctrine, the Court will reconsider this harsh rule. Hopefully, the Court will re-emphasize its broad statu-

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middlemen have no alternate source of supply. Since they pass along the monopoly overcharges to the plaintiff consumers, the middlemen are not injured. *Illinois Brick* does not allow the only parties injured - the consumers - the right to sue. *Hearings on S. 300 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess.* 82-85 (1979).

Finally, there are several good reasons why a direct purchaser will not bring suit against a defendant manufacturer. A large manufacturer has at least two weapons it can wield which can give it a certain degree of control over a direct purchaser. First, its most effective weapon is its control over the extension of a line of credit to purchasers. The availability of credit is crucial to all but large established businesses especially during periods of low sales and earnings. Since not only objective but subjective factors are used in determining a direct purchaser's "credit-worthiness," a defendant manufacturer has total discretion as to whether it will extend credit and how much credit it will extend. Second, the defendant manufacturer can avail itself of its right under the Robinson-Patman Act to refuse to deal with any given potential purchaser. This threat of a termination of the buyer-seller relationship also gives the supplier a degree of control which can discourage private actions by direct purchasers.

99. *See* note 25 *supra*.

100. *S. 300, 96th Cong., 1st Sess.* (1979). *See* note 96 *supra*. 
tory interpretation in Reiter and fully endorse the indirect purchaser as plaintiff. In the alternative, a congressional mandate abrogating the Illinois Brick rule may be forthcoming. Until either the Court or Congress responds, however, the consumer is effectively denied an antitrust remedy. Since the consumer ultimately suffers the financial loss wrought by artificially high prices, the action by Court or Congress should not be long delayed.

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