ANTITRUST ENFORCEMENT ACT OF 1979, S. 300

DOCUMENTS

AUG 20 1979

FAR... LIBRARY
KAN... UNIVERSITY



HEARINGS

BEFORE THE

...MITTEE ON THE JUDICIARY

...UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 300

FEBRUARY 1, MARCH 9, 14, AND 19, 1979

Serial No. 96–2

Printed for the use of the Committee on the Judiciary

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

ANTITRUST ENFORCEMENT ACT OF 1979, S. 300

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 300

FEBRUARY 1, MARCH 9, 14, AND 19, 1979

Serial No. 96–2

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
42-005 O WASHINGTON : 1979

COMMITTEE ON THE JUDICIARY

EDWARD M. KENNEDY, Massachusetts, *Chairman*

BIRCH BAYH, Indiana
ROBERT C. BYRD, West Virginia
JOSEPH R. BIDEN, JR., Delaware
JOHN C. CULVER, Iowa
HOWARD M. METZENBAUM, Ohio
DENNIS DECONCINI, Arizona
PATRICK J. LEAHY, Vermont
MAX BAUCUS, Montana
HOWELL HEFLIN, Alabama

STROM THURMOND, South Carolina
CHARLES McC. MATHIAS, JR., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ROBERT DOLE, Kansas
THAD COCHRAN, Mississippi
ALAN K. SIMPSON, Wyoming

DAVID BOIES, *Chief Counsel and Staff Director*

CONTENTS

THURSDAY, FEBRUARY 1, 1979

STATEMENTS

	Page
Opening statement of Senator Kennedy	1
Opening statement of Senator Metzenbaum	3
Opening statement of Senator Thurmond	4
Opening statement of Senator Laxalt	6
Opening statement of Senator Hatch	9
Opening statement of Senator Baucus	10

TESTIMONY

Shenefield, John, Assistant Attorney General, Antitrust Division, Department of Justice	11
Bosworth, Barry, staff director, Council on Wage and Price Stability	27
Babbitt, Hon. Bruce, Governor, State of Arizona, and National Governors Association, accompanied by Ken Reed	38
Panel from National Association of Attorneys General:	
Browning, Chauncey, attorney general, State of West Virginia	60
Scott, William, attorney general, State of Illinois	62
Smith, James, attorney general, State of Florida	64
Clark, Stephen, attorney general, State of Arkansas	64
White, Mark, attorney general, State of Texas	66
Buffmire, Andrew, assistant attorney general for antitrust, State of Utah	67
Panel of representatives of consumers:	
O'Reilly, Kathleen, executive director, Consumer Federation of America	77
Rofsky, Mitch, Congress Watch	80
Jones, Jerry, national legislative director, and Charles Sabatier, national advocacy director, Paralyzed Veterans of America	82
Panel of representatives of small businesses:	
Freie, Glenn, chairman, Meat Price Investigators Association	90
Gravlee, Vondal, president, National Association of Home Builders	93
Panaro, Gerard, associate general counsel, Retail Bakers of America	96
Cleveland, Edgar, wheat farmer, Oklahoma	99

PREPARED STATEMENTS

Babbitt, Hon. Bruce	49
Biester, Edward G., Jr	76
Bosworth, Barry	36
Browning, Chauncey	69
Clark, Stephen	72
Freie, Glenn	100
Gravlee, Vondal	101
Hansen, Robert B	74
Jones, Jerry	88
O'Reilly, Kathleen	85
Panaro, Gerard	103
Rofsky, Mitch	87
Scott, William	70
Shenefield, John	24
Smith, James	71
White, Mark	75

FRIDAY, MARCH 9, 1979

STATEMENT

Page

Opening statement of Senator Thurmond 112

TESTIMONY

Aders, Robert, president, Food Marketing Institute, accompanied by James Rill 121
Panel of American Bar Association experts:
Foster, David, chairman, civil practice and procedure committee, antitrust section, American Bar Association 147
Schmidt, Harold, vice chairman, civil practice and procedure committee ... 147
Baylson, Michael 155
Reed, Kenneth 156
Weinschel, Alan 158

PREPARED STATEMENTS

Aders, Robert 112
Baylson, Michael M 142
Eagleton, Senator Thomas F 109
Farr, William D 114
Foster, David L 135
Rill, James F 116
Reed, Kenneth 144
Schmidt, Harold 138
Weinschel, Alan 143

WEDNESDAY, MARCH 14, 1979

STATEMENT

Opening statement of Senator Cochran 173

TESTIMONY

Landes, William M., Ph. D., professor of economics, and Richard A. Posner, Lee and Brena Freeman professor of law, University of Chicago Law School 174
Kirkham, Francis R., attorney, San Francisco, Calif 195
Lacovara, Philip A., attorney, Washington, D.C 213
Panel of attorneys:
Goldberg, Perry, Chicago, Ill 230
Kohn, Harold E., Philadelphia, Pa 232
Saveri, Guido, San Francisco, Calif 238
Sloan, James, Chicago, Ill 241

PREPARED STATEMENTS

Goldberg, Perry 230
Lacovara, Philip A 213
Landes, William M. and Richard A. Posner 174
Kirkham, Francis R 195

MONDAY, MARCH 19, 1979

STATEMENT

Opening statement of Senator Thurmond 253

TESTIMONY

Nelson, Senator Gaylord 254
Sneeden, Emory, associate dean, University of South Carolina 261
Stein, Alvin, attorney 269

Page

Panel of lawyers:
Murphy, Samuel W. 290
Gray, Boyden C 292
Liedquist, Robert E 296
Moore, Beverly C., Jr., director, Citizens for Class Action 315
Rogers, William F., antitrust counsel, Monsanto Co 319

PREPARED STATEMENTS

Gray, Boyden C 283
Liedquist, Robert E 285
Moore, Beverly C., Jr 310
Murphy, Samuel W 280
Rogers, William F 319
Sneeden, Emory 260
Stein, Alvin 267
X Corporation 255

APPENDIX

S. 300, as introduced, January 31, 1979 327
S. 300, floor statement of Senator Kennedy 330
S. 300, as reported to Senate 334

ADDITIONAL SUBMISSIONS FOR THE RECORD

Gray, C. Boyden, counsel, Business Roundtable 339
Moore, Beverly C., Jr., director, Citizens for Class Action Lawsuits 354
Action, A.P., & Co., Inc 383
Kirkham, Francis, attorney 396

LETTERS

Letter to Senator Kennedy from President Carter, re support for Illinois Brick legislation, April 23, 1979 418
Letter to Senator Kennedy from John Shenefield, Assistant Attorney General, Antitrust Division, Department of Justice, re additional information on testimony given on S. 300, March 7, 1979 419
Letter to Senator Kennedy from Michael Pertschuk, Federal Trade Commission, re support of S. 300 legislation, February 27, 1978 423
Letter to Senator Eastland from Michael Pertschuk, Federal Trade Commission, re support and views on Illinois Brick legislation, April 28, 1978 425
Letter to David Boies from James F. Rill, re comments on the Supreme Court's decision in *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, March 19, 1979 . 429
Letter to Hon. Scott Matheson, Governor, State of Utah, from John J. Flynn, re comments on Illinois Brick decision, February 20, 1979 434
Letter to Senator Kennedy from Alfred E. Kahn, re support for "Antitrust Enforcement Act of 1979" legislation, January 29, 1979 439
Letters to Senator Kennedy in support of Illinois Brick legislation, January 29, 1979 440
Letter to Senator Kennedy from L. Stanley Schoelerman, expressing views against overruling Illinois Brick, April 25, 1979 467
Letter to Senate Judiciary Committee from Harold T. Halfpenny opposing legislation to overrule Illinois Brick, February 8, 1979 469

ANTITRUST ENFORCEMENT ACT OF 1979, S. 300

THURSDAY, FEBRUARY 1, 1979

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 10:05 a.m., pursuant to call, in room 2228, Dirksen Senate Office Building, Hon. Edward M. Kennedy (chairman of the committee) presiding.

Members present: Senators Kennedy, Metzenbaum, Thurmond, Laxalt, Hatch, Baucus, Bayh, Cochran, DeConcini, and Heflin.

Staff present: David Boies, staff director and chief counsel, Thomas Susman, general counsel, Joel Perwin, staff counsel, Johnathan Orloff and Jack Hupper, staff assistants, and Peter Chumbris, minority counsel.

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. The hearing will come to order.

The Senate Committee on the Judiciary opens hearings today on legislation to permit consumers and others injured by antitrust violations to recover damages measured by the extent of their injury, whether or not they had dealt directly with the violator. Last year, both the House and Senate Judiciary Committees reported legislation with that objective, but no action was taken before Congress adjourned.

This bill is intended to bring new force and new fairness to the operation of our antitrust laws, by compensating those who are truly injured by antitrust violations, and by creating a strong deterrent to the commission of such violations in the future. Those are two overriding objectives of our antitrust laws, but both were seriously jeopardized in June 1977, when the Supreme Court issued its ruling in the case of *Illinois Brick Company* v. *Illinois*. There the Court held that only those who purchase directly from an antitrust violator—those in privity of contract—are empowered by section 4 of the Clayton Act to seek redress in court.

Most of those injured by antitrust violations, however, are not direct purchasers. Most direct purchasers are middlemen, who pass on the cost to their own purchasers, to retailers and consumers, to farmers and small businesses, to State Governments and many Federal agencies.

They are the real victims of antitrust violations, and in the past they have been the backbone of our national effort to challenge unfair market power. Before the *Illinois Brick* ruling, private damage suits under section 4 exceeded governmental actions by 10-fold. Since 1960, over 25 percent of those actions involved only

indirect purchasers, and two-thirds involved at least some indirect purchasers.

In Arizona, consumers collected $2.3 million—distributed to 245,000 families—from makers of bread and bakery products who had conspired to fix prices. In California, consumers won damages of $2.5 million against makers of potato chips. They won $60 million nationwide from drug companies in the tetracycline case. They are claiming $42 million in a pending case against sugar companies. The Federal and State Governments, as indirect purchasers, have pending suits of almost a billion dollars in damages.

All of those actions are threatened by the Court's ruling in *Illinois Brick*. It threatens the right of consumers to seek just recompense. It threatens the force of our antitrust laws, in providing a credible deterrent to violations, and it threatens the effectiveness of a major weapon against inflation, at a time when most other weapons have proved ineffective.

That situation is intolerable—to consumers, to small businesses, to the Federal and State Governments, and to all of us who care about the exercise of illegal and disproportionate market power. For that reason, shortly after the Supreme Court's ruling in *Illinois Brick*, the Senate Subcommittee on Antitrust and Monopoly commenced hearings to consider legislation to restore the rights of indirect purchasers. We heard from 55 witnesses in 8 days of hearings. We learned that there is literally no substitute for the vigorous enforcement efforts of indirect purchasers, not the prospect of suits by direct purchasers, and not the prospect of criminal prosecution by the Department of Justice. Both are useful and important tools, but neither can provide the force or dimension of proprietary actions by consumers or by Government.

We learned that Congress has long recognized that central role of indirect purchasers, from its passage of the Sherman Act in 1890, to the Clayton Act in 1914, to the Hart-Scott-Rodino Act adopted by the 94th Congress. That statute permits State Attorneys General to commence actions on behalf of consumers under the theory of *parens patriae*. Their surrogate power was rendered hollow when the Supreme Court drastically constricted the underlying rights of consumers by its judgment in *Illinois Brick*.

We also learned that the technical and mechanical factors which proved so persuasive to the Court, are factors effectively handled by the legislation we consider today. The Court's decision derived from its earlier judgment in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, which held in 1968 that antitrust defendants cannot escape liability by proving that a plaintiff had passed-on illegal overcharges to its customers, and thus had not been injured in its business or property. In light of that ruling, the Court reasoned that permitting suits by indirect purchasers would subject a defendant to multiple liability for the same offense.

This legislation avoids that result, by apportioning damages according to the actual injury suffered by the purchasers of a product. It does so while escaping the unfairness treated by the Court's opinion, which allows direct purchasers to profit from a violation at the expense of consumers, and then collect again from the pricefixer in court. The consumer or other ultimate purchasers—the parties injured in fact—have no remedy at all.

This bill gives a remedy to all parties who are injured in a chain of product distribution. It measures their damages by the extent of their injury, and it does so in a manner that administers their claims both fairly and efficiently.

This bill invokes traditional principles of standing, remoteness, and proximate causation, to limit the number of claimants seeking recovery. It invokes longstanding doctrines of joinder, statutory interpleader and informal coordination, to minimize the number of separate actions for a single offense. It invokes existing standards of res judicata and collateral estoppel, to prevent defendants from avoiding liability by shifting their identification of the party injured. It invokes a history of judicial apportionment of damages, to guide the court in doing so. That history includes more than just the complexities of apportionment in patent litigation, securities fraud, bankruptcy and admiralty cases. It also includes the very question which this bill creates, because 9 years elapsed between the decisions in *Hanover Shoe* and *Illinois Brick.* Our courts effectively apportioned damages during that period, and they can do so again.

Most important, this bill invokes the central principles of our antitrust laws. It compensates those who are injured by illegal conduct, and it provides the force we need to prevent illegal conduct. Over a period of almost 100 years, Congress has fashioned our laws to pursue those vital principles. Even as the Court ignored that history in deciding *Illinois Brick,* it invited Congress to set the record straight. In this session we must take that opportunity.

The issues which are of the greatest concern are: one, the equity issue, in terms of those who have been affected adversely by price fixing in violation of the antitrust laws; two is to maintain the central thrust of antitrust enforcement, which is to protect the private citizens of this Nation; and, third, to develop a system which will permit those who have been affected by antitrust violations to be involved in the antitrust action. The *Illinois Brick* decision does violence to all of those objectives.

I would hope, Mr. Shenefield, that you would mention the consequences if we don't pass the *Illinois Brick* bill—what this would mean in terms of the resources of the Antitrust Division. We are not going to get enforcement. If we end up on the opposite side of the coin, it will mean that we will have to increase the budget of the Antitrust Division significantly so that there will be sufficient antitrust enforcement action. I think that is the other side of the coin. If we are not going to permit access to private citizens, to small businessmen, to those who have been directly affected, it seems to me that we are going to have to steam up the Antitrust Division.

I wish you would address that particular point sometime during the course of your statement.

Senator METZENBAUM. I have an opening statement but I ask it be included in the record.

Senator KENNEDY. As if read.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. I am pleased to see such expeditious consideration of this bill which would reverse the Supreme Court's

decision in *Illinois Brick*. That decision has set antitrust law on its head. It bars those truly injured by antitrust violations from seeking relief in the courts while providing windfall profits to those who suffer no injury. In the process, it threatens to undermine our efforts to promote competition in the marketplace through effective enforcement of the antitrust laws.

Our antitrust laws are designed for the ultimate benefit of the consumer. The reason we strive through these laws to promote competition in the marketplace is to insure individual consumers the highest quality products at the lowest prices possible, but under *Illinois Brick* these ultimate consumers have no remedy.

Who are these ultimate consumers abandoned under *Illinois Brick?* They're average citizens—small businessmen, individual consumers, and taxpayers whose tax dollars are wasted on illegal overcharges paid by State and Federal agencies for goods they consume. Fundamental fairness requires that average citizens not bear the costs of antitrust violations while middlemen are permitted to reap the benefits of treble damage antitrust awards. It is imperative that we assert in no uncertain terms our commitment to use the antitrust laws to protect the rights of individual citizens.

Congress never intended to bar ultimate consumers from seeking relief; not only would that have been unfair, but it would have undermined private damage actions as a vehicle for enforcing our antitrust laws. If we desire to set the record straight and restore the effectiveness of our antitrust laws, we will expeditiously pass this legislation.

Senator KENNEDY. Would anyone else like to make a comment. Senator Thurmond.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Mr. Shenefield, I have a statement that is about 3 minutes long and I will read that. Then, if you don't have time this morning in your testimony to address the remarks of my statement, I wish you would do so for the record, if you will give us your opinion.

Mr. Chairman, today we begin new hearings on the so-called *Illinois Brick* bill, a bill that was very controversial in the previous Congress. There is a great burden upon the proponents on this year's bill to overcome the very damaging testimony against the bill given by a number of witnesses, who normally would be considered as witnesses favoring such a bill, but who for good reasons testified against the bill.

In the previous Congress, the minority members called a number of outstanding legal experts in the antitrust field—judges, professors, defense and plaintiff lawyers—who stated vigorously that a bill, such as the *Illinois Brick* bill, would be detrimental.

In our minority views, we listed 23 such witnesses, and excerpts of their statements were printed in our report. But time does not permit even a brief review of those excerpts. Those statements are still a part of this record.

For the benefit of the public and persons interested in this issue, we summarized our minority views as follows: First, in the "Table of Contents," with thumbnail sketches of the reasons why such a bill would be very bad; second, an "Overview of the Issues" on

pages 1 through 6, and third, a "Brief Summary" of our arguments against the bill beginning on pages 6 through 11, with the following subtitles:

A. S. 1874 would result in less protection for indirect purchasers, including consumers.

B. The bill nullifies *Hanover Shoe* as well as *Illinois Brick.*

C. *Illinois Brick* and *Hanover Shoe* strike a good balance between deterrence and compensation.

D. Consumers benefit from effective deterrence.

E. Contrast the enforcement under *Illinois Brick* and *Hanover Shoe* with that of S. 1874.

F. Justice is not served by S. 1874 which discourages meritorious suits and encourages class actions on contingencies.

G. S. 1874 applies to all antitrust laws, not just price-fixing, and therefore provides class action attorney with a club to force settlements from virtually any company.

H. S. 1874 will injure consumers.

I. S. 1874 will result in severe court congestion, thwarting the timely consideration of other civil and all criminal cases.

J. S. 1874 is patently unconstitutional.

K. More understanding of the issues involved in *Illinois Brick* are required before substantive changes, if ultimately needed, can be wisely crafted.

Fourth, why *Illinois Brick* and *Hanover Shoe* together are superior to S. 1874.

The basic debate and exhibits against S. 1874 begin on page 14 through page 117 and should be read very carefully and fully by all who are interested in this question.

I will be glad to get you a copy of this, so you can reply for the record if not in person.

Thank you, Mr. Chairman.

Senator KENNEDY. Senator Laxalt.

Senator LAXALT. Mr. Chairman, very briefly, first of all I ask leave to file my statement.

Senator KENNEDY. Without objection, it will be printed as if read.

Senator LAXALT. Thank you, Mr. Chairman.

In the interest of permitting Mr. Shenefield coming on early, let me make a couple of points. *Illinois Brick* when it came to us last year appeared to be a situation which lent itself to a simple legislative solution, and I must confess at the outset I subscribed to it, but the more that we dealt with this problem in hearings, the more we deal with it out in the country, the more impressed we all have to become, that it is highly complicated and highly complex and the solution at this point is in doubt.

We have been told, all of us, in one degree or another that if there isn't some form of legislative solution, the legal sky is going to fall out and we are going to have all kinds of dire consequences. I don't know, but I must say, and I want members of the committee to know this, we are investigating in full now what the situation is in respect to the State cases brought by the Attorney General since the decision came down, and also we are investigating each and every direct purchaser case and I would hope that we could use the help and assistance of your office.

As far as I am personally concerned, as I indicated it is a tough question. It is complex. I rather doubt, frankly, whether or not it lends itself to a legislative solution. I have a strong suspicion—it is growing stronger by the day—that perhaps this is one of those cases where the solution is best found in the courts. But as far as I am concerned, I am going to retain an open mind. If we can achieve a reasonable compromise through the legislative process, so be it.

Thank you.

OPENING STATEMENT OF SENATOR LAXALT

Mr. Chairman, it is interesting, and perhaps ironic, that the first legislative hearing in this committee in the 96th Congress is being devoted to the *Illinois Brick* bill. If nothing else, the intensity of emotion evoked by this bill will again be demonstrated here, as it has been before on the numerous days of hearings as well as in the many private meetings held on this legislation.

At first blush, *Illinois Brick* looks like a simple matter. The bill to overturn the Supreme Court case, which is at issue here, was introduced only days after the Court announced its decision in June 1977, and I have the impression that its proponents believe that the short, 2-page bill, overturning that case would attract sufficient appeal, and be sufficiently uncomplicated, to easily pass Congress.

The result has been, of course, far different. The more this apparently simple concept is examined, the more hearings are held, the more cases bearing on the issue are decided, the more complex the consequences become. The matter has now become so complicated, and the consequences so unpredictable, that the whole matter resembles the proverbial can of worms.

Testimony of several antitrust experts during the last session indicated that one of the unforeseen consequences of this bill was the impact it would have on pending direct purchaser cases. Those sources indicated that a great majority of antitrust cases filed are direct purchaser cases, and that many of those cases would become impossible to prove if this bill were to become law.

We have also been told, both by the State attorneys general and by the bill's proponents in Congress, that hundreds of millions of dollars of potential damages would be lost by the taxpayers if this bill is not passed. Our Chairman, in fact, in his last "Dear Colleague" letter on this subject indicated that the figure of such lost damages had escalated to $2 billion.

My office, in order to get some reliable figures and to try to make some sense out of this controversy, has undertaken an investigation of such cases, and is in the process of researching every pending case brought by the States to try to determine, firsthand, the amount of damages actually at issue, and the degree to which such damages would be affected by this bill. Additionally, we are researching each direct purchaser case now pending in the United States to determine the dollars involved and how the potential damages would be affected by this bill. Although the results are not yet final, it appears that the cases in the latter category involve hundreds of millions of dollars in damages which would not be recovered if this bill became law. The results of the former

survey, involving the States, indicates that the actual damages involved are substantially less than have been alleged by the bill's proponents.

The new bill just introduced and to be discussed today includes a new provision which gives the Court discretion to determine whether the pass-on defense may be asserted. At first glance, such a scheme appears to be unusual and controversial, and I hope the Committee will examine that provision with care and diligence. I look forward, in fact, to discussions by some of the legal experts in the antitrust field on this provision.

We tried, unsuccessfully, to reach some sort of compromise on this matter during the last Congress. We met with the various people concerned dozens of times, and spent a great deal of time on the issue. That fact alone, perhaps, indicates some of the complexities involved in this bill. Although I maintain my sense of hesitancy about overturning a major Supreme Court case in a field as complicated as antitrust legislatively, I stand willing to listen, and to discuss this matter in an attempt to reach a compromise. I do maintain, however, my initial conclusion that matters such as this are generally handled more successfully, more expeditiously, and with far greater certainty by the courts than they are by the legislatures.

Senator KENNEDY. Thank you very much.

Senator Hatch.

Senator HATCH. I would like to make a few remarks, Mr. Chairman, about the proposed legislation for overruling *Illinois Brick* and the related decision in *Hanover Shoe.* I have not had time to review the new bill in great depth, but I do have a few preliminary questions. I hope they can be addressed by the witnesses we have here today and the additional witnesses which I hope we will have in the future.

For instance, if this is the only day of hearings, and as I review, cursorily looked over the testimony, every witness is for this piece of legislation, when we know that there is a vast body of authority out there against this legislation. I think we ought to hear from both.

As I indicated on numerous occasions last year, I have serious reservations about legislation in this area. The extensive records compiled last year satisfied me that our current private antitrust enforcement effort works terribly well. The facts indicate the direct purchasers have historically pursued defendants vigorously, much more vigorously than indirect purchasers. Most of the pending cases are direct purchaser cases.

My first question is, therefore, whether we need any legislation to improve private enforcement? I realize that *Illinois Brick* has caused indirect cases, but many, perhaps most, of these cases are by States which have other measures to protect themselves from violators. They can take assignments of the rights to sue, or they can seek to do so directly.

Private parties may not have the same alternative. Last year's hearing convinced me that the private plaintiffs would lose many of their cases in the complexity caused by the retroactive legislation, and they would be deterred from suing in the future. I didn't think then that this was either fair or sensible.

This leads to my second question. Can this legislation be fairly or constitutionally applied to pending cases and other pre-existing rights? The evidence last year showed that the bill would jeopardize most of the pending cases, which are direct purchaser cases, by interjecting issues. Billions of dollars in claims and over $600 million of verdicts or settlements are at stake. Is this right?

My third question is whether the new pass-on defense provisions make any difference? The bill appears designed to allow the trial court discretion to permit the pass-on defense or not. But won't this be just as confusing and as complex as last year's bill? How will direct purchasers ever have any certainty about the vitality of his case before he brings it? And won't the consumer class actions encouraged by the bill raise the pass-on complexities even if the trial court denies the pass-on defense?

This leads me to my fourth question. Will the new bill actually improve compensation? We have an effective system of direct purchaser deterrence now. It would, therefore, make little sense to disrupt the status quo unless the new bill would improve compensation for indirect purchasers, including consumers. But it is undeniable that private consumer class actions do not compensate consumers; they only benefit the lawyers who bring them and who defend them. Does it make sense to substitute this for what we now have?

This leads to my final observation. I confess I have become intrigued from time to time with the puzzle presented by attempts to overrule these two Supreme Court cases. I sometimes think that we can find the solution, but it always seems to elude us. Only the lawyers seem to benefit. Aren't we really just playing into the hands of the lawyers in these cases?

I do not mean to say that our present antitrust system is perfect. Some injured parties are barred from recovery by rules of standing that have nothing to do with *Illinois Brick.* But these rules, like *Illinois Brick,* seem to me to be really designed to keep the system simple enough to work effectively. I think it works effectively now. I question whether we ought to tamper with it.

It is easy for us to say that the courts can work out the meaning of the new bill, and they probably could eventually. But the only people we benefit in the interim are the lawyers. In this period of inflation, I wonder whether we can afford the increased legal costs, weakened deterrence, and confusion this bill will almost certainly create.

I notice that a number of the State attorney general representatives are testifying today. I think they do have some legitimate concerns here. On the other hand, I think those concerns have to be balanced and weighed with the overall detrimental effects that I think this legislation at least portends to have.

To make a long story short, I am concerned about this legislation. I like to try to keep an open mind, but I am basically very much concerned about the thrust of this legislation, and I know that I don't know why it didn't come out last year and why our majority leader didn't decide to test it on the floor, but he didn't.

Senator KENNEDY. I can tell you why. How many amendments did you file? [Laughter.]

Senator HATCH. Only half of those that I had prepared. [Laughter.]

And about one-quarter of those we will have when this one comes up.

Senator KENNEDY. Are there any other comments?

Senator BAUCUS. I have a statement I would like to submit for the record, Mr. Chairman.

Senator KENNEDY. It will be printed in its entirety in the record.

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. I would like to make a few remarks about the new proposed legislation for overruling *Illinois Brick* and the related decision in *Hanover Shoe*. I have not had time to review the new bill in great depth. But I do have a few preliminary questions. I hope they can be addressed by the witnesses we have here today and the additional witnesses I hope we shall have in the future.

As I indicated on numerous occasions last year, I have serious reservations about legislation in this area. The extensive record compiled last year satisfied me that out current private antitrust enforcement effort works fairly well. The facts indicate that direct purchasers have historically pursued defendants vigorously—much more vigorously than indirect purchasers. Most of the pending cases are direct purchaser cases.

My first question is therefore whether we need any legislation to improve private enforcement. I realize that *Illinois Brick* has caused dismissal of some indirect cases. But many, perhaps most, of these cases are by States, which have other means to protect themselves from violators. They can take assignments of the right to sue, for example, or they can seek to buy directly. Private parties, however, may not have the same alternatives. Last year's hearing convinced me that the private direct plaintiffs would lose many of their cases in the complexities caused by the retroactive legislation. They would be deterred from suing in the future. I did not think then that this was either fair or sensible.

This leads to my second question: Can this legislation be fairly or constitutionally applied to pending cases and other pre-existing rights? The evidence last year showed that the bill would jeopardize most of the pending cases, which are direct purchaser cases, by interjecting pass-on issues. Billions of dollars in claims, and over $600 million in verdicts or settlements, are at stake. Is this right?

My third question is whether the new pass-on defense provisions make any difference. The bill appears designed to allow the trial court discretion to permit the pass-on defense or not. But won't this be just as confusing and complex at last year's bill? How will a direct purchaser ever have any certainty about the viability of his case before he brings it? Also won't the consumer class actions encouraged by the bill raise the pass-on complexities even if the trial court denies the pass-on defense?

This leads to my fourth question: Will the new bill actually improve compensation? We have an effective system of direct purchaser deterrence now. It would therefore make little sense to disrupt the status quo unless the new bill would improve compensation for indirect purchasers, including consumers. But it is undeniable that private consumer class actions do not compensate con-

sumers. They only benefit the lawyers who bring them and who defend them. Does it make sense to substitute this for what we now have?

This leads to my final observation. I confess I have become intrigued from time to time with the puzzles presented by attempts to overrule these two Supreme Court cases. I sometimes think that we can find a solution. But it always seems to elude us. Only the lawyers seem to benefit. Aren't we really just playing into the hands of the lawyers?

I do not mean to say that our present antitrust system is perfect. Some injured parties are barred from recovery by rules of standing that have nothing to do with *Illinois Brick.* But these rules, like *Illinois Brick,* seem to me to be really designed to keep the system simple enough to work effectively. I think it works effectively now. I question whether we ought to tamper with it. It's easy for us to say that the courts can work out the meaning of the new bill, and they probably could eventually. But the only people we benefit in the interim are the lawyers. In this period of inflation, I wonder whether we can afford the increased legal costs, weakened deterrence and confusion this bill will almost certainly create.

OPENING STATEMENT OF SENATOR BAUCUS

Senator BAUCUS. These hearings this morning focus attention on the important subject of the enforcement of our antitrust laws. As a new member of the antitrust subcommittee of the Judiciary Committee I am particularly concerned with this subject and am pleased that the full committee has already begun consideration of this matter.

The specific issue before this committee today is proposed legislation that would directly address the June, 1977 Supreme Court decision *Illinois Brick Company* v. *State of Illinois et al.* In that case the Court ruled that only direct purchasers or sellers could enforce their right to be compensated for injury suffered at the hands of antitrust violators. The Court specifically limited the collection of triple damages from violators to direct purchasers, a remedy the Congress gave to the Federal Government in 1914 and to the State attorneys general in 1976, all to be exercised on behalf of the consuming public. The Court did correctly note that if the Congress disagreed with the result of their opinion that they could of course amend and clarify section 4 of the Clayton Act.

It is clear that our antitrust laws are useless if they are not enforced. The protection of the public from antitrust violators is essential and the Congress and the Federal Government both have a responsibility to insure that American consumers are adequately afforded that protection.

Senator KENNEDY. We have a very full agenda. The distinguished Governor of Arizona, representing the Governors; and several representatives of the State attorneys general; and Mr. Shenefield, we welcome you.

I would say at the outset we have indicated to the minority that we welcome additional hearings with whatever witnesses that the minority desires.

Mr. Shenefield, we apologize for the delay in hearing your presentation. We look forward to your comments here today.

STATEMENT OF JOHN SHENEFIELD, ASSISTANT ATTORNEY GENERAL ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. SHENEFIELD. It is a pleasure to be here, Mr. Chairman, members of the committee, to express the administration's strong support for the Antitrust Enforcement Act of 1979. This would grant to purchasers and sellers not in privity with an antitrust violator the right to sue for damages under the antitrust laws by amending sections 4, 4A, and 4C of the Clayton Act, 15 U.S.C. section 15, 15A and 15C. It would permit all persons injured in fact by an antitrust violation to recover for those injuries. President Carter stated in his State of the Union message to this Congress:

"I continue to support legislation to allow those who are injured by antitrust violations to recover damages from the antitrust violator, whether the injured person is a direct or indirect purchaser."

Under the Supreme Court's decision in the *Illinois Brick* case only direct purchasers may recover, even though they may have passed on the injury to consumers, who are prevented from suing. This decision undercuts State and private enforcement of the antitrust laws, reduces their deterrent effect, may contribute to higher prices, and often allows the violator to keep his gain at the expense of the injured consumer. This needed legislation would overturn that decision.

The bill before this committee is very similar in concept to legislation that was recommended to the Senate by this committee at the end of the last Congress. The House Judiciary Committee also endorsed such a bill, but it has been refined to address some of the problems that were raised in connection with last year's version.

Antitrust damage actions, particularly treble damage actions, are absolutely essential components of the antitrust enforcement scheme. Indeed, as a private lawyer I often had the view that they were the most important part of an antitrust law enforcement.

Antitrust actions have two important and broad objectives. First, there is compensation of victims of antitrust violations; second, deterrence of future violations.

As the Chairman suggested, in the absence of viable and strong private treble damage enforcement, you would simply have to hire new lawyers in the Justice Department in order to try to keep antitrust enforcement at the same level that we now have. The material resources of the Justice Department together with the antitrust portions of the State attorneys general offices simply are not adequate to enforce the laws without the help of private treble damage cases.

Let me address just for a moment the deterrence point. The point of this legislation is to remove the profit incentive for violations of the antitrust laws. What this really means is that from the perspective of effective antitrust enforcement, it is important to maximize the chance that some plaintiff somewhere will be available to challenge a violation and that any recovery will be large enough to serve the deterrent objective of private damage action.

I sat in on conferences when I was in the private bar where decisions were being undertaken and addressed, that depended quite clearly on their outcome for some estimation as to how likely it was that private suits would be filed.

42-005 O - 79 - 2

Criminal prosecution is, of course, something that private firms are concerned about. But when it comes to the bottom line in corporate decisions, I assure you that treble damages sound louder in boardrooms and in the halls of decision than the possibility of Government suit.

To ensure that the treble damage remedy remains fully effective, it is obvious to me that indirect purchasers must be allowed to bring damage actions for several reasons. First of all, direct purchasers in many situations simply will not sue. They will not sue for a variety of reasons.

First, they may very well have passed on the overcharge to their own purchasers down the distribution line and thus not be injured and not feel the need of redress.

Senator METZENBAUM. May I interrupt for a minute? I want to be certain that that point that I just heard you make and as I understand it, as a corporate lawyer when you were sitting in meetings having to do with this issue, it was the deterrent effect of the civil suit which was really a much more important consideration than the possibility of a criminal action.

Is that correct?

Mr. SHENEFIELD. That is precisely the point. The notion is that while jail, when it is given by judges, which is all too rarely, affects the conduct of individuals. Corporate decisions depend in a sense on a net dollar and cent resolution.

The Government, the Federal Government can sue only for single damages, so there is no loss to a firm in trying to maximize profits through antitrust violation. But it is the treble damages, the aspect of antitrust liability that takes the actual damage and trebles it, that really makes a difference to corporate executives.

Senator METZENBAUM. On a scale of zero to 100, from a deterrent standpoint, what percentage of the deterrent is eliminated if we don't do something with respect to the *Illinois Brick* decision?

Mr. SHENEFIELD. I think my answer to that would be something like this: Private actions as compared with government actions, I have always thought of as being more important for antitrust law enforcement, on something like a 60 to 40 basis. Of all private actions, as I understand it, our records show a large number are indirect purchaser actions. Maybe as many as two-thirds of all potential actions. Two-thirds of 60 percent is about 40 percent, so nearly half of the antitrust enforcement may have been wiped out by *Illinois Brick*.

Senator METZENBAUM. Thank you.

Thank you, Mr. Chairman.

Mr. SHENEFIELD. Another reason why direct purchasers will frequently refrain from suing is that it jeopardizes important supply relationships which those direct purchasers have. They have to make a very tough corporate decision: Shall we sue and try to recover for antitrust violations and thus jeopardize relations with our main supplier for some important supply that we need for our business, and when it comes to a shortage situation in all probability not have that supplier around or shall we go ahead and just relax, take whatever loss we have had, and be sure our business is able to continue?

Many times, in my experience, direct purchasers will simply not sue because it jeopardizes crucial, absolutely critical supply relationships. So that in a large number of cases indirect purchasers are really the only plaintiffs around for challenging antitrust violations.

In addition, the present rule may vitiate the parens patriae title of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. This law was intended to allow State attorneys general to sue to recover antitrust damages for natural persons residing in their States. It was meant to replace a somewhat chaotic system where antitrust plaintiffs of all descriptions were coming in and maintaining class actions with the organized efforts of the State attorneys general. That has in fact now been pretty much vitiated by a court decision that makes it impossible in most cases for these cases to be filed.

Senator LAXALT. Will the witness yield?

I am not aware of any cases where that has been the result. Could you indicate either here or if you have to go back to your files what kind of cases that actually resulted in the vitiation of the parens patriae provisions?

Mr. SHENEFIELD. Two answers to that. We don't, of course, keep records on antitrust cases filed by everybody, but my suggestion is that we would never know what kinds of cases were not filed because they never reached the point of institution.

Senator LAXALT. What is then the basis of the contention?

Mr. SHENEFIELD. My own commonsense experience is that if a law that was passed by the Congress was desired strongly by the State attorneys general and very few suits have resulted, something happened in between the time of enactment and today to cause that and the one obvious thing that happened was the *Illinois Brick* decision.

Senator LAXALT. Thank you.

Mr. SHENEFIELD. Since individual consumers most often suffer damages as indirect purchasers, neither purpose of the parens remedy can be fulfilled unless indirect purchasers represented by State attorneys general can sue for antitrust damages.

The Court in *Illinois Brick* was concerned essentially by two things: First, they were concerned about the possibility of multiple liability; second, they were concerned about the possibility of undue complexity in antitrust cases.

In the view of the Department of Justice, the approach taken by this bill addresses both of those concerns. First of all, where the multiple liability in theory could arise, the defendant would be permitted to argue that the damages had been passed on by a particular plaintiff to the next level in the distribution chain, and thus avoid the normal problem of multiple liability.

Thus there is in general a clear and rather neat solution to the possibility of multiple liability. In addition, a number of procedural devices are available to resolve controversies among possible plaintiffs, transfer and consolidation, interpleader and joinder. We can go into those later, if you wish. The possibility of multiple recovery and undue complexity seem to me to be well addressed by this statute to the extent that we should not be in a position of trying to deny plaintiffs who have been injured the possibility of recovery

for those injuries because the procedural problems have largely been dealt with.

Senator LAXALT. May I ask one question, Mr. Chairman?

Mr. Shenefield, on the problem of complexity, do you agree at all with the contention of Mr. Hatch that many of these cases are brought by law firms, which result in minimal recoveries to the individual consumers, and also result in substantial benefits to lawyers throughout this country? Do you think this piece of legislation disposes of that problem?

Mr. SHENEFIELD. That question, as I understood it, addressed class actions in particular, and, of course, this legislation reaches well beyond class actions. Indeed, it deals with class actions only incidentally. I think we ought not to lose sight of the small businesses who are indirect purchasers who are also thrown out of court by this decision.

Senator LAXALT. Do you think we should get rid of class actions, then? We considered that last year. Let's get them out of the way because they do plug up the courts. They do result far too often in minimal recoveries to the individual consumers and fat fees to the law firms. Do you think we should consider that?

Mr. SHENEFIELD. I think any proposition should be considered, but I would not be in favor of it, and I would like to address the two premises of the question, namely, that they are instigated by lawyers without any benefit to consumers and that they result only in fees to law firms. It seems to me that our justice system has got to deal with the problem of how to compensate consumers that have been damaged, but damaged only to an extent that would not make it a plausible thing for them to come into court individually. The class action is a noble experiment, not one that is perfect, obviously, but a noble experiment in trying to deal with this problem of justice.

It happens, of course, that in our system, lawyers make their living by bringing law cases, defense lawyers make their living by having retainers and private plaintiffs lawyers make their living to some extent by fees that depend on the outcome. I don't think there is anything immoral about that, and it seems to me that we ought to address that issue in a narrow sense rather than trying to deal with it through the *Illinois Brick* problem.

Senator LAXALT. Isn't it true, too, that throughout the country there are just a handful, really, of law firms that specialize in this type of action?

Mr. SHENEFIELD. I can't tell you the answer to that. I would like to think, in the interest of competition, a variety of law firms would feel free to come into this area. If there are some barriers, perhaps the Antitrust Division could do something about it.

Senator LAXALT. It is not so much a barrier. It is that the hearings last year revealed that this requires, this field, as we all know, a high degree of expertise and that necessarily limits those who are in the field.

Mr. SHENEFIELD. As I recall, the approximate membership of the Antitrust Law Section of the American Bar Association is 10,000. Each lawyer there, assuming he is competent to practice any kind of antitrust law, can bring suits on both sides. I wouldn't assume that it is a small number that are padding their pockets by class

actions, but it is important, I think, to be aware of the fact that this is not a class action bill. Indeed, the Washington Post headline this morning that gave that impression was simply erroneous. It is a bill to allow indirect purchasers, represented in terms of classes or in any other way, into court to recover damages for injuries.

The second point, of course, is that the deterrence effect has got to be addressed in any event. We have got to have adequate enforcement of the antitrust laws and budgets these days in the executive branch are not likely to expand as the economy expands.

The President has submitted to the Congress a budget of approximately $43 million for the Antitrust Division. It is a $1.8 trillion economy that we are trying to deal with. It seems to me altogether healthy to try to mobilize private resources to join in the enforcement of the antitrust laws to maximize their competitive effect.

Senator LAXALT. Do you have any idea as to what the breakout is as between individual actions brought in price fixing cases, as opposed to the class actions at the present time? It is my impression from the testimony last year most of the actions were of the class type.

Mr. SHENEFIELD. I do not know the answer to that. I can try to find out for the record.

Senator BAYH. I don't want to be in any way impolite, but some of us have tried to schedule our schedules this morning so we would have a chance to hear the Assistant Attorney General. Would it be possible to let him finish the statement, and I think the questions are good ones. But it would be an imposition on the people.

Senator LAXALT. That is fine with me. I wanted to keep it current, rather than trying to backfill. That is perfectly all right with me.

Senator BAYH. If you have a schedule problem, I will yield.

Senator KENNEDY. We will try to accommodate those who do have a schedule problem. We will try to permit them to ask the question, but otherwise, we will ask the Assistant Attorney General to proceed. If there is a particular point of elaboration or comment, I would welcome the Senators' participation. We do want to move along.

Mr. SHENEFIELD. I have given you the skeleton of the statement. I would ask the full statement be printed in the record as if read.

We strongly support the bill, look forward to working with this committee and the House committee on the perfection of it leading to passage. I would be happy, of course, to try to answer questions.

Senator KENNEDY. Senator Thurmond, do you want to ask a question?

Senator THURMOND. Mr. Shenefield, in our previous hearings of April 1978, Professor Milton Handler, and Francis R. Kirkam submitted information. Dr. Handler noted of 69 cases filed in New York, 66 cases were brought by direct buyers in New York City Federal District Court. Mr. Kirkam stated, and I quote, "The Administrative Office supplied us with a list of 84 cases pending in the District of Arizona, that is the Phoenix and Tucson Division. Eighty-one percent of the total had been brought by direct and indirect purchasers. Only the one case was brought by indirect

purchasers," and you will find that, I believe, at page 49 of the record.

Has the Department of Justice made any effort to determine the ratio of cases filed by direct purchasers versus purely indirect purchasers?

Mr. SHENEFIELD. We have not, Senator, and we would be happy to do that. In general, we don't keep research records of all suits that are filed. I would suggest that one of the difficulties with those statistics may well be that they are highly selective. Professor Handler practices law in the Southern District of New York in the Second Circuit which has, as I understand it, a somewhat specialized standing rule that may have affected the outcome. The Tucson and Phoenix District I am not familiar with, but it may well be that if it were possible to get nationwide statistics as opposed to selective statistics, something quite different would be the result.

In any event, the significance of those statistics depends on the conclusion that somehow antitrust enforcement will be less effective if this bill is passed, than it was in those cases.

I simply don't see that as being likely. It is in effect an argument, I guess, that the defendant will be allowed off more lightly if his damages are paid only to indirect purchasers. It seems to me his liability is the same. People will sue if they have a chance to recover, and the point is the distribution of damages, rather than the amount of the damages.

Senator THURMOND. Mr. Shenefield, in your statement, you refer to a Justice Department official's opinion that the *Illinois Brick* bill would be ruled constitutional. Such opinions as this are diametrically opposite to the statements submitted at our 1978 hearings by two distinguished and scholarly law professors, both of whom are considered to be antitrust and constitutional law experts, namely, Professor Milton Handler and Philip Lacovara, the latter a Deputy Solicitor General of the United States in the recent past.

Since the constitutional statements of Dr. Handler and Philip Lacovara are in the appendices of the minority views, it would be well for this committee to review them and for the Justice Department opinion in its entirety, if it is available for the record.

I would ask unanimous consent, Mr. Chairman, that such opinions be made available for the record.

Senator KENNEDY. They will be made a part of the record.

Senator THURMOND. Mr. Shenefield, you do agree, I presume, that the final arbiter on the issue of constitutionality will be the Supreme Court of the United States.

Mr. SHENEFIELD. Yes, sir, but I would like, if I may, to respond to the suggestion of your earlier point. The Department of Justice opinion addressed the question whether a law that applied to cases pending at the time of enactment would be unconstitutional. I am not aware of any serious and objective constitutional authority who thinks that is a doubtful question at all. Last year, the bill was somewhat different in its formulation. As you know, Senator, it applied to cases pending as of June 9, 1977, the date on which the decision was handed down, a quite different kind of constitutional problem. I don't think there is a serious question of constitutionality as to this bill.

Senator THURMOND. Mr. Shenefield, on July 21, 1978, in an answer to a question from Senator Laxalt, you said, and I quote:

> It seems to me that if as a part of a group of citizens of a state all of you aggregated can prove that you have been damaged one penny each, but it amounts to a million dollars in total, so you have that standing to sue and you do have this standing under current law.

Senator Laxalt replied:

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

You replied, "I believe it is."

Mr. Shenefield, how do you reconcile your answer to the answers of the FTC, and Antitrust Division heads testifying before the Antitrust Subcommittee in the past 20 years who told us that the agency could not pursue the subcommittee's request to act in an issue that was in the public's interest on the grounds of, and I quote, "There was not sufficient national interest to pursue the issue."

Mr. SHENEFIELD. I am not familiar with the testimony to which you allude. But my guess is that the problem that those officials were alluding to was a case which raised in total, damages of a rather small amount, and as I understood the hypothetical that Senator Laxalt and I were discussing last year, it was one in which the total amount was substantial, but each individual recovery was slight.

It seems to me that in view of the two objectives of antitrust enforcement and the treble damage remedy, compensation and deterrence, it is important for suits of that sort to be filed because, one, compensation will come to some extent, and two, deterrence will be enhanced, an equally important objective of the antitrust private treble damage remedy.

Senator THURMOND. Mr. Shenefield, I would just ask one other question so that others may have a chance to come in. Mr. Shenefield, I would pursue your example of 1 million persons receiving small amounts, a dollar or two, and whether it is worth it or not. A Federal district court judge said, and I quote.

> The rarities of antitrust litigation lead me to the conclusion that the individual indirect purchasers would not be recompensed very much by these suits. Certainly, I would hesitate to seriously weaken the deterrence effect of the relatively simple and uncomplicated civil actions for the minimal benefits of having what would probably amount to small, if not negligible recoveries to individual consumers.

The beneficiaries of the proposed legislation would be antitrust defendants through the use of pass-through defense. The fees will become large because of the extraordinary difficulties of obtaining and proving the complicated antitrust case. The cases will languish in the courts because neither the plaintiff nor the defendant will feel that they are ready for trial, and the courts burdened as they are with criminal and other civil cases, will look around and beyond the complicated class actions.

Would you comment on the judge's quotes?

Mr. SHENEFIELD. I would be happy to. I am sympathetic to the Judge's concern about new kinds of cases getting into the judicial system and causing a breakdown. I think that is an important matter that we all have to address seriously and deal with on its merits. It does not seem to me that the proper way to deal with

that problem, however, is to deny people who have been injured—individuals, as well as small businessmen, as well as the Federal Government, as well as State governments—to deny those kinds of plaintiffs the right to recover for those injuries. It seems to me that if the problems are essentially procedural ones, then we ought to be turning our attention to the procedures to deal with those problems rather than wiping out the entire remedy.

I would fully acknowledge that there is a great deal of improvement in the area of procedure that can be undertaken and I would assume that this committee will be closely examining those kinds of proposals. The President's National Commission on review of the antitrust laws and procedures just spent 6 months dealing with those kinds of problems, but this legislation is designed to compensate and deter. It seems to me that those overriding important social purposes need to be served in some way.

Senator THURMOND. Mr. Chairman, I yield now.

Senator KENNEDY. Just briefly. In general, what do you think is the loss of the American taxpayer or the Federal Government by not providing a remedy for the Attorney General to be able to sue? Are we talking about tens of thousands of dollars, hundreds of thousands? Are we talking about millions or tens of millions?

Mr. SHENEFIELD. I think even higher than that, Senator. I think we are talking about hundreds of millions. It is difficult, of course, to pin down these numbers because you never know when you file complaints what the final arbiters will permit you, but our sense of it, when we took a look at this last year was that if you aggregated all of the possible recovery in our cases in court today, the ballpark figure was $100 to $200 million.

Senator KENNEDY. And the Supreme Court's decision will not, without the legislative remedy, permit the Attorney General to pursue the recovery of that amount of money, of taxpayers' money effectively?

Mr. SHENEFIELD. It is a real danger. I don't want to concede the loss of all our prospects to those damages because we would like to make some legal arguments, but it is a real and serious danger that needs to be addressed.

Senator KENNEDY. We will hear from the Governors and the attorneys general later.

Do you have an estimate of the loss to State taxpayers? It seems to me we are in danger of the loss of hundreds of millions of dollars to taxpayers by not providing a remedy at the Federal level, and there are millions and millions of dollars of losses at the State level. Do you have any estimate on that?

Mr. SHENEFIELD. No precise estimate. It has to be larger than the loss to the Federal Government. It has to be an order of magnitude larger because you are talking about treble damages to consumers all across the economy, nationwide. You are talking about damages in the area of bread, milk, almost every conceivable product.

Senator KENNEDY. So we are basically talking about, the potential recovery of hundreds of millions of dollars to the Federal Government, and to the State governments, and to consumers across this country?

Mr. SHENEFIELD. I believe that is true.

Senator KENNEDY. Just finally, if this remedy is not available in the private sector, what does that mean to you as someone responsible for Federal enforcement? Does this mean that compliance with antitrust laws requires more aggressive action by the Antitrust Division or by the Federal Government in order to keep life in the antitrust laws?

Mr. SHENEFIELD. I just don't think the resources of the private bar are replaceable, no matter how many Government lawyers we employed. But if we were trying to keep the same level of antitrust enforcement that we would have without *Illinois Brick,* you would be talking in terms of doubling the actual trial staff resources.

Senator KENNEDY. Senator Thurmond has a request. Then I will yield to you, Senator Metzenbaum.

Senator THURMOND. Mr. Shenefield, could you get the cases you are referring to?

Mr. SHENEFIELD. Referring to, the Federal Government cases?

Senator THURMOND. For the record.

Mr. SHENEFIELD. Yes, sir.

[The documents referred to above appear in the appendix.]

Senator METZENBAUM. I just want to make a brief statement, Mr. Chairman, because the question of constitutionality is not an unimportant consideration and the Senator from South Carolina pointed out that the two professors of law had addressed themselves to this question of constitutionality and when we have professors of law speaking to subjects of this kind, we give them sort of an aura of impartiality.

I would like to make certain that the record reflects that when Professor Lacovara was speaking that he was testifying in behalf of Bristol-Myers, a corporate client. He indicated that his firm is currently trial counsel in various antitrust cases for various companies, including Bristol-Myers, and so he had not that degree of objectivity that we expected the law professors to have but came here on behalf of a client and Professor Handler also has that same kind of lack of objectivity. He is also a member of a law firm that represents and is involved in a number of antitrust cases. I don't say that makes their opinion less valid, but I do believe that it indicates that they as certainly many other witnesses are not impartial in coming before this committee.

On that score, Mr. Shenefield, I just have a couple of questions as to the matter of constitutionality and I wonder if you would be good enough to summarize your reasoning relative to making this legislation applicable to actions pending at the date of enforcement.

Mr. SHENEFIELD. Our analysis of the problem is that it is probably not a retroactivity problem at all. It in no sense reaches back to actions that were concluded before the date of enactment. In all probability, it is better regarded as something that affects prospective rights. But even if it can be taken on faith that it is a retroactivity problem, it affects, I think, what the courts would describe as procedural rights, not so much the right to avoid antitrust liability on the part of the defendants but the right to have it sought by different plaintiffs.

Senator METZENBAUM. Is the longstanding distinction between substantive rights and procedural rights the fact that you can work

from the standpoint of retroactivity as pertains to the procedural, but not purely in the same manner with respect to substantive rights. Is that the point?

Mr. SHENEFIELD. That is essentially the point and the point is also that the law that has been developed on the question of retroactivity makes it clear that you engage in sort of a balancing test. You look at the quality of the right that has been affected and the public interest served by the legislation that has been proposed.

In this case, I don't think there is much serious question, given the nature of the right, which is a procedural right, and the important public interest vindicated by dealing with the *Illinois Brick* decision, that a court, even assuming that it was a retroactivity problem, would come to the conclusion that this legislation was constitutional.

Senator METZENBAUM. Do you have an idea as to the legal overcharges that would go unchallenged if that effective date were not used?

Mr. SHENEFIELD. I don't, Senator, but one has the intuitive sense that it is almost beyond definition it is so large.

Senator METZENBAUM. Thank you, Mr. Chairman.

Senator KENNEDY. Senator Laxalt.

Senator LAXALT. I don't have any additional questions at this time.

Senator KENNEDY. Senator Baucus?

[No response.]

Senator Cochran?

Senator COCHRAN. Thank you, Mr. Chairman. I wanted to ask you, in connection with the statement you made in your direct testimony, about the proposed bill incidentally creating a class action remedy and you also coupled that with an observation that there was a reluctance, natural reluctance for business reasons, for a direct purchaser to sue a supplier because of the fact he wanted to have a good business relationship.

Looking at those two statements and taking the example of an automobile manufacturer, for instance, if there is that reluctance to sue, for instance, a steel company, wouldn't someone farther down the distribution line, automobile dealer, for instance, have that same reluctance as the automobile manufacturer and therefore create in the ultimate automobile owner the only person according to your argument with an incentive or the freedom to bring such an action.

Given those circumstances, then, I would suggest that what we may be creating here in this bill is really a class action remedy and incidentally creating a situation where an individual, indirect purchasers, could bring such actions.

Mr. SHENEFIELD. I wanted to address that directly, Senator, because I don't want to leave a misimpression.

This bill creates, as you recognized in the latter part of your question, no class action remedy that doesn't already exist. It doesn't have anything to do with creating class actions. Those are either created or not created under Federal Rule of Civil Procedure 23 and this bill doesn't affect whether there are new or old class actions permitted.

What it does say is that when there is a valid class action, the determination of whether there has been a passing on of damages can be done on a classwide basis rather than on an individual plaintiff-by-plaintiff basis which would take, as everyone recognizes, forever. That provision is in the bill.

My suggestion in answer to the second part of the question is that there are a lot of small businessmen in this country who would not agree with the notion that they are in some way as foreclosed from suing as are their suppliers, who happen to be direct purchasers from antitrust violators. They can, if they wish, move to some alternative distribution sources. In many independent industries you have concentration of sufficient degree that there are less alternatives up the distribution chain. It is less likely, I think, on average that purchasers down the distribution chain will feel as beholden to that ultimate supplier as the direct purchasers will, but it is a question of degree, I would concede.

Senator COCHRAN. I think it is probably widely recognized, most everybody agrees, that the complexity of antitrust litigation would be increased when you are dealing with indirect purchasers. There is a great deal of discovery that would necessarily be required in order to determine damages and the like. As a matter of fact, I think the Supreme Court itself in the *Illinois Brick* case suggested that there could be 20 times more complexity to antitrust litigation if indirect purchasers were permitted to sue.

Do you have any reaction or comment with respect to the Supreme Court's observation and what that would mean in terms of being an incentive or disincentive to actually bring such suits?

Mr. SHENEFIELD. I do. I think the fear is exaggerated. There would be some additional steps of proof that would have to be undertaken. That is clear. But the procedural devices are available to our judiciary. The methods of resolving those problems are, it seems to me, sufficiently tried and true as not to make it a difference in kind, but a difference in degree.

I would not think, if you balanced the slight additional complexity against the unfairness to indirect purchasers, that a sensible policy resolution would be to deny indirect purchasers access to the courts. I would think, in fact, if there are procedural imperfections we ought to deal with that. What are the kinds of concerns that the Supreme Court has? They apparently envisioned a variety of plaintiffs in the courtroom, all bickering with one another about who had which damages and how much had gotten passed on to whom. Essentially that is a problem of taking a finite pie, because the size of a pie doesn't change depending on who is asking for a piece of it, and seeing how to divide it up.

This is a very common problem that judges deal with all the time, how much of the total property is allocable to that plaintiff, how much is allocable to that plaintiff and how much allocable to that? I would envision a trial which would proceed in a very orderly fashion, determination of liability, and determination of total damages. Once the determination of total damages is completed, the defendant in a sense is through. He can go home. The question then is who has the right to which portion of the damages? It seems to me that that is not a difficult problem to solve.

It will add one step, but the price of not adding that step is that a large number of plaintiffs have no remedy.

Senator COCHRAN. I remember in law school some professors used to talk about the reasons that some courts gave for ruling as they did was that the rule, one way to create, opens what they called the floodgates of litigation. I never knew what that was. I never had seen it. I just imagined what would be created but one witness who testified in hearings last year suggested that because of the increase in litigation that would result from the adoption of this legislation, that there could very well be a requirement for us to enlarge the Federal judiciary to handle the new cases and an estimate of 150 new judges was made before the committee.

I know that we already have, Mr. Chairman, about 100 and some odd new judges that we are going to have to confirm this year. We are going to end up with more judges than people if we keep going.

What is your reaction to that suggestion?

Mr. SHENEFIELD. I don't see the parade of horribles coming, frankly. It seems to me that you are talking about a finite number of cases, many of which are there in one form or another now and you add a step to the process, which allows a different class of plaintiffs to come in.

Most district judges before whom I have had the pleasure of practicing could take care of the problem, maybe on Saturday morning or Saturday afternoon, but I don't think they would need to be supplemented in terms of numbers. I don't see it as being that big a problem.

Senator COCHRAN. Thank you, Mr. Chairman.

Senator LAXALT. May I ask one question?

Senator KENNEDY. Of course.

Senator LAXALT. Last year, we discussed the breakout between private cases on the direct basis and indirect, and I do not expect you to remember that. I don't remember the numbers myself. But isn't it true that the bulk of the cases in the private area are bought by direct purchasers?

Mr. SHENEFIELD. I think the facts are in dispute as to that. Senator Thurmond quoted Professor Handler and somebody else to the effect that that was true and I suggested that that was a selective sample. That can easily be determined. The other point, of course, that that set of statistics would leave out, assuming it were taken in recent years, is the effect of *Illinois Brick* itself. A large number of indirect purchasers have just given up until this Congress can deal with the problem.

Senator LAXALT. If I remember in dealing with the last year we were looking at the numbers prior to *Illinois Brick* to see what the breakout was separate and aside from the effect of *Illinois Brick.* But if we assume for our purposes here and that assumption may be less valid now than it was when we last discussed this that the bulk of the cases are private and if you assume further as has been testified to here by pros in the field, that the effect of amending the *Illinois Brick* may have some rather dire consequences on the direct purchaser's case and if you assume as you have indicated that the private enforcement is vital in addition to your own effort, what is your opinion as to the possible effect of this kind of legislation having an adverse effect on the direct purchasers?

Mr. SHENEFIELD. If I assume all of those steps, I find myself pushed off the edge. But I don't think those intermediate premises are accurate. I don't see that total private law enforcement will be diminished by passage of this bill, quite the contrary. I don't think that direct purchasers are likely to be in some way inhibited from suing because they may have to share the recovery with someone to whom they passed on some of the overcharge.

It seems to me, as a matter of fact, that we ought to be concerned a little bit about the windfall aspects of permitting direct purchasers to recover and keep the money.

Senator LAXALT. That is a problem even if they passed it on.

Mr. SHENEFIELD. What that whole calculus leaves out is the State governments and the Federal Government, not an inconsiderable factor in civil enforcement and one that I think, with the passage of parens patriae, would have grown immeasurably in the aid of antitrust law enforcement. We have unfortunately lost the benefit of that at least for a time.

Senator KENNEDY. Just finally, Mr. Shenefield, isn't it true that between the *Hanover Shoe* decision and *Illinois Brick* decision the lower courts actually worked out the allocation of the various interests?

Mr. SHENEFIELD. It is the kind of problem that came up and judges were able to deal with it.

Senator KENNEDY. There were years during which this issue—which is raised now concerning the complexity of allocating damages—was the practical experience of our courts. It was actually addressed by lower courts prior to the time of *Illinois Brick,* as I understand it, and a number of courts at that?

Mr. SHENEFIELD. I think that is correct. I would suggest that many of the arguments that are being made on behalf of direct purchasers are really the wolf defense arguments in the sheep's clothing of antitrust enforcement. I think what you are really hearing is the lawyers of the defense bar who are concerned for their clients, as they ought to be, because antitrust enforcement ought to be enhanced by passage of this kind of bill. I would examine those statistics very closely indeed.

Senator KENNEDY. Let me just ask finally, do you have any figures about the actual reduction in cases, since *Illinois Brick* has been decided, brought by the private bar?

Mr. SHENEFIELD. I do not. I can certainly try to supply those for the record.

Senator KENNEDY. Could you? I think it would be useful to have at least that information. I don't know whether it would be a fair reflection, considering what would have been the normal increase of such cases. If the line before that was going up, or it might have increased even marginally, your estimate would be higher.

If you could also take a look at the tread, and perhaps give us your judgment as to why it might have been higher, I think that would also be useful.

If there are no further questions, we want to thank you for being here. We will look forward to working with you.

[The prepared statement of John Shenefield follows:]

PREPARED STATEMENT OF JOHN SHENEFIELD

I am pleased to be here today to express the administration's strong support for the Antitrust Enforcement Act of 1979. This would grant to purchasers and sellers not in privity with an antitrust violator the right to sue for damages under the antitrust laws by amending sections 4, 4A, and 4C of the Clayton Act, 15 U.S.C. 15, 15A and 15C. It would permit all persons injured in fact by an antitrust violation to recover for those injuries.[1] President Carter stated in his State of the Union Message to this Congress:

"I continue to support legislation to allow those who are injured by antitrust violations to recover damages from the antitrust violator, whether the injured person is a direct or indirect purchaser. Under the Supreme Court's decision in the *Illinois Brick* case only direct purchasers may recover, even though they may have passed on the injury to consumers, who are prevented from suing. This decision undercuts State and private enforcement of the antitrust laws, reduces their deterrent effect, may contribute to higher prices, and often allows the violator to keep his gain at the expense of the injured consumer. This needed legislation would overturn that decision."

The bill before this committee is very similar in concept to legislation that was recommended to the Senate by this committee at the end of the last Congress. The House Judiciary Committee also endorsed such a bill.

The Clayton Act as presently interpreted by the Supreme Court in *Illinois Brick Co.* v. *Illinois*[2] permits only direct purchasers to obtain monetary relief from illegal overcharges. In our view, this rule severely damages private enforcement of the antitrust laws and undermines the important deterrent effect of the private damage remedy.

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

In recent years, private antitrust cases filed in the district courts outnumber government cases by a factor of more than ten. Damage recoveries from these cases have also substantially increased in recent years. It is my understanding that private parties recovered about $450 million from the electrical equipment manufacturers, about $240 million from the antibiotic manufacturers, and about $70 million from the gypsum manufacturers.

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

To ensure that the treble damage remedy remains fully effective, indirect purchasers must be allowed to bring damage actions. In many cases, the direct purchaser will not sue. The direct purchaser may have passed on a substantial part of the overcharge to its customers and, therefore, may have little incentive to bear the risks of litigation. In some instances, where the direct purchaser's selling price is set by a fixed percentage markup, it may actually be a beneficiary of a price-fixing scheme. Even if damaged, the direct purchaser may not bring suit in order not to risk disrupting an important source of supply. Also, even where some direct purchasers decide to sue, these considerations may cause the number of such purchasers to be insufficient to act as a strong deterrent to antitrust violations, since the potential recovery represented by those suing may be nowhere near the total amount of overcharges. For example, it is my understanding that in the tetracycline litigation only about 10 percent of the notified middlemen druggists decided even to

---

[1] As discussed below, we understand that the bill is not intended to alter existing law regarding those injuries that are so remote or unrelated to the purposes of the antitrust laws as to preclude recovery of damages. See *Brunswick Corp.* v. *Pueblo Bowl-O-Matic*, 429 U.S. 477 (1977). We also assume that it is not intended to alter existing standing requirements for plaintiffs not directly in the chain of distribution. See, e.g. *Loeb* v. *Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910); *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

[2] 431 U.S. 720 (1977).

file claims to the settlement fund.[3] Thus, in a substantial number of cases, indirect purchasers are the only available parties to see that an antitrust violator is not allowed to largely retain its ill-gotten gains.

Moreover, in cases where the direct purchaser has in fact passed on an overcharge, the rule of *Illinois Brick* leaves most indirect purchasers with substantial injuries without a means to obtain just compensation.[4] For instance, in many cases, State and local governments (and the Federal Government) have suffered millions of dollars of damages as indirect purchasers. This result alone requires congressional action.

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

The majority in *Illinois Brick* expressed two principal reasons for its holding that indirect purchasers could not recover for overcharges passed on to them by upstream purchasers. In *Hanover Shoe, Inc.* v. *United Shoe Machinery, Corp.*,[5] the Court had held that defendants could not attempt to avoid liability in suits by direct purchasers by arguing that any overcharge was passed on down the distribution chain. The majority in *Illinois Brick* believed this rule by necessity precluded indirect purchasers from recovering for overcharges passed on to them. Otherwise, defendants would be subject to possible multiple liability for the same injury. Moreover, the Court believed that passing-on, used either offensively or defensively, would unduly complicate private damage actions, reducing the incentives for any plaintiff to sue.

In our view, the approach taken by this bill addresses the Court's fear of multiple liability. Under its provisions, where multiple liability may arise, the defendant would be permitted to argue that injuries allegedly sustained by a particular plaintiff were passed on to the next level of the distribution chain. A defendant would not be denied under the *Hanover Shoe* doctrine the right to employ passing-on defensively in a suit by direct purchasers, while nevertheless being subject to a damage award in a suit by purchasers further down the distribution chain based upon an allegation that the same illegal overcharge was passed to them.

Where subsequent purchasers, however, were essentially barred from recovery, as in the case of the running of the applicable statute of limitations, a court would be permitted to deny defendants the right to argue that the antitrust injuries at issue were passed on to such purchasers. This would avoid the harmful result of permitting a defendant to escape all liability via the pass-on defense. Since the bill, as we interpret it, contemplates that a court may deny a defendant the right to argue a pass-on defense only where subsequent suits by those to whom the damages were arguably passed are not a realistic possibility, it ensures fairness to the defendant while also appropriately helping to ensure that the fruits of an antitrust violation will not remain with the violator. With this one sensible qualification, the effect of the bill is to permit those injured in fact to recover under the Clayton Act while also maximizing deterrence by assuring that there will be an available plaintiff. This is an entirely equitable and fair approach.

In any case, we continue to be convinced that the Court's fear that if defendants would be subject to multiple recovery for the same injury if suits by indirect purchasers were permitted, is exaggerated. The defendant could protect itself from this possibility by a number of procedural devices. If suits by direct and indirect purchasers are pending in different courts, they may be transferred and consolidated in one or more of the ways suggested by the *Manual for Complex Litigation*.[6] Once cases are consolidated, damages may be allocated under rule 42(a) of the Federal Rules of Civil Procedure.[7]

---

[3] H. Rept. 95–1397, 95th Cong., 2d sess. 8 (1978).

[4] The Court recognized in *Illinois Brick* that in certain "cost plus" situations, indirect purchasers would be permitted to prove that an overcharge was passed on to them.

[5] 392 U.S. 481 (1968).

[6] 2 Moore's Federal Practice: Manual for Complex Litigation, 5.20–5.40 (2d ed., 1976). This legislation would also amend the Multidistrict Litigation Act, 28 U.S.C. 1407, to permit the Judicial Panel on Multidistrict Litigation to order consolidation of actions for trial as well as pretrial.

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

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

Nevertheless, by permitting passing-on to be employed both offensively and defensively, this proposed legislation would protect against any significant risk of multiple liability. Multiple liability for the same injury would be possible only in the remote case where different courts in subsequent cases reach substantially inconsistent conclusions on the passing-on issue or on the ability of subsequent purchasers to sue. We do not believe these possibilities are sufficiently probable to warrant any more than passing mention in a law review article footnote. These risks are certainly not comparable to the tremendous injury done to the treble damage remedy by the arbitrary *Illinois Brick* rule.

In both *Illinois Brick* and *Hanover Shoe,* the Court was anxious to avoid making antitrust litigation more complex by introduction of the passing-on issue. Undoubtedly, this issue would provide some additional complications for these cases. We are satisfied, however, that this issue is not in any sense unmanageable. As the Supreme Court recognized in *Bigelow* v. *RKO Radio Pictures, Inc.,*[8] measuring damages in an antitrust case often requires a good deal of estimation based upon reasonable inferences about the nature of the market. A similar approach can be adopted regarding the passing-on issue. In fact, the Ninth Circuit in re Western Liquid Asphalt cases,[9] directed the district court to follow such a common sense approach to resolution of the passing-on issues present in that case.

There is every reason to believe that the courts will be able to appropriately handle this issue in the same way they have handled such complex issues as proof of the amount of an overcharge. In addition, a provision of this bill that I will discuss in a moment—which permits classwide, aggregate proof of the pass-on issue—addresses this problem.

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

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

I wish to discuss with you two other specific provisions of this legislation. Subsection C, referring to proof of injury on a classwide basis, does *not* extend in any way the right to bring class actions—a right derived from rule 23 of the Federal Rules of Civil Procedure. What subsection C does is to reduce the burden on the judiciary in handling such actions by specifically authorizing courts to permit proof on an aggregate, classwide basis, of the fact and amount of injury passed on to or from another level of the distribution chain. This provision serves two useful objectives. First, some courts might, absent such a provsion, interpret this legislation narrowly to require proof of the precise amount of injury passed on to or by each member of a particular class of purchasers or sellers, disallowing any classwide averaging techniques. Such an interpretation could place a formidable barrier in the way of class action certifications not present under existing law.[10] This would be a particularly unfortunate result for class actions by businesses that are direct purchasers, and

---

[8] 327 U.S. 251 (1946).

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

[10] Rule 23 of the Federal Rules of Civil Procedure provides that a class may not be certified unless "there are questions of law or fact common to the class" and these common questions predominate over questions affecting individual members of the class. (See *Windham* v. *American Brands, Inc.,* 565 F. 2d 59 (4th Cir. 1977).) Under *Hanover Shoe* a class of direct purchasers is likely to satisfy these requirements because the primary questions of the case, liability and the amount of the overcharge will be common to all members. However, the introduction of the pass-on issue could pose a barrier to certification of class actions by direct and indirect purchasers unless some provision is included to permit the fact and amount of pass-on to be determined on a classwide basis rather than as a matter of separate individual proof for each member of the class.

would unnecessarily exacerbate the effect of overturning *Hanover Shoe* for such purchasers. In addition, aggregate proof of the amount of injury passed on would reduce some of the complexity that concerned the Court in *Illinois Brick*. To insure that defendants would not be prejudiced by this approach, the bill would not permit so-called "fluid" recovery—damages instead would be paid only to those members of a class who actually presented a valid claim to the court.

In sum this provision is designed merely to address specific problems raised by the introduction of the pass-on issue, and it does not affect existing requirements for class actions. In our view, many courts will likely adopt the aggregate proof approach without specific authorization, since it is sensible and consistent with the approach taken by the courts on other issues in the antitrust damages area. Nevertheless, specific authorization for aggregate proof of pass-on may help to achieve a wider acceptance of the approach, and avoid a good deal of needless litigation on the issue.

Next, it is important to note that this legislation would affect all actions still pending on its date of enactment, or filed thereafter. While there was some discussion in the last Congress concerning the constitutionality of such application there is, in fact, no substantial doubt as to its constitutionality. The Assistant Attorney General in charge of the Justice Department's Office of Legal Counsel has rendered an opinion in a letter to Chairman Rodino that such an effective date provision for this legislation would be clearly constitutional.[11] As a matter of policy, the Department believes that consumers, State governments and the Federal Government—who have suffered past injuries totaling hundreds of millions of dollars—deserve an opportunity to prove their claims in court. Thus, we favor this effective date provision.

Finally, one further point deserves mention. In the hearings last July on S. 1874, the predecessor to this legislation, before the Senate Subcommittee on Antitrust and Monopoly, some witnesses expressed concern that the language in that bill might be construed by the courts as affecting the standing requirements for certain plaintiffs not directly in the distribution chain. There is a line of authority, for example, in some circuits that denies standing to persons not "directly injured" by an antitrust violation. Such persons would include suppliers, stockholders and employees.[12]

This bill is not subject to such misinterpretation. It is clearly not designed to have any broader effect on the present standing requirements or the related remoteness rules than is necessary to permit indirect purchasers to sue for their injuries. In our view, this result follows from the fact that only indirect purchasers and sellers in the "chain of manufacture, production, or distribution" are permitted to recover under this legislation. Of course, this limitation on the bill's intended effects may be further highlighted by appropriate explanation in the legislative history.

In conclusion, the Department, speaking on behalf of the Administration, strongly supports the Antitrust Enforcement Act of 1979 and recommends the swift passage of such legislation.

Senator KENNEDY. Our next witness is Barry Bosworth, the staff director of the Council on Wage and Price Stability, and charged with oversight of the President's wage and price guidelines and with a cost-benefit analysis of Federal agency regulations. In that capacity he is one of the nation's chief inflation fighters, and recognizes the importance of vigorous antitrust enforcement in preserving competition.

Mr. Bosworth only this morning returned from 3 days of meetings of the Organization of Economic Cooperation and Development in Paris, so we want especially to thank you for making a special effort in being with us. We look forward to your testimony.

STATEMENT OF BARRY BOSWORTH, STAFF DIRECTOR, COUNCIL ON WAGE AND PRICE STABILITY

Mr. BOSWORTH. Thank you, Mr. Chairman.

---

[11]Letter from Assistant Attorney General John M. Harmon to Chairman Peter Rodino of the House Judiciary Committee, June 19, 1978.

[12]See, e.g., *Loeb* v. *Eastman Kodak Co.*, supra.

I guess I would like to start by emphasizing that I am not here today as a lawyer. I am an economist and am mainly concerned about the economic impact of this bill. From our perspective, therefore, we do not see this bill as an issue of class action suits, which I know has been raised in the press recently and which I think is a general problem that extends far beyond antitrust law. The *Illinois Brick* decision has had a significant impact on reducing the disincentives, against price fixing. The vigorous enforcement of antitrust laws can make a vigorous contribution to reducing inflation.

One point that should be kept in mind, for example, with respect to price fixing, is that it is purely inflationary. Unlike some other antitrust issues, there are no social benefits from price fixing. It is an unnecessary increase in profits above what would be received in a competitive situation.

It goes to a problem that is inherent in a major aspect of the current inflation difficulties this country has, which is the notable development over the last 20 or 30 years of the rigidity that has gotten built into the U.S. pricing system, and the inability of the traditional economic tools to influence price and wage behavior by manipulating aggregate demand.

Instead we are finding again and again, even in periods of recession as severe as 1975, that prices and wages are not brought down, particularly in the most concentrated sectors of the economy.

One of the reasons for this has to do with the potential for firms just to resist market pressures and hold their prices up. One very important point to make is that, if it were not for the legal penalties, price fixing is very easy to do from a business practice point of view.

The reason I think the United States has not had a major problem with price fixing is precisely because the penalties are very severe, and companies are very reluctant to get involved in situations where they might be convicted of price fixing.

This bill will restore one important incentive in that area by returning the right of indirect purchasers and others who are indirectly affected to intervene in price fixing situations.

I think that we would like to emphasize—it is spelled out in the written testimony—three aspects of that. One is that it is frequently true that middlemen lack the incentive in the U.S. economy to pursue vigorously antitrust issues. The reason for this is that very often a businessman has a very limited source of supply. If he were to bring an antitrust action against a major supplier, it would not be possible for him to find an alternative source of supply, at least in the short run.

The potential for other retributive actions to be taken against him very frequently limits his willingness to come forward.

In fact, we have had the same set of problems in our current efforts to run a price monitoring program. It has been very difficult to get suppliers to come forth and tell us about price increases. It is far more common for us to be notified about price increases by small businessmen who are indirectly affected. We find it necessary, therefore, to go back and trace through the chain of reactions to find out where the initial price increase actually occurred.

The private sector is where all the information is for the judgments that can be made when it is likely that a price increase or a

level of prices is inconsistent with cost and existing market conditions. It is not common for the Government itself to have the type of information on which to base that decision.

Rather, all of the information and the ability to make judgments lies with the private sector; it is not available to the Government.

Our concern is not so much with the issue of whether or not people can recover the costs or the damages done to them, but rather with the fact that this is an extremely important disincentive. It does not help us too much in fighting inflation to find out years afterwards that somebody may have recovered some of the costs of price fixing. The real value of these procedures is to increase the disincentives for corporations or other business firms to try to engage in price fixing, to make the threat rather than the actual event the major penalty.

We have found in the past that the private sector has been a vigorous enforcer of antitrust actions in trying to support the actions of the Federal Government. This decision would drastically reduce this. Therefore, it implies that the Federal Government would have to drastically step up its own actions in the antitrust area if we are to live with the *Illinois Brick* decision, a decision which implies reduction in private sector enforcement.

The Council's view, and the similar problems we have had in trying to analyze price changes, is that it is just inherently very difficult for a Federal agency to do it. It is much more successful and positive if it is done in the private sector.

I think the issue that is raised about spurious suits, class actions and others is a problem that extends far beyond antitrust actions alone. It is an issue that has come up in several sectors of judicial activity.

I don't think it can be handled by saying, "Therefore, we won't try to enforce the antitrust laws." From an economic point of view I think they are very important. Other proposals have been made. For example, I know many economists would favor, because we feel that the issues in antitrust are so complicated, some sort of judicial specialization with respect to antitrust.

The real difficulty in our mind is not with the lawyers; it is with the judges.

Senator LAXALT. I might indicate to the witness that during the course of the hearings this point was emphatically made. The expeditious processing of these cases seemed to be almost in direct relationship with the competency and background experience of the judge.

Mr. Shenefield indicated before it seems like a very simple process to find liability, find total damages, and then cut up the pie. But apparently in practice it is quite difficult for someone unskilled in antitrust to be able to handle this expeditiously.

I think that the point that you make is perfectly valid, that somewhere along the line in this whole complicated area of antitrust we may have to look at some form of specialization at the judicial level.

Mr. BOSWORTH. I think that is true. I guess we would just want to emphasize that although that is maybe a difficulty, that by no means diminishes the importance from our perspective of a vigorous enforcement of the antitrust laws.

I had a few more extended remarks in the written testimony, but I thought I would just submit it for the record since I think most of the issues have been gone over in prior testimony.

Senator KENNEDY. We will include it in its entirety.

Do I understand you to say that the information available to you on the establishment of a pricing mechanism comes much more from indirect purchasers—from the smaller companies and corporations?

Mr. BOSWORTH. In the first few months of this program of trying to find out about major price increases, we have found most of our information about major price increases comes from small retailers and small wholesalers, usually about the second level down. They are the ones who are the first to yell. It is very uncommon for a major firm to come tell us that his suppliers have recently raised prices. Of course sometimes in private conversations we find out that they think that was kind of a large increase and perhaps an unjustified one. But they are not about to ruin their business relationships with their suppliers by publicly coming forward and making a big issue of it.

That extends even into retailing with large retailers who have very close relationships to suppliers. Small business firms are more fluent. They don't care, so they are the first to yell.

Senator KENNEDY. Are they the ones who generally have more information about pricing than is available to you or other Government agencies?

Mr. BOSWORTH. Yes. We now have one source of Government information of any value, the Consumer Price Index. Over time the Wholesale Price Index has become an extremely poor measure of actual prices because of the list prices.

As you know, the price fixing and other situations are usually carried out by means of discounting and deviation from list price. These prices are never reflected in any kind of a public document available to the Government.

Senator KENNEDY. Is it your observation that it is inflationary to shift enforcement from the private sector to the public sector? Does this have an impact on the budget, for example, in terms of enforcement?

Mr. BOSWORTH. No. I think the dollar cost in terms of budget outlays in the Federal Government will be relatively minor.

What would concern us more is that it is a very significant reduction in the disincentives to any producer by decreasing the likelihood of his getting caught. Therefore, it can turn out to be inflationary in a very direct fashion by reducing businessman's fears of prosecution. Therefore, they may be more likely to engage in price fixing.

Senator KENNEDY. Can you draw any conclusions about the extent of price fixing based upon the information available to you? I know you are not a prosecutorial or investigative arm, but just in general terms, can you say it is de minimis? Is it significant? How would you describe it, or is there any precise way to describe it?

Mr. BOSWORTH. No. It is certainly not de minimis. Most of the economic estimates that have been made of the effects of price fixing are imbedded within broader antitrust measures, so it is difficult to pick out just the effect of price fixing. But I think that a

reasonable estimate of the cost price fixing would run into several hundreds of millions of dollars a year.

In the few cases that have been brought to light, one of the surprising things is the magnitude of the money involved over time. It was extremely difficult to prove in the cement case in the late forties. The case with the electrical industry in the fifties and sixties involved very substantial sums of money, and in the drug industry as well.

Just taking some of these individual cases and trying to infer from that the rest of the market in suggesting their costs, it is probably in the range of $100, $200, or $300 million.

Of course, since you never can find all of the situations, it is almost impossible to come up with a realistic estimate of these costs. They are part of an overall cost of what is called antitrust violations—deviation from perfectly competitive situations—that some economists have estimated to run as high as $100 billion. But that also includes regulation of the airline industry, regulation of the trucking industry, and other areas where they have been given exemptions from the antitrust laws.

Senator KENNEDY. But as I gather from what you say, it is a significant factor in the battle against inflation.

Mr. BOSWORTH. Yes.

Senator KENNEDY. It is an important weapon in meeting the problems of creeping inflation in our economy. You believe that to be so.

Mr. BOSWORTH. Yes; because I think particularly where it shows up is in periods of economic downturn where there are incentives to reduce prices. That is when most of the pressure comes to try to reach some agreement, frequently extremely informal, to hold prices up. And price rigidity has been a major feature in the current inflation problem.

Senator KENNEDY. Senator Cochran?

Senator COCHRAN. Mr. Chairman, thank you.

Several witnesses have indicated that because litigation complexity would be increased as a result of the indirect purchasers being able to sue, this is necessarily, they think, going to increase the cost of litigation. If that occurs, then I think we can presume that the increased cost of litigation and the expenses of litigation will be passed on to consumers. Isn't this in itself inflationary?

Mr. BOSWORTH. Yes, but in any law that you have, you have to measure the benefits against the cost. If you think the cost of litigation to the economic system—and it will definitely be passed on to the consumers—is greater than the cost of the antitrust violations, then you would decide not to do it.

However even if we employed every lawyer in the country, price fixing would still cost the consumer more than litigation.

Senator COCHRAN. Some have suggested, though, that this bill, instead of providing incentives to bring suits to discourage price fixing, will actually have just the reverse effect, that it will not really be a deterrent to price fixing because the litigation will be more complex; it will be more expensive to get involved in; damages will be harder to prove in an indirect action than in a direct action; and that courts can become congested because of this protracted litigation.

If that is true, and the legislation doesn't increase the deterrent, then that would be inflationary as well, would it not?

Mr. BOSWORTH. Yes. If it does not increase the deterrent, then by definition it would be.

However, as I understand the bill—and I can always be corrected on this—it simply goes back to where we stood before the *Illinois Brick* decision. I don't see why restoring what we once had is now going to have all of these disastrous impacts with court costs.

Senator COCHRAN. Do you have any figures indicating how many indirect actions have been brought prior to *Illinois Brick* against companies suspected of price fixing?

Mr. BOSWORTH. No; I think you would have to have somebody in the Department of Justice develop data like that.

Senator COCHRAN. They didn't know.

Mr. BOSWORTH. In some testimony before this committee, and Senator Kennedy spoke of it in his opening remarks, is that historically about a quarter of most price-fixing cases that have been brought have been involved with direct purchasers.

Senator COCHRAN. Thank you, Mr. Chairman.

Senator KENNEDY. Senator DeConcini?

Senator DECONCINI. I have no questions.

Senator KENNEDY. Senator Hatch?

Senator HATCH. Thank you, Mr. Chairman.

Mr. Bosworth, the new class action provisions of this particular bill apparently reflect on an intent to enable indirect consumers to recover. Yet one of the pro consumer witnesses at the hearings, Beverly Moore, has recently written: "the empirical evidence is indisputable that many absent class members, not infrequently a majority of them, do not avail themselves" of the opportunity to collect their small recoveries. Mr. Posner and Mr. Ellis testified to the same effect. There has been no testimony to the contrary.

How then can we honestly state that the consumer class actions compensate consumers?

Mr. BOSWORTH. Because the whole purpose, from at least my perspective, has almost nothing to do with the recovery of damages. In my view that is a relatively unimportant part of the law.

It is the disincentive and the fear that companies have of being prosecuted that leads them not to fix prices. The value of most of the antitrust litigation that I have seen, has been the disincentive it puts on people.

We are concerned that if there is not a real threat of prosecution for price fixing, more companies would be tempted to engage in it.

Senator HATCH. Aren't you concerned about opening this field up to indiscriminate class actions and allowing the antitrust people to use this device?

Mr. BOSWORTH. I think that would be a legitimate problem. I am not a lawyer. Lawyers will look over the bill carefully and argue among themselves about whether or not they think that is what would happen. I haven't got the foggiest notion whether you will end up with a million class action suits.

Senator HATCH. I think you can presume that. You make it easier for attorneys to sue in class actions. Do you know how many class action suits have resulted in a verdict or judgment?

Mr. BOSWORTH. No; from an economic point of view, I guess I would think that a lawyer would raise a class action suit when he thinks he has a reasonable chance of success versus the cost of the litigation. If you think that there are too many that are spurious, that is an issue where your judges should be better trained to handle that.

Senator HATCH. Let me add to your knowledge. There are a number of lawyers who bring class action lawsuits whether they have good causes of action or not because they know that they can get them settled because it is cheaper to settle them than to have to go through the awful defense cost of defending them.

That is a factor in our society. It is really one of the big reasons so many people experts and authorities in the field, are against opening this wide up.

The second reason is that the major suits which have been brought as a deterrent to antitrust violations have been brought by direct purchasers rather than indirect purchasers. Were you aware of that?

Mr. BOSWORTH. There has been a mixture. There have been significant antitrust cases brought by indirect purchasers.

Senator HATCH. Not a significant percent.

Mr. BOSWORTH. As far as I can see from the available information, about a quarter of the cases that are brought and prosecuted are indirect.

I guess what concerns us, if you reach a situation where a company says that, "The only risk I have in price fixing is whether my direct purchasers will bring an antitrust suit against me," there are an awful lot of other weapons it could use against direct purchasers to assure they will never do it, like the threat, "I will just cut you off and sell to others."

Business relations between the supplier and purchaser are an extremely important part of doing business. Yet it is in exactly those situations where the opportunities for price fixing are greatest.

I can understand your concern about class action suits and whether or not they get to the point where they can prosecute. I don't know anything about the legal aspects of class action suits. I am concerned here with the issue of whether or not it is appropriate to limit antitrust price fixing cases strictly to the direct purchasers or whether it shouldn't be extended to indirect purchasers.

Senator HATCH. Yes; you are concerned about the disincentive effects to bring antitrust actions.

Mr. BOSWORTH. Certainly there must be some way to draw up a law that can, one, simultaneously deal with the issue of class action suits being spurious and, two, deal with the real, legitimate situation.

Prior to the *Illinois Brick* case, I haven't found that the courts were being inundated with spurious cases. I do think there is a problem of judges being inadequately informed about the complexities of antitrust issues, but that is a separate issue.

Senator HATCH. Wouldn't this bill expose potential defendants to damage claims 6 or even 12 times the actual damages as a result of separate actions being instituted by indirect purchasers? Would that not also be a consequence?

Mr. BOSWORTH. No; I think the judicial process should be capable from an economic point of view of distributing the burden of price fixing. There is not that much difficulty in tracing through the excess cost and finding out who actually pays. I don't think that the possibility of their being double and triple accounting of those costs is a significant problem. Information can be supplied to the courts to deal with that.

Senator HATCH. It is my understanding that the Antitrust Council of the American Bar Association adopted the following resolution after consideration of the reports of the special *Illinois Brick* task force by both plaintiff's and defendant's lawyers:

> The reports of the task force do not provide a workable solution to the considerations of judicial administration which we believe caused the Supreme Court to decide *Illinois Brick* in the way it did, and the efforts of the task force demonstrate that such a workable solution is not apparent.

Now, didn't the department's division staff participate in the selection of this special task force, and what is the staff's reaction to the council's resolution?

Mr. BOSWORTH. No; the Council on Wage and Price Stability didn't have anything to do with that. We don't participate in anything like that. We are primarily an organization; we have about four too many lawyers right now.

Senator HATCH. You and I may agree on that. Won't this bill turn antitrust actions into a dole—while we are at it, I think we might have far too many economists. [Laughter.] Or should we say far too many economists who don't know what they are talking about. Fortunately, I believe you do in many ways; maybe not in this bill. But nevertheless, I have been very appreciative of your candor in public and things you have chatted about in public in the past. I have a lot of regard for you personally. But won't this bill turn antitrust actions into a dole between economists where no one would really know how much of the alleged illegal price increases has been passed on at each level?

Mr. BOSWORTH. No; I want to stay away, if I can, from the legal issues that you raise.

Senator HATCH. But that is a very important aspect.

Mr. BOSWORTH. But on this question of whether it is possible to find out where a supplier has raised prices higher than they should be, and whether it is possible to find out what indirect purchasers have paid, the answer is yes. The cost passthroughs, the operation of a market, the charging of a uniform price to all purchasers, does make it possible to allocate those costs in a way that very few economists would disagree with. That is not a major technical problem.

Senator HATCH. Won't the antitrust defendants be forced to pay much more than three times their actual overcharge because of the multiplier effect?

Mr. BOSWORTH. I think that is the same thing. You can figure out exactly, not by multiplying through the costs, but by computing the dollar amount of those costs passed through to the purchaser. You would not have an actual multiplier effect there, although they will end up paying more because of the court costs and all.

Senator HATCH. Can you give me your opinion as to what has been the effect of the 1974 amendment to the Sherman Act for

criminal penalties as a disincentive to price fixing? If you will recall, that is now a felony. I wonder if you have any information with regard to that.

Mr. BOSWORTH. No, sir.

Senator HATCH. Thank you, Mr. Chairman.

Senator KENNEDY. Senator Baucus?

Senator BAUCUS. Mr. Bosworth, I wonder if you could tell us to what degree section 4 damage suits aid you in pinpointing trouble spots in the economy. Do they aid attempts to spot excessive price increases? Is it a fact that the filing of damage suits helps you identify trouble spots so that you can follow up with investigations?

Mr. BOSWORTH. Since I have had this job, there have been a couple of such episodes where that has been true. Some local allegations with respect to gypsum led us to take a very close look at the gypsum market and the way it was operating.

To some extent we watch markets where there has been a history of price fixing a lot more closely than we watch some other markets. There is some guidance there.

Senator BAUCUS. So it is of some value.

Mr. BOSWORTH. Yes; but don't overstate it.

Senator BAUCUS. The second question is, Isn't it true that in recent times there has been a greater concentration of economic wealth due to mergers and consolidations rather than through corporate disintegration or proliferation of business entities?

Mr. BOSWORTH. Well, there have been two aspects to the merger movement. Part of it would bear on it and part wouldn't. Many merger activities have been unrelated to business. It is a way of going into one area of the economy, like oil, and another retail trade and arbitrarily take a risk between the two.

The direct market merger activity of sort of picking up a competitor has not picked up significantly from what it was in the fifties and sixties.

Senator BAUCUS. Do you agree that mergers and consolidations can be characterized as having an inflationary effect? Are you able to characterize the effect at all?

Mr. BOSWORTH. Specifications will vary. In general it has been our feeling that the merger activity that has been going on in the United States on a net balance has been inflationary because of the need under the law for the Government to prove that there is going to be harm, which is very hard to do, rather than the requirement on the private side that they prove there are going to be benefits.

From an economic point of view, we believe that mergers will normally lead to a reduction in competition and higher profit margins than before.

Senator BAUCUS. To what degree does this bill, *Illinois Brick,* address itself to the prosecution of cases of these inflationary activities? To what degree will this bill help address this problem?

Mr. BOSWORTH. It is only a small part of the whole problem, if that is what you are getting at. It helps in one area, which is simply the extent of existing market structures, by keeping the disincentives fairly high for firms who might be tempted to engage in price-fixing situations.

On the other hand, there are many other attributes of the whole issue of concentration of economic power and its impact on inflation, which we believe in some cases is quite substantial, that are not addressed in any way by this bill.

Senator BAUCUS. Can you quantify the impact at all?

Mr. BOSWORTH. One example of the quantification running into the several billions of dollars was to see what happened when the airline industry was regulated and let open to competition. We think that the cost of regulation in the trucking industry may run somewhere in the order of $5 billion. That is specifically because they are exempted from the antitrust laws. We think that costs about $5 billion a year.

Senator BAUCUS. Thank you, Mr. Chairman.

Senator KENNEDY. I am glad to get that additional information. [Laughter.] Also, of course, the information on mergers.

I will just make one final point. On the question of allocation, Mr. Bosworth, as you would know, between the *Hanover Shoe* decision and *Illinois Brick,* the courts did allocate damages in a number of cases. That is a matter of record. Were we not able to deal with that issue?

Mr. BOSWORTH. I really don't quite see what the difficulty is of taking the cost of the primary purchaser and allocating it out to the buyers.

Senator KENNEDY. You have given very helpful testimony. We want to thank you very much, and particularly for your special effort to be here. Thank you.

[The prepared statement of Barry Bosworth follows:]

PREPARED STATEMENT OF BARRY BOSWORTH

I'm pleased to have this opportunity to discuss the connection between antitrust, and more specifically the intent of the proposed "Antitrust Enforcement Act of 1979," and our anti-inflation effort. As you know, inflation is one of the most important problems facing our economy. Yet the arsenal of acceptable and effective anti-inflation weapons is regrettably limited.

Our main effort to reduce the current rate of inflation centers on a voluntary program of restraint, coupled with responsible monetary and fiscal policy. However, longer-term improvement can also be contributed by the forces of market competition strengthened by antitrust action, freer international trade, and elimination of other barriers to competition and sources of inefficiency.

When all is said and done, strong price competition provides a powerful weapon against inflation and the most effective means for removing inefficiencies and improving the welfare of our citizenry. Competition checks price increases very directly. It also moves resources quickly to the places where they are most urgently needed, and promotes the rapid development and adoption of more efficient production techniques.

The Council has long been concerned with the impact of imperfectly competitive markets on prices. The Council on Wage and Price Stability Act directs the Council to "review and analyze * * * the effect of economic concentration and anticompetitive practices * * * in various sectors of the economy." [1] Practically all of the Council's public studies of price movements in selected industries have discussed the impact of market structure on prices. Price fixing is a direct restraint on competition. Its inflationary impact is immediate—equalling (at a minimum) the difference between the price that suppliers set in collusion and the price that would result in a free market.[2] This bill in its present form would help rectify this situation by allowing indirect purchasers to sue for treble damages, thus reinforcing the disincentive facing potential price fixers (thereby reducing the incidence of the practice).

---

[1] Section 3(a), paragraph 1 of the Council on Wage and Price Stability Act, Pub. L. 93-387 (Aug. 24, 1974) as amended.

[2] This does not include the impact on other prices in the economy, and the cost of the welfare loss resulting from misallocation of resources.

Specifically, the Antitrust Enforcement Act, as now proposed, would undo the harm inflicted by the Supreme Court's *Illinois Brick* decision. By precluding all parties other than the direct purchaser from recovering treble damages, the *Illinois Brick* decision undermines what Congress and the courts have repeatedly said to be the aims of private antitrust enforcement: deterrence of anticompetitive conduct and compensation for economic injury. The basic problems flowing from *Illinois Brick* can be summarized as follows:

(1) *The decision is unfair.*—While the Court is seeking to enhance enforcement of the antitrust laws by preventing the multiplication of parties, its decision has just the opposite effect, since direct purchasers are often middlemen who may lack motivation to sue. They often can pass on any overcharge to another middleman, or the final consumer, and are reluctant to jeopardize valuable relationships with their suppliers. The consumer, who actually bears most of the injury, is left with no recourse. *Illinois Brick* unchanged could mean hundreds of millions of dollars every year in uncompensated injuries.

(2) *Private antitrust enforcement gives vital support to Federal Government efforts.*—By restricting private antitrust enforcement to direct purchasers, the vast group of "private Attorneys General" is seriously diminished. A recent study revealed that almost two-thirds of private treble damage cases since 1960 involved indirect purchasers, with over 25 percent of the total number of antitrust private damage actions involving only indirect purchasers.[3] In fact, before *Illinois Brick,* there were over ten times more private damage actions than Government enforcement actions. Private parties are obviously in a better position to spot antitrust violations and, collectively, they have vastly more resources than do the Justice Department and the Federal Trade Commission. Of particular importance are state legal offices which have sophisticated antitrust departments to bring parens patriae suits under the Antitrust Improvement Act. Such activity provides vital support to Federal enforcement efforts, and the Justice Department admits that the possibility of treble damages is sometimes a stronger deterrent than the Department's own criminal prosecutions.[4] At the same time, advancing vigorous enforcement of antitrust laws by private parties need not and should not foster the propagation of spurious suits which harass without social benefit. This potential problem in antitrust litigation clearly is not restricted to the present bill. However, the impact on the incidence of such suits of increasing the number of parties with standing to sue should be dealt with.

(3) *The vacuum in enforcement could require increases in Federal programs.*—Unless Congress reverses *Illinois Brick,* a substantial increase in the resources available for the Government's own antitrust efforts will be necessary just to maintain enforcement at pre-*Illinois Brick* levels. This could only come at the expense of other programs, or by further straining the budget. If enforcement is not increased Government agencies might commit additional resources to regulating those markets where competition is insufficiently protected, even though such regulation may itself contribute to inflation and may often be an imperfect remedy. Until the necessary actions are taken, antitrust enforcement will be commensurately reduced.

We should rely as much as possible on market competition to lessen some of the long-term inflationary pressures that threaten our economy. Improvement of the competitive structure of our economy requires an attack on many fronts: effective antitrust enforcement, removal of import and other barriers to trade, elimination of anti-competitive entry and rate regulation and many others. Since the antitrust laws support our anti-inflation program, I endorse the principle of overruling *Illinois Brick* by enacting legislation allowing indirect purchasers to participate in private antitrust enforcement.

Senator KENNEDY [continuing]. Our next witness is Gov. Bruce Babbitt from the State of Arizona, representing both the State and the National Governors Association, which has given unanimous support to this legislation.

Under the Hart-Scott-Rodino Act passed in the 94th Congress, State attorneys general are empowered to bring actions on behalf of their consumers. No one recognizes that responsibility more than Governor Babbitt and the attorneys general themselves. Gov-

---

[3] See S. Rept. 95-934, Part 1 at p. 18 (June 14, 1978) to accompany S. 1874.
[4] *Id.*

ernor Babbitt has served as attorney general of Arizona, and was particularly active in the enforcement of antitrust and consumer laws. It was Governor Babbitt who introduced the resolution in which the National Governors Association endorsed this bill.

Welcome, Governor.

STATEMENT OF HON. BRUCE BABBITT, GOVERNOR, STATE OF ARIZONA: AND NATIONAL GOVERNORS ASSOCIATION, ACCOMPANIED BY KEN REED

Governor BABBITT. Thank you, Mr. Chairman.

It is a pleasure to be here on behalf of the National Governors Association. I have prepared a written statement which I would like to have inserted in the record in lieu of simply reading it.

Senator KENNEDY. Yes. It will be printed in its entirety.

Governor BABBITT. Thank you.

In lieu of that, I would like to make just a few brief remarks covering some of the grounds in the report.

The National Governors Association last August meeting in Boston unanimously voiced its support for this legislation. The Governors, of course an exceedingly diverse group, politically, geographically, reflect diversities of their States. Every Governor present last August voted in support of this resolution. Governors are not noted for their unanimity on any subject.

I think by way of introduction it might be worth commenting on why each of the Governors of the States, without qualification, support this legislation.

The roots of that unanimity I think lie in the climate of fiscal austerity that States are now struggling with. It is a familiar issue with all of us. It is an issue which has come to rest I think most rapidly in the States. Each State now, each Governor, is confronted with a budget which is being analyzed literally job by job, dollar by dollar.

Damages which the States are suffering from antitrust violations, which might have gone relatively unchallenged in the past, now assume a new significance because of this climate of fiscal austerity.

In my own State, for example, we have a constitutional expenditure limitation, which means that at the start of each budget year we have a fixed dollar amount which we cannot exceed which we must allocate. The pie is fixed.

What that means is that any dollar lost to antitrust violators is literally a dollar that cannot be used in the medical program, the highway program, or in some other State service.

Antitrust violations, with resulting damage to State and local governments, take taxpayer dollars out of the programs that cannot by constitution be replaced. I would like, if I might, to provide you with one specific example out of our experience in antitrust enforcement.

Prior to the decision in the *Illinois Brick* case, the State of Arizona began examining its highway construction program, a major item on the budget of every State. We commenced a lawsuit known as the *Western Asphalt* case rising out of overcharges in asphalt road building.

That lawsuit went to judgment and the State of Arizona as a plaintiff in that case, clearly an indirect purchaser, won a judgment of $2.1 million. That went into the Arizona Highway Trust Fund and literally reduced the taxpayer burden for highway construction by that amount. There were virtually no direct purchasers of any kind in that lawsuit. The judge in his opinion in the ninth circuit commented on the absence of direct purchasers. That opinion I think stands very clearly in the factual context for the conclusion that the direct purchasers had little or no interest in enforcement but, more importantly, that it was the State who suffered the loss, who collected the damages, who put that money—in our case, $2 million—directly back into the highway trust fund.

That suit could not be brought today. The taxpayers of Arizona could not make that recovery in the wake of the *Illinois Brick* decision.

Having succeeded in minimizing highway costs with that lawsuit, we then proceeded to examine other areas of highway construction. We very rapidly got into concrete and ready mix which has a construction cost in the magnitude of asphalt.

By the time we were done analyzing our historic relations, direct purchasers and the State as an indirect purchaser, it became very clear we had in our case a massive, explicit conspiracy among most of the concrete, gravel, and ready-mix suppliers in Arizona—indeed, throughout the West—of dwarfing the *Western Asphalt* case in terms of dollar impact in the State of Arizona.

Our preliminary computer damage analysis would indicate that the taxpayers, as a result of this explicit conspiracy, lost between $10 and $20 million; and that by going to court in the concrete and ready-mix cases, we stood I believe an excellent chance of recouping that money lost in highway construction.

Senator HATCH. Mr. Chairman, could I interrupt?

How many taxpayers do you have? How many citizens do you have in Arizona?

Governor BABBITT. Senator Hatch, we have approximately 2.5 million residents.

Senator HATCH. So you are talking about $6, something like that, apiece.

Governor BABBITT. Senator Hatch, if I might put it in another context, the recovery in *Western Asphalt* cases of $2 million, I think, could be judged against our annual State appropriations for highway construction of about $50 million. The recovery in that one case was about 4 percent of an annual budget.

In the concrete cases, it would have been I think significantly higher, perhaps 30 or 50 percent.

Senator BAUCUS [presiding]. Governor, I wonder if you could tell us whether the direct purchasers would have sued the asphalt companies. You commented on the inability of the State to sue.

Governor BABBITT. Senator, in the *Western Asphalt* cases, the court itself commented on the absence of the direct purchasers; in effect saying that in the judgment of the court, it would have never happened. I think that is a fair reading. In the concrete cases, the direct purchasers throughout a massive piece of litigation which spread nationwide were almost totally absent.

I think most of the plaintiff's lawyers in the case feel that they were in one way or another implicitly in conspiracy with the manufacturers and suppliers, making it necessary for the State as an indirect purchaser to go to court.

Now at the time that discovery began in that case, the bombshell of *Illinois Brick* burst upon us. I have to tell you today that the State's damage claims, which I view as exceedingly good, are now dying on the vine. The case has not yet been dismissed, but it has lost its vitality. It is laying there virtually dead.

The State of Arizona and its taxpayers are deprived of the claim because of the bombshell that burst in *Illinois Brick.*

There are a number of other cases, sitting on the table, that will probably never even get to court. Taxpayers of Arizona have paid money that they shouldn't have paid and have literally been deprived of tax dollars by conspiracies in plywood, electrical fixtures and junction boxes, concrete and rebar steel; good cases thrown out in Texas, as one example, in the wake of the *Illinois Brick* decision.

The upshot of it is that the present state of the law is depriving the States the ability to recover illegally taken tax dollars in the wake of fiscal austerity and expenditure limitations. Those are dollars that are literally, in the most literal sense, being taken from other parts of the State budget.

If I might for just a moment, I would like to share with you some of our experiences in consumer class actions. I had not originally intended to get into that, but apparently it is of some interest.

I have with me today Ken Reed who I hired some 4 years ago to direct Arizona's antitrust effort. We have had some considerable experience in indirect purchaser consumer class actions. Two I think are of special significance in terms of your study and analysis.

The first is the *Bakery Products* litigation, a massive price fixing conspiracy covering almost all bread products sold in Arizona. The State filed on behalf of its consumers the case, which was litigated aggressively under the control of a firm, resolutory judge. These are the following results.

First of all, the consumer recovery was 80 percent of each dollar. The court and settling parties adjudged that 80 percent of the fixed prices had been passed through to the housewives and consumers who bought bread in the stores. That amounted in that settlement to $2.5 million.

Searching for a way to test consumer response, we mailed out notices and advertised in newspapers, and 250,000 consumers mailed in claims. In due course, without any undue problem, their claims were assessed, evaluated by fixed criteria, audited and mailed out. A quarter of a million consumers in Arizona received in the mail checks averaging about $10.

We then did an audit and examination of the costs in making that recovery. The cost was a little over 10 percent for the total recovery. That includes out-of-pocket cost, litigation costs, processing, and attorneys fees.

It is our judgment as a result of the bakery products case a quarter of a million consumers benefited in overhead, in cost of attorneys fees, of approximately 10 percent.

We then filed in the milk products case a similar conspiracy involving again blatant disregard of the antitrust laws, explicit up-front price fixing, nolo contendere plea criminal case followed by a civil action. Again the same story.

The direct purchasers, in this case the grocery stores, were not interested in bringing the claim. Believe it or not, half the grocery stores didn't even file claims once the case was settled. Their relationship with the dairy industry was so incestuous that, one, they didn't bring the suit; and, two, once the money was available, they didn't even come forward to claim it.

The net result was a partial settlement of about $4 million during this past year. Ninety percent of that was adjudged by the court—again under able, aggressive direction—to have been sustained by consumers.

We again went through the claims procedure. This time 350,000 residents of Arizona responded.

I think what that means is that consumers, the people most directly affected, are in fact voting in their self-interest and recognizing that these cases not only provide deterrents but provide positive benefits also.

Again, the average recovery will be relatively small, perhaps $15, $20, $25. But there are a third of a million consumers out there to whom that is a significant amount.

Let me say in conclusion again the Governors support this legislation. They have indirect purchasers in their citizens. In Arizona we are highly committed to the free enterprise effort. Our antitrust enforcement, which received unanimous support from the conservative side of our society, from the press, the results of our efforts have I believe reinstilled a lot of faith in the viability of the enterprise system.

It would be an enormous setback and tragedy if *Illinois Brick* were allowed to stand. Thank you.

Senator BAUCUS. Thank you very much, Governor.

Senator Hatch?

Senator HATCH. Thank you, Mr. Chairman.

You indicated that you recovered in this one case $2.5 million and returned about $10 per consumer to 250,000 consumers. In these various cases in the State of Arizona, how much were the court costs, attorneys fees, and so forth? How much time did that take up?

Governor BABBITT. Senator Hatch, out-of-pocket costs were 10 percent of that one-quarter of a million dollars. Mr. Reed, who is with me today runs an antitrust section which has approximately five or six lawyers in it. I would guess that he probably devoted two lawyers time for the better part of a year. Is that fair, Ken?

Mr. REED. Yes.

Senator HATCH. It is my understanding that the States, and you among them, are arguing that this bill is necessary in order to permit them to recover for their own purposes in their proprietary capacity. But no one has contradicted the testimony of Professor Bernstein last year in which he says that States can obtain assignment from their suppliers and contractors if their rights as first purchasers have been violated. Indeed, such assignments would

seem to be valid as a matter of Federal antitrust laws with standard boilerplate language in purchase contracts.

If that is so, and I believe it to be so, why do we need this complex and confusing legislation which may have a lot of deleterious side effects on society without perhaps as many benefits as you have indicated in your personal experience if the States can take care of the problems on their own?

Governor BABBITT. Senator Hatch, if as you suggest assignments were routinely available——

Senator HATCH. What you have to do is put a boilerplate in the contract.

Governor BABBITT. I disagree with that. But were that routinely available, we would then be back into the parade of horrors that has been suggested by the opponents in terms of complexity of litigation, none of which I think to be true in terms of our experience. The problems of the assignments I think are many. We have tinkered around with a variety of forms, getting into negotiations with lawyers for the suppliers. There are different assignment forms presumably necessary in a variety of areas.

We frankly think that the legal right ought to lie on the face of the law with the damaged party. It shouldn't be necessary for us to enter into negotiations with direct purchasers, many of whom in our experience are on the border of the conspiracy and who will not be eager to cooperate in any way with the State.

Senator HATCH. As I understand it, the cases you are talking about are parens patriae cases. If that is so, why weren't they thrown out if they are *Illinois Brick*?

Governor BABBITT. By some exceptionally good fortune, both of these cases went to settlement. One went to settlement pre *Illinois Brick*. One went to settlement shortly after when there was some existing ambiguity about the effect of *Illinois Brick*.

Senator HATCH. There is still that existing I should say great doubt whether *Illinois Brick* does overrule the parens patriae cases.

Governor BABBITT. I understand, sir.

Senator HATCH. Could you give me an example, if you would, of any case, any parens patriae case which has been overruled since *Illinois Brick*?

Governor BABBITT. Let me refer to Mr. Reed, if I might.

Senator HATCH. Any parens patriae case that has been overruled since *Illinois Brick*, and that is in the country, not just Arizona.

Mr. REED. That is two-fold. I think in our dairy products case that case was settled for approximately $4 million in the wake of *Illinois Brick*. Had *Illinois Brick* not been decided, I think the conservative value of that case would have been in the neighborhood of $10 to $12 million.

Senator HATCH. Answer my question. Can you give me any illustration of any parens patriae case which has been overturned or overruled since *Illinois Brick?*

Mr. REED. One.

Senator HATCH. Now that is in the country.

Mr. REED. In the dairy case it was ultimately a substantial reduction. Other cases, in legitimate parens patriae cases, cases where the Federal Government has returned indictments alleging

price fixing, like in the water heaters placed in consumers homes, alleging price fixing in the other components of public housing, of consumer products, these are the cases that I think the legislative history and the Hart-Scott-Rodino Antitrust Improvements Act of 1976 indicated that State attorneys general would bring prosecution and return dollars to taxpayers on.

Despite those Federal indictments in those products, price fixing of those products, those cases have not been brought. I think, from personal experience in Arizona, and from my conversations with other attorneys general, parens patriae cases were not brought in the wake of those Federal cases because of *Illinois Brick.*

Senator HATCH. But that is a decision you have made. There is no court that has overturned parens patriae cases since the *Illinois Brick* decision, to my knowledge.

Mr. REED. I do not think the court has addressed the question because the Supreme Court indicated very clearly in the *Illinois Brick* decision that the indirect purchaser rule applied as well to parens patriae cases as to actions brought under section 4.

Senator HATCH. You and I respectfully disagree on that point.

Mr. REED. Yes, sir.

Senator HATCH. Let me ask you this: Do you agree with the Governor that there is no way that you could put a boilerplate assignment in the State contracts, especially with all of the State revenues you have?

Mr. REED. As the Governor indicated, the assignment is of no use in helping to recover dollars that have already been stolen from State revenues. As the Governor indicated, there are negotiation problems, there are problems with the fact that many of the people we are dealing with are on the fringes of conspiracy, if not part of it, and they are highly disinclined to help us do anything to recover against manufacturers who are one step removed.

Senator HATCH. That is the same problem you have anyway. If you insist on the assignment, you will get them and if you have them, that doesn't deter the State's attorney general in bringing these suits in anyway. Isn't that true.

Governor BABBITT. I am not as optimistic. If we insist on the assignment, we get them. There are a number of purchasing areas where unfortunately the notion of a highly competitive market with lots of responses to every RFP. It is not always the case.

I think it is fair to say in some areas where you are purchasing against narrow specifications, where there are not a lot of alternatives, you might literally be frozen out of a desirable product by a conspiracy between manufacturer and the director.

Senator HATCH. It is very difficult for the States to get assignments in some instances. You have to admit it is not any in other instances. Is that correct?

Governor BABBITT. I am sure if you are buying bubble gum or standard spec widgets.

Senator HATCH. I think it may even be asphalt, you see. All I am saying is you don't know unless you try, but if you try, then, in those cases you would have every right to bring a suit without this bill which may have some awful—not may—but will have some awful repercussions and problems.

42-005 O - 79 - 4

Governor BABBITT. It might arguably do something for the State as purchaser. The concept of assignment is obviously we do nothing for the State in the parens function on behalf of the consumers.

Senator HATCH. Let me ask another question. What stops you from bringing this action within the State courts?

Governor BABBITT. There are some very serious problems.

Senator HATCH. I know what those are because I don't think they are.

Governor BABBITT. *Western Asphalt and Concrete* are good examples where you have a massive conspiracy, perhaps not nationwide but certainly regionwide.

There are mainly and simply many defendants beyond the jurisdiction of the State courts as a necessary corollary of the Federal system principle. The only way of getting all of the parties in a massive conspiracy before the court is to be in the one court in this land that has nationwide reach. That is the U.S. District Court.

Senator HATCH. I have to admit that I would feel the same jurisdictional problems would apply in Federal court, although there are some nuances that are different. In other words, the arguments I have been given by the State's attorney general are that, No. 1, some of the States don't have the laws that would enable them to bring it. My suggestion to them is let's change the laws so that you can bring them within maybe the less auspicious State courts but where you might recover even more from State people and, No. 2, that even if they have the laws, there may be some jurisdictional advantages to bringing them in the Federal court.

My attitude is I think that is highly speculative and perhaps doesn't solve the problem anyway. So the point I am trying to make is that the States have lots of alternatives without having this bill, which may cause all kinds of legal distortion in America and no question as far as I am concerned in discriminate class action suits.

Governor BABBITT. I couldn't disagree more respectfully, but frankly, on the jurisdiction issue.

Senator HATCH. Are you an attorney?

Governor BABBITT. Yes, sir, I am.

Senator HATCH. Are you a trial lawyer?

Governor BABBITT. Yes, sir. I have practiced antitrust law.

Senator HATCH. You are very knowledgeable.

Governor BABBITT. The main fact is——

Senator HATCH. I just disagree with you.

Governor BABBITT. With coordinated pretrial discovery nationwide and the jurisdictional reach of the Federal courts, the difference is like day and night. There is no way that you can effectively manage a large regional conspiracy case in the State court. You certainly can in the Federal court.

Senator HATCH. Is that because the judges are better or the judges are more equipped to handle it?

Governor BABBITT. It is because, as a generalization, the jurisdictional reach of the Federal court is much, much broader than the jurisdictional reach of the State court. There are constitutional limitations.

Senator HATCH. Why aren't there limitations on the Federal courts?

Governor BABBITT. Because the U.S. Federal system is one court operating under the law with essentially nationwide reach. The Supreme Court has made it clear for 200 years that the State courts cannot enter their jurisdiction.

Senator HATCH. I take it that Arizona, like Utah and many other States, if not all of them, has a long-arm statute.

Governor BABBITT. We have, Senator, the maximum long-arm statute permissible under the Supreme Court decisions.

Senator HATCH. You are saying if you were to expand that to what the Federal court jurisdiction is, that it would be unconstitutional.

Governor BABBITT. Absolutely.

Senator HATCH. That is all for now.

Senator BAUCUS. Senator DeConcini.

Senator DECONCINI. Let me point out for the record that Governor Babbitt had an outstanding career in the civil law before he became the attorney general, coming from a business practice that did a great deal of prior work in behalf of his clients and has in fact a longstanding record, commitment to the free enterprise system in the development of the business in Arizona, both in the private practice and as the chief executive of the State of Arizona.

I think it is important to note that the Governor's testimony here is based on experience that he personally was involved in arguing under the cases that he has discussed today in his testimony before the ninth circuit and the district court in Arizona.

Governor, I noticed that the resolution that you cite here is from the National Governors Conference in your testimony. Do you know for a fact were the Western States represented there and did they vote in favor of this to your knowledge?

Governor BABBITT. Senator, first, I appreciate your remarks and your support and assistance which you have very generously given for our efforts in law enforcement in Arizona and for the antitrust matters that are before us now.

In Boston, most of the Western States were there. And I might add that the Governors voting in support of this included people as diverse, and I say diverse, as former Governor Meldrim Thompson and myself. It is purely a question of the self-interest of 50 sovereign States.

Senator DECONCINI. Was the Governor of Utah there?

Governor BABBITT. Governor Matheson has been a strong, vigorous, exceedingly articulate advocate of this piece of legislation.

Senator DECONCINI. Is that true of the attorney general of Utah?

Governor BABBITT. The attorneys general of the 50 States, again incredibly diverse in political view, have consistently and unanimously supported this legislation.

Senator DECONCINI. So it would be safe to say that this expression by the National Governors Association is certainly one of representing what they feel is the best interests of not only the Nation, but certainly of their particular State.

Governor BABBITT. Senator, if I might in closing, this legislation is supported by local governments and by the people of this Nation,

beyond any doubt. The opposition is coming from a few highly self-interested people in the business community, a small minority.

I might say that many of the businesses, many of the large businesses are not joining this effort to torpedo this, but it is a selfish, narrow, self-centered opposition that flies in the face of unanimous support from public officials and I believe the public.

Senator DECONCINI. Governor, you point out in your testimony your concern on paragraph C of section 41, the reference to the class action provisions there.

Is it your belief that that paragraph C–1 should be excluded from this bill?

Governor BABBITT. Senator, I would strongly advocate that C–1 and C–2 ought to be consigned to your subcommittee. They don't belong in this bill. They don't do a lot of damage. I read them as carefully as I can, as essentially a rescript or a restatement of the case law, existing today under rule 23. There is some ambiguity in the rule 23 decisions and it may or may not be in accordance with the majority of the decisions.

But in any event, it is not central to this bill. It has nothing to do with this bill, and I think it is very proper that it be the subject of the work you are doing.

Senator DECONCINI. We could pass this bill extracting section C from section 41 and do no violence to the concept of the legislation before us today.

Governor BABBITT. Senator DeConcini, it is my view that proponents and opponents alike will probably in the main agree to that. It is a rule 23 issue and deserves serious attention. There is no question that there are some deficiencies with the class action statute.

The class action issue has mushroomed beyond the wildest dreams of the framers of rule 23. My concern is that that issue not be used as a red herring to torpedo the issue of allocation of antitrust recoveries. I would be delighted to see it out of this bill.

Senator BAUCUS. Senator Cochran?

Senator COCHRAN. I would be happy to yield.

Senator HATCH. I was interested in your characterization of the opposition of this as being narrow, selfish.

Governor BABBITT. I apologize and I retract that remark. It was made in excessive rhetoric.

Senator HATCH. I appreciate that. I felt it was a little harsh when we have a leading academician, Prof. Milton Handler, present, and former judges, economists, plaintiffs, bar, small business groups throughout this country, Idaho Cattle Feeders Association, Texas Cattle Feeders Association, Iowa beef industry counsel, the National Livestock Meat Board, including Business Roundtable, NAM, Manufacturing Chemists Associations, Pharmaceutical Manufacturers Associations, Grocery Manufacturers Association, Food Marketing Institute, American Paper Institute, the American Bar Association, City of New York which is probably the most prestigious antitrust bar association in the country, AVA as antitrust counsel, et cetera. You go on and on.

You, I think, have more than satisfied me with your statement, your most recent statement. But all I am saying is that there is a

legitimate, very sincere, very dedicated consideration on the part of those who have not seen much merit in this bill.

I raised the point earlier that it may be from the State attorneys general standpoint, I wish there was some way of solving that problem, but there are a lot of other balancing considerations that maybe the public officials have not considered in this matter in their self-interest themselves to take care of their jobs for their State, which is a legitimate self-interest, and I admire you for coming here and saying that.

But I just wanted to make that point.

Governor BABBITT. Senator, as I said, I apologize for the rhetorical excess. I would finish by adding that I spent 7 years with the antitrust defense law firm, including defending such prestigious clients as Mr. Boies' former client, the largest antitrust defense fee generator in the United States of America.

Senator HATCH. You must have learned an awful lot from them is all I can say. [Laughter.]

Governor BABBITT. Notwithstanding that experience I honestly don't think there are any significant issues at stake here. I think the problem is the red herring issue.

There are problems in the judicial system. The same problems of allocation of damages appear increasingly in complex personal injury lawsuits, airplane crashes. They have to be addressed.

The allocation issues, the abusive class actions appear across the counter in every kind of lawsuit that is filed every day. I would be the first in line to join in an attack upon the excesses of the bar and the failures of the judicial system. I would hate to see that become, if you will, a red herring to torpedo——

Senator HATCH. But you will admit this does not address those problems and may create more of those problems.

Governor Babbitt. I don't think it will create or created prior to the *Illinois Brick* any special problems that are not endemic to the entire system.

What I am suggesting is we have got to get at those endemic problems.

Senator HATCH. I apologize to my distinguished colleague, and I am very grateful that you would allow me to make those points and ask one or two more questions. Thank you.

Senator COCHRAN. Thank you.

Mr. Chairman, I have one observation to make and a short question. I noticed that one of the witnesses in hearings last year pointed out that as of June 1977, which was before the *Illinois Brick* case was decided, that of 3,141 antitrust cases in the Federal court, only 113 or 4 percent were government actions. With this in mind and considering the opportunities under parens patriae, together with the opportunity that *Illinois Brick* seems to provide to governments to take assignments, isn't the interest of State governments rather insubstantial in terms of this particular legislation and the impact that it would have on the future cases of action against antitrust violators?

Governor BABBITT. I don't believe so. I think the reason for the statistics is that prior to about mid-1975 State governments, because of lack of sophistication and lack of resources, simply have not been enforcing the antitrust laws.

We had an atmosphere in Phoenix which I view as one of the citadels of the free enterprise ethic, that bordered on scandalous in terms of the disregard for the antitrust laws.

The States are now getting into it, and we are finding that they have an enormous stake in enforcement, in the name of competition and in terms of collecting taxpayer dollars that have been taken and have been violations. And from mid-1975 to now, the escalation—and I think very legitimate—has been like this. Prior to 1974, the State of Arizona in its history had filed one antitrust suit. Since Mr. Reed came on in 1974, approximately 30 have been filed. One has been dismissed; that is on appeal.

I think that says something for what is out there and for the need to get on with the job of enforcing those laws.

Senator COCHRAN. I appreciate the interest, and I sympathize with the concern that you have in trying to protect the interest of consumers. I am under doubt as to whether or not this legislation, though, is really going to protect consumers or whether it is going to create an atmosphere where price fixing is actually encouraged rather than acting as a deterrent to it.

Let me ask you this, though, in that connection: Would legislation that simply spells out the right of State governments to pursue such actions be satisfactory to protect the interests that you are speaking to today?

Governor BABBITT. Senator, I don't think it would. I have 600,000 consumers who have made claims and who half of them have received money and the other half will, and in my role as Governor, that is one of the few areas where I have had literally scores and hundreds of citizens writing me and saying we pay tax dollars year after year and you guys spend them and rip us off and this is the first time we have ever seen tangible evidence that the State is protecting our interest.

Senator COCHRAN. I congratulate you on that and suggest again that maybe legislation that specifically provides for the protection of the State's rights to pursue such claims would be all that may be needed here instead of this legislation that is before the committee, which has created such a wide controversy throughout the country.

Governor BABBITT. Senator, let me if I might give you one example of why that is not enough. There are two major utilities in Phoenix, who are presumptively big recipients of damages because of the kinds of supplies and enormous amount of construction. One is a Reclamation Act utility and, therefore, is a public body and would have the right to sue under the distinction you propose. The other one is an investor-owned utility. It would be barred from suit. That utility, Arizona Public Service Co., supports this legislation because it knows that if it has the right to sue and to collect damages, those will be factored into the rate base and will result in a tangible direct reduction in utility consumption. The State government can't do that for the Arizona Public Service Co.

Senator COCHRAN. Under the question about the advisability of taking assignments or the possibility of getting assignments, to permit you to institute such actions, is it your practice in Arizona now to try to get such assignments?

Governor BABBITT. Mr. Reed can correct me. I believe that a lot of this is being held in abeyance pending this session of the Con-

gress. There has been a lot of research done on it. I don't believe we have gotten into that hassle at this point.

Senator COCHRAN. That means no, I guess.

Governor BABBITT. Unless Mr. Reed rules me down, that means no.

Senator COCHRAN. I have no other questions.

Thank you, Mr. Chairman.

Senator BAUCUS. Thank you very much, Governor Babbitt. We appreciate your testimony.

Governor BABBITT. Thank you and the committee members. Thank you very much.

[The prepared statement of Governor Babbitt follows:]

PREPARED STATEMENT OF BRUCE BABBITT

I welcome the opportunity to appear here today on behalf of the State of Arizona and my fellow members of the National Governors' Association to support the important legislation to overrule the Supreme Court decision in *Illinois Brick Co.* v. *State of Illinois,* 431 U.S. 720 (1977). As a former Attorney General of Arizona, I am personally familiar with the problems this decision presents to effective antitrust enforcement and now as Governor of Arizona I am keenly aware how it hampers my efforts to hold down the cost of government. Unfortunately, this remedial legislation got caught in the rush for adjustment in the last Congress. I hope that we can avoid that fate this year and that Congress will move forward with the prompt enactment of this bill. The hue and cry that we contain the cost of government and end inflation will not tolerate further delay with this legislation.

In *Illinois Brick,* the Supreme Court held that indirect purchasers, that is, purchasers who did not deal directly with conspirators, may not recover damages suffered by them by reason of an antitrust violation. In reaching this decision, the Court flaunted the will of Congress as expressed as early as 1890 when the Sherman Act was enacted and as recently as in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1383 (1976). The decision was based on unsupported and demonstrably incorrect assumptions regarding the persons who truly suffer the injuries caused by antitrust violations and the practical difficulties involved in such lawsuits. In sum, the Court took away the ability of the State, local, and Federal Governments and of consumers to be made whole for their injuries and did so not in the name of justice but of expediency. The Court thus denied us an important weapon in our arsenal against inflation and severely hampered our ability to guard against the waste of tax dollars.

The merits of *Illinois Brick* legislation received a full airing in the last Congress. This committee heard testimony from 55 witnesses during 8 days of hearings and issued a report urging enactment of what was then styled S. 1874. S. Rept. 95-934. On the House side, another 4 days of hearings were held and the House Judiciary Committee likewise issued a bi-partisan report recommending remedial legislation. H.R. Rept. 95-1397. Indeed, in view of the fate of this bill in the last Congress, it would seem that it received too full an airing on the merits and not enough action. I will not attempt to go over again the ground which was ably covered last Congress but I would like to stress the need for this legislation and the urgency which demands its immediate enactment.

The National Governors' Association is a diverse group of individuals whose views transverse the entire political spectrum. One thing we all share is the task of balancing the need for Government services against the demands that taxes be held in check and that Government operate efficiently. When we see the cost of our highways, our buildings and our other needed Government services inflated by unlawful price-fixing, it is with no small measure of outrage and frustration that we hear the Supreme Court tell us that we are powerless to remedy this expropriation of tax dollars unless we dealt directly with the price-fixers, the bid-riggers or the monopolists. It was this outrage and frustration which led the diverse membership of the National Governors' Association to adopt at our meeting in Boston last August a unanimous resolution urging Congress to overrule the *Illinois Brick* decision. That resolution sums up the need for this legislation:

"As major consumers, states spend billions of dollars each year on the procurement of goods and services. As one means of assuring that taxpayers receive a fair return on the use of their taxes, States have actively used antitrust laws to recover

damages for the violation of those laws by suppliers of goods and services needed by states.

"Recently the Supreme Court of the United States decided in *Illinois Brick Company* v. *Illinois* that in most cases States and local governments may recover for injuries sustained as a result of antitrust violations only if they deal directly with violators of the law. That is, if a State purchases goods or services directly from a manufacturer rather than through a wholesaler. The decision bars States from recovering tax dollars from violators with whom they have dealt indirectly, thus hindering efforts to hold down the cost of government.

"The Judiciary Committees of the Senate and the House of Representatives have approved legislation which would amend the antitrust laws, and effectively overrule *Illinois Brick* by allowing States to recover damages for injuries sustained as a result of antitrust violations of indirect as well as direct suppliers of goods and services.

"The National Governors' Association strongly recommends that Congress enact and that the President sign legislation amending the antitrust laws which would overrule the Supreme Court decision in *Illinois Brick,* and enable States and other antitrust plaintiffs to maintain suits against antitrust violators from whom they have purchased goods or services either directly or indirectly.

I do not find it surprising that so diverse a group of Republicans and Democrats, liberals, moderates and conservatives can reach unanimous agreement on this resolution. What I find surprising is the extended debate over what would seem to me to be the self-evident proposition under our legal system that a person who has suffered a demonstrable monetary injury as a result of a violation of the law should be entitled to his day in court to seek compensation.

At least until the *Illinois Brick* decision, the conventional wisdom had it that the antitrust damage remedy was founded on the dual objectives of providing compensation to those actually injured and of creating an incentive for the enforcement of the antitrust laws. (E.g., *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 139–40 (1968.) The remedy was to be read broadly: "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." (*Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 236 (1948).)

Illinois Brick seemingly changes these accepted premises. The Supreme Court apparently will no longer concern itself with whether a particular party has actually been injured by unlawful conduct. Instead, and in the name of expediency, it has closed its eyes to questions of actual injury and has given a windfall to a group some members of which may actually have profited by unlawful conduct. Incentives for the enforcement of the antitrust laws have also been disserved by *Illinois Brick.* The Supreme Court has limited the role of private attorney general to a group which may have affirmative reasons for not instituting suit and which historically has shown little interest in antitrust enforcement.

The Supreme Court's conclusion that only direct purchasers are injured by antitrust violations is certainly belied by repeated statements of Congress and the results in innumerable lawsuits. The 51st Congress which originally enacted the damage remedy as part of the Sherman Act clearly contemplated that indirect purchasers would be entitled to obtain recovery. The remarks of Senator George are typical:

"An advance in the price to the middleman is not mentioned in the bill for the obvious reason that no such advance would damnify them; it would rather be of benfit, as it would increase the value of goods he has on hand. He buys to sell again. He buys only for profits on a subsequent sale. So whatever he pays he receives when he sells, together with the profit on his investment; and so on all of them; including the last, who sells directly to the consumer. The consumer, therefore, paying all its increased price advanced by the middlemen and profits on the same, is the party necessarily damnified or injured." (21 Cong. Rec. 1767 (1890).)

Two years ago, the ability of indirect purchasers to recover for their injuries was again acknowledged by the Congress in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1383 (1976). This committee's report on the bill expressed a clear intent that indirect purchasers not be prevented from recovering their damages:

"Section 4C is intended to assure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to manageability [of class actions], standing, *privity, target area, remoteness,*

and the like." [Emphasis supplied.] (S. Rept. 94-803, 94th Cong., 2d sess., at 42 (1976).

The House report likewise emphasized that the legislation was intended to allow recovery of damages by indirect purchasers. (H.R. Rept. 94-499, 94th Cong., 1st sess., at 6 n.4 (1975).) The Supreme Court chose to disregard these clear directions in its *Illinois Brick* decision.

A long line of litigated cases also refutes the Supreme Count's determination that indirect purchasers are not injured by reason of antitrust violations. The *Electrical Equipment Conspiracy* cases resulted in recoveries of tens—if not hundreds—of millions of dollars. Something in the neigborhood of $300 million was recovered in the *Tetracycline* litigation; well over $70 million was recovered in *Gypsum;* over $30 million in *Western Liquid Asphalt;* and over $21 million in *In re Master Key Antitrust* litigation. In all of these cases, the bulk of the recovery went to direct purchasers.

Most important to my support of this legislation is our experience in Arizona. I am including with my prepared remarks a summary of the major antitrust actions brought by the State of Arizona. Although ours is a small State and our antitrust enforcement effort is of relatively recent vintage, antitrust damage actions have returned $2.8 million to the State and local governments and another $5.2 million directly to consumers. This is $2.8 million which is available for needed government services which does not have to be paid for by new or increased taxes and $5.2 million of inflationary overcharges which are actually being returned to consumers.

Comparing two recent cases will illustrate my point. Before *Illinois Brick* was decided, we were able to recover approximately $2.1 million for overcharges for liquid asphalt used in highways in Arizona even though we bought only completed highways and did not deal directly with the asphalt companies who allegedly fixed prices. The recovery in that case meant that $2.1 million in past overcharges were recovered but, more importantly, that $2.1 million was now available for new construction without any increase in taxes. More recently, we brought a lawsuit against the cement companies who allegedly fixed the price of the cement used to build highways. The amount of injury and the potential recovery were for in excess of that in the *Asphalt* case but now that we are faced with the *Illinois Brick* decision Arizona taxpayers may never recover the money stolen from them unless Congress acts promptly. When you add to our experience in Arizona comparable tales from the other 49 States, I think you will understand why all of our governors, our attorneys general and our State purchasing officials support this legislation while antitrust defendants lobby against its enactment.

Compensation of injury is not the only purpose served by the antitrust damage action. Treble damage actions are also an important part of a broad-based policy of antitrust enforcement. An award of three times the amount of an unlawful overcharge may well represent a greater penalty (and therefore also a greater deterrent) than a $1,000 fine or a suspended jail sentence. Because the Antitrust Division and the Federal Trade Commission both have finite resources, private enforcement helps ensure that the antitrust laws will be more broadly enforced than if reliance were placed solely on the Federal Government. To the extent the treble damage incentive is reduced, antitrust enforcement is accordingly weakened. To the extent this remedy is placed solely in the hands of those who have affirmative reasons for not exercising it, this aspect of antitrust enforcement becomes nonexistent. The Supreme Court's *Illinois Brick* decision weakens antitrust enforcement in both respects.

From a historical perspective, it is clear that indirect—rather than direct—purchasers have provided the major impetus for private antitrust enforcement. In cases such as *Electrical Equipment, Tetracycline, Gypsum, Western Asphalt* and *Master Key* it was indirect purchasers who carried the burden of the prosecution and who were able to obtain a significant portion of the total damages awarded.

In re Petroleum Products antitrust litigation and *In re Cement and Concrete* antitrust litigation are two more recent cases which demonstrate direct purchasers' disinclination to sue. The *Petroleum Products* litigation has been pending for more than five years now and the only plaintiffs who have brought suit are those who purchased at retail. Independent marketers of petroleum products have not yet evidenced any interest in filing suits. *Cement and concrete* is in the same vein. That case has been pending for more than 2 years. Even though cement companies and ready-mix companies are both named as defendants and even though ready-mix companies are substantial direct purchasers of cement, only one of the defendant ready-mix companies has asserted a claim against the cement company defendants.

The reluctance of direct purchasers to sue is readily understandable. As Senator George noted, those who purchase directly from price-fixers may actually profit by

the continuance of the conspiracy through their own percentage markup pricing practices. A middleman who routinely adds a 10-percent markup to the costs of goods he resells will have little practical incentive to reduce the amount of his profit. In any event, the middleman's business relationships with his suppliers would certainly be threatened if he were to sue his suppliers for price-fixing. In *In re Western Liquid Asphalt* cases, 487 F. 2d 191, 198 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974), for example, the Ninth Circuit cited such reasons as the explanation for the general failure of the immediate purchasers to sue those who had fixed the price of liquid asphalt:

"It is understandable that contractors might not sue, in view of (1) their alleged dependence upon appellees for their supply of asphalt, (2) the possibility that they earned a percentage profit on the overcharges, and (3) the control and interdependence alleged between appellees and the contractors. Thus if the present appellants could establish antitrust violations but were precluded from recovering, no one else would sue and appellees would retain their assumedly illegal profits."

There are those who even today will debate the practical wisdom of Senator George and who will say that the direct rather that the indirect purchaser is more likely to sue. This debate misses the point, however. If the Antitrust Division and the Federal Trade Commission are to be aided by private litigants in enforcing the antitrust laws, the Congress should broaden rather than narrow the category of persons who can bring suit. The Antitrust Enforcement Act of 1979 accomplishes this objective.

I would like to turn now to some of the specific provisions of the Antitrust Enforcement Act of 1979. Section 4I(a) would overrule the decision in *Illinois Brick* while section 4I(b) deals with the problem of duplicative recovery which troubled the Court in *Illinois Brick* by authorizing a limited "passing-on" defense first considered in *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968). Existing notions, of standing, proximate cause and target area are preserved by the reference to "the chain of manufacture, production, or distribution." Additional safeguards against duplicative recovery are provided by section 4 of the bill which amends 28 U.S.C. 1407(h) to permit the Judicial Panel on Multidistrict Litigation to consolidate cases for trial and which merits enactment in its own right. Of course, the savings clause in section 5 of the bill makes the remedial legislation applicable to pending and future lawsuits consistent with the constitutional constraints outlined in Assistant Attorney General John Harmon's memorandum for the last Congress. If the bill went no further than this, it would be a tight piece of legislation which would have my unqualified endorsement.

The provision of the bill which causes me pause is section (c) which seeks to address some of the problems presented by antitrust class actions. The *Illinois Brick* bill is not a class action bill and it should not be weighted down with this class action baggage. My good friend from Arizona Dennis DeConcini has already held hearings on legislation that would address the problems perceived in rule 23 class actions and I understand that he is now working with Judge Bell to rewrite the bill that was introduced in the last Congress. That is the vehicle for revising class action procedures under rule 23 and there is no need to complicate the simple *Illinois Brick* bill with this unnecessary and unrelated provision.

The defendants who are accused of antitrust violations stand to lose the most if this bill is enacted and they have pulled out the stops in presenting arguments why this bill should not be enacted or should be limited severely. Some say that the bill will permit frivolous strike suits but they fail to explain why a strike suit is any more or less likely by an indirect purchaser than by a direct purchaser. If one were truly concerned about strike suits, I would expect to see the provision from the House version of the *Illinois Brick* bill in the last Congress that allowed fees and costs to prevailing defendants in frivolous cases. I suspect that those who rail loudest about strike suits have as their true objective that there be no suits at all.

Another argument we hear from defendants is that remedial legislation should apply only to suits brought by governmental plaintiffs and not to cases involving private parties. Were it not for the fact that this argument is advanced with a straight face, I would be tempted to dismiss it as a transparent attempt to divide and conquer the proponents of this legislation. There is no reason in logic why a public school district should be able to recover the unlawful overcharges on textbooks it purchased indirectly and a parochial school should not or why a municipal electric utility should be able to recover for overcharges for its share of an electric generating facility while an investor-owned utility should be denied recovery for overcharges for its share of the same generating facility. Arizona Public Service Company is the largest investor-owned electric utility in my State and it supports remedial legislation. I see no reason why it (or its customers through a reduced rate

base) should receive less favored treatment from this Congress than the largest public electric utility in Arizona, the Salt River Project. All persons who suffer a proveable injury from an antitrust violation should be entitled to their day in court.

We also hear that the *Illinois Brick* problem should be dealt with locally by a series of 50 State statutes. The Republican Attorney General of Arizona Bob Corbin is proposing legislation to ensure that Arizona's antitrust laws will afford indirect purchasers the right of recovery and I support General Corbin in these efforts. Both General Corbin and I recognize, however, that exclusive reliance upon State legislation to solve the *Illinois Brick* problem will only exacerbate the concerns felt by the Supreme Court. If the possibility of duplicate recovery is to be guarded against—and I believe that it should be—it is no solution to have defendants answer to direct purchasers in a Federal court action and then pay the same amount all over again to indirect purchasers in a State court suit. Nor would State legislation mitigate the problems of increasingly complex litigation. To the contrary, if State remedial legislation is accompanied by Congressional inaction the result would be a proliferation of separate suits in State courts across the country and a major step backwards from the procedural improvements brought about by the multidistrict litigation statute 28 U.S.C. 1407.

In its *Illinois Brick* opinion, the Supreme Court acknowledged that it might not have the last word on this subject. It said, "Should Congress disagree with this result, it may, of course, amend the section to change it." In the interest of the fair and effective enforcement of the antitrust laws, I join with the President of the United States, the Governors and attorneys general of each of our 50 States, and a wide range of business, labor, farmer and consumer groups and urge the Congress to accept the Court's invitation to amend sections 4, 4A and 4C of the Clayton Act in order to allow indirect purchasers to recover any damages that may be proved by them.

APPENDIX TO STATEMENT OF

GOVERNOR BRUCE BABBITT

SUMMARY OF MAJOR ANTITRUST CASES FILED IN ARIZONA

GYPSUM CASES, CIVIL NO. 46414-A AJZ; STATE OF ARIZONA, ET AL., PLAINTIFF, V. UNITED STATES GYPSUM CO., ET AL., DEFENDANTS, CIVIL NO. 70-865-A AJZ.

This was an action to recover for damages resulting from price-fixing by the manufacturers of gypsum wallboard. In 1975, the State of Arizona and various governmental entities within the State recovered approximately $100,000 in this lawsuit. Because the gypsum wallboard was purchased as a part of completed buildings and not directly from the defendants, this recovery would have been impossible had Illinois Brick been on the books at the time.

IN RE: CONSOLIDATED PRETRIAL PROCEEDINGS IN THE WESTERN LIQUID ASPHALT CASES, MASTER FILE NO. 50173-RES CIVIL; THIS PLEADING REFERS TO THE ARIZONA CASES, STATE OF ARIZONA, ET AL., PLAINTIFFS, V. AMERICAN PETROFINA, INC., ET AL., DEFENDANTS, NO. C 51092-RES.

This was an action to recover for damages resulting from the price-fixing by the producers of liquid asphalt. In 1976, the State of Arizona and various political subdivisions within the State recovered in excess of $2.1 million in this lawsuit. Again, this was a case where the producers sold liquid asphalt to highway contractors who in turn sold highways to the State and this recovery of tax dollars would have been impossible had Illinois Brick been on the books at the time. None of the so-called "direct purchasers" in Arizona brought suit in this action and this case is particularly interesting because the United States Court of Appeals for the Ninth Circuit had the opportunity to comment on the direct purchasers' failure to sue:

> It is understandable that contractors might not sue, in view of (1) their alleged dependence upon appellees for their supply of asphalt; (2) the possibility that they earned a percentage profit on the overcharges, and (3) the control and interdependence alleged between appellees and the contractors. Thus if the present appellants could establish antitrust violations but were precluded from recovering, no one else would sue, and appellees would retain their assumedly illegal profits. In re Western Liquid Asphalt Cases, 487 F.2d 191, 198 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974).

IN RE: ARIZONA BAKERY PRODUCTS LITIGATION MASTER FILE, CIV. NO. 74-208-A PHX. CAM. (THE STATE OF ARIZONA, PLAINTIFF V. HOLSUM BAKERY, INC.; RAINBO BAKING COMPANY OF PHOENIX; RAINBO BAKING COMPANY OF TUCSON; BAIRD'S BREAD COMPANY; C. J. PATTERSON COMPANY; AND CAMPBELL TAGGART, INC., DEFENDANTS, NO. CIV. 74-330 PHX CAM)

This was an action against the major bakeries in Arizona for price-fixing. Most of the bakery products are, of course, sold to consumers through grocery stores and in this litigation lawsuits were brought on behalf of both the direct-purchasing grocery stores and the indirect-purchasing consumers following an indictment of the bakeries and their executives by a federal grand jury. Consumers were represented in this action by the Attorney General of Arizona. While both direct and indirect purchasers sued here, it is noteworthy that more than 81% of the recovery went to consumers and less than 19% to groceries. Thus, approximately $2.5 million was individually distributed to some 250,000 households in Arizona. This graphically illustrates that indirect purchasers suffer the brunt of the injury resulting from price-fixing. Needless to say, these 250,000 Arizona households would not have been able to recover had Illinois Brick been on the books at the time. Aside from the recovery by Arizona consumers in this case, this price-fixing conspiracy illustrates the importance of indirect purchaser suits for another reason. Following the sentencing in the federal criminal case, one of the bakery executives said: "When you're doing $30 million a year and stand to gain $3 million by fixing prices, a $30,000 fine doesn't mean much. Face it, most of us would be willing to spend 30 days in jail to make a few extra million dollars." Business Week, June 2, 1975. Without the recovery by consumers in the Bakery Products case, then, there would have been no deterrent for unlawful price-fixing.

IN RE: ARIZONA DAIRY PRODUCTS LITIGATION, NO. CIV. 74-569-A PHX. CAM. (THE STATE OF ARIZONA, PLAINTIFF, V. BORDEN, INC., ET AL., DEFENDANTS, NO. CIV. 74-594 PHX. CAM)

This is a pending action against the major dairies in Arizona for price-fixing in the production and sale of dairy products. As with Bakery Products, most dairy products are sold to consumers through grocery stores although there have been some direct sales to consumers through home-delivery sales. As was also the case in the Bakery Products lawsuit, claims were asserted on behalf of Arizona consumers with the Attorney General of Arizona representing consumers within the State. Interestingly, more than half of the grocery stores in the State have affirmatively indicated that they will not assert claims against the dairies.

This results, perhaps, from the fact that many of the grocery stores are alleged to have conspired with the dairies to increase the price paid by consumers. In any event, a partial settlement of over $4 million has already been reached with some of the defendants. Over 90% will go to consumers with less than 10% going to grocery stores which again demonstrates that the injury resulting from price-fixing is suffered by the indirect purchaser and that little deterrence will result from giving direct purchasers the sole right to sue. Unless Illinois Brick is reversed, the chances of successful prosecution against the remaining defendant are problematic.

IN RE: SUGAR ANTITRUST LITIGATION, MASTER FILE NO. MDL 201; (STATE OF ARIZONA, PLAINTIFF, V. CALIFORNIA AND HAWAIIAN SUGAR COMPANY, A CALIFORNIA CORPORATION; HOLLY SUGAR CORPORATION, A NEW YORK CORPORATION; CONSOLIDATED FOODS CORPORATION, A MARYLAND CORPORATION; AMERICAN CRYSTAL SUGAR COMPANY, A MINNESOTA CORPORATION; AND SPRECKELS SUGAR COMPANY, A DIVISION OF AMSTAR CORPORATION, A DELAWARE CORPORATION, DEFENDANTS, NO. CIV. 75-752 PHX. CAM)

This is a pending action by the State of Arizona against the nation's major sugar refineries for price-fixing in the sale of sugar. As in the case of Bakery Products and Dairy Products, the State of Arizona seeks recovery on its own behalf, on behalf of political subdivisions within the State and consumers within Arizona but -- unlike those two cases -- no direct-purchasing middleman in the State has filed suit. With Illinois Brick on the books, the prospects of recovering tax dollars for the alleged price-fixing are dim.

IN RE: MASTER KEY ANTITRUST LITIGATION, MDL DOCKET NO. 45; (THE STATE OF ARIZONA, PLAINTIFF, V. EMHART CORPORATION, A CONNECTICUT CORPORATION; EATON CORPORATION, AN OHIO CORPORATION; AND ILCO CORPORATION, A MASSACHUSETTS CORPORATION, DEFENDANTS. CIV. NO. H-75-382).

This was an action to recover for damages resulting from price-fixing by the manufacturers of master key systems and other hardware used in the construction of buildings. The State of Arizona and political subdivisions within the State recovered some $150,000 in this lawsuit. As with the Gypsum and Asphalt matters, this was a situation where the product in question was sold to general contractors who acted as middlemen before reselling to the State. As before, had Illinois Brick been on the books at the time, the State would not have been able to recover the $150,000 in tax dollars which it was able to return to the public coffers. Although this case had been pending some seven years before it was actually tried, not a single direct purchaser within the State of Arizona bothered to sue any of the defendants. The

testimony of one of the middleman during the trial of this matter perhaps illustrates why the direct purchasers were not interested in bringing suit:

> Q. Now, in fact, if there were an overcharge on the hardware as a result of a conspiracy among the manufacturers of the hardware, wouldn't that overcharge have been borne by the owner rather than the contractor?
>
> A. If it were charged on the bid that we got and we used, it would be passed on to the owner, yes sir.
>
> Q. That is, if it was a cost to you you would pass that overcharge on to the owner?
>
> A. Whatever cost we had, we would pass over to the owner, yes sir.
>
> Transcript of trial proceedings in In re Master Key Antitrust Litigation, M.D.L. Docket No. 45 (D. Conn.), October 21, 1976, pp. 2782-2783.

The testimony of another direct-purchasing middleman was to the same effect:

> Q. Now, if a hardware dealer's price to you is excessive, either as a result of violation of the law or for any reason, would that excessive amount of his price be passed on to the owner of the building?
>
> A. Yes, it would.
>
> Transcript of trial proceedings in In re Master Key Antitrust Litigation, M.D.L. Docket No. 45 (D. Conn.) October 8, 1976, p. 1885.

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION, MDL DOCKET NO. 150 WPG (ARIZONA CV 76-324 WPG).

This is a pending lawsuit against the major refineries of petroleum products in which it is alleged that the defendants unlawfully increased the price of petroleum products at each of the levels of the distribution process. The State of Arizona has filed suit on its own behalf and on behalf of political subdivisions and consumers within the State. Arizona has been joined by other states in this litigation but, to date, not a single private party has filed suit. While the lawsuit is still pending and the full impact of Illinois Brick cannot therefore be determined, testimony provided to the House Subcommittee on Monopolies

and Commercial Law illustrates the pernicious application to which those accused of antitrust violations will put Illinois Brick:

> The same type of argument has recently been raised in the refined petroleum products antitrust litigation, which is now consolidated before Judge Gray in the central district of California. That is a case where a variety of States have alleged price fixing among the major oil companies, and the allegations are that at each level of the marketing chain the defendants conspired among themselves to fix prices.
>
> There was an argument before Judge Gray on the 25th and 26th of August, last month, in which defendants argued that even though they may have conspired to add a nickel a gallon at the wellhead; and even though they may have conspired to add a nickel a gallon at the pipeline; and even though they may have conspired to add a dime a gallon at the refinery; and even though they may have conspired to add another nickel a gallon at the jobber level; and even though they may have conspired to add another 15 cents a gallon at the retail level, defendants read Illinois Brick to provide that even though they conspired at each of these levels of distribution, the consumer can only recover for the 15 cents that the price was increased unlawfully at the retail level, despite the allegations and the proof we have developed in that case to date indicating the conspiracy operated at each of the production levels in the industry. Hearings Before the Subcomm. on Monopolies and Commercial Law, Committee on the Judiciary, on H.R. 8359, 95th Cong., 1st Sess., at 45-46 (1977).

STATE OF ARIZONA V. PORTLAND CEMENT ASSOCIATION, ET AL., NO. CIV. 76-672 PHX CAM (D. ARIZ.) (IN RE CEMENT AND CONCRETE ANTITRUST LITIGATION, MDL NO. 296).

Following a year-long investigation, the State of Arizona filed in 1976 a price-fixing suit against the major producers of cement and the major producers of ready-mix concrete. The lawsuit was on behalf of the State and political subdivisions within the State. Arizona has since been joined in this suit by the States of California, Colorado, Kansas, Missouri, Montana, Nebraska, New Mexico, Oregon and Utah. Although the State of Arizona buys both cement and concrete directly from the defendants, by far the

great bulk of its purchases are made indirectly through middlemen in much the same fashion as in the Asphalt case mentioned above. Most cement produced is sold to ready-mix companies and for the most part those ready-mix companies have not asserted claims against the cement companies. Some of the middlemen who purchased directly from ready-mix companies have filed suit against those ready-mix companies but they did so only after the State of Arizona first brought suit. Unless Illinois Brick is overturned, its political subdivisions will be able to recover only a fraction of the estimated $10 to $25 million which was unlawfully taken from tax revenues by reason of defendants' alleged unlawful activities. On a national scale, it is conservatively estimated that states and local governments have suffered more than $200 million by reason of the alleged conspiracy and their ability to obtain full compensation is hampered by Illinois Brick.

IN RE: FINE PAPER ANTITRUST LITIGATION, MDL DOCKET NO. 323 (STATE OF ARIZONA, PLAINTIFF, V. BOISE CASCADE CORP., ET AL., DEFENDANTS, CIV. NO. 78-2463).

This lawsuit was filed last year against the nation's major manufacturers of "fine paper" (i.e., printing and writing paper) and their middlemen within the State of Arizona. Most of the State's purchasers are from these middlemen rather than from the manufacturers. The State of Arizona brought this action on its own behalf and on behalf of political subdivisions within the State. While other lawsuits have been brought in other parts of the country, no one else in Arizona has brought suit against any of these defendants. Unless Illinois Brick is overturned, the State's ability to recover the estimated $4 million in overcharges from the manufacturers is problematic.

Senator BAUCUS. Our next witnesses represent the National Association of Attorneys General.

I wonder if you four representatives could tell us your travel plans; that is, what time is your plane out of Washington? Is that panel here?

PANEL FROM NATIONAL ASSOCIATION OF ATTORNEYS GENERAL: STATEMENTS OF HON. CHAUNCEY BROWNING, ATTORNEY GENERAL, STATE OF WEST VIRGINIA, PRESIDENT, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL; HON. WILLIAM SCOTT, ATTORNEY GENERAL, STATE OF ILLINOIS; HON. JAMES SMITH, ATTORNEY GENERAL, STATE OF FLORIDA; HON. STEPHEN CLARK, ATTORNEY GENERAL, STATE OF ARKANSAS; HON. MARK WHITE, ATTORNEY GENERAL, STATE OF TEXAS, and HON. ANDREW BUFFMIRE, ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, STATE OF UTAH, REPRESENTING HON. ROBERT HANSEN, ATTORNEY GENERAL

Mr. BROWNING. I am attorney general of West Virginia, president of the National Association of Attorneys General, Mr. Chairman.

You inquired about travel plans. I didn't hear all of that. I apologize.

Senator BAUCUS. In the interest of time, we are wondering whether you could proceed with oral summaries We will try to get through the questions as quickly as possible.

It is my understanding that you have other commitments this afternoon. We would like to proceed as quickly but as fairly as possible.

I understand that with you is William Scott, attorney general of Illinois; James Smith, attorney general of Florida; Steven Clark, attorney general, of Arkansas; Mark White, attorney general of Texas, and Andrew Buffmire, Utah's assistant attorney general for antitrust representing the attorney general of Utah, Robert Hansen.

We are very happy to have you with us. If you could proceed quickly, I would appreciate it very much.

Mr. BROWNING. We appreciate very much the opportunity to appear and give testimony and respond to questions with reference to the problems that we face as attorneys general.

Each of us will not read our statements. I would ask that they be inserted in the record as written and presented and we will make very short summaries from them.

Senator BAUCUS. I was wondering if you could give your summary at this point. When you have finished, I will list a few questions I would like all five of you to address in your summaries as well so that we can expedite matters a bit.

Mr. BROWNING. All right, sir.

Mr. Chairman, if I may, I would also like to present for inclusion in the record a statement from Attorney General Biester, Republican attorney general from the State of Pennsylvania, who is a former Member of Congress, in support of this legislation.

Senator BAUCUS. Without objection, the document will appear in the appendix.

Mr. BROWNING. I will be very brief, Mr. Chairman. I would like to point out, as I did at the hearings last year, that the same

concerns and problems of Governors with diversity of attitudes, Governors who are unanimous in support of this legislation, are shared by the attorneys general who for the first, and perhaps only time in its history, and certainly within my knowledge, have been unanimous in support of legislation that would reverse the decision of *Illinois Brick.*

This problem which has been presented to us by the decision in *Illinois Brick* involves a loss of tax dollars to our States of pending cases, those cases pending prior to June 1977, some before, in the neighborhood of approximately $300 million. That does not take into account the number of cases which might have been brought since June 1977. And in trying to arrive at some approximate figure, I think it is fair to say that we have now lost and are continuing to lose a total somewhere in the neighborhood of $750 million of State tax dollars, of taxpayers money that has been lost as a result of this decision.

In addition to that I think it is important to point out initially and immediately that under the parens patriae section of the Antitrust Improvement Act of 1976, there have only been, prior to *Illinois Brick,* five cases which were instituted because of the time limitations, investigative problems and others. Since that time I am not aware of more than one in the State of Vermont which may have been filed after *Illinois Brick* was decided.

I think it is important to note that in fact we have been prevented, we think, effectively by *Illinois Brick* from presenting the cause of the State and in trying to protect the tax dollars of our State and that the longer that Congress fails to act on this issue, then, the more tax dollars in the millions and hundreds of millions of dollars will be lost throughout the 50 States. I think when you add that problem together with the problem of the tax dollars that have been lost in the millions from the Federal Government's standpoint in their purchasing and procurement process, this is a vital issue that I am appreciative is being addressed by the Congress this year and early this year.

I think that we had anticipated, Mr. Chairman, that each of these gentlemen would make a statement. I think that without burdening the record, because basically the information which I have submitted to you is already in the record, that perhaps the best approach for us to take is to let these gentlemen respond to questions and that each of their statements probably will be put into the record at that time.

Senator BAUCUS. Without objections, the statements will be included at the end of your oral testimony.

I wonder if each of the remaining members of the panel will make his summary statements and could address the four questions which I have asked and which have already been addressed by Mr. Browning. Can you tell us what kind of actions are threatened in your State by *Illinois Brick*?

Second, what are the dollar amounts of the claims in those actions? In those cases, how significant is the involvement of indirect purchasers as compared to direct purchasers? Finally, do you think those cases would have been brought without the involvement of indirect purchasers?

We will begin with Mr. Scott. Please proceed, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

I would direct my answers to those questions and also I want to emphasize in light of the very excellent testimony of Governor Babbitt and the comments of Senator Hatch that I share with Senator Hatch the feeling that the people who are concerned about some of the problems are doing it for a very legitimate cause.

I was very much involved in the *Illinois Brick* case. As attorney general of Illinois, my responsibility was to protect people's rights, including the right not to be cheated, the right not to be cheated out of tax dollars.

As a Republican, I probably am one of the strongest advocates of our free enterprise system, feeling that the difference in America's strength is the fact we don't have the cartels that Europe has.

So we did have, and still do have, probably the most active State antitrust department in this Nation. We have won some of the largest recoveries in the history of this Nation. Unfortunately, we lost one of the most important antitrust cases in the history of this Nation.

The judge who decided that case was a very conscientious Federal judge who not only had been president of our State bar association, but had been an assistant attorney general under my office and had been the chairman of my lawyers' committee. So there was no question of the intent that went into it in the Supreme Court.

Tremendous problems have been created in that case, which was not just the case of Illinois, incidentally—every single State in the Nation joined us in the Supreme Court in our position in the *Illinois Brick* case.

The problems have been tremendous, not only in terms of the losses which Attorney General Browning mentioned, totaling well over $750 million, the potential losses in bills to the taxpayers, and the consumers of this Nation, but also the incredible loss of preventive medicine to protect our free enterprise system and to protect our individual businessmen.

A few of the cases that we have pending are very deeply affected by the action of this committee of the Senate, and the Congress, including the *Illinois Brick* case, are of incredible magnitude. We, for example, have a case filed against the so called "Super Pool," the milk monopoly, the Associated Milk Producers. The motion is pending to dismiss us on the basis of the *Illinois Brick* case, leaving the people of this Nation, particularly in the central part of the Nation, without any individual remedies for recovery for a very basic product.

The same motion to dismiss is pending in the sugar case, again an incredible price fixing case which saw the prices of sugar skyrocketing. The same problems are in the wiring devices case that Governor Babbitt talked about. So in the pending cases that we have, the totals are into the millions and millions of dollars, not only for Illinois but for the States.

If you look at some of the cases that we haven't been able to get at, the figures become even more staggering. The Department of Energy has filed a suit recently involving new oil and old oil. Certainly while we alone in our State government purchase over $3 million a year in oil and have a very great stake in it, we have no

direct purchases. That one case could be a billion dollar case. So the magnitude of the amounts involved are incredible, not just into the hundreds of millions.

Senator BAUCUS. Would Illinois have jurisdiction in that case, or would that be brought by a Federal plaintiff?

Mr. SCOTT. We certainly could bring an antitrust action in the Federal courts.

Senator BAUCUS. The State of Illinois?

Mr. SCOTT. No question about it. We did in *Tetracycline,* which involved price fixing not only all over the Nation but the world alike. A good example of the case that was regularly affected by this was the *Ampicillin* case which again dealt with drug companies that were not only nationwide, but international in scope. In that case, there was a settlement over sitting on the table for literally tens of millions of dollars that was withdrawn immediately after the *Illinois Brick* decision. So the amounts are staggering.

Regarding the second part of it, the indirect purchasers, and Senator Kennedy mentioned it yesterday very correctly in his comments, the role of the middlemen. I don't think there is a case that is a better example of it than in the antitrust litigation that we are involved in with the paper companies. There are over 1,200 merchants in this Nation who would have been direct purchasers and to my knowledge none of them have filed in that case. Yet, the whole question of that case is going to be dependent on the action of this committee in the *Illinois Brick* decision.

So that there probably isn't a decision that this committee is going to face that more directly affects not only the taxpayers of our State and our Nation, but also the individual consumers as to their very basic fundamental rights not to be cheated out of their hard earned dollars or that more directly affects the concept that our Nation was founded on of free enterprise competitive business. It is for that reason that I very strongly urge the committee to adopt this legislation.

Senator BAUCUS. Thank you very much, Mr. Scott.

I wonder if you could give us your assessment of the percentage of damages that would be attributable to indirect purchasers as opposed to direct purchasers? That is, what percentage of damages are threatened because of *Illinois Brick* decision in actions brought by the State of Illinois?

Mr. SCOTT. The losses, of course, are staggering, in the tens of millions of dollars. From a practical standpoint, the direct purchasers just aren't in a position to bring the case and in some instances where they are, the direct purchaser would be the beneficiary of an incredible windfall.

For example, in the cases of gas meters where not only was there the determination of liability but one of the defendants incredibly enough pleaded guilty to price fixing. Yet our local gas company would get the benefit of not having collected at the higher rate, but they would get back the damages rather than the individual consumers. So they benefit both ways where they are able to do it.

The effect is very, very serious, because it puts the individual purchasers of gasoline or sugar, milk or soda pop into a position where it isn't practical for them to bring a case, but it is also in those instances where the direct purchasers could do it, many

times will leave them with a windfall of not only having profited on the price fixing where they got a percentage of it already but also profiting again on the recovery rates.

Senator BAUCUS. Thank you very much, Mr. Scott.

The next witness is the attorney general of the State of Florida.

Mr. SMITH. It is a privilege for me to be here with my colleagues, Mr. Chairman, discussing legislation pending before this committee. I believe that I can answer the four questions that you pose by a quick discussion of one case pending in Florida, the *State of Florida* v. *Bethlehem Steel Corporation,* a case involving about some $30 million worth of indirect purchases by State agencies of steel re-bars. In that case three economists working independently of each other concluded that about 30 percent of that $30 million worth of steel re-bars were overpriced as a result of price fixing. That would amount to some $9 million; trebling that would give the State a recovery of $27 million.

The direct purchases in that case only amount to some $500,000, which taking 30 percent of that would allow the State to recover $150,000 of purchases, and with treble damages some $450,000.

So I think that is a very stark example of what the taxpayers of our State stand to lose without the legislation that is pending before this committee being passed—$27 million as opposed to some $450,000.

That is the quickest, best example that I can give you as to why we badly need this legislation to be passed.

I would also like to quickly comment on one question by Senator Hatch as to why State courts really are not equipped to handle antitrust actions. I am somewhat embarrassed to have to tell this committee that in Florida our State antitrust law has not been amended in some 65 years. Our neighbors in Georgia, I am told, don't even have an antitrust State statute. So I think some of us, some of the States in the South are lagging.

We are going to present it to the new State legislature this year and I am hopeful it will pass. But I think that the bottom line is really that the States are just starting to come into their own as far as antitrust enforcement.

Senator BAUCUS. You don't know the size of the staff of the antitrust division in Utah or what the Utah statutes are, do you?

Mr. SMITH. No.

Senator BAUCUS. Could you tell us what the current status of the steel re-bar case is?

Mr. SMITH. There is a motion pending before the Federal District Court judge to dismiss that case because of the *Illinois Brick* decision.

Senator BAUCUS. Also, if you could tell us, what other actions in Florida are threatened by *Illinois Brick* ?

Mr. SMITH. We have in court now with other States a very large antitrust suit against oil companies that would be threatened as to the treble damages issue and indirect purchase question if this legislation did not pass.

Senator BAUCUS. Thank you very much, Mr. Smith.

Our next witness is Mr. Steven Clark, Attorney General of the State of Arkansas.

Mr. CLARK. Thank you, Mr. Chairman.

I also have to admit that in the State of Arkansas it has been 73 years since we updated our antitrust code. We are attempting to do that now and are getting actively into the field.

But to address the four questions that you have, but with two particular cases in my State, I would point out that as in most cases our purchases are not direct but from indirect purchases, in most instances two or three people down the chain of distribution. We have the *Fine Paper* case, which in a typical year, 1976 in our State, Arkansas purchased roughly $2 million of paper products, only 113 different contracts, only 5 of those contracts were with the manufacturers, so that a substantial portion of the paper was purchased from the manufacturers who are the defendants. Only about 3 percent can be argued to be direct purchases from those companies and thus be involved in that antitrust suit.

General Scott mentioned the *Ampicillin* case, which we participated in, and the third case that I would mention is a statewide price fixing suit that we have initiated against four major dairies and milk processors in our State. That suit is now at the point of discovery. We just had a class certified of a little over 11,000 plaintiffs, which represent a class of commercial purchasers. We had every school district, every municipality. We have also counties. But we do not have any individuals because they do not purchase directly from the manufacturer. Otherwise, we are not able to maintain a class action for those other indirect purchasers or those consumers in this action.

The total value is around $8 or $9 million at this point. If we are successful, treble that that would be $24 or $27 million. We can't estimate the total that would be involved if we had consumers involved in that action.

So it is a situation where we are trying to update our present laws and even though we do that, we need the impact of this bill in order to protect our treasury from illegality in terms of price fixing or other anticompetitive activity.

Senator BAUCUS. With respect to the *Fine Paper* case, I wonder whether in your judgment that action would have been filed without the involvement of indirect purchasers? Would direct purchasers alone have brought the case?

Mr. CLARK. I really don't know. I don't think so. But I don't know. I can get you that information.

Senator BAUCUS. I am just curious what your judgment would be at this point.

Mr. CLARK. In my judgment, I doubt it.

Senator BAUCUS. Which goes to the second question; that is, in your opinion do suits by indirect purchasers represent a significant deterrent to antitrust violations?

Mr. CLARK. No question about that in my opinion, Senator.

Senator BAUCUS. A significant deterrent, a very great deterrent? Can you qualify that?

Mr. CLARK. I think significant deterrent.

Senator BAUCUS. Thank you very much.

Mr. CHUMBRIS. Mr. Chairman, I was speaking to the chairman a moment ago about the Supreme Court decision in the *Illinois Brick* case on page 6. If I might read that paragraph.

The court chose to interpret section 4 so as to allow plaintiff to recover the entire overcharge. This choice was consistent with the recognition of the importance of treble damage action in deterring antitrust violations.

So in the opinion of the court, they felt that the direct purchaser was really the deterrent force in these cases.

Senator BAUCUS. Our next witness is Mark White, attorney general of the State of Texas.

Mr. WHITE. Mr. Chairman, I have been attorney general for the State of Texas for approximately a month and I assume much like the State of Florida we had a little problem with our re-bar contractors and it appears that in response to your first question, the State has filed suit against the United States Steel Corp. and seven other defendants who were in collusion in the fixing of prices of reenforcing bars for contracts for public bodies throughout the State of Texas.

Our estimate indicates approximately $10 million in direct overcharges due to that collusion. Trebling that would amount to some $30 million recovery to the State of Texas and to the taxpayers. That would be allocated to the various political subdivisions which had experienced loss.

In response to your second question, the direct purchase relationship between the State and those re-bar sales would amount to some $50,000 versus the $10 million through indirect purchase. The *Illinois Brick* case effectively would have eliminated the recoveries which have already been realized from collusion in the pricing of library books, brass tubes, pipes, gypsum wallboard, and plumbing fixtures, all of which were purchased at excessive rates by the State and its political subdivisions and for which recovery has already been received in that interim period of time since the *Hanover Shoe* case.

So the *Illinois Brick* case effectively would have eliminated all of those recoveries as a result of those past proven violations of antitrust law.

In response to your last question concerning direct purchasers, to date no direct purchasers have filed any lawsuits to exercise their right to recovery under the antitrust laws.

Senator BAUCUS. Thank you very much, Mr. White.

I am curious as to whether the State of Texas has appealed their dismissal in the Texas re-bar case.

Mr. WHITE. That dismissal is now pending in the Southern District of Texas. We filed under our State antitrust law, a State suit.

The differences here are striking. Our State law, which is also an old law, permits a minimum of $50 and a maximum of $1,500 per day recovery for violations. In this particular circumstance, our computations indicate that that violation had occurred for such a length of time that they at the maximum recovery levels have exposed themselves to $14,850,000 in State penalties at $1,500 per day maximum, which is significant itself.

However, I think that the volume of business indicates that one violation of very large amounts, involving very large amounts of money would not have not been deterred by the mere $1,500 a day penalty under State law; but may, I believe, be deterred under the treble damage feature.

Senator BAUCUS. So no action has been brought under State law then?

Mr. WHITE. We are going to bring action under the State law but as you can see it is a much smaller recovery for the same transaction.

Senator BAUCUS. Are there any other pending Texas suits that are threatened by *Illinois Brick*?

Mr. WHITE. No. I think not.

Senator BAUCUS. Thank you very much, Mr. White.

Next we will hear from Mr. Andrew Buffmire, assistant attorney general for antitrust division, State of Utah.

Mr. BUFFMIRE. I appreciate the opportunity to appear today. I am appearing on behalf of Robert Hansen, attorney general for the State of Utah, and have brought along a prepared statement of the attorney general for submission in the record.

I would like to preface my remarks, make them very short and to the point by saying I appreciate and reflect Attorney General Scott's comments about the concern of Senator Hatch and others. Yet to address your direct question, the State of Utah does have substantial concerns in pending cases. We have currently filed in the *Fine Paper* and in the *Cement* case.

In the *Cement* case we received a motion to dismiss based upon *Illinois Brick*. In those two cases we have rough estimates of damages of approximately half a million dollars in *Fine Paper* and in excess of $5 million in *Cement*.

It must be realized that this is on behalf of the State alone, that in both of those actions we are representing classes of cities, counties and towns and other political subdivisions of the State. So the actual amounts of damages involved, when these other entities are included, would be substantially larger.

Yet I would like to add further that this is only part of the picture, that the real effect of *Illinois Brick* now is not just on pending cases but is on the ability to look beyond pending cases when problems arise and go beyond asking your purchasing agent the initial question: How do we buy this material, device or whatever, to have a place in the marketplace? But what is really lost in addition to the pending cases, or in addition to the problems raised in the pending cases is the downstream effect on our ability to look in other areas of purchasing and, in turn, the downstream effect on deterrence.

We have looked at the general purchasing structure in the State of Utah and the vast majority, I would say in excess of 90 percent, of our purchases I would say are done so indirectly.

In conclusion, I would like to say that the attorney general and I have discussed this at length and we have come down to the final determination that what is really involved is the question of windfall profits versus the right of those who have actually been harmed and can prove that harm given the chance to so appear and prove it and that is the major reasons we support and seek reversal of the *Illinois Brick* bill.

Senator BAUCUS. To what degree have you attempted to use your authority under the parens patriae legislation recently enacted?

Mr. BUFFMIRE. We do not use parens at all in the State of Utah. We have not filed a parens action. I think *Illinois Brick* raises some serious questions of parens patriae.

Mr. BROWNING. Mr. Chairman, if I may, I have some more general knowledge, perhaps, of the attitude of the attorneys general throughout the country on that question. The fact is that while only about 3 years ago there were only about 50 State antitrust attorneys throughout the United States, today there are about 300, as a result of the parens legislation that was passed and the congressional appropriations made available to us to build up and beef up our antitrust statutes. That was done on the basis, and in the very logical and good basis, I think, that the Federal Government is unable simply to handle all of the antitrust work in the United States, and certainly is not able to handle the so-called small cases which exist in our States which take money either from our taxpayers or from our consumers, or the regional cases which exist throughout the country.

Attorney General Shenefield simply does not have the resources to handle that. So it was the direction of Congesss in the passage of the Antitrust Improvement Act, the Hart-Scott-Rodino Act of 1976, to give the States that ability in order to maintain the free enterprise system and to see to it that competition does exist to the extent, greatest extent possible throughout the country.

When the *Illinois Brick* decision came down, it was impossible and is impossible to calculate the very scarce resources which we have to institute a number of parens cases without any indication that we are going to be successful in those cases.

And certainly last year, when it was indicated that the Congress was going to act on *Illinois Brick* reversal legislation, it would have been foolish for us to have started a large number of parens cases at that time, given those resource allocations.

Second, I think, if I may add one further thing, with regard to class actions, because that question was raised at some length and I had one or two comments on it.

First of all, rule 23 is under discussion. I agree with those who have testified that this legislation ought not to be shot down, if you will, on the basis of problems with class action legislation. I do not think that if there are problems, or I do think that if there are problems with class action legislation, it should be solved across the board and not simply in the context of antitrust litigation.

Finally, as a member appointed by the president of the National Commission for the Review of Antitrust Laws and Procedures, we have made very specific recommendations, some of which may require legislation or urge legislation to solve some of these procedural problems which admittedly do exist in complex litigation, whether it be antitrust, securities or any other kind. We did not attempt to zero in just on the antitrust problems. I think that if the recommendations of that Commission are followed, that many of the problems that have been expressed with regard to procedures will be resolved and taken care of.

Senator BAUCUS. Gentlemen, I want to thank you very much.

Mr. CHUMBRIS. In view of the fact that the minority——

Senator BAUCUS. Would it be all right if you could submit those questions for the record?

Mr. CHUMBRIS. I was going to suggest two things: One, that since the Senators are not here, we would like the privilege of having each Senator, if he so desires, to have a chance to read the record and submit questions to each of the attorneys general here. Also, in our previous hearing last year, Senator Laxalt and Senator Thurmond sent a questionnaire to each of the 50 attorneys general and they responded to the number of cases that they have had, and perhaps maybe that will be part of their request to update the number of cases that you have handled. But on one point, if we could get the immediate action on, that is to have perhaps Ray Marvin of the Washington office to be able to give us a list of each of the cases that you have before your respective States, and the name of the case, the court in which it is pending, the amount of damages, that would be informative to this committee, and such other information that we will be talking to Mr. Marvin about.

If that is agreeable to the chairman, I would like to have it done.

Senator BAUCUS. Without objection, so ordered.

Gentlemen, thank you very much. Some of you have come great distances. I want to tell you personally I found your testimony very valuable and quite helpful. Thank you very much.

[The statements of Chauncey Browning, William Scott, James Smith, Steven Clark, Robert Hansen, Mark White and Edward G. Biester, Jr. follow:]

PREPARED STATEMENT OF CHAUNCEY H. BROWNING, JR.

I am Chauncey H. Browning, attorney general of West Virginia and President of the National Association of Attorneys General. We are pleased to accept your invitation and to have this opportunity to present a panel of individuals actively involved in State antitrust enforcement for the purpose of assisting in the development of the record to support the immediate legislative correction of the destructive effect of the ruling in the case of *State of Illinois* v. *Illinois Brick Co.* decided by the U.S. Supreme Court on June 9, 1977.

I would like to introduce the others at the table with me. You have already had the benefit of testimony during last year's proceedings of attorneys general from the States of Iowa, Maryland, Colorado and California. This year I am pleased to introduce Attorney General Scott of Illinois who has some knowledge of the *Illinois Brick* case; Attorney General Steve Clark of Arkansas; Jim Smith, the Attorney General of Florida; Mark White, Attorney General of Texas and Assistant Attorney General Andrew Buffmire who will present the testimony of Attorney General Robert Hansen of Utah. These gentlemen will make short statements and be available for questions.

At the outset, the committee should be reinformed that the members of the National Association of Attorneys General are unanimous in their support of legislation overruling *Illinois Brick*. So far as I am aware, every Attorney General in the United States, Democrat, Republican, North, South, Liberal and Conservative, is in wholehearted support of the immediate enactment of legislation which would reverse the adverse effects of this decision. In view of the crippling effect of the *Illinois Brick* decision upon the States, it would have been possible to have had thirty or forty State attorneys general here today. I would like to point out, therefore, that this panel represents and speaks on behalf of not only the National Association of Attorneys General, but on behalf of each of its members individually.

This unanimous position of our association and its individual members is probably unique, but it is understandable when the result of the *Illinois Brick* decision is properly focused: the impact of that decision is truly devastating upon each of the States. We have estimated that approximately 90 percent of the purchases of State governments are made through middlemen. The six member majority of the Supreme Court in *Illinois Brick* held that States may not commence a suit against persons other than those with whom we deal directly, thereby putting an end to the long and responsible history of State antitrust enforcement activity through proprietary treble damage action. This is a totally unacceptable result when it is considered that the States have recovered hundreds of millions of dollars over the last

fifteen years from pricefixers. These recoveries represent scarce tax dollars which were fraudulently and conspiratorily taken from our governments by antitrust violators. The ruling in *Illinois Brick* prevents the States from instituting such actions in the future and deprives us of the ability to recover for each of our States those damages to which we should be entitled for such antitrust violations. With regard to this area of antitrust enforcement, those who would conspire to fix prices against the States now may do so with impunity. It is not surprising, therefore, that persons of all political persuasions, liberal and conservative, support a return to or restoration of adequate antitrust remedies. The State attorneys general believe that no other concept is so widely shared in this country as the belief that businesses should not be permitted to conspire and fix prices, and that competitors should actually compete. Antitrust enforcement enhances the strength and viability of our capitalistic system and our free market economy.

We commend you, Senator Kennedy, and the 21 Senate cosponsors and the members of your committee for scheduling hearings on this matter so promptly, and we also commend you and Chairman Rodino of the House of Representatives Judiciary Committee for developing an agreed version of corrective legislation for introduction and consideration by the Congress. These are significant steps which will make possible an accelerated consideration of this legislation which is so desperately needed in this area. In view of the fact that a full congressional year has passed and the issues involved fully ventilated with the testimony, pro and con, of dozens of witnesses, we hope that the matter can be promptly concluded at the committee level and referred to the full Senate for a vote on the merits within the next four weeks. Thank you very much for your interest and concern, and for the opportunity which you have afforded us today. I will be available for questions with the other members of the panel.

PREPARED STATEMENT OF WILLIAM SCOTT

I am Bill Scott, Attorney General of the State of Illinois. I was very pleased to accept you kind invitation to present to this panel my views on proposed legislation to overrule the Supreme Court decision in *Illinois Brick Co.* v. *State of Illinois.* That decision has cut deeply into the ability of the State of Illinois and all of the other States of the union to properly and adequately enforce the antitrust laws.

Now in my fourth term as attorney general for the State of Illinois, I have consistently sought full enforcement of the antitrust laws in our State. I am proud to say that Illinois now has more antitrust cases on file than any of the other States. Over the years, we have tried to build up the antitrust expertise of our office and we now are handling 24 of the 28 filed cases within our office. I should note quickly, however, the *Illinois Brick* case was not one of those cases handled in office.

Because of the emphasis we have placed on antitrust enforcement, the *Illinois Brick* decision came as a very severe blow to us. We have always felt that the consumer fraud laws and the antitrust laws have worked hand in hand to protect taxpayers throughout the land from being victimized by unreasonable and deceptive trade practices. I was, therefore, greatly disheartened to learn that the Supreme Court had taken away antitrust protection that consumers had previously had in the normal chain of distribution of a product. It has been the experience of my office that indirect purchasers quite commonly do bear the brunt of part or all of an illegal overcharge occasioned by a price fix. The *Illinois Brick* decision is simply an anomaly if measured by traditional tort recovery theories.

Let me give you some examples of how the *Illinois Brick* decision has adversely impacted on the State of Illinois. We have four complex multidistrict antitrust cases on file in which the State's potential recovery has been chopped to almost nothing because we, like our local governments within the State of Illinois, are indirect purchasers. These cases are the *Midwest Milk* monopolization lawsuit in Kansas City, the *Western Sugar* antitrust litigation in San Francisco, *Wiring Device* litigation in New York, and *Fine Paper* antitrust litigation in Philadelphia. In addition, we have been party to settlement in two complex cases involving chickens and potash; both of these cases realized for the State and its local governmental entities far less than could have been realized if *Illinois Brick* were not on the books.

We are also aware of four or five cases in which the State of Illinois would have a very real interest to sue if we were not indirect purchasers. These cases involve consumer products which would logically give rise to statewide consumer class actions. For example indictments have been returned against the manufacturers of

gas meters and of water heaters. I understand that in the gas meter case one defendant has even pled guilty to the charges in the indictment.

Finally, I would note, as others have to this committee, that *Illinois Brick* decision has had a very chilling effect on State filing of parens patriae cases. We have had several parens patriae investigations that we have shelved because of the indirect purchaser problem. I might add that a couple of these investigations involve products that, to the best of my knowledge, no other antritrust enforcement agency had looked into.

Because of the direct and substantial impact of the *Illinois Brick* decision on the State of Illinois and its consumers, I cannot urge too strongly that this subcommittee and this Congress adopt legislation overruling the holding in *Illinois Brick*. I therefore support passage of the bill presently before you.

I do, however, have one suggestion for an amendment to the existing language of section 4I. As presently worded, that section provides that an indirect purchaser has the right to sue if he shows "proof of payment of all or any part of any overcharge for such goods or services." The phrase "proof of payment" has an evidentiary ring to it and if read literally, could drastically change existing case law on how a plaintiff must prove an antitrust violation. Certainly, it would be a judicial waste of time to require a plaintiff to prove his damages prior to showing the defendant's liability. Over the years, it has become common practice to bifurcate antitrust trials, first requiring the plaintiff to show defendant's liability and secondly, to show the amount of damage. Since the 1931 U.S. Supreme Court decision in the *Story Parchment* case, there has been a clear cut distinction between the concepts of "fact of damage" or "fact of injury" and "amount of damage" or "amount of injury." The fact of damage would be part of the liability trial while the amount of damage would be part of the damages trial. In 1969 the U.S. Supreme Court held in *Zenith* v. *Hazeltine* that: "[T]he burden of proving the fact of damage under section 4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of providing compensable injury under section 4." I believe the plaintiff should be required to show some casual connection between his loss and an antitrust violation but this requirement should be satisfied by less than full and complete proof of payment of overcharges.

Again, let me express my appreciation for the opportunity to present my views to the subcommittee and I hope that your hard work will result in the speedy repeal of the *Illinois Brick* decision.

PREPARED STATEMENT OF JAMES SMITH

It is my pleasure to join my colleague attorneys general today in giving testimony in support of legislation aimed at restoring effective antitrust enforcement in the states.

Prior to becoming attorney general of Florida January 2, I was not involved in the practice of antitrust law and—as many other lawyers and consumers—had only a vague perception of their philosophy and application. The *Illinois Brick* decision of the Supreme Court was merely a case name.

I have attempted, since the election, to familiarize myself with the total operation of the Florida Department of Legal Affairs, including the antitrust unit.

In so doing, I've come to realize that no responsibility is any more compelling than the need to adopt an aggressive antitrust enforcement posture. Effective enforcement of antitrust laws is fundamental to the maintenance of a free market economy.

Therefore, I have determined that antitrust enforcement and education will be a high priority of my administration. If this property is to translate into action in behalf of Florida and its citizens, effective antitrust enforcement tools must be available.

If we attorneys general and those "private attorneys general"—as described in antitrust literature—are to achieve results, the legislation you consider today must be enacted into law. *Illinois Brick* must be removed as the prevailing rule of law.

It is difficult to understand the Supreme Court decision rendered in its opinion of June 9, 1977.

I find it inconceivable that justice is properly served by denying a right of recovery to those persons—individual, governmental or commercial—who suffer the economic losses of antitrust violation. *Equally inconceivable to me is the assumption*

that justice could be served by the establishment, for enforcement purposes, of an artificial cutoff at the first-purchaser level. The return to a rule of contractual privity is a step backward in our struggle to insure accountability through competition.

As my understanding of the impact of the *Illinois Brick* opinion evolves, I regret that the good work of you, Mr. Chairman, and other supporters of remedial efforts, has not been rewarded with success in righting our enforcement course.

As an example of *Illinois Brick's* potential impact on the efforts of my office to enforce antitrust laws, I refer to the case *State of Florida* v. *Bethlehem Steel Corp., et al.* pending in the Middle District of Florida.

A treble-damage action brought under section 4 of the Clayton Act on behalf of the State, in its proprietary capacity, and as class representative of governmental purchasers in Florida, the case followed Federal grand jury indictments that alleged a long standing conspiracy to allocate the Florida market among a very few steel rebar manufacturers.

Pursuant to court order and prior to the date of the *Illinois Brick* decision, my office undertook extensive discovery of State purchases. Total State purchases during the 4 years allowed for initial discovery amounted to $30 million.

Simultaneous with our discovery efforts, three economists, working independently, determined that the overcharge attributable to the conspiracy was on the order of 30 percent.

Applying this figure to total purchases, one finds a potential overcharge of $9 million, which, when trebled as provided in section 4 of the Clayton Act, yields potential recoverable damages of $27 million.

I would point out that, although subsequently overturned by the 5th Circuit on the basis of an erroneous jury instruction, the jury in the criminal case arising from these same grand jury indictments determined the conspiracy to have existed at least as far back as 1959.

In the aftermath of the *Illinois Brick* decision, our antitrust unit calculated that the State and its citizen-taxpayers stand to recover only $450,000 from direct purchasers of $500,000.

The State, therefore, is denied the full right to recover damages for itself and its citizens from the antitrust violator. The Supreme Court would have us rely on the enforcement zeal of the middleman who, dollar-for-dollar, passes on to the ultimate purchaser such overcharges.

Neither I, nor my colleagues, nor the constituencies we represent, can place great reliance on enforcement by those who suffer no injury, who profit from violations through application of fixed percentage mark-ups, or who are captives of the supplier-violator and dare not endanger a fragile source of supply.

At a time when government is under pressure to rein in excessive expenditures, to be accountable, to achieve the maximum benefit from each dollar spent, it defies reasoned explanation to allow *Illinois Brick* to remain the operative rule.

It is the taxpayer who demands fiscal control.

It is the taxpayer who demands that government discharge its responsibility by protection of its fiscal integrity.

Our State government must continue to provide essential services—to build roads, hospitals and schools.

The cost of these services will be borne by each taxpayer. Will they have assurance that they are getting a fair return? It is the taxpayer who demands passage of this legislation.

PREPARED STATEMENT OF STEPHEN CLARK

My name is Steve Clark, and I am the Attorney General of Arkansas. I appreciate this opportunity to appear before you and relate the impact that the *Illinois Brick* decision has had upon my office's ability to pursue antitrust enforcement.

Early 1977, the prospects for an active antitrust role were bright. Congress had passed the Hart-Scott-Rodino amendments to the Clayton Act, giving to State attorneys general broad powers to pursue claims on behalf of the consuming public. Legislation was in motion which would provide substantial Federal aid to the State to improve their capacity for antitrust enforcement. In June 1977, the *Illinois Brick* decision created a dark cloud on this otherwise bright horizon. The gloom became more pervasive as the full impact of the decision became known. The vast bulk of State purchases were made through local distributors, dealers or other types of middlemen. In fact, of some three hundred million dollars of State purchases in 1978, over *90 percent* were purchased through contracts with sellers other than

manufacturers. Moreover, many of these transactions were with local distributors who were two or more steps down the chain of distribution.

The reality of our situation in the wake of *Illinois Brick* is evident. Under Federal law, the State of Arkansas would have standing to recover possible overcharges on less than ten percent of its purchases.

The impact of *Illinois Brick* upon the recently created authority for attorney's general to bring parens patriae suits on behalf of consumers has been equally devasting. In very few instances do consumers purchase directly from manufacturers. Unlike the State, they do not even benefit from the ability to do business with distributors.

Finally, I have significant doubts about the ability or inclination of direct purchasers, usually larger business interests, to vigorously pursue antitrust violators and protect our competitive economy. First, the likelihood of a suit is small when a direct purchaser is economically dependent upon an antitrust violator for its continued viability. Moreover, any overcharges are very often passed along the chain of distribution so that there is no real damage to the direct purchaser. Similarly, since any recovery by a direct purchaser who has passed along the overcharge, is a windfall, there is not the same incentive to pursue a complex, lengthy and expensive case as where exists actual injury.

Let me speak briefly about how the implications of *Illinois Brick* have influenced our own enforcement practices. First, it has forced us to redirect investigations to only those areas where either the State or its consumers are direct purchasers of the products or services involved. In a few instances, this has meant investigations have not been pursued because neither the State nor consumers in general were direct purchasers.

More generally, *Illinois Brick* has caused our attention to be focused on only a very narrow segment of the economic distribution chain. In the case of State purchases, it has been distributors and vendors which deal directly with the state. In terms of consumers, we now must concentrate on the retail industry or other final distribution outlets.

This narrowing of our enforcement range not only restricts the ability of the State to recover damages it or the consumer may suffer. It removes the deterrent value of State governmental action from the most concentrated sectors of the economy. This is in direct contradiction, it seems to me, to both the intent of Congress, as expressed in the Antitrust Improvements Act of 1976, and the policy of the current administration, which is to turn over an increasing share of antitrust enforcement jurisdication to State attorneys general.

Up to this point I have talked about the effects of *Illinois Brick* on our enforcement activity and the ability to recover damages in very general terms. If I may, I would like to illustrate these effects referring to three specific causes where we are involved in litigation.

The first of these cases is a price fixing charge against several manufacturers of fine paper products. Using 1976 as a typical year, the State of Arkansas purchased roughly $2 million of such paper products through some 113 different contracts. However, only five of these constracts were with manufacturers, or their affiliates, and only one of them, valued at $60,000, was with a subsidiary of a named defendant in the suit. All other purchases were through local distributors which had purchased from either paper merchant houses or direct from manufacturers. Thus even though a substantial portion of the paper purchased was manufactured by the defendants, only 3 percent can be argued to be a direct purchase from those companies involved in the antitrust suit.

The second case I want to mention is the multidistrict *Ampicillin* case. In 1975 the Arkansas Attorney General became a plaintiff representing both the city-county-state class and individual consumers of ampicillin and other semi-synthetic penicillins. However, in July 1978, the consumer class was dismissed as a direct result of *Illinois Brick.* Estimates on the exact loss to consumers in Arkansas are not available, but it undoubtedly is the major share of the total purchases within the State.

The third instance I would like to discuss is a statewide price fixing suit brought by our office against four major dairies and milk processors operating in the State of Arkansas. Consumers do not purchase directly from the processors, who we allege to have fixed prices and allocated territories, but rather buy from various groceries, restaurants and other commerical establishments. Consequently, they are ineligible to recover any overcharges resulting from the conspiracy and we could not file suit on their behalf. The State, however, is a direct purchaser, as are the cities, counties and their subdivisions. The attorney general has also been certified as a representative of a class of commerical purchasers who buy directly from the defendant

diaries. Thus the bulk of any recovery will not be returned to the consumer, who almost certainly was damaged as the higher prices were passed on to him, but by the commerical class who purchased directly from the defendants.

As a footnote to this case it is significant to note that only one member of the commerical class has ever brought suit independently of the State action, and that plaintiff had dropped out of the action before the first hearing one class certification had taken place.

The Attorney General of Arkansas stands ready, willing and able to take his place in the antitrust enforcement effort of this country. Back home this week a new and comprehensive State law drafted by my office will be introduced in our general assembly. We have assembled, thanks to Federal funds, an eager and capable core staff of attorneys, investigators and economists to conduct antitrust litigation. Part of my budget request in this session will include an appeal to our legislature to provide State funds for this effort when our Federal funding expires. Yet, if we are successful in all of these efforts, as long as *Illinois Brick* remains the law of the land, we will remain handcuffed and without effective deterrent power to remedy or prevent anticompetitive conduct at the highest levels of the chain of distribution. I urge this committee to promptly approve S. 300 and restore to the States their proper role in antitrust enforcement.

PREPARED STATEMENT OF ROBERT B. HANSEN

I appreciate this opportunity to submit a statement to you in regard to the impact of the U.S. Supreme Court's decision in *Illinois Brick Company* v. *Illinois,* 431 U.S. 720 (June 9, 1977). I believe strongly in the need for and the salutary effect of the Federal antitrust laws in maintaining the free market nature of our competitive economic system. I also believe that the Supreme Court's opinion in *Illinois Brick* undercuts and limits the effectiveness of those laws in furthering this fundamental economic policy.

The Federal antitrust laws contemplate not only public enforcement but also private enforcement of their provisions by providing for the recovery of treble damages as an incentive to sue when the law is violated. The States have taken an active and forceful role in such civil enforcement of the Federal antitrust laws. Many private treble damage actions have been filed by the States on behalf of themselves and, in some cases, on behalf of classes of other governmental entities such as cities, counties, towns and other political subdivisions. Because of the magnitude of purchases involved, many of these cases have resulted in substantial recoveries to government purchasers. The States have also, as you know, been given authority under the provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 to bring parens patriae actions on behalf of natural persons residing within their respective states.

Both of the above roles of the States have been substantially undercut by the *Illinois Brick* decision. A review of our purchasing practices over the last year has revealed that the vast majority of purchases made by the State of Utah are made indirectly through contractors, brokers, or other middlemen. As regards possible parens patriae actions on behalf of natural persons it is clear that such persons rarely purchase other than indirectly as ultimate consumers in our Nation's complex system of commercial distribution.

With regard to private treble damage actions, the amont of losses which the States could be forced to suffer may be very large indeed. For example, the State of Utah is currently plaintiff in an action Filed in November 1978 against several cement producers and their national trade organization (*State of Utah* v. *Portland Cement Association, et al.,* D. Utah, C 78-0429). Utah has sued in its own right as a purchaser of cement and cement-containing products and seeks to represent a class of all Utah governmental entities that have purchased cement and cement-containing products. The gravamen of the complaint is that defendants have engaged in a nationwide conspiracy to raise, fix and stabilize the price of cement. We are already receiving motions to dismiss on the basis of *Illinois Brick.* The State purchases vast quantities of cement, albeit arguably indirectly. These purchases are for the construction of very expensive public highways, building and other public works. Based on rough expenditure data furnished to my office by State officials, we have estimated actual damages for the State alone during the period of time alleged in the complaint to be in excess of $5 million. Even though the State and ultimately the taxpayers of the State may have actually suffered this loss, redress cannot be realized if such motions prevail. In these difficult economic times, with rising cries of tax limitation, the inability to recover damages for harms actually suffered by

governmental purchasers pursuant to violations of the antitrust laws is unacceptable.

It has been argued that, even if indirect purchasers cannot bring lawsuits, the direct purchasers will file any necessary causes of action and give effect to the private enforcement policies of the Federal antitrust laws. The potential plaintiffs that are left under the current state of the law, the direct purchasers, are much less likely to bring antitrust lawsuits than are indirect purchasers for two reasons. First, in many cases the direct purchaser, even if it is a totally separate entity, is economically dependent upon the antitrust violator for its continued commercial viability. Second, the direct purchaser has oftentimes either not been harmed as a result of the antitrust violation because he either passed on the inflated price or has in fact profited from the violation, as, for example, in those instances where resale is made with profit margins being based upon a percentage above cost. It is unrealistic to assume that an entity who may not have been harmed and whose very ability to continue in business may cease as a result of the filing of an antitrust lawsuit will take on the responsibility of private enforcement.

One idea that has been put forth is to move enforcement of such indirect claims to the State level and have redress sought under State antitrust laws. It must be pointed out that the States have generally looked to the Federal statutes and court decisions to provide the fair competition concepts and principles adopted by the States as part of their own antitrust statutes and court decisions. It is not realistic to expect that the States, in the face of the *Illinois Brick* decision, will act to allow recovery by indirect purchasers. Assuming, arguendo, that the adoption of laws in all the States allowing suits by indirect purchasers would be a realistic alternative, such a solution would not deal with the difficulties raised by regional and national cases. Such cases could more effectively be brought and taken care of in Federal forums which allow for, among other things, nationwide service of process. Such a solution might also generate 50 different sets of law applied and construed in 50 different forums. Such a development would make the burden of compliance upon individuals and business organizations uncertain and very difficult, if not impossible.

I would like to point out that efforts to reverse the *Illinois Brick* ruling have generated broad support in Utah. The Governor of the State has taken a strong position in support of reversal of this ruling; the State's two major daily newspapers and at least one radio station have editorialized in favor of reversal of *Illinois Brick;* and the Salt Lake County Commission (the State's largest county by population) has passed a resolution in support of reversal.

I would like to close with perhaps the most compelling argument in support of adoption of legislation reversing the *Illinois Brick* decision. It is simply unfair to prohibit those who have in fact been harmed by violations of law, and can show that harm, from filing suit to seek redress of that harm. *Illinois Brick* has precisely that effect. I respectfully submit that this state of affairs must be remedied.

PREPARED STATEMENT OF MARK WHITE

As a new attorney general, I am committed to strict antitrust enforcement because I believe that antitrust laws are pro-business. Antitrust laws provide a healthy business climate and protect the honest, scrupulous businessman. When I took office this year, I learned that the Supreme Court's decision in *Illinois Brick* v. *Illinois* has eliminated the most significant deterrent to antitrust violators—the private treble damage lawsuit.

This fact was dramatically brought home by a case currently being litigated by my office. The State alleges in *Texas* v. *United States Steel Corp., et al,* Cause No. 74-H-533, in the United States District Court for the Southern District of Texas, Houston Division, that the State and other governmental entities suffered millions of dollars of actual damages resulting from a conspiracy by steel companies to fix the price of reinforcing steel rods. Discovery that is of public record in this case has revealed 4 years of the most blatant of antitrust violations involving secret hotel meetings and the existence of a ledger document on which defendants allocated jobs. Unless *Illinois Brick* is legislatively overruled, the people actually injured, the taxpayers who support school districts, hospitals and universities, will never be recompensed. The defendants in this lawsuit will be the beneficiaries of millions of dollars in windfall gains.

Why will defendants so benefit? Because the decision reached in the *Illinois Brick* case completely ignores the realities of the marketplace as well as the intent of Congress. Buyers who are direct purchasers are unlikely to sue for fear of angering

their suppliers and, in any case, they can pass on extra costs generated by price fixes. Indeed, no primarily direct purchaser of reinforcing steel rods has filed a related suit against the steel companies. Mister Justice Brennan in a strong dissent artfully articulated the flawed reasoning of the majority opinion:

"Today's decision flouts Congress' purpose and severely undermines the effectiveness of the private treble-damage action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution. In these instances, the Court's decision frustrates both the compensation and deterrence objectives of the treble-damage action. Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers." (*Illinois Brick Co., et al.* v. *Illinois, et al.*, —— U.S. ——, 45 U.S.L.W. 4611, 4618 (1977).)

Other cases brought in the past by the Texas attorney general's office exemplify the type of antitrust protection the taxpayers of Texas should have but will not have if the *Illinois Brick* decision remains in effect. In cases involving library books, brass mill tubes and pipe, cast iron pipe, and gypsum wallboard, the monetary recovery that was returned to school districts, municipalities, hospitals, State agencies, and other governmental subdivisions totaled more than three million dollars. If the *Illinois Brick* decision had been in effect, these recoveries never would have occurred since Texas purchased all these products I have mentioned indirectly.

The *Illinois Brick* decision is simply an unreasonable and extremely regrettable step backward from effective antitrust enforcement. I cannot urge you too strongly for the reasons I have set forth in my statement to support legislation that will reverse the Supreme Court's action in *Illinois Brick.*

PREPARED STATEMENT OF EDWARD G. BIESTER, JR.

I am grateful for the opportunity to submit my views to the committee on this most important question and genuinely regret that I am unable to appear personally. However, I am submitting this statement to be made part of the public record. Although I am new to the position of acting as the commonwealth's attorney general and therefore its chief law enforcement officer, I am nevertheless somewhat familiar with the problems of State antitrust enforcement out of my experience on the House Judiciary Committee during my tenure in the House of Representatives.

The Commonwealth of Pennsylvania wholeheartedly endorses the "Antitrust Enforcement Act of 1979." This legislation is designed to correct the untenable situation which currently exists because of the Supreme Court's 1977 decision in *Illinois Brick Co.* v. *Illinois.*[1] As you well know, this decision held that State and local governmental entities, as indirect purchasers, could not recover overcharges, paid by the direct purchaser, which were passed on to them. The Court refused to allow the "offensive" use of the pass-on doctrine, just as it had rejected the "defensive" use of the pass-on doctrine in *Hanover Shoe.*[2]

The impact of this decision is extremely adverse to the legitimate interests of State and local governments. It is estimated that as much as 90 percent of the purchases of State governments are through intermediaries. Thus, the States are foreclosed from pursuing, in Federal court, proprietary actions when the State does not deal directly with the antitrust violator. This decision has a particularly unfortunate affect on Pennsylvania because the Commonwealth is one of the four States which does not as yet have a State antitrust statute. Therefore, we must proceed, if at all, under the Sherman and Clayton Acts.

State enforcement of the Federal antitrust laws, unlike private treble damage actions, is unique. The beneficiaries of State litigation are the State itself, its agencies, political subdivisions, and the consumer. The litigation is conducted by public attorneys charged with the responsibility of promoting the public welfare, fees, often huge, to private counsel of class representatives in private treble damage class actions are avoided, and a larger portion of any recovery is directed to the benefit of those who were in actuality injured, the consumer taxpayer.

Over the years, States have maintained successful proprietary suits for antitrust violations which have returned hundreds of millions of dollars to State treasuries. However, the six member majority in *Illinois Brick* has effectively immunized those who conspire to fix prices against the States from this type of remedial litigation.

---

[1] 431 U.S. 720 (1977).

[2] *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

The ever-increasing cost of State government dictates that this result must not be permitted to continue.

Not only does *Illinois Brick* impact on the Commonwealth in its proprietary capacity, it affects the consuming public in two ways: (1) it precludes the consumer from pursuing antitrust violators with whom they have not dealt directly; and (2) it effectively emasculates the parens patriae provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[3]

The Court's decision dealt with the possibility of duplicate recovery against defendants and the manageability of the proof that would be required to show the allocation, within the distribution chain, of the amount passed on to those down the chain,[4] that they had rejected in *Hanover Shoe.* This legislation will prevent duplicative recovery, for it provides that a defendant may prove that a plaintiff passed on all or some of the overcharge.[5] The manageability problems, or "susceptibility of proof," [6] are simply matters of proof. States certainly should not be foreclosed from pursuing actions against pricefixers merely because the proof necessary to demonstrate the amount of damage suffered is complex.

The National Association of Attorneys General has supported legislation to correct the devastating situation brought about by the *Illinois Brick* decision. Furthermore, the Supreme Court invited Congress to enact this type of remedial legislation.[7]

I believe that antitrust enforcement by the States promotes the free and open competition that is the cornerstone of our economy. On behalf of the Commonwealth, I urge passage of the "Antitrust Enforcement Act of 1979."

Senator BAUCUS [continuing]. The Chair wishes to announce at this point we will recess one-half hour for lunch. We will reconvene at approximately 1:30.

[Whereupon, at 12 noon the committee was recessed, to reconvene at 1:30 p.m., this same day.]

AFTERNOON SESSION

Senator BAUCUS. The committee will resume its hearing on the *Illinois Brick* decision.

The next witnesses represent organizations that speak in behalf of the consumers, Kathleen O'Reilly, executive director of the Consumer Federation of America, who is no stranger to this committee, or to this body, for that matter; and Mitch Rofsky is here representing Congress Watch. We also want to welcome Jerry Jones, national legislative director of the Paralyzed Veterans of America; and Charles Sabatier, national advocacy director of the Paralyzed Veterans of America. We are delighted to have all of you with us. If you will proceed in any manner that you wish, that will be fine with the committee.

PANEL OF REPRESENTATIVES OF CONSUMERS:

STATEMENTS OF KATHLEEN O'REILLY, EXECUTIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA; MITCH ROFSKY, CONGRESS WATCH; JERRY JONES, NATIONAL LEGISLATIVE DIRECTOR, AND CHARLES SABATIER, NATIONAL ADVOCACY DIRECTOR, PARALYZED VETERANS OF AMERICA

Ms. O'REILLY. In the interest of time, rather than reading my statement, I would like to submit it for the record and touch very

---

[3] 15 U.S.C. 15c.

[4] 431 U.S. at 737–745.

[5] This provision of the legislation would not apply to States' proprietary actions, or to actions brought by a State as parens patriae.

[6] 431 U.S. at 745.

[7] 431 U.S., 733 n. 14.

informally and very briefly on the major points that we would like to present to the committee.

I will not exhaust the litany of reasons why Consumer Federation supports *Illinois Brick.* Other witnesses have done that in a very effective fashion. I would like to point out that those who have had a great deal of experience in antitrust law point out that the expression of the use of the word "overcharge" in section 41(a) line 4 is not a term of art in antitrust law, and we would prefer to have that substituted with the more common expression of a "violation" of the antitrust law to avoid the specter of that first wave of attorneys going into the courts and arguing very strenuously that the use of the word "overcharge" represents a departure from tradition and therefore should be used as an excuse for a different standard of proof in the courts. This would lead to the wonderful benefit of the attorneys in terms of the extra time necessary to argue that case, and would be reflected in their increased fees, but would not reap any benefits for consumers.

We are also concerned that the language of the bill as presently structured creates at least a potential confusion or even an inconsistency as to the chronology of the burden of proof. This is also related to the whole concern about the time consuming and very expensive process of proving the amount and the allocation of damages. We hope that the legislation will make it very crystal clear that the initial burden of proof, namely, of showing the violation, is very much the first order of business so that they are not dealt out in the deck, so to speak, just because the damage provision has not been met sufficiently to the satisfaction of the Court.

We also would urge a consideration of an arbitration approach in the entire process of determining the amount in allocation of damages. Arbitration has been used very successfully in complex labor, medical malpractice cases, and we feel it might be a very efficient resolution of the problem of the time consuming process of very complex damage allocations.

We are also very concerned about the inclusion of section 4(c)(2) because it essentially backs the strength of the parens patriae and essentially puts back, say, in a situation where there is a clear violation of the antitrust law, that unless the victims can be identified and come forth to claim their part of the recovery, that the price fixture would be allowed to keep those funds. We deem that as offensive and very inequitable, and that if nothing else, those funds could be given to the State or the Federal tax revenue funds. We do not think that an avowed and established price fixer should be allowed to keep those funds.

We are also consistently supportive of maintaining *Hanover Shoe* and recognizing that this year's bill is an improvement over last year's bill because it does place that consideration in the discretion of the Court.

We would urge total elimination of even that provision because we think *Hanover Shoe* is terribly important for consumers, and we also urge that this bill not be considered in isolation as an antitrust measure that we are very hopeful that this committee will, throughout the 96th Congress, really pass in a package approach needed resolutions of class action problems, taking a look at the

very time-consuming discovery process in the antitrust area, also consider actually conveying upon individual the right to enforce antitrust consent orders because consent orders, unless they are watchdog, really do not provide an ongoing process of compliance.

So without diminishing our support of the overture of the *Illinois Brick* case, we really do want to urge that the other factors be resolved as well, because the passage of *Illinois Brick* alone, and significantly without a strong class action reform, really would not help consumers very much at all. It would benefit State attorneys' point of view, which we support, but the package approach, which is, practically speaking, a necessity.

Thank you.

Senator BAUCUS. Counsel has a couple of questions.

Mr. BOIES. I would like to clarify a couple of things. I understand your concerns are broader than just the *Illinois Brick* bill, but I want to probe whether you really meant what you said at the end, which is that absent a more general form of class action legislation—which I think as much as it might be desirable is quite dubious as to whether it is going to be passed in Congress—we should just let the *Illinois Brick* issue go.

Ms. O'REILLY. I am not saying abandon this bill. Realistically this bill, however, will be a reform for the parens patriae part of the problem, but will not, as a practical matter, allow consumer class action suits to be a viable mechanism in the courts unless we simultaneously overturn and address the other problems. Consumers cannot presently qualify under rule 23. Therefore, I am saying you cannot package this as a wonderful victory for "consumers" unless there is a simultaneous addressing of class action problems.

We think it should be included for the very reason you expressed. We are not at all optimistic that the class action bill is moving expeditiously.

Mr. BOIES. Would you still support this piece of legislation independent of whether class action legislation was passed?

Ms. O'REILLY. That decision must obviously be postponed until we know the political dynamics at the time of that decision. But we think that as a matter of realism the class action provision should be included in this bill because that is the logical vehicle for class action reforms.

Mr. BOIES. Would that be your view even though that would mean delaying this bill, at least several months, and perhaps at a minimum until next year, inasmuch as we have no realistic prospect of class action legislation being reported out promptly?

Ms. O'REILLY. I would prefer a more vigorous attack on the charges that class action lawsuits are dragging down the courts. In fact, I was mentioning earlier that the 1975 report that Senator Magnuson's committee prepared very effectively rebuts the very arguments that Senators Hatch and Thurmond were making this morning.

Mr. BOIES. I sympathize and agree with a lot of your positions on class action legislation. I agree it is useful to respond to some of the remarks that were made about class actions, but I am focusing on the practical problems; that is, given the fact that we are not going to have class action legislation reported out promptly, and I think that is a fact that we all have to accept as reality, do you

favor us putting this bill on the back burner until we see how that comes, or should we proceed with this bill now?

Ms. O'REILLY. Definitely proceed with this bill—but with the inclusion of 41(c)(1). That is my point. I don't want a premature decision made to scrap that because of the other bill not moving. I think it is essential that it be included, because practically speaking, that is the best mechanism.

Mr. BOIES. But with the bill as drafted, you would support proceeding with that bill now as drafted, which of course includes the c(1) and c(2) provisions?

Ms. O'REILLY. I am saying that on balance the bill has more merit to it than it does not. But I would not want our support characterized as being an excited endorsement of all the provisions, because I feel very strongly that section c(2) is a significant erosion of a very basic consumer principle established in *parens patriae.*

Mr. BOIES. Recognizing that politics is a process of compromise and c(1) and c(2) are linked together to some extent, at least in some people's minds, would you favor the elimination of both c(1) and c(2) or the retention of both c(1) and c(2) if we assume that they are linked?

Ms. O'REILLY. I would rather make that decision later in the process.

Mr. BOIES. Do you have a judgment or does your organization have a judgment that would aid us now?

Ms. O'REILLY. If I had to make that decision by this afternoon because the bill was moving to the floor, I would certainly make the decision that the retention of both is far superior to the elimination of both.

Mr. BOIES. Let's assume that this bill pretty much as drafted passes, but that no other legislation reforming the availability of class action suits passes, to what degree do you think consumers would still bring class action suits to redress antitrust violations?

Ms. O'REILLY. I feel that the passage of this bill as drafted would be a major step forward in allowing consumers to have that vehicle and that the inclusion of section c(1) is what would guarantee that.

Senator BAUCUS. Thank you very much.

Next we will hear from Mitch Rofsky, Congress Watch.

Mr. ROFSKY. Thank you, Mr. Chairman.

First, of course, I would like to submit my statement for the record.

Briefly, I will summarize my statement, but first, I would like to address some of the concerns that were raised earlier today.

Senator Hatch claimed that it is undeniable that only attorneys benefit from private antitrust suits of the "indirect" type that we are talking about today. In fact, it is quite deniable. Opponents of this legislation have exaggerated the size of attorneys' fees in private antitrust suits. A recent study by "Class Action Reports" concluded that all litigation costs, including attorneys fees in these cases have amounted to an average of 17 percent of recovery, which is certainly not an outrageous amount by any means.

More to the point, the same study reveals that there is little difference between attorneys fees as a percentage of total class recovery in direct and indirect cases.

Furthermore, you should not be mislead by the argument that consumer recoveries are always negligible.

In fact, recoveries are substantial more often than would be indicated by the discussion today. For example, just last year, at your own hearings on this measure, two witnesses testified that they had received about $1,000 each as a result of the tetracycline settlements.

I am somewhat surprised by what seems to be the fairly unreasonable tone of some of the opponents of this legislation. The potential harm of this bill is being greatly exaggerated. All this bill does is provide the court with tools to fashion the fairest possible result on a case-by-case basis. If there is a threat of duplicative recovery, the pass-on defense can be utilized. If the case is unmanageable despite this legislation, then the trial court is not required to go forward. But when the court can look at, say, a defendant's books and easily determine the injury suffered by indirect purchasers, why not let the case go forward?

In fact, many of these same arguments were made by the opponents of the Antitrust Improvements Act of 1976, and Congress saw through them at that time, and I trust will do so again.

To quickly summarize the points in my testimony, some of the questions today implied that *Illinois Brick* should only be overruled as to State or Federal Government cases. I believe this would be a serious mistake for it ignores the limited resources of the Government to pursue antitrust violators.

The *Illinois Brick* decision "flouted the will of Congress" and "soaked consumers." These are not my words, but the words of former Minority Leader Hugh Scott, and I urge all those concerned with this matter to read his eloquent testimony from last year.

The most mischievous proposal of last year was that Congress do nothing. Of course, it was advocated by many of the members of the defendants' bar. But a holding action would cost the American public millions of dollars. Several hundreds of millions of dollars are currently at stake just in State law suits involving indirect purchasers. In 1976, Congress decided to let the law develop with consumers in possession of a practical mechanism to recover their damages. The Supreme Court should not be allowed to overrule congressional intent and dictate that uncertainties will be exploited in a fashion inimical to consumer interests.

One part of the bill that we think has been improved in a crucial manner is the issue of *Hanover Shoe,* and the fact that *Hanover Shoe* is now repealed only in part.

Last year consumer representatives, as well as representatives of the antitrust bar expressed their concern that the maximum possible damages would not be recovered from the guilty defendants if *Hanover Shoe* was repealed totally.

This, in fact, was a point made by Beverly Moore of Class Action Reports and he was cited profusely in the minority statement in last year's report, but this matter, I believe, has been largely corrected in this year's bill.

Finally, I think this legislation offers a modest, yet important tool that the consumers can use to combat inflation.

With antitrust violations costing consumers billions of dollars a year, a proposal which returns to the average citizens and their

State officials the power to reduce legally jacked up prices appears to capture the public mood. Thank you.

Senator BAUCUS. Thank you very much.

We will now hear from Gerald Jones, National Legislative director and Charles Sabatier from the Paralyzed Veterans of America.

Mr. JONES. Thank you, Mr. Chairman.

The Paralyzed Veterans of America support efforts to overturn the June 9, 1977, Supreme Court ruling in *Illinois Brick Company* v. *Illinois.* PVA, along with many other organizations and consumers, believes that injured consumers, whether government, businesses or individuals, should have access to the court. The courts should have the flexibility to determine on a case-by-case basis whether the suit has merit and is to be pursued. Furthermore, we believe that all purchasers who have been injured by antitrust violations, whether direct or indirect, including the Federal Government, States, businesses and consumers should be able to recover damages.

In addition to reviewing cases of price fixing, the courts should have the power to rule on cases where monopolistic manufacturers of specialty items injure their often small but dependent market.

The Paralyzed Veterans of America has a membership of 10,000, most of whom will be directly and beneficially affected by legislation to overturn the *Illinois Brick* decision. Without a free, competitive wheelchair market, American wheelchair users have little choice in purchasing the most important product they must buy. The wheelchair provides mobility and independence for disabled individuals; without it, the disabled person cannot work, attend school, shop, or engage in other everyday activities.

I appear before you today representing my constituents who, by virtue of their use of wheelchairs, are greatly interested in the lawsuit, *Good, et al,* v. *Everest & Jennings,* a consumer class action suit against the major U.S. manufacturer of wheelchairs. Wheelchair consumers have been injured by having to pay artifically inflated prices for their wheelchairs and related devices because Everest & Jennings has engaged in monopolistic restraints of trade, unfair competition and deceptive practices. It is estimated that there are over half a million individual long term wheelchair users in the United States. We believe that Everest & Jennings controls 90 percent of the market of wheelchairs that are intended for long term use. The *Illinois Brick* decision has had an adverse impact on hundreds of thousands of wheelchair users who have no choice but to purchase a product at artifically inflated prices, and this monopoly has resulted in poor quality workmanship due to the lack of competition in the industry. The *Illinois Brick* decision has hit hardest a group of consumers who are left with no other option than to pay exorbitant prices to an illegal monopoly.

The Paralyzed Veterans of America has also played a major role in opposing two proposed consent decrees in the parallel case of *U.S.* v. *Everest & Jenning,* a civil action being brought by the Department of Justice. The first consent decree developed by the Justice Department and Everest & Jennings was rejected by the U.S. district court on December 18, 1978. The second consent decree is presently before the Court for its public interest determination.

Everest & Jennings is the major manufacturer of wheelchairs in the United States. Its operations began in 1933 and by the mid-fifties it had a predominant share of the U.S. wheelchair market mostly because it held a patent for a folding tubular steel frame wheelchair, which was quite an innovation in wheelchair design for its time. This patent, and other significant patents, had expired by 1955. At that time, Everest & Jennings became seriously concerned about foreign competition from wheelchair manufacturers overseas. Everest & Jennings' response to this threat was to enter into agreements with English and German wheelchair and medical device manufacturers and distributors. The intent of these agreements was to make territorial allocations of the international wheelchair market and to ensure that foreign manufacturers would not sell wheelchairs in the United States. In the sixties Everest & Jennings purchased a Canadian and a Mexican wheelchair manufacturing company. Both companies have never exported wheelchairs into the United States.

Everest & Jennings is the most profitable wheelchair manufacturer in the industry; their records indicate high profit margins on wheelchair operations. Their corporate officers have been paid extremely high salaries, and the Jennings family's interests have received extremely large amounts of money through salaries and returns on equity.

All of this has been at the expense of the wheelchair consumer. In 1976 the cost of a standard adult wheelchair E&J's No. 8AU 260 770 with detachable desk arms and pneumatic tires all around in England was $158.87. The same wheelchair in the United States cost the consumer $521.00. The policy of Everest & Jennings has been to prohibit the sale of the less expensive wheelchairs in the United States, and the result is that American designed wheelchairs sell for considerably less in Europe than in the United States.

Another unfair practice that wheelchair consumers have complained of is that retailers and the manufacturer often take weeks to perform routine servicing and repair work. The consumer may not be given a loaner wheelchair to use during the time that his or her regular wheelchair is at the shop. Retailers often blame the time lag on delays in receiving replacement parts from Everest & Jennings. This situation forces consumers to purchase two wheelchairs at inflated prices in order to be able to have a wheelchair to use during repair delay time.

Another major result of the illegal wheelchair monopoly is poor quality workmanship of the basic product itself. In a 1976 survey of wheelchair users conducted by the Disability Rights Center, wheelchair consumers complained of poor design, lack of durability, poor back support, improper fit, defective parts, and peeling chrome hand-rims that cut users' hands. When these misfortunes arise, as they so often do, the consumers are in the position of having to go back to Everest & Jennings because of a lack of choice. Without healthy free market competition, the product is not expected to improve.

The *Illinois Brick* decision has resulted in the dismissal of the private wheelchair suit in Federal Court for the Central District of California. Wheelchair consumers are appealing that decision, ar-

guing that *Illinois Brick* should apply only to price-fixing cases, not those involving monopolization claims.

The Paralyzed Veterans of America are appreciative for the opportunity to testify against both price fixing and monopolistic practices. We have tried to illustrate the need for consumer protection by showing the damaging effects one monopolistic enterprise has had on the members of an isolated, hapless market.

Wheelchair consumers are relying on the members of this committee to give them the power to use the Federal courts to seek redress. We cannot believe that Congress ever intended to leave us virtually defenseless against a profiteering monopoly that is very content to take advantage of the fact that handicapped people need wheelchairs as a necessity of life. We ask you for no more than what is equitable and fair.

Senator BAUCUS. Thank you very much.

A couple of questions come to mind. One is whether handicapped citizens have a great deal of choice among products. Are they limited to only a few firms?

Mr. JONES. The market for prosthetic appliances and medical supplies that handicapped consumers need is very limited.

Senator BAUCUS. Could you give me some idea in terms of numbers? With respect to wheelchairs, how many manufacturers are there? Is it true that one company has about 90 percent of the market?

Mr. JONES. There may be four or five recognized manufacturers of wheelchairs, but we believe that Everest & Jennings does control 90 percent of the market.

Senator BAUCUS. Would you also discuss the relationship between wholesaler and retailer outlets. What is the mechanism by which one manufacturer distributes the products of other distributors?

Mr. SABATIER. If I could comment, the problem in the wheelchair industry, as we see it, is that one company controls 90 percent of the market. The problem is that this same company owns subsidiaries in other countries and they do not let them import wheelchairs into the United States. Consequently, there is a lack of competition, and therefore, we pay higher prices for wheelchairs in the United States than do people in other countries.

We would like to see more competition in the industry. Other than Everest & Jennings, there is a handful, probably less than five small companies. They are not likely to expand, mainly because Everest & Jennings dominates the market for all the prosthetics. They have the marketing ability. They have bought out their competition in other countries, and they don't let them sell the chairs in the states. If you want to buy a long-term heavy-duty wheelchair in the United States, you go to one company.

Senator BAUCUS. Could you also describe the number of links in the distribution chain for wheelchairs? Could you identify the number of links in the chain between the consumer and the manufacturer?

Mr. SABATIER. Basically, it goes from the manufacturer to their retailers, to the consumer. One of the biggest problems that the consumer encounters is that the retailers do not stock a quantity of parts for wheelchair repair. You can't order one part through the

retailer without them taking 8 to 10 weeks from time of order to get whatever is needed from California to the East Coast.

So what happens is you have to buy two wheelchairs because if one wheelchair breaks, it is going to take you 8 to 10 weeks to get parts. It is simply the manufacturer, the retailer and the consumer.

Senator BAUCUS. Even though there is only one link in the chain, that is from the manufacturer directly to the retailer, *Illinois Brick* forecloses action by the ultimate consumer of the product?

Mr. SABATIER. That is correct. The way the judiciary proceedings are right now is that the U.S. Justice Department is only seeking to create competition. They are not asking for monetary reimbursement to consumers.

Senator BAUCUS. What is the current status of the *Good* v. *Everett & Jennings* case?

Mr. SABATIER. Right now I am not sure exactly where that stands.

Senator BAUCUS. Does anybody on the panel know?

Mr. JONES. Mr. Chairman, our attorney was not able to be with us today. We cannot provide that information at this time.

Senator BAUCUS. Do you have any further statement, Mr. Sabatier?

Mr. SABATIER. No, sir. Thank you.

Senator BAUCUS. I want to thank you all very much for your excellent testimony. We appreciate it very much.

[The prepared statements of Ms. O'Reilly, Mr. Rofsky, and Mr. Jones follow:]

PREPARED STATEMENT OF KATHLEEN F. O'REILLY

Consumer Federation of America is a federation of 240 national, state and local nonprofit organizations that have joined together to espouse the consumer viewpoint. CFA and its member organizations represent over 30 million consumers throughout the United States. Among our members are: 60 state and local consumer organizations; 83 consumer cooperatives; 16 national labor organizations, and 27 national and regional organizations.

CFA vigorously supports legislation aimed at overturning the June 1977 Supreme Court *Illinois Brick* decision. In that decision, the Court ruled that only consumers purchasing directly from a manufacturer who has engaged in price-fixing can recover damages. Consumers purchasing from retailers, suppliers or other middlemen would be denied any means of redress even if the middleman passes on the overcharge to consumers. In addition to removing the right of individual consumers to sue, the Court decision also threatens the right of state Attorneys General, who were recently empowered to sue price-fixers on behalf of the citizens of their states in the parens patriae legislation enacted by the 94th Congress.

The ability to sue for damages is important both as a matter of equity to compensate individual consumers who are victims of price-fixing overcharges and as an effective deterrent to antitrust violations.

The current inflationary crisis intensifies the need for such legislation, because budget conscious consumers need every available tool for eliminating unjustifiable costs, including those associated with price-fixing. Most vulnerable are the budget items attributable to the basic necessities of food, energy, health and housing. Significantly, the pattern of price-fixing cases brought in the recent past have typically involved products in those categories of food, energy, health, and housing.

At a time when public confidence in government and industry is at a disturbingly low level such legislation is needed to demonstrate to the public that the government process does provide a responsive mechanism for adequate consumer redress from anticonsumer practices in that so-called "free market."

In 1976, as a result of the extraordinary efforts of supporters of the parens patriae legislation, Congress clearly established in that law the right of direct and indirect customers to collectively sue for violations of the antitrust laws. Simultaneously, the

Congress expressed an affirmation of *Hanover Shoe* when proponents successfully defeated Senate and House amendments to overrule that decision.

How frustrating and ironic that the collective efforts of so many could be effectively undone one year later by a gratuitous footnote authored by Justice White. It is incomprehensible and offensive that such a footnote could seize on an issue that was not before the Court and not even briefed. Essentially, Justice White took it upon himself to decide not only that Congress had not taken action on behalf of direct and individual purchasers in the parens patriae legislation, but that they could not take such action.

As a result we must all reassemble to urge congressional correction of such judicial sloppiness.

In developing language to overrule *Illinois Brick,* it is essential to remember that the principle of simplicity in the language of antitrust law has made that body of law viable. Overly complex and rigid antitrust legislation (as opposed to detailed regulation in other bodies of law) is too easily outmoded and inappropriately intrudes on the legitimate of flexibility which the judiciary needs on a day-to-day basis if they are to wrestle with the intricacies of a particular antitrust fact pattern. In that spirit we urge passage of the most simple and bare bones language necessary to reaffirm parens patriae and are concerned that language beyond the insertion of "direct or indirect" in sec. 4 of the Clayton Act, may create more problems than it resolves.

For example the expression "overcharge" in sec. 41(a) line 4 is not a term of art in antitrust law. We urge that it be replaced with the traditional language of antitrust "violation." Otherwise it is not hard to imagine the lucrative field day antitrust lawyers would have arguing before a court that the "overcharge" language was a significance-ridden congressional departure which demands different standards of proof. The obvious effect of such stall tactics would be swollen time sheets for lawyers at the expense of the consuming public.

We are likewise concerned about the potentially contradictory approach to burden of proof encompassed in sections 41 (a) and (b). The first provision suggests that chronologically the plaintiff has the initial burden of proof in establishing damages before the questions of antitrust violation is even considered. On the other hand (b) suggest an initial burden of proof on the defendant.

It is essential that the legislation unequivocally specify that consideration of an antitrust violation precede the questions of injury, and amount and allocation of damages. Only that sequence makes equitable and logistic sense. Price-fixers should not be allowed to triumph in the court room just because some or all of the victimized consumers have not adequately sustained their burden of proving their specified damages. In those situations the defendants should not be allowed to hoard their price-fixed profits but rather should forfeit those funds in a manner consistent with judicial discretion. Even civil damages payable to the State and Federal treasuries or both would be far preferable to no recovery at all.

In light of the fact that the proof of damage component of the trial would frequently be the most time-consuming and complex aspect of the litigation, (particularly in a judicial world where *Hanover Shoe* has been weakened), we urge consideration of a more efficient process of proof. Specifically, we recommend that whereas the proof of violation and fact of injury should be tried in the traditional manner by judge or jury, the amount and allocation of damages might be resolved by an arbitration process. The Congress has wide latitude in molding such an approach, and the use of arbitration has generally proven to be efficiently successful in other areas of law.

Central to CFA's support of this bill, is our conviction that the *Hanover Shoe* decision is vitally important for consumers. Litigation by direct purchasers even in "pass through" situations has acted as an effective deterrent and enforcement leverage. Potential double recovery skirmishes can and should be accommodated by such procedures as mandatory joinder, reasonable standards of foreclosure, et cetera. Although this bill's approach to *Hanover* is an improvement from last year's bill, we would urge total elimination of sec. 41(b).

Finally, CFA emphasizes that passage of the *Illinois Brick* bill alone would as a practical matter, do little if anything to restore individual consumer clout against price-fixers. A number of other measures must also receive priority treatment by the 96th Congress. Reasonable consumer class action notification and aggragation of damage procedures must be legislatively restored. Individual consumers should be empowered to enforce antitrust consent orders. A clear right to consumer "standing" in the courts must be recognized, and unwieldy and counterproductive antitrust discovery procedures must be reformed.

Only a "package" of reform bills will shape the much needed total substance around the form encompassed in the *Illinois Brick* legislation.

PREPARED STATEMENT OF MITCHELL ROFSKY

I appreciate the opportunity to represent today the views of Public Citizen in support of the "Antitrust Enforcement Act of 1979." Our support is an outgrowth of our deep commitment to effective private enforcement of the antitrust laws. Private antitrust cases have totaled an average of over a thousand a year including numerous suits brought by state attorneys general. When this figure is contrasted with the average of 65 cases a year brought by the Antitrust Division between 1969 and 1978, it is clear that consumers cannot rely upon the Federal Government alone to deter antitrust illegality. Only state and private antitrust suits will take all the profits out of price fixing.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 incorporated many of our suggestions. From the standpoint of non-federal antitrust enforcement, the most important portion of the Act was title IV's parens patriae provision, which permits state attorneys general to represent local residents injured by price fixing. Yet, no sooner was the first major antitrust reform to emerge from the Senate Judiciary Committee in 25 years on the books than the Supreme Court effectively repealed it.

The Court took what might be termed the "indirect" approach to vitiating the Hart-Scott-Rodino law. Its *Illinois Brick* decision bars a state injured by a price-fixing conspiracy from recovering where it did not deal directly with the price fixer. This decision has already had the effect of barring suits by consumers who are indirect purchasers. For example, courts have prevented consumers from pursuing antitrust suits involving sugar products and wheelchairs due to the *Illinois Brick* ruling. Consumers will be injured frequently when middlemen pass price fixed overcharges to them, but these consumers will have no direct dealings with the price fixer. Under *Illinois Brick,* the real victims of price fixing are prevented from recovering their damages.

Given the theme of indirectness, it was only to be expected that the Courts dismiss the legislative history of the Hart-Scott-Rodino Act in a footnote. Justice White chose to ignore numerous floor statements that reflected Congress' belief that consumers already had standing to sue antitrust violators, whether their relationships were direct or indirect. Furthermore, the Court did not consider that not one legislator in either the House or Senate questioned whether the Hart-Scott-Rodino Act was flawed for not confronting the issue of indirectness.

Senator Hugh Scott described congressional intent eloquently at last year's hearings: "We were acting to close a gaping holiday in the coverage of the antitrust laws. Experience had shown that middlemen are ordinarily reluctant to sue their suppliers. Thus, we were guided by two basic concerns, first, a genuine concern for the ultimate victims, to allow cash payments to the small consumer who previously had no meaningful remedy; and second, a desire to deter the widespread practice of price fixing in small consumer items by exposing the price-fixer to potentially ruinous liability. Unless one accepts these premises as true, the debate that preoccupied the Senate and House last year made absolutely no sense."

Scott pointed out that the opponents of the Hart-Scott-Rodino bill must have recognized that the legislation authorized attorneys general to sue on behalf of all consumers for them to oppose it so diligently. Scott continued, "I would lack candor if I did not say to you today that in my opinion the majority of the Court in *Illinois Brick* has flouted the will and purpose of Congress in a most crass fashion." Scott concluded that the Court's opinion "soaked consumers." [1]

Objections to this legislation in last year's hearings were of two types: First, there were technical questions as to whether the legislation successfully accomplished its intended goal of restoring consumer rights. One witness questioned whether the terms "directly" and "indirectly" were used in such a way as to inadvertently grant standing to remote plaintiffs. Another witness expressed concern that the House provision for tracing damages were not incorporated into the Senate version. These problems appear to be corporated into the Senate version. These problems appear to be resolved in the new version of the Antitrust Enforcement Act.

The second type of objection was less technical, but more familiar. The opponents of the Antitrust Enforcement Act of 1978 dusted off the same arguments that Congress rejected when it enacted the Antitrust Improvements Act of 1976. The same arguments concerning unmanageability, duplicative liability, uncertain dam-

---

[1] Statement of Senator Hugh Scott, Subcommittee on Antitrust and Monopoly, Hearings on the Antitrust Enforcement Act of 1978, July 21, 22, and September 9, 1977, pp. 15–16.

ages and profligate attorney fees were heard all over again. Congress should be no more swayed now by the imaginative concerns of the antitrust defense bar than they were when the Hart-Scott-Rodino Act was enacted.

But the most mischievous proposal of last year was that Congress do nothing. "Give the law a chance to develop further on its own," declaimed Samuel W. Murphy, Jr.,[2] "Frankly, the pace at which the Congress is moving gives me cause for worry," said the representative of the National Association of Manufacturers. "I would prefer to have the dust settle before presenting the American bar and the Courts with additional legislation to digest." [3] Of course, the holding action advocated by these men would cost the American public millions of dollars. Several hundreds of millions of dollars are currently at stake just in state lawsuits involving indirect purchasers. To the extent that antitrust law is now uncertain, it will be no more uncertain if Congress overrules *Illinois Brick*. In 1976, Congress decided to let the law develop with consumers in possession of a practical mechanism to recover their damages. The Supreme Court should not be allowed to overrule congressional intent and dictate that uncertainties will be exploited in a fashion inimical to consumer interests.

The bill that was introduced yesterday has been improved over last year's version in a way we consider essential: *Hanover Shoe* is now repealed in part. The "pass-on" defense is to be considered by the Court only when duplicative liability is, in fact, a danger. This is a valuable effort by the sponsors to respond to the concerns of both consumer representatives and the antitrust bar that the maximum possible recovery be obtained from a guilty defendant. The legislation should now assure that a defendant will not successfully wield the "pass-on" defense to frustrate a direct purchaser plaintiff, only to retain its overcharges when indirect purchasers fail to bring suit. I would like to explore with staff whether there are stronger devices, such as joinder, interpleader, or notice to indirect purchasers who have not yet instituted suit, which could assure that the lawbreaker's illegally-obtained profits are completely recovered.

The opponents of this legislation have never lacked ingenious arguments. They are willing to condone antitrust violations which could yield their clients millions of dollars because they are not satisfied with the size of the consumer's injury. Or they will contend that consumer suits are a waste of time since the cost of the judgment is incorporated into retail prices and passed right back to the consumer.

These arguments ignore a number of factors: Individual consumer recoveries are substantial amounts of money as often as not. (Two witnesses at last year's Senate hearings received about $1,000 each as part of the tetracycline settlements.) Competitive market conditions should limit the ability of corporations to immunize themselves from consumer recoveries. But if these arguments were not, on their face, invalid, the Senate would then have to confront a more fundamental issue: can those corporations which seek the same rights as individuals evade the responsibilities of individuals? This Nation's major corporations persuaded the Supreme Court to extend them the First Amendment's protections of free speech in the *Bellotti* decision.[4] But corporations want immunity from suit enjoyed by no individual even when the plaintiff has relatively little at stake. This committee has rejected previous attempts by corporations to hide behind their organizational structure when it suits them, and should do so again.

Finally, this legislation offers a modest, yet important, tool that consumers can use to combat inflation, the nation's most serious economic problem. The public has been misled that their only duty is to monitor the size of the Federal deficit. The responsibility of the private sector for higher prices is often ignored. With antitrust violations costing consumers billions of dollars a year, a proposal which returns to the average citizen and their state officials the power to reduce illegally jacked up prices captures the nation's mood and must have the support of the great majority of Americans.

Prepared Statement of Gerald Jones

The Paralyzed Veterans of America support efforts to overturn the June 9, 1977, Supreme Court ruling in *Illinois Brick Company* v. *Illinois*. PVA, along with many other organizations and consumers, believes that injured consumers, whether Government, businesses or individuals, should have access to the court. The courts should have the flexibility to determine on a case-by-case basis whether the suit has

---

[2] Statement of Samuel W. Murphy, Jr., op. cit. p. 182.
[3] Statement of Rodd D. Young, op. cit. p. 168.
[4] *First National Bank of Boston* v. *Bellotti*, 98 S. Ct 1407 (1978).

merit and is to be pursued. Furthermore, we believe that *all* purchasers who have been injured by antitrust violations, whether direct or indirect, including the federal government, states, businesses and consumers should be able to recover damages.

In addition to reviewing cases of price-fixing, the courts should have the power to rule on cases where monopolistic manufacturers of specialty items injure their often small but dependent market.

The Paralyzed Veterans of America has a membership of 10,000, most of whom will be directly and beneficially affected by legislation to overturn the *Illinois Brick* decision. Without a free, competitive wheelchair market, American wheelchair users have little choice in purchasing the most important product they must buy. The wheelchair provides mobility and independence for disabled individuals: without it, the disabled person cannot work, attend school, shop, or engage in other everyday activities.

I appear before you today representing my constituents who, by virtue of their use of wheelchairs, are greatly interested in the lawsuit, *Good et. al.* vs. *Everest & Jennings,* a consumer class action suit against the major U.S. manufacturer of wheelchairs. Wheelchair consumers have been injured by having to pay artificially inflated prices for their wheelchairs and related devices because Everest & Jennings has engaged in monopolistic restraints of trade, unfair competition and deceptive practices. It is estimated that there are over half a million individual long-term wheelchair users in the United States. We believe that Everest & Jennings controls 90 percent of the market of wheelchairs that are intended for long-term use. The *Illinois Brick* decision has had an adverse impact on hundreds of thousands of wheelchair users who have no choice but to purchase a product at artificially inflated prices, and this monopoly has resulted in poor quality workmanship due to the lack of competition in the industry. The *Illinois Brick* decision has hit hardest a group of consumers who are left with no other option than to pay exorbitant prices to an illegal monopoly.

The Paralyzed Veterans of America has also played a major role in opposing two proposed consent decrees in the parallel case of *U.S.* v. *Everest & Jennings,* a civilian action being brought by the Department of Justice. The first consent decree developed by the Justice Department and Everest & Jennings was rejected by the U.S. District Court on December 18, 1978. The second consent decree is presently before the Court for its public interest determination.

Everest & Jennings is the major manufacturer of wheelchairs in the United States. Its operations began in 1933 and by the mid-fifties it had a predominant share of the U.S. wheelchair market mostly because it held a patent for a folding tubular steel frame wheelchair, which was quite an innovation in wheelchair design for its time. This patent, and other significant patents, had expired by 1955. At that time, Everest & Jennings became seriously concerned about foreign competition from wheelchair manufacturers overseas. Everest & Jennings' response to this threat was to enter into agreements with English and German wheelchair and medical device manufacturers and distributors. The intent of these agreements was to make territorial allocations of the international wheelchair market and to ensure that foreign manufacturers would not sell wheelchairs within the United States. In the sixties Everest & Jennings purchased a Canadian and a Mexican wheelchair manufacturing company. Both companies have never exported wheelchairs into the United States.

Everest & Jennings is the most profitable wheelchair manufacturer in the industry: their records indicate high profit margins on wheelchair operations. Their corporate officers have been paid extremely high salaries, and the Jennings family's interests have received extremely large amounts of money through salaries and returns on equity.

All of this has been at the expense of the wheelchair consumer. In 1976 the cost of a standard adult wheelchair (E & J's 8AU 260–770 with detachable desk arms and pneumatic tires all around) in England was $158.87. The same wheelchair in the United States cost the consumer $521.00. The policy of Everest & Jennings has been to prohibit the sale of the less expensive wheelchairs in the United States, and the result is that American designed wheelchairs sell for considerably less in Europe than in the United States.

Another unfair practice that wheelchair consumers have complained of is that retailers and the manufacturer often take weeks to perform routine servicing and repair work. The consumer may not be given a loaner wheelchair to use during the time of the repair, and thus may be forced to have a spare on hand to use during the time that his or her regular wheelchair is at the shop. Retailers often blame the time lag on delays in receiving replacement parts from Everest & Jennings. This

situation forces consumers to purchase two wheelchairs at inflated prices in order to be able to have a wheelchair to use during repair delay time.

Another major result of the illegal wheelchair monopoly is poor quality workmanship of the basic product itself. In a 1976 survey of wheelchair users conducted by the Disability Rights Center, wheelchair consumers complained of poor design, lack of durability, poor back support, improper fit, defective parts, and peeling chrome hand-rims that cut users' hands. When these misfortunes arise, as they so often do, the consumers are in the position of having to go back to Everest & Jennings because of a lack of choice. Without healthy free market competition, the product is not expected to improve.

The *Illinois Brick* decision has resulted in the dismissal of the private wheelchair suit in Federal Court for the Central District of California. Wheelchair consumers are appealing that decision, arguing that *Illinois Brick* should apply only to price-fixing cases, not those involving monopolization claims.

The Paralyzed Veterans of America are appreciative for the opportunity to testify against both price-fixing and monopolistic practices. We have tried to illustrate the need for consumer protection by showing the damaging effects one monopolistic enterprise has had on the members of an isolated, hapless market.

Wheelchair consumers are relying on the members of this Committee to give them the power to use the Federal courts to seek redress. We cannot believe that Congress ever intended to leave us virtually defenseless against a profiteering monopoly that is very content to take advantage of the fact that handicapped people need wheelchairs as a necessity of life. We ask you for no more than what is equitable and fair.

Senator BAUCUS. Our last witnesses today will be a panel representing small businesses, Glenn Freie, chairman, Meat Price Investigators Association. We are glad to have you back, Mr. Freie. Vondal Gravlee, president of the National Association of Home Builders; Gerard Panaro, associate general counsel, Associated Retail Bakers of America; and Edgar Cleveland, who is a wheat farmer from southwest Oklahoma, who is also back with us today. Thank you very much, gentlemen.

It was brought to my attention that Mr. Gravlee is from the State of one of the newer and more illustrious members of this committee, Senator Heflin.

Senator HEFLIN. I appreciate the kind comments about the illustrious member, coming from the next junior Democrat to me. I think that is a great compliment, but I am particularly glad to welcome here Mr. Gravlee, who is the president of the National Association of Home Builders. Vondal has been active in civic affairs and politics. He was Senator Sparkman's finance chairman for years, and former president. We welcome you here today.

Mr. GRAVLEE. Thank you, Senator.

PANEL OF REPRESENTATIVES OF SMALL BUSINESSES: STATEMENTS OF GLENN FREIE, CHAIRMAN, MEAT PRICE INVESTIGATORS ASSOCIATION; VONDAL GRAVLEE, PRESIDENT, NATIONAL ASSOCIATION OF HOME BUILDERS; GERARD PANARO, ASSOCIATE GENERAL COUNSEL, RETAIL BAKERS OF AMERICA; AND EDGAR CLEVELAND, WHEAT FARMER, OKLAHOMA

Senator BAUCUS. Mr. Freie, why don't you proceed first?

Mr. FREIE. Thank you. I will submit my statement for the record.

It is getting to feel like old home week here. I will go quickly through it.

Let me say I have lived, slept, and eaten this issue for about a year and a half now, and I will be very happy when I can go on to

my original occupation of farming. I have spent a great deal of time on this subject. You are liable to run into me anyplace in the hall.

The significance of the *Illinois Brick* decision is hard to state in just a few minutes of time, to us, the cattlemen of the country.

There are two things that trouble me greatly. I have spent weeks visiting with many people on our views. One is that it seems to me that all I hear from the opposition is that the matter is complex, we had better leave it alone because it would tie up too much time for the courts and the country.

I guess this really bothers me a great deal, that to think that we are going to try to administer justice in our country on this philosophy. We as cattlemen have spent hundreds and hundreds of thousands of dollars and 4 years of hard work doing some things that in our opinion should have been done by some of the agencies here in Washington in the first place. When this matter was brought to the attention of the many agencies here in Washington, concerning the beef antitrust litigation, it seemed like nobody was interested in coming out from behind their desks and coming out to the fields and really trying to find out if we had a legitimate reason to be complaining, and to want something done.

As I hear the opposition to *Illinois Brick* talk about the many kinds and processes that we might go through to obtain a remedy for our problem, it disturbs me to no end because I know that I have been through that route, I have been to all of the so-called agencies. I have been around the country. I travel 250,000 miles a year. I talked to people all over this grand country of ours, and there was nobody interested in doing this job until the meat price investigators put together the money to do it. I come in here and I hear people say that because what you are talking about is a complex issue, and it might take some of the courts' time that we had better forget about justice.

I think that every person who is involved in lawmaking ought to consider this and see whether this is really the best policy for our country.

I guess I have always been taught that where there is a will, there is a way, as a rule. As I heard the dialog again this morning, it seemed to me that some of the people who are opposed to this legislation were not interested in trying to find out a way to write this bill that would seem to them to do the job, only interested in trying to conceive of many new different kinds of ideas and ways of doing it in a different way to maybe make it more complex than it would be if we tried to straighten the bill out we had.

I guess I am an old-fashioned country boy because that is where I come from, but I still believe that the courts were made for justice in this country, and I wonder where the justice is when there are over 50,000 cattlemen involved in this beef litigation who are independent businessmen, who have in our hands and at our disposal at this time the evidence to prove that price fixing and monopolization is occurring in the meat industry—in fact, in a judgment handed down by Judge Taylor in Texas on the *Iowa Beef Pricers* case, where they wanted summary judgment to eliminate the case we were involved in, he ruled there was plenty of sufficient evidence to bring this case.

42-005 O - 79 - 7

We did the work that was supposed to be done, and now along comes the courts and they say that we no longer have the right to be heard.

I might sound a little critical this afternoon, but I present this only because I want people to know that all I want is justice. I did not come to Washington to ask for any handouts. We did not come to ask you to support the beef industry, when we went through the last 4 years of unduly low prices. But I want a fair opportunity to operate in a marketplace that is not controlled by a few people.

If that is the wrong kind of justice to ask for, then maybe I am living in the wrong country. I will do for myself what is necessary in the handling of my business as a small, independent businessman, to correct the problems I face if I can go out into the marketplace and receive my fair share of that thing.

I would like to close with a little thought that I hope points out what might happen. Let us suppose today, Senator, that you were holding a hearing on criminal law instead of antitrust and that you would ask Glenn Freie, as chairman of the Meat Price Investigators, to come to testify about a problem that he faces that might be remedied by criminal law. I come to you today and I said, Senator, I have a problem. Every day there is a man with a gun who comes out to my place, takes a little bit of my property. Because he comes from outside of Franklin County, which is the northern part of Iowa, the sheriff says he can't do anything about it.

On top of it, Senator, when I get ready to load my beef up to take it to the market, there is a man standing there in the driveway with a gun saying, "Where are you going?" I say, "I am going to market." He says:

> OK, you can go to market but you are going to go to market where I want you to go and you are going to receive the price for that beef for what I want to pay you. If you want to market in those conditions, take it. Otherwise, you had better unload it.

If I brought that to you, I am sure that every Senator and every Congressman here would try somehow to put together a law that would eliminate the things that threaten me in those two circumstances. When I come here to do this under the antitrust laws of our country, there is a great deal of opposition and the same thing is happening.

In both cases, they are stealing from me what is mine and they are taking away from me the opportunity to be a retail, independent businessman of a country which has made our country what it is. You say, again, this sounds old fashioned. I have heard it so many times. I have been around too long, traveled to too many college campuses and talked to too many students. I know what made America great, because it is the land of justice. If it was a criminal law, it would be handled immediately. Give the sheriff the right to arrest those two guys and that would be done immediately.

When it comes to the antitrust laws, because many people are afraid of antitrust because they don't understand it, and I guarantee you I couldn't even say the word until about 2 years ago, I had no idea what it is. I am no lawyer, no economist; I am a farmer from Franklin County.

Because they say it is too complex, I have heard it in all the hearings, in the offices that I walked around, that it is such a complex issue I can't understand it. But really, if you want to take

the time, it is not that complex. You say, again, you are being very simple. Let me tell you, I have heard judges, lawyers, professors, politicians and people from all over the country, talking for 2 solid years, and you can make out of it what you want to make out of it.

So today I ask for nothing else again, but when the Senate and the Congress takes a look at this matter to realize that no matter what kind of law you write, that there is going to be some bad and some good from it. That if we are going to write laws that only takes care of simple things, maybe then we could start electing simple people to Congress, because it would be a simple matter to handle.

Again, I am not here to condemn, but I have spent many days wondering where the justice is going to come for the cattlemen of the country and for the consumers who are consuming the product that we produced.

Thank you, Senator.

Senator BAUCUS. Thank you, Mr. Freie. That is one of the more compelling statements we have heard today. I come from a State very dependent upon the livestock industry. And I can assure you that Montana cattlemen are in accord with your feelings. They would be very proud if they were able to hear you today speak on their behalf. I want to thank you for your contribution.

Senator Heflin, do you have any questions?

Senator HEFLIN. No.

Senator BAUCUS. We will proceed next to Mr. Gravlee. Welcome to the committee.

Mr. GRAVLEE. Mr. Chairman, members of the committee, my name is Vondal Gravlee, and I am a home builder from Birmingham, Alabama. I am testifying today on behalf of the more than 113,000 members of the National Association of Home Builders, the trade association of the Nation's home building industry, of which I am president.

Accompanying me today are Robert D. Bannister, senior staff vice president for governmental affairs, and Jennifer Sauve, assistant legislative counsel.

We appreciate the committee's invitation to appear here this morning to present our views on the Antitrust Enforcement Act of 1979, and to explain why reversal of the *Illinois Brick* decision is important to America's home builders.

The National Association of Home Builders strongly supports legislation to overrule the *Illinois Brick* decision and once again allow businesses and other indirect purchasers the right to recover damages for antitrust violations in those instances in which they have not dealt directly with the violator.

To illustrate the impact of *Illinois Brick* on the National Association of Home Builders, it is helpful to recognize the makeup of our association. Most of NAHB's members are small business home builders engaged in the construction of both single-family and multifamily housing as well as commercial structures. Annually, our members purchase thousands of items and materials that are used in constructing and equipping the structures they build.

Traditionally, NAHB's members, the builder-owners, have not purchased building materials directly from manufacturers. Many purchase materials from general contractors as part of a finished

construction project. Others purchase from subcontractors as part of the specialty subcontract which is let in the course of building a structure. Still others purchase from wholesalers of building materials. Only a small minority are large enough to be able to avoid the building industry's materials distribution system and buy directly from the manufacturer.

Thus, under *Illinois Brick,* most, if not all, of the builder-owner members of NAHB would be indirect purchasers with no standing to be plaintiffs or class members in antitrust actions against manufacturers.

Under the *Illinois Brick* decision, where manufacturers overcharge their customers as a result of price fixing, only the direct purchasers can recover. Yet, the direct purchasers would usually be wholesalers or other middlemen who are often able to pass on part or all of their increased costs to the builder, who would be the injured party.

Since middlemen may not suffer financial harm, they would have no motivation to sue the manufacturer. In addition, a middleman and a manufacturer often share a longstanding relationship which a middleman may not want threatened by litigation.

While a middleman would not be very likely to sue, if he did he could retain any recovery, although he had already collected from the builder in the form of higher prices during the period of illegal antitrust actions of the manufacturer.

Where, then, is the deterrent effect of this part of the antitrust law? If a builder is an indirect purchaser and has no standing to sue the antitrust violator, and the middleman himself is unlikely to sue, this leaves the antitrust law without much force. Apparently the treble damage provision was envisioned as a forceful deterrence, but the law as interpreted by the Supreme Court dilutes this deterrence considerably.

And, where is the compensation for the injured party? If a home builder or other small businessman has had to pay the illegal price increase which was passed on by the middleman, the indirect purchaser is the injured party, but he has no standing to collect damages from the antitrust violator.

Illinois Brick, then, has virtually eliminated the ability of the small businessman to protect himself from antitrust violations. And in doing so, by sharply curtailing the indirect purchaser's recourse to the courts, the decision has protected the violator from threat of treble damage suits against him. Fairness demands compensation to an injured party from an antitrust violator, whether the purchase was made directly or indirectly.

Mr. Chairman, you are well aware that increased housing costs are one of the major problems affecting our national economy today. Over the past year, the median cost of a new house has increased from $51,800 to $58,700, a 13.3-percent increase. I am not saying that illegal overcharges in construction materials have been a major component in this price increase. Construction materials make up approximately one-third of the sales price of a home. However, providing the builder with a cause of action under section 4 will provide a deterrent against price fixing or other violations of the antitrust laws by the manufacturers and suppliers of

construction materials which could unjustifiably increase the price of a new house.

The bill states that pass-on of the illegal overcharge may, in the discretion of the court, be permitted as a partial or complete defense against a damage claim in order to avoid duplicative liability. The NAHB agrees that a partial reversal of the *Hanover Shoe* decision under certain specified circumstances is preferable to allowing pass-on as an absolute defense.

An illegal price increase on one single item in the construction of a house, when passed on by the builder who cannot absorb the increase, may amount to a very small increased cost to the home buyer. The buyer in this case would probably not choose to bring suit against the manufacturer who allegedly price fixed that item.

The home builder, on the other hand, may have had to pay this illegal cost increase on every house he built for several years, amounting to sufficient economic injury to warrant legal action. Under the pending bill, the court would have discretion to determine whether there is really a threat of duplicative liability before pass-on is allowed as a defense.

The committee's scheduling of this legislation early in the session indicates not only the importance of reversing the *Illinois Brick* decision, but also the urgent need for corrective legislation.

NAHB does not take lightly its support of legislation which would reverse a decision of the U.S. Supreme Court. However, our understanding of section 4 of the Clayton Act would indicate that any person injured in his business by reason of anything forbidden in the antitrust laws may sue for treble damages. We believe, therefore, that Congress should pass legislation to reaffirm the congressional intent that "any person injured in his business" means any person injured, whether or not he dealt directly with the defendant.

Since the June 9, 1977 Supreme Court decision, courts have dismissed some pending damage suits or limited the class of plaintiffs who may recover to those purchasing directly from the violator.

No one can accurately predict how many indirect purchasers who were victims of antitrust violations over the past 20 months have been left remediless as a result of *Illinois Brick*. Nor can one predict the recoveries lost to the victims of price-fixing conspiracies.

One case, however, may illustrate the enormous importance of the pending bill. The mammoth "phantom freight case" is the recent antitrust case concerning southern plywood. Late last year a Federal jury in New Orleans returned what could be the first $1 billion judgment in history. The verdict was in favor of purchasers of southern plywood on their claim that three major plywood manufacturers had conspired to artifically set the price of southern plywood. The jury found that over a 5-year period, from 1968 to 1973, these companies overcharged their customers by adding the cost of western freight to the mill price at the southern mill and by using certain standard "association weights" which were higher than the actual weight.

Consistent with the decision by the U.S. Supreme Court in the *Illinois Brick* case, the trial court had limited the class of plaintiffs

who may collect damages to those who purchased directly from the mill, from company-operated distribution centers or through agents or brokers selling for the account of the manufacturers.

The jury did not determine the amount of the damages and that will be done in a separate proceeding. The amount of the overcharge was determined to be equal to the amount by which the West Coast freight exceeded the actual freight and by the excess of the "association weight" charges for freight over the actual freight.

The defendants contended that southern plywood was priced to be competitive with western plywood and the addition of western freight was to make it easier to compare the two.

The amount of the verdict in this case and the fact that indirect purchasers had no standing to present their claims illustrate the importance of congressional action to reverse the effects of *Illinois Brick* without further delay. NAHB commends you, Mr. Chairman, for your prompt scheduling of hearings.

Thank you very much for the opportunity to testify before you today. I will be happy to answer any questions you may have.

Senator BAUCUS. Thank you very much, Mr. Gravlee.

Senator Heflin, any questions?

Senator HEFLIN. I have one question. Would you explain to me why the home builders favor this bill if they pass on, as I am sure they do in most instances, all of the cost increases to the consumers and that is the purchasers of homes?

Mr. GRAVLEE. Let me explain this to you. I think it will help you understand our thinking on this and reasoning for this testimony.

Many of our builders may be building, we will say, a complex of apartments, or they may be building a subdivision of houses for which the prices have already been stated.

They base those prices, the apartments or the houses, on the prices that were quoted to them at the start of the project. Therefore price the product—in this case, the house—or the contract sale on a group of apartments based on those prices. We have no protection whatsoever if that price changes within 60 or 90 days while they are under construction.

Senator BAUCUS. Thank you very much.

Next, we welcome Mr. Gerard Panaro, associate general counsel, Retail Bakers of America.

Mr. PANARO. Thank you.

I have a statement which will take me approximately 4½ minutes to deliver and I have a written statement for the record as well.

Senator BAUCUS. Without objection, it will be included at the end of your oral testimony.

Mr. PANARO. My name is Gerard Panaro. I am associate general counsel of the Retail Bakers of America. RBA is the national trade association of the retail baking industry, comprising some 20,000 retail bakeries. Most of these are small, independent, family-owned businesses which make what they sell themselves, often by handcraft methods, and sell directly to the ultimate consumer in neighborhood shops.

We recommend the approval of the Antitrust Enforcement Act of 1979 by this committee and its enactment into law for the following reasons.

First, the holding of *Illinois Brick* v. *Illinois* ought be reversed because it is not required by the Supreme Court's previous decision in *Hanover Shoe* v. *United Shoe Machinery Corporation;* indeed, it is based on a misreading of that case. It goes against established principles in other areas of the law and is contrary to the words of the Clayton Act and other antitrust legislation.

Second, by reversing the holding of *Illinois Brick,* this bill will restore the right of indirect purchasers such as retail bakeries to sue or share in recoveries for antitrust violations.

Third, the present bill is both adequate to correct the error of *Illinois Brick* and sufficient to prevent the problems feared by the Court.

Most retail bakeries are too small to buy the ingredients, equipment, and other supplies they use directly from the manufacturer or producer. Yet, they do use substantial enough amounts of these materials to be concerned about recovering for overcharges as a result of antitrust violations.

For example, there are pending right now class actions against sugar refineries and manufacturers of folding cartons alleging violations of the antitrust laws in the sale of these products. Official notices and letters from counsel regarding these suits make it clear that only direct purchasers are included in the plaintiff classes.

I cannot tell you precisely how many retail bakeries are direct or indirect purchasers of sugar and folding cartons since time did not permit calling all our members, much less every bakery in the country, but I can tell you that we alone have some 900 members in the relevant sugar market who are potential plaintiffs.

I called four bakeries here in the Washington area to be able to give the committee some idea of how much sugar they consume. They told me they used between 500 and 600 pounds a week. The other told me he uses between 1,200 and 1,500 pounds a week. That adds up to a range of 26,000 to 78,000 pounds a year. The same bakeries use between 12,000 and 24,000 folding cartons per year. If each of these bakeries were overcharged only 1 penny per pound on sugar, it would still amount to $260 a year for 261,000 pounds. Over 9 years, the period of time covered in the sugar antitrust action, that is $2,340. Trebeled, each baker's damages would amount to over $7,000. These are typical bakeries. They are single-unit operations which means only one store is involved. Each employs six or eight full-time people and six or eight part-time people.

All are indirect purchasers of sugar and folding cartons, among other things, and all four of these bakeries at least will not be able to share in any awards which may be recovered from the sugar and carton defendants in these antitrust actions so long as *Illinois Brick* is the law of the land.

For the reasons given in my written statement, we believe that the result of *Illinois Brick* solved one apparent but not true dilemma, only to create another real dilemma. We believe that the reasoning adopted in that opinion begins from a faulty premise and ends with a faulty conclusion, which is to bar indirect purchasers as plaintiffs.

We submit that whatever judicial efficiency, expediency, and symmetry may flow from the Court's decision must be balanced against the unfairness, injustice, and demerit done to all the poten-

tial plaintiffs thus sacrificed. Retail bakers, as I have just tried to show, feel this injustice particularly sharp. Because we believe the result of *Illinois Brick* to be unfair, unnecessary, contrary to statute and other judicial precedent and destructive of the rights of indirect purchasers such as retail bakeries and because we believe the provisions of the Antitrust Enforcement Act of 1979 will correct the problem if passed, we, the Retail Bakers of America, support the enactment of the present legislation. Thank you.

Senator BAUCUS. Why can't bakeries purchase directly from sugar manufacturers or folding carton manufacturers?

Mr. PANARO. Basically for two reasons: First of all, they don't consume sufficient quantities of sugar in particular to justify the large volume purchases that would have to be made. For example, in talking about the purchase of ingredients such as sugar or flour, you are talking about buying in carloads and by carloads, of course, I mean boxcar loads or truckloads.

Second, most bakeries do not have the storage space, do not have the storage facilities. Most of them are one store operations which means that in one part of the building they do their baking, and in the front part of the store they do their selling. That is for the typical retail outlet.

Within the production area itself, you have to allow space for workbenches, equipment such as mixers, refrigerators, ovens, washing facilities. So only a small part of the total production area which itself is a small part of the shop can be set aside for storage purposes.

So you are talking about being able to have, say, only a couple of hundred pound bags of sugar or flour, et cetera, on hand on any particular day, or time of day.

Senator BAUCUS. I wonder if you could give us an idea of what percentage of cost increases the bakeries are able to pass on and what percent they are forced to absorb?

Mr. PANARO. I am glad you asked that question, because as a matter of fact, as I understand it, retail bakeries cannot pass on entirely any increased costs to their consumers. Here again, this is for a variety of reasons. First of all, ingredient cost while significant does not represent the total cost of the product. A very significant part of the cost of any bakery product, at least in the retail bakery, is labor. The cost of labor is anywhere between 20 and 50 percent or more of the cost of an item.

Second, each retail bakery and retail bakeries as a whole face far greater competition among themselves than higher levels in the distribution chain do, such as their supply houses or the ultimate sources of supply.

In the case of a retail bakery, if the price of an item, whether it is a cookie, a cake, a pie, a loaf of bread, whatever it is, seems too high, the consumer has one of three choices: He can refuse to buy the product at all; the consumer can decide to give up cookies or cakes for this week or month or whatever it is. Or, second, the consumer may go to another bakery or third, choose to buy the product elsewhere than in a retail bakery. So for these reasons, while the retail bakery can pass on to some extent its increased costs, it must absorb a proportion of them, too.

Senator BAUCUS. Could you give us any idea of the percentage of the cost increases which they can or cannot pass on?

Mr. PANARO. I really couldn't. I could try to find out. I don't know if they themselves would know that because again due to the size and nature of the operation most of the bakers we are talking about are not very good recordkeepers. I will try to find out if I can.

Senator BAUCUS. Next we will hear from Mr. Ed Cleveland, Oklahoma wheat farmer. Mr. Cleveland, you can proceed in any manner that you wish.

Mr. CLEVELAND. Thank you, Mr. Chairman. Thanks again for the opportunity to appear before this committee. My name is Ed Cleveland, a wheat farmer in southwest Oklahoma. I don't wish to burden the committee with repetitious testimony. Nothing has really changed in my situation since I made a detailed statement in connection with this bill, the previous bill, to this committee last April 26th.

Our suit is still in limbo. I still represent 34,000 Oklahoma wheat farmers in a class action against six international grain traders and an Under Secretary of Agriculture. But today we are barely alive in our suit, which was filed long before *Illinois Brick,* and without passage of the Senate bill, this suit is dead.

Under *Illinois Brick* the Federal judge in Oklahoma says our class is out as certified, and those who subvert the market can continue to do so without challenge. It just seems to me that this *Illinois Brick* decision is eroding our free enterprise, free, open market system. And farmers who market a commodity such as wheat where such a large portion of it enters the international trade channels, we will remain at the mercy of market manipulation.

I believe that this situation will appear as intolerable to you as it does to us. Let's say by some chance that the PRC makes demands on our production to the extent that Russia did in 1972, will we face the same debacle? This suit represents no subsidy, asks for no new government program, just a fair shake in the marketplace.

That is sort of a capsule, Mr. Chairman, of my testimony last April. If there are any questions, I would be happy to try to answer them.

Senator BAUCUS. Thank you, Mr. Cleveland. I am very interested in your testimony. The production of wheat is very important to my State, Montana. The subject you are addressing this afternoon is one which I have been trying to get a handle on for the last couple of years. I want to commend you for your efforts.

Mr. CLEVELAND. I am sure you are aware that subsequent to the suit we filed in Oklahoma a similar suit was filed in Texas and one in New Mexico by New Mexico growers. Those suits—well, a little bit of history. That hung up in Washington for a long time and then those suits were all consolidated for the purposes of discovery and testimony under the Federal judge in Oklahoma City, just a matter of information about the history of this suit.

Senator BAUCUS. I want to thank the panel very much for your participation this afternoon. I appreciate your constructive testimony. Thank you very much.

[The prepared statements of Messrs. Glenn Freie, Vondal Gravlee, and Gerard Panaro follow:]

PREPARED STATEMENT OF GLENN L. FREIE

My name is Glenn L. Freie, and I am a farmer and livestock producer from Latimer, Iowa. I am appearing before this Committee in my capacity as chairman of Meat Price Investigators Association, a trust and unincorporated association representing approximately 500 cattlemen in 14 states.

In early 1975, a group of Iowa cattlemen, including myself, became disturbed by the extended depressed price that cattlemen were receiving for their cattle. We had read about an antitrust lawsuit brought by a few Iowa cattlemen. Some of us had heard about a jury verdict in a case brought by a few West Coast cattlement against A. & P. In other words, our curiosity about possible antitrust problems in our industry brought some of us together to see if we could do anything to help ourselves. We believed that if we could show that we were wronged and injured, the law provided us a remedy.

At that time (February 1975) we simply could not understand the way the cattle market was working. All we knew was that we were losing a lot of money.

We started talking to other cattlemen around the State of Iowa, and in March 1975, about 120 met together in Des Moines to discuss our common problems. At that meeting, we decided that something was definitely wrong. We formed an organization which eventually became Meat Price Investigators Association (or "MPIA") and hired a couple of Des Moines lawyers with antitrust experience to see if they could figure out what was going on. I was elected by the group to keep an eye on the lawyers.

First of all, we went to Washington, D.C. and talked with the Justice Department, the FTC, the Department of Agriculture, Packers and Stockyards Administration, and various committees of Congress who were then, or had been recently, investigating the food industry in general. We found little help or enlightenment, and little interest in getting behind the problem. No one was interested in enforcing the law for cattlemen, in spite of the fact that a Federal jury in San Francisco had just found that A. & P. and other retail food chains had violated the Sherman Act in the procurement of beef during 1964 to 1968.

No one, in 1975, was interested in leaving their desk in Washington to see what was happening in the field. This was particularly true of the Justice Department. They felt that if the problem did not magically appear on their doorstep, there was no problem (I might add that today the House Small Business Subcommittee and the Packers and Stockyards Administration have made some field investigations which are showing that there is something wrong in the cattle and beef industry.)

Of course, all of us had talked through the years to our packer buyers about our problem—they were not interested in helping us by sueing their customers, the retail food chains. We later were to learn why packers would not sue—they were and are part of the rig. (Judge Taylor, in the *Beef Industry Antitrust Litigation,* has recently ruled that we had enough evidence to keep Iowa Beef Processors in our suit against the packers, when he overruled IBP's motion for summary judgment.)

The stark reality in 1975 for MPIA was that if someone was going to get behind the beef marketing system in the United States, locate the problems, and enforce the Antitrust laws, we were going to have to do it ourselves. The incentive for our action was the Sherman and Clayton Acts, which then clearly told us that if we could prove a case, we could receive compensation for our injuries and obtain corrective injunctive relief. With this understanding of our rights in the Federal courts, we pooled together our money. We felt that even though we had all lost hundreds of thousands of dollars in the cattle business, and some of us had gone totally broke, it was worth while to somehow find the money to seek redress for our injuries in the courts. With that in mind, we sought out other cattlemen to make substantial financial commitments to our investigation and possible lawsuit.

MPIA has now been investigating the beef industry for over 3 years. We have spent many tens of thousands of dollars of our members' money. We have travelled all over the country. We have consulted with many of the leading agricultural economists and other experts in the field. We have developed a convincing case of a massive combination in restraint of trade and attempted monopolization of the beef industry, whose target has been and is still the cattleman. We are the persons they intend to injure—they are intentionally in combination to depress our price.

In December 1975, we brought a lawsuit in the Southern District of Iowa against the 10 largest retail food chains, their trade association, and a price setting service known as the National Provisioner "Yellow Sheet." In August 1976, we brought an

additional lawsuit against four major beef packers. Both suits charge violations of sections 1 and 2 of the Sherman Act.

After 8 months delay, our case against retailers was consolidated by the Multidistrict Panel with several other similar cases brought by hundreds of cattlemen throughout the country in the Northern District of Texas in *In Re Beef Industry Antitrust* ligitation, MDL No. 248. Later on, our packer case was also consolidated into that Multidistrict docket.

At all times prior to the *Illinois Brick* decision, the Fifth Circuit would allow proof of offensive pass-on. This was clearly stated in the *Yoder Brothers* case.

As soon as *Illinois Brick* came down, the retail defendants moved to dismiss our case. In spite of the fact that we could show a clear pass-on and a two-tier combination between retailers and beef packers, Judge Taylor dismissed our retail case last December (1977). The cases are now on appeal to the Fifth Circuit and will be argued on February 6, 1979.

The long and short of the situation is that when we investigated and filed our retail lawsuit in 1975, we clearly had a remedy under the Antitrust laws. Now the Courts say we have none. As far as cattlemen are concerned, Clayton section 4 has been repealed.

During the seventies, thousands of cattlemen have been forced out of business. Hundreds of thousands of cattlemen have lost substantial money. The cattle industry is a $17 billion a year business. This $17 billion year business now has no remedy in the Courts for Antitrust violations against it.

The big talk around Washington today is inflation and how to stop it. All agree that a great part of the problem is the massive debt, both public and private. Recent studies show that the biggest increase in the private debt in the past 10 years has been in agricultural borrowing. I believe a major part of the agricultural debt increase came from cattlemen borrowing to stay in business after receiving disastrously low cattle prices year after year. In many midwestern and western states billions of dollars of capital are needlessly tied up as a result of the manipulation of beef prices by irresponsible retailers and packers.

There is some talk in Washington about keeping the price of beef down today. I submit to you, however, that the biggest inflationary problem in the beef industry today is the overwhelming debt and dislocation incurred because of the low prices, especially from 1973 to late 1977. It is to recover as much of that loss as we can and to prevent it from happening again that we turn to the Antitrust laws.

We believe that the reason for the courts in this country is to do justice. We believe that where there is an injury, there must be a remedy. If the only goal of our laws were enforcement, then perhaps it would be wise to repeal the Bill of Rights. But even if enforcement is the only goal of the Federal antitrust laws, who is going to enforce our claims? Who besides ourselves will come forward to enforce the antitrust laws in the beef industry. Certainly not those middlemen to whom we sell, for they are in combination against us.

We need clarifying legislation affirming our right to damages against those in the chain of distribution above us, whether we sold to them directly or not. We support and encourage this committee to pass an *Illinois Brick* repealer as soon as possible.

In conclusion, I repeat that MPIA was organized with the understanding that producers had a remedy against those setting prices even if the producer did not sell directly to the price fixer. Virtually all investigative activity that has been undertaken with regard to pricing in the beef industry has been generated by private cattlemen in antitrust lawsuits. If we, the indirect sellers, do not have the right to sue, the price fix in the beef industry will never see the light of day in the courts.

Prepared Statement of Vondal S. Gravlee

My name is Vondal S. Gravlee, and I am a home builder from Birmingham, Alabama. I am testifying today on behalf of the more than 113,000 members of the National Association of Home Builders (NAHB), the trade association of the Nation's home building industry, of which I am president. Accompanying me today are Robert D. Bannister, senior staff vice president for governmental affairs and Jennifer Sauvé, assistant legislative counsel.

We appreciate the committee's invitation to appear here this morning to present our views on the Antitrust Enforcement Act of 1979, and to explain why reversal of the *Illinois Brick* decision is important to America's home builders.

The National Association of Home Builders strongly supports legislation to overrule the *Illinois Brick* decision and once again allow businesses and other indirect

purchasers the right to recover damages for antitrust violations in those instances in which they have not dealt directly with the violator.

To illustrate the impact of *Illinois Brick* on the National Association of Home Builders, it is helpful to recognize the makeup of our association. Most of NAHB's members are small business home builders engaged in the construction of both single-family and multi-family housing as well as commercial structures. Annually, our members purchase thousands of items and materials that are used in constructing and equipping the structures they build.

Traditionally, NAHB's members, the builder-owners, have not purchased building materials directly from manufacturers. Many purchase materials from general contractors as part of a finished construction project. Others purchase from subcontractors as part of the specialty subcontract which is let in the course of building a structure. Still others purchase from wholesalers of building materials. Only a small minority are large enough to be able to avoid the building industry's materials distribution system and buy directly from the manufacturer.

Thus, under *Illinois Brick*, most, if not all, of the builder-owner members of NAHB would be indirect purchasers with no standing to be plaintiffs or class members in antitrust actions against manufacturers.

Under the *Illinois Brick* decision, where manufacturers overcharge their customers as a result of a price-fixing conspiracy, only the direct purchasers can recover. Yet, the direct purchasers would usually be wholesalers or other middlemen who are often able to pass on part or all of their increased costs to the builder, who would be the injured party. Since middlemen may not suffer financial harm, they would have no motivation to sue the manufacturer. In addition, a middleman and a manufacturer often share a long-standing relationship which a middleman may not want threatened by litigation.

While a middleman would not be very likely to sue, if he did he could retain any recovery, although he had already collected from the builder in the form of higher prices during the period of illegal antitrust actions of the manufacturer.

Where, then, is the deterrent effect of this part of the antitrust law? If a builder is an indirect purchaser and has no standing to sue the antitrust violator, and the middleman himself is unlikely to sue, this leaves the antitrust law without much force. Apparently the treble damage provision was envisioned as a forceful deterrence, but the law as interpreted by the Supreme Court dilutes this deterrence considerably.

And, where is the compensation for the injured party? If a home builder or other small businessman has had to pay the illegal price increase which was passed on by the middleman, the indirect purchaser is the injured party, but he has no standing to collect damages from the antitrust violator.

Illinois Brick then has virtually eliminated the ability of the small businessman to protect himself from antitrust violations. And in doing so, by sharply curtailing the indirect purchaser's recourse to the courts, the decision has protected the violator from threat of treble damage suits against him.

Fairness demands compensation to an injured party from an antitrust violator, whether the purchase was made directly or indirectly.

Mr. Chairman, you are well aware that increased housing costs are one of the major problems affecting our national economy today. Over the past year, the median cost of a new house has increased from $51,800 to $58,700—a 13.3 percent increase. I am not saying that illegal overcharges in construction materials have been a major component in this price increase. However, providing the builder with a cause of action under section 4 will provide a deterrent against price fixing or other violations of the antitrust laws by the manufacturers and suppliers of construction materials which could unjustifiably increase the price of a new house.

The bill states that pass-on of the illegal overcharge may, in the discretion of the court, be permitted as a partial or complete defense against a damage claim in order to avoid duplicative liability. The NAHB agrees that a partial reversal of the *Hanover Shoe* decision under certain specified circumstances is preferable to allowing pass-on as an absolute defense. An illegal price increase on one single item in the construction of a house, when passed on by the builder who cannot absorb the increase, may amount to a very small increased cost to the home buyer. The buyer in this case would probably not choose to bring suit against the manufacturer who allegedly price-fixed that item. The home builder, on the other hand, may have had to pay this illegal cost increase on every house he built for several years, amounting to sufficient economic injury to warrant legal action. Under the pending bill, the court would have discretion to determine whether there is really a threat of duplicative liability before pass-on is allowed as a defense.

The committee's scheduling of this legislation early in the session indicates not only the importance of reversing the *Illinois Brick* decision, but also the urgent need for corrective legislation.

NAHB does not take lightly its support of legislation which would reverse a decision of the U.S. Supreme Court. However, our understanding of section 4 of the Clayton Act would indicate that any person injured in his business by reason of anything forbidden in the antitrust laws may sue for treble damages. We believe, therefore, that Congress should pass legislation to reaffirm the congressional intent that "any person injured in his business" means any person injured, whether or not he dealt directly with the defendant.

Since the June 9, 1977, Supreme Court decision, courts have dismissed some pending damage suits or limited the class of plaintiffs who may recover to those purchasing directly from the violator.

No one can accurately predict how many indirect purchasers who were victims of antitrust violations over the past 20 months have been left remediless as a result of *Illinois Brick.* Nor can one predict the recoveries lost to the victims of price-fixing conspiracies.

One case, however, may illustrate the enormous importance of the pending bill. The mammoth "phantom freight case" is the recent antitrust case concerning southern plywood. Late last year a Federal jury in New Orleans returned what could be the first $1 billion judgment in history. The verdict was in favor of purchasers of southern plywood on their claim that three major plywood manufacturers had conspired to artificially set the price of southern plywood. The jury found that over a 5-year period, from 1968 to 1973, these companies overcharged their customers by adding the cost of western freight to the mill price at the Southern mill and by using certain standard "association weights" which were higher than the actual weight.

Consistent with the decision by the U.S. Supreme Court in the *Illinois Brick* case, the trial court had limited the class plaintiffs who may collect damages to those who purchased directly from the mill, from company operated distribution centers or through agents or brokers selling for the account of the manufacturers.

The jury did not determine the amount of the damages and that will be done in a separate proceeding. The amount of the overcharge was determined to be equal to the amount by which the West-Coast freight exceeded the actual freight and by the excess of the "association weight" charges for freight over the actual freight.

The defendants contended that southern plywood was priced to be competitive with western plywood and the addition of western freight was to make it easier to compare the two.

The amount of the verdict in this case and the fact that indirect purchasers had no standing to present their claims illustrate the importance of congressional action to reverse the effects of *Illinois Brick* without further delay.

NAHB commends you, Mr. Chairman, for your prompt scheduling of hearings.

Thank you very much for the opportunity to testify before you today. I will be happy to answer any questions you may have.

Prepared Statement of Gerard Paul Panaro

My name is Gerard Panaro. I serve as the associate general counsel of the Retail Bakers of America. William A. Quinlan is our general counsel. The Retail Bakers of America was founded in 1918 as the national nonprofit trade association of the retail baking industry. According to U.S. Census Bureau figures, there are some 20,000 retail bakeries in the country today. Every day, they produce a marvelous variety of bread, cakes, cookies and other bakery foods by largely handcraft methods for direct sale to the consumer in his own neighborhood. Most of our members are small, independent, family-owned businesses. The association's offices are at 6525 Belcrest Road in Hyattsville, Maryland.

I come here today to testify on behalf of S. 300, the "Antitrust Enforcement Act of 1979," to recommend its approval by this Committee and to urge its enactment into law.

We favor this legislation for the following reasons:

1. It will reverse the conclusion of the Supreme Court in *Illinois Brick Co.* vs. *Illinois,* 431 U.S. 720 (1977) that only direct purchasers may sue their sellers for violations of the antitrust laws. In so doing, it will restore the right of indirect purchasers such as retail bakeries, most of whom are too small to buy the ingredients, equipment and other supplies they use in their business directly from the manufacturer or producer, to bring suit or share in recoveries in pending or future

antitrust cases. Indeed, at this moment, many retail bakeries are excluded from plaintiff classes in sugar and folding carton litigation presently before courts in Philadelphia and Illinois.

2. The holding of the *Illinois Brick* opinion is not required by the Court's previous decision in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968); goes against precedent in other areas of the law; and is contrary to the words and spirit of the Clayton Act and other antitrust legislation; and ought, therefore, to be corrected by Congress for these reasons;

3. The present bill is both adequate to correct the error of *Illinois Brick* and sufficient to prevent the problems feared by the Court.

I. ILLINOIS BRICK DECISION TAKES AWAY RIGHT OF RETAIL BAKERS WHO WERE INDIRECT BUT SUBSTANTIAL PURCHASERS OF SUGAR IN THE EASTERN MARKET TO SHARE IN SETTLEMENT

On June 26, 1978, a "Notice to Certain Purchasers of Refined Sugar" was sent to RBA's offices advising of the pendency in the U.S. District Court for the Eastern District of Pennsylvania of actions against certain sugar refiners for alleged violations of the antitrust laws. *In re Eastern Sugar Antitrust* litigation, Master File No. MDL 201A.

The notice defines the geographic area as comprising the states of Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Maryland, West Virginia, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, Tennessee, Kentucky, Ohio, Michigan and District of Columbia.

The notice also states that:

"To qualify as a class member in the classes covered by this notice, you must have purchased refined sugar directly from one or more of the above-named defendants or another refiner or processor of refined sugar during the period January 1, 1967 to December 31, 1975. . . ."

A letter from David L. Creskoff, Esquire, of the firm Mesirov, Gelman, Jaffe, Cramer & Jamieson of Philadelphia, representing the Wholesaler Class, accompanying the Notice sent to our office, states in part:

"As you may know, a recent U.S. Supreme Court decision held that indirect purchasers of a product do not have standing to sue under the antitrust laws.

* * * * * * *

"Since your membership undoubtedly consists of a number of firms which were indirect purchasers only, under the present status of the law they would have no claim in the above pending litigation."

The reference to a recent Supreme Court decision is, of course, to *Illinois Brick.*

Since time did not permit calling all of our members in the affected states, much less contacting all retail bakeries whether members or not, I cannot tell you precisely how many such firms are direct purchasers of refined sugar in these states. I can tell you, however, that RBA alone has some 900 members in the listed states who are potentially affected. I can also tell you that most retail bakeries are too small to purchase their supplies and ingredients, such as sugar, directly from the manufacturer or refiner. Instead, they buy these goods from jobbers, distributors or supply houses. In some cases, these middlemen themselves buy from other, even larger distributors; in other cases, they buy directly from the manufacturer or processor. Few retail bakeries are large enough themselves to deal directly and immediately with their ultimate sources of supply.

Yet even a small retail bakery uses substantial quantities of products such as sugar. I called four of our members here in the Washington area to be able to give the Committee some idea of how much sugar the typical retail bakery consumes in a week or a year. Three of the bakers I contacted told me that they use between 500 and 600 pounds of sugar a week; the fourth said he uses about 1,500 pounds. That adds up to between 26,000 and 78,000 pounds of sugar a year. Taking the average retail price of sugar to be about 21 cents per pound (U.S. Department of Agriculture figures for December 1978), these bakers are paying from $5,500 to $16,400 a year for their sugar. Multiply that figure by nine (the Eastern Sugar Antitrust Litigation covers purchases of sugar made between January 1, 1967 and December 31, 1975), and you begin to see the bakers' interest in being permitted to recover antitrust damages from the sugar companies.

All four of the bakeries I contacted are single-unit operations, which means they bake and sell in the same shop or building and own only the one establishment. Each bakery employs 6 to 8 fulltime people and about the same number of part-time people. From the examples and figures I've been able to assemble, rough and

approximate though they may be, the Committee can easily see that although the average retail bakery is usually too small to buy sugar directly from a refiner, it is large enough to have a considerable economic interest in recovering for overcharges on the part of refiners as a result of antitrust violations, if any.

II. ILLINOIS BRICK DECISION WOULD ALSO TAKE AWAY RETAIL BAKERS' RIGHTS IN FOLDING CARTON ANTITRUST LITIGATION

The sugar antitrust case is not the only antitrust matter affecting the retail baking industry. On December 12, 1977, a "Notice to Purchasers of Folding Cartons of Class Action Determination" was sent to RBA headquarters in Washington. This notice advised of treble damage actions for alleged violations of the antitrust laws pending against certain named manufacturers of folding cartons for the sale of such cartons. *In re Folding Carton Antitrust Litigation,* MDL 250.

The plaintiff class was defined as:

"All persons in the United States (excluding Defendants, their subsidiaries, affiliates or agents), who purchased folding cartons from any of the Defendants in these actions during the period from January 1, 1960 to December 31, 1974." [Emphasis added]

Although the notice on its face makes no reference to *Illinois Brick,* a letter from James B. Sloan, Esq., of the firm Sloan and Connelly, P.C., of Chicago, plaintiffs' coordinating secretary, states:

"Therefore, members of your association *who have purchased folding cartons directly* from any of the defendants on the attached sheets during the period should have been picked up from the defendants' records." [Emphasis added.]

In this instance, as with sugar, the ordinary retail bakery lacks both the need and storage space to buy quantities of folding cartons sufficient to allow it to deal directly with the manufacturer; in this instance, as with sugar, the ordinary retail bakery buys its cardboard boxes from intermediate jobbers, distributors and suppliers; in this instance, as with sugar, the bakery nonetheless uses enough folding cartons to have a significant stake in sharing in any recovery obtained for overcharges as a result of violation of the antitrust laws; and in this instance, as with sugar, most retail bakeries will be excluded from suing or from being members of the plaintiff classes so long as *Illinois Brick Co.* v. *Illinois* is the law of the land.

Again, I did not have time to gather statistics on folding carton usage from all our members throughout the country, and so I asked for information on this subject from the same four bakeries I contacted with respect to sugar. I was told that in each bakery, some one to 2,000 folding cartons were used in each week. That adds up to between 12,000 and 24,000 cartons a year. In this instance, as with sugar, the ordinary retail bakery, even though too small most of the time to be a direct purchaser of the raw materials it uses, is nonetheless large enough to have a significant financial interest in any overcharges for these materials by others further up the distributive chain as a result of antitrust violations.

III. THE COURT'S REASONING IN ILLINOIS BRICK IS CONTRARY TO PRECEDENT IN OTHER AREAS AND THE RESULT IN ILLINOIS BRICK IGNORES THE PLAIN WORDS OF CLAYTON AND IS UNNECESSARY UNDER HANOVER SHOE

The holding of *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977)—that the "offensive use" of the "pass on" theory is inconsistent with prior restrictions on the defensive use of the theory and that therefore indirect purchasers cannot sue in antitrust to collect treble damages—is the result of the Court's having put itself in a dilemma. In the words of Justice White:

" * * * We are faced with the choice of overruling (or narrowly limiting) *Hanover Shoe* or of applying it to bar respondents' attempt to use this pass-on theory offensively." [Slip opinion at 6.]

But the dilemma is false. For the issue in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.* 392 U.S. 481 (1968), is not the same as the issue in *Illinois Brick Co.,* v. *Illinois,* supra. Whereas the issue in *Illinois Brick* was the right of indirect vs. direct purchasers to recover treble damages from manufacturers accused of antitrust violations, the issue in *Hanover Shoe* was whether a defendant could use indirect purchasers as an excuse for avoiding any liability at all to direct purchasers for antitrust violations. Hanover Shoe did not involve the rights of direct vs. indirect purchasers to bring suit or recover damages.

Thus, the Court could have avoided having to choose between overruling *Hanover Shoe* or forbidding an "offensive" use of the pass-on theory, and hence could have avoided reaching the result it did in *Illinois Brick,* simply by distinguishing *Hanover Shoe* on the issues and facts.

Worse, in extricating itself from one seeming dilemma, the Court created another, real, dilemma. That dilemma is the following: either allow indirect purchasers to sue at the risk of further "complicating" treble-damage actions and creating asymmetry in application of the pass-on argument; or forbid them to sue, deny them any right to a hearing or redress of wrongs, and by-pass the plain meaning of the Clayton Act in the process.

We submit that whatever fairness, justice or merit there may be in the Court's decision to bar indirect purchasers from being plaintiffs for the sake of judicial efficiency, expediency and symmetry, it must be weighed against the unfairness, injustice and demerit done to the potential plaintiffs thus excluded. Retail bakers, as part 1 of my testimony herein amply demonstrates, feel this injustice particularly sharply.

If the result in the *Illinois Brick* opinion may be criticized for unnecessarily creating, resolving and creating again a dilemma, it may also be criticized for going against the established precedents in other areas of law. That is to say, the Court's opinion required direct privity between seller and purchaser to bring an antitrust action. But this doctrine of "privity of contract" has long since been done away with as unrealistic and unduly harsh in its consequences to victim-plaintiffs both in the products liability and warranty areas of tort and contract law. We see no reason why the same doctrine, discredited in these areas, should be given a place of honor in the antitrust field. We submit that the requirement of direct privity between seller and purchaser insisted upon in *Illinois Brick* is at least as destructive of the rights of potential plaintiffs and at least as insensitive to the economic injury inflicted on them as it is in the case of personal injury or breach of warranty. We submit that in antitrust, as in tort or contract, privity should be no bar to suit or recovery.

In so saying, we are not unmindful of the Court's fear of introducing additional levels of complexity into the resolution of antitrust cases "with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge." [Slip opinion, p. 2.] We must agree, however, with those who have said that there already exist rules of judicial procedure for handling these problems and that with such rules, the additional complexity can be handled. (*See,* for example, statement of John H. Shenefield, Acting Assistant Attorney General, Antitrust Division, Department of Justice, at p. 19 of the hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary (Senate), July 21, 22, and September 9, 1977.)

Finally, we favor legislation such as the present bill because we believe that in *Illinois Brick Co.* v. *Illinois* the Supreme Court went contrary to the words and language of the Clayton Act statute, to say noting of subsequent, more recent legislation.

The Clayton Act says simply:

"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 . . ."

Whenever former Justice Douglas dissented in a case involving the First Amendment, he was fond of noting that the First Amendment said simply: "Congress shall make *no* law" abridging freedom of speech, press or religion. "Not 'Congress shall make no law except * * *'," Justice Douglas would write, "but 'Congress shall make no law' period." The same admonition that Justice Douglas used with regard to the First Amendment is appropriate with regard to the Clayton Act. The act does not say "Any person who shall be a direct purchaser and shall be injured . . ." but simply "Any person who shall be injured . . ." Any attempt to re-write the statute to dilute or narrow it, as the effect of *Illinois Brick* seems to be, ought to be resisted and rejected.

IV. THE PRESENT BILL IS ADEQUATE TO REMEDY ILLINOIS BRICK AND TO PREVENT OVERLAPPING RECOVERIES

Having studied the text of the bill, we are persuaded that its provisions are both adequate to correct the result in *Illinois Brick* and sufficiently narrow to prevent undue complexity or multiple recoveries, the two primary reasons for the Supreme Court's having decided this case as it did.

We think that section 4I(b) of the proposed act is well-advised. That section makes use of the "pass on" theory depend on the sound discretion of the trial court and gives the court guidance in the exercise of such discretion by specifying that the defense may be used "in order to avoid duplicative liability."

We are, however, troubled by section 4 of the proposed act, which would make its provisions apply only to cases pending "on the date of enactment." Any retail bakery which is not a direct purchaser of sugar in the Eastern Market or is not a direct purchaser of folding cartons in the U.S. is now excluded from the plaintiff class in those actions. Should these actions be finally adjudicated before this bill becomes law, all those retail bakeries would forever be precluded from any share in whatever settlement or damages may be arrived at, if any. Similarly, new actions which may be brought before final action by the Congress on this bill will also have to cope with the same uncertainty.

Even if the act were not made retroactive to the date of the *Illinois Brick* opinion, then, (June 9, 1977), we believe that it should be made retroactive to some date earlier than the date of enactment.

V. CONCLUSION

The typical retail bakery is a small business which uses substantial amounts of various materials but not in sufficient quantity in most cases to enable it to deal directly with manufacturers and processors. They thus have an important stake in enforcing the antitrust laws. As a result of the Supreme Court's decision in the *Illinois Brick Co.* v. *Illinois* case, indirect purchasers such as retail bakeries are precluded forever from instituting suit or joining others in suing for violations of the antitrust law. This decision immediately impacts on the rights of retail bakeries to recover in pending sugar and folding carton litigation. The result reached by the Supreme Court in *Illinois Brick* is unfair, unnecessary, contrary to statute and other judicial precedent, and destructive of the rights of indirect purchasers such as small retail bakeries.

The proposed Antitrust Enforcement Act of 1979 will correct the holding of *Illinois Brick* without either overruling *Hanover Shoe* or creating intolerable complications for courts.

We, therefore, the Retail Bakers of America, support the Antitrust Enforcement Act of 1979 and urge its enactment into law.

Senator BAUCUS [continuing]. The committee stands adjourned.

[Whereupon, at 2:35 p.m., the committee was recessed, to reconvene subject to call.]

42-005 O - 79 - 8

ANTITRUST ENFORCEMENT ACT OF 1979, S. 300

FRIDAY, MARCH 9, 1979

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., in room 1114, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman) presiding.

Present: Senators Thurmond and Baucus. Also present: David Boies, chief counsel and staff director; Joel Perwin, counsel; Pete Chumbris, minority counsel.

Senator THURMOND. The committee will come to order.

[The statement of Senator Thomas F. Eagleton follows:]

PREPARED STATEMENT OF SENATOR THOMAS F. EAGLETON

Mr. Chairman, I would like to request of the committee that it print, in its hearings record on S. 300, the text of an amendment and floor statement that I introduced on Wednesday, March 7. The amendment would change the effective date provision of S. 300 to alleviate the injustice to many pending suits by direct purchasers which would occur under the bill as currently drafted.

I hope that, when this amendment is referred to this committee, that you will give it your closest attention and fullest consideration.

Thank you Mr. Chairman.

[Amendment and floor statement of Senator Eagleton follow:]

Mr. EAGLETON. Mr. President, I am introducing an amendment to change the effective date of provision of S. 300, a bill to restore fair and effective enforcement of the antitrust laws.

Mr. President, as currently drafted, S. 300, would reverse two Supreme Court decisions applicable to private antitrust enforcement under the Clayton Act. 15 U.S.C. § 15 et seq. It would reverse *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), which permits only direct purchasers to obtain monetary relief from illegal overcharges, and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968), which prohibits defendants from avoiding liability to direct purchasers by arguing that those purchasers passed on the illegal overcharges down the distribution chain. Section 4 of S. 300, as introduced, would reverse these cases retroactively, allowing indirect purchasers to sue and the possible use of a pass-on defense in all cases pending on the date of enactment of the bill.

The amendment to S. 300 here proposed would not change the bill with respect to the retroactive application of the *Illinois Brick* reversal. It would amend section 4 of that bill to reverse *Hanover Shoe* prospectively.

Subsection (a) of my amended version of section 4 would permit indirect purchasers to recover damages under section 4, 4A or 4C of the Clayton Act in all cases, pending or future, irrespective of when the damages occurred.

Subsection (b), however, would permit defendants to assert the pass-on defense (subject to the discretion of the court, under the current draft of S. 300) in all cases, but only as to damages occurring after the enactment of S. 300.

The rationale for the retroactive application of the *Illinois Brick* reversal has been well documented in the hearings record. As a rule, I oppose retroactive legislation. But a detailed look at pending cases that had been brought by State governments, consumers, and other indirect purchasers prior to the *Illinois Brick*

decision, shows that retroactivity is necessary in this case to avoid doing a serious injustice to their claims.

In attempting to avoid that injustice, however, S. 300 should not impose injustice on a different class of plaintiffs. The retroactive application of the provision overruling *Hanover Shoe* would be a financial disaster for direct purchaser plaintiffs who filed suit in reliance on the prohibition against use of the pass-on defense.

I will use, as an example, a case brought by a Missouri businessman for alleged damages due to price-fixing. I will not mention his name or the name of his case since, of course, the matter is still in litigation. This businessman filed a suit under the Clayton Act some 4 years ago against two major oil companies for ongoing damages amounting to several million dollars. At that time, he assessed his position under *Hanover Shoe* and, in accordance with the mandate and encouragement of Congress in section 4 of the Clayton Act, began a complex and expensive antitrust case. This was a business decision to invest a significant amount of capital to recover the overcharge and the additional damages due to him for acting as a "private attorney general."

Now, more than 4 years later, he should not have the ground cut from under him by retroactive legislation. Nor should he have the Congress impose upon an existing lawsuit the requirement that he spend additional money in the extensive and expensive litigation of pass-on issues which were not in the case when he filed it.

If this happens, his potential for recovery is made considerably more difficult and expensive. The remaining damages might barely cover his final attorney's fees. It is hardly fair to encourage the investment up-front of substantial attorney's fees, only to retroactively slash the amount of recovery after 4 years of litigation. Moreover, there has never been an indication that any of the indirect purchasers, to whom some of the overcharge was passed on, were likely to join in the suit. This was the case before the *Illinois Brick* decision, and during the pending of the overruling legislation. Thus, if *Hanover Shoe* is overruled retroactively, the defendant in the suit will receive a windfall by escaping a large percentage of liability through the pass-on defense and using the statute of limitations to foreclose any indirect purchasers from recovery.

I make no comment here about the wisdom of overruling *Hanover Shoe* prospectively. But to do so retrospectively is to renege on the promised incentives on which conscientious businessmen made business decisions up to 4 or 5 years ago. Furthermore, if Congress reneges now, how can it expect future victims of price-fixing, direct or indirect, to rely on the "new" Clayton Act provisions enough to file the long, complex, and expensive antitrust cases.

Another reason for treating the statutory reversal of *Hanover Shoe* and *Illinois Brick* differently is that this legislation owes its proposal and most of its support to a negative reaction to the latter case. *Illinois Brick,* decided by the Supreme Court in 1977, sets out a new principle of law prohibiting indirect purchasers from recovery under the antitrust laws. No legitimate argument can be made that antitrust defendants have expended money or taken action based upon the expectation that they may with impunity violate the antitrust laws because they are invulnerable to suits by indirect purchasers. Also, there is a degree of inconsistency between both expanding the scope of permissible recovery by overruling *Illinois Brick,* and restricting pending private actions by reversing *Hanover Shoe* retroactively.

~~1496T0046~~

Purpose: Calendar No. _____

To revise the provisions relating to the effective date of the amendments.

Printed Amdt. No. _____

Un-Printed Amdt. No. _____

96th CONGRESS
1st Session S. 300

IN THE SENATE OF THE UNITED STATES

Referred to the Committee on _____ and ordered to be printed.

Ordered to lie on the table and to be printed.

AMENDMENT

Intended to be proposed by Mr. Eagleton to S. 300, a bill to restore fair and effective enforcement of the antitrust laws, viz:

On page 3, strike out lines 3 through 6, and insert in lieu thereof the following:

Sec. 4. (a) Section 4I (a) of the Clayton Act, as added by section 2 of this Act, shall apply to any action under section 4, 4A, or 4C of the Clayton Act which is pending on

the date of enactment of this Act or which is commenced on or after such date of enactment.

(b) Section 4I (b) of the Clayton Act, as added by section 2 of this Act, shall apply to any action under section 4, 4A, or 4C of the Clayton Act which is pending on the date of enactment of this Act or which is commenced on or after such date of enactment, but shall apply only to damages occurring on and after the date of enactment of this Act.

Senator THURMOND. I have a couple of committee meetings this morning. I had to go to another one. So we are a few minutes late getting started.

OPENING STATEMENT OF SENATOR THURMOND

Today the Senate Judiciary Committee resumes hearings on S. 300, Antitrust Enforcement Act, a bill to reverse the Supreme Court's January 9, 1977, *Illinois Brick* decision and 1968 *Hanover Shoe* case.

The hearings for today and those scheduled for March 14 and 19 have been requested by the minority members of the committee to ensure a balanced record on this bill. In addition, an agreement has been worked out between the chairman and the minority to vote on S. 300 in the Judiciary Committee on April 23, 1979.

During the hearing on February 1, 1979, I made a statement regarding this legislation. I refer further to that particular statement with regard to my views on this legislation.

This morning we have a number of representatives of the American Bar Association, the Food Marketing Institute, and the committee welcomes all of you.

Our first witness is Mr. Robert Aders, president of the Food Marketing Institute, and he is accompanied by Mr. James Rill. We would be pleased to hear from you at this time.

[The prepared statements of Robert O. Aders, William D. Farr, and James F. Rill follow:]

PREPARED STATEMENT OF ROBERT O. ADERS

Mr. Chairman. I am appearing here today to express views on behalf of Food Marketing Institute of which I am president.

Food Marketing Institute, a nonprofit organization, conducts programs in research, education and public affairs on behalf of its members—food wholesalers and retailers, from corner stores to supermarket chains—and their customers. FMI's 900 member companies operate 24,000 stores with a sales volume of $80 billion yearly, half of all grocery sales in the United States. FMI membership includes food chains, independent grocers, voluntary wholesalers and cooperatives in the United States, Canada and about 30 foreign countries.

By way of personal background, I have previously held positions in the Antitrust Division of the U.S. Department of Justice, as Under Secretary of Labor, and have a long-time association with the food industry. I was employed by the Kroger Co. for 17 years, serving for many years as general counsel and as chairman of the board of the company from 1970 to 1974.

I'd like to emphasize at the outset that supermarket operators deal directly with consumers. *Illinois Brick* or no *Illinois Brick,* our direct relation with our customers has always exposed us to suit for any alleged wrongdoing. We accept that and cherish our close relationship with consumers.

In preparing for my testimony today, I reread the record of both the House and Senate hearings last year on similar legislation to overrule the Supreme Court's *Illinois Brick* decision. I have reread editorial comments, pro and con, from around the country. I have studied the positions taken by various segments of the bar and by consumer groups and Government spokesmen. In all of this research, I've examined the record from the point of view of the supermarket companies which FMI represents.

Abundant testimony has been given by others with respect to the impact of H.R. 2060 and S. 300 on consumers, business, the courts and the economy in general. Today, I want to discuss only how food distributors and their customers are uniquely affected.

Our interest in the case is unique. FMI and many large and small supermarket companies are defendants in an action referred to as the "beef litigation." You have heard a lot about those cases already. My colleague, Mr. James Rill, will describe

the beef litigation more completely in his testimony. It is the beef case which illustrates our unique interest and concern.

Let me make an additional comment before I explain why.

A new and important dimension has been added to the record this year. H.R. 2060 and S. 300 are being described as tools in the fight against inflation. Barry Bosworth of the Council on Wage and Price Stability so testified, as did the President's Consumer Advisor, Esther Peterson. They appeared on behalf of consumers, explaining that it would be in the interest of consumers for them to be able to sue in their role of indirect purchasers of overpriced products.

Well, Mr. Chairman, I too am here on behalf of consumers, as well as food distributors, to present a case that has yet to be made. It is a case on behalf of consumers and lower prices. I am deeply troubled by indirect sellers benefitting from the bill. Why? Because even as indirect buyers have an interest in lower prices, so indirect sellers have an interest in higher prices. Every buyer tries to get as low a price as possible, while sellers always try to get as high a price as possible. What is the complaint in the beef litigation? It is that supermarkets have conspired to drive beef prices down. Let me repeat that. We are accused of forcing beef prices down. Even though these charges are groundless and wholly without merit, supermarket companies have been spending millions of dollars a year to defend such charges in which a small group of cattlemen in lawsuits encouraged by certain opportunistic spokesmen seek damages of $12 billion, more than the total net worth of the defendant companies—and these lawsuits were filed by less than one-tenth of 1 percent of all American cattlemen.

Most cattlemen don't believe there is any merit to suits of this kind, and that they are contrary to the interest of the cattle industry because they obscure the very real problems brought about by changes in costs and markets, by the uncertainties of weather and the cattle cycle. Mr. W. D. Farr, a cattleman from Greeley, Colorado, so testified before this committee last year—April 24, 1978. Mr. Farr's testimony is attached to my own.

Mr. Chairman, it seems eminently clear that the passage of H.R. 2060 and S. 300 would permit ambitious "plaintiffs' lawyers" to stir up indirect sellers of all types to sue for higher prices. In whose interest is that? On page 12 of last year's Senate Judiciary Committee Report on S. 1874, in discussing the history and intent of the antitrust laws, it was stated that ". . . the right to sue for damages was intended to benefit consumers, and not middlemen or others . . ." The underlying purpose of our antitrust laws, whether the Sherman Act, the Clayton Act, the Hart-Scott-Rodino Act, or any other, has been to protect the consumer, by outlawing practices that result in artificially high prices or by enlarging the legal avenues by which to attack them. Why then does this bill, which purports to aid consumers, include rights for indirect sellers whose avowed interest is in increasing costs to consumers.

We believe in and support the antitrust laws. We hold no brief on behalf of conspiracies or monopolies. We believe that antitrust violations should be attacked by private and Governmental action. But we don't think it is in the public interest to encourage remote sellers to sue indirect buyers.

The point is that the threat of indirect seller litigation has a unique chilling effect on forceful, individual buyer bargaining. Remote sellers tend to file highly speculative and wide-ranging charges. The addition of several tiers of seller-plaintiffs makes the litigation enormously more complex as the question of economic injury must be traced back through many levels on the basis of contrived economic theory and questionable hypotheses. In addition, indirect seller inclusion encourages substantially larger numbers of potential claimants, thus combining the exposure to duplicate recovery with the threat of ruinous aggregate damages. The cost of litigation, uncertainty of just and accurate result, and risk of destructive loss are all vastly multiplied when the suit is maintained in behalf of indirect sellers. It is this combination of effects which is of principal concern to food retailers.

Interestingly enough, the only reported litigation by an indirect seller against his remote customers that has come to our attention is the cattlemen's suits against supermarkets. And even in those matters, the plaintiffs, including their spokesman, who has appeared before this committee, have actions still pending against a group of packers. So they have a remedy against a party with whom they deal directly. In fact, I understand that there is now an agreed settlement with one packer for $425,000. In other words, these cattlemen can have their day in court, regardless of the outcome of this or similar legislation.

It appears, Mr. Chairman, that in the proposed legislation purporting to assist consumers and other buyers, and in line with Government efforts to hold down prices, aid and comfort may also be given to those who complain that prices aren't high enough. I find it difficult to believe that Congress wishes to be in this position.

There are enough uncontrollable factors in the economy exerting upward pressure on food prices now. Do you, in your desire to strengthen the antitrust laws, really wish to extend this protection to indirect sellers and thus add to the pressure toward higher consumer prices? Will not the threat of indirect seller litigation be a desincentive for buyers to fight for the best possible deal for the consumer? Supermarkets act as purchasing agents for the public. If we are to enter the very competitive marketplace in which we operate, handicapped by the constant threat of suits by distant sellers attempting to blame supermarkets for the vagaries of the marketplace, we will be discouraged from doing the best job possible for our customers. How can supermarkets bargain effectively with their direct suppliers, if the threat of litigation filed by some remote supplier is constantly present? In short, Mr. Chairman, if the rights of indirect sellers to sue are established by this legislation, who, down the entire chain of distribution, has any incentive to fight for lower consumer prices?

I urge you, Members of the committee, to weigh the problems associated with the inclusion of indirect sellers in your deliberations. I ask you to remember that the pressure up the chain of distribution toward the consumer is for higher prices. You must decide whether it is appropriate for you to add to that pressure for higher prices.

Thank you.

STATEMENT OF WILLIAM D. FARR

My name is William D. Farr, and I am president of Farr Farms Company of Greeley, Colorado. Farr Farms is a family-owned cattle feeding company located east of the Rocky Mountains in Greeley. Farr Farms began feeding cattle in 1931, and our feedlots now have a total one-time capacity of 50,000 head. Farr Farms is also involved in cattle ranching, including the production of beef calves from a cow herd, and the grazing of calves until they are ready for the feedlot. .

I have been a cattleman all of my life. I have also been active in various associations of cattlemen, holding the positions of president and first vice-president of the American National Cattlemen's Association, now the National Cattlemen's Association. I was one of the founders of the Colorado Cattle Feeders Association. I have also served on various task forces advising several Secretaries of Agriculture. I have testified on several occasions before committees of the Senate and of the House.

Farr Farms has been a pioneer in the cattle business. Some of you may have read James A. Michener's Centennial, a marvelous historical novel about a fictitious town in my part of Colorado. There is a family in Centennial, the Brumbaughs, who built an early feedlot near the railroad tracks across from a beet sugar plant. I do not know if Farr Farms was a model for Mr. Michener, but the original Farr Farms feedlot in Greeley is near the railroad and across from the beet sugar plant.

I am testifying today because I am tired of hearing misstatements being made by a small group of disgruntled cattlemen about what is wrong with the cattle industry. These cattlemen charge that someone is fixing cattle prices. These charges are wrong. No one dictates cattle prices. Farr Farms is in the market virtually every week, buying cattle for its operations, and selling finished cattle to packers. In every instance prices are negotiated through a highly competitive process involving well-informed buyers and sellers.

The problems in the cattle industry have nothing to do with antitrust suits. It is a complex industry. There are no simple solutions to these problems. One of these problems is that the cattle industry regularly goes through periods of boom and bust, with great fluctuations in prices. Although there have been many periods when the industry has prospered, as shown by the tremendous growth in the cattle industry in the last 30–40 years, we need to find ways to smooth out the fluctuations, and to moderate the severe downtowns, which occur. I believe that some things underway today will tend to bring about this moderation, but more work is needed.

It will not be easy to solve these problems. The cattle and beef industries represent a highly complicated and sophisticated chain of production and distribution spanning 3–5 years—from the birth of a calf to the roast bought in a retail store, the hamburger eaten at a fast-food restaurant, or a slice of prime roast beef consumed on a flight between Denver and Washington. The possible variations just in the movement of a calf from birth to slaughter illustrate these complexities. Cattle show striking differences as to who owned them, the period of time they were owned, the manner by which they were bought and sold, and the weight, age, and

quality of the animals. Cattle may be sold for slaughter at any time—as a calf, a fattened animal, or as an old cow or bull—depending upon feed and market conditions. Slaughter at these various stages of maturity produces quite different types of beef.

Prices in his complex industry are strongly affected by what we in the cattle business know as the cattle cycle. Without going into a great deal of detail, let me explain that there is a regular cyclical pattern to the number of cattle on farms and ranches, with these numbers rising and falling over about a 10-year period. During the upward phase of the cattle cycle, herds are built up and cattle numbers rise. After a period there comes a point when there are too many cattle and too much beef being produced, and cattle prices decline.

In the most recent cycle, cattle prices began to decline in late 1973 and 1974. Responding to these declining prices, cattlemen began to liquidate their herds, and this liquidation continued through 1975, 1976 and 1977. This resulted in temporarily higher levels of beef supply for consumers, and even lower cattle prices, which reached bottom in 1976. But this herd liquidation process then set the stage for a turn in the cattle cycle, and an increase in cattle prices as current supply levels were reduced.

One can see this concretely by looking at the recent USDA figures on January 1 cattle inventory numbers. On January 1, 1975, cattle numbers peaked at an all-time high of 131.8 million head. By January 1, 1978, the liquidation phase of the cattle cycle had reduced total cattle to 116.3 million, a 15.5 million head reduction unparalleled in our history. It is this herd reduction, and reduction in beef supply, which has resulted in the present price improvement.

I should also note that the decline in cattle prices in 1973–74, and the extent of the herd liquidation in 1975–77, were aggravated by the effects of governmental wage and price controls. We all know the disasters which wage and price controls can cause, and there was no industry more seriously hurt by controls than the cattle industry. Governmental interference is strongly opposed by cattlemen, and it is no wonder President Carter explained his opposition to the recent farm bill as stemming in part from a concern for its adverse affects on cattle producers.

With the liquidation phase of the cattle cycle approaching an end, the beef cattle industry is now well into a period of sustained prosperity likely to last at least for five years. As one measure of this improvement, a year ago slaughter cattle prices were below $40 per hundredweight. Now they are above $50 per hundredweight, having begun their rise last fall. What is important to note about these improved prices is that it was entirely predictable that this upward trend would occur. This recent trend in prices reflects the operation of the cattle cycle, with prices being determined by market forces of supply and demand.

Although cattle prices have improved recently there are some actions which might well be beneficial to the cattle industry over the long run. Some of us supported the recent effort to establish a producer-funded beef research and promotion program. The purpose of this program was to improve all aspects of the cattle industry.

In addition, not all cattlemen, and probably not the great majority of cattlemen, understand the cattle cycle. Therefore, efforts to educate cattlemen about the fundamental nature of the industry could help cattlemen to make sensible decisions about their production plans. Also, there is always room for improving the accuracy of information about cattle supplies, marketings and prices at all levels in the industry. I emphasize, though, that these are long-run solutions requiring careful consideration by everyone who might be affected.

The cattle industry will not be helped by lawsuits against retail chain stores. Chain stores buy only a portion of the beef produced in this country. These lawsuits make no sense, and are harmful to cattlemen because they divert attention and resources away from useful efforts to better the cattle and beef industries, such as improving promotion, education, and marketing information and increasing the amount of research devoted to nutrition, genetics and new technology.

I have followed these cattle lawsuits over the years, including the low price years of 1975 and 1976 when many suits were filed. I gave an affidavit in one case, explaining the cattle operations of Farr Farms. I know generally the charges which are made—that cattlemen have suffered financial losses because of illegal pricing practices by chain stores. As I have said, I am convinced these charges are groundless, and I am opposed to these lawsuits—as are most of my friends in the cattle industry.

Thank you for the opportunity to testify, and I would be happy to answer any questions.

PREPARED STATEMENT OF JAMES F. RILL

My name is James F. Rill and I am appearing today in conjunction with Robert Aders, president of Food Marketing Institute. I am a member of the law firm of Collier, Shannon, Rill, Edwards & Scott which is counsel for FMI in the pending Beef Industry Antitrust Litigation, about which you have previously heard testimony.

My purpose in appearing today is to discuss the implications of the proposed legislation from the vantage point of an attorney who has some practical experience with one type of litigation that would be affected by these measures. It is not my purpose to discuss the merits of any pending case, but merely to explain some of the background, since other witnesses have commented on the cattle cases.

At the threshold, it should be recognized that the cattle litigation is unique among the cases which have been discussed with the committee in connection with this legislation. In these cases, the plaintiffs' are asserting that conduct by the retail defendants, who are not direct buyers from the plaintiffs, resulted in the price of live cattle being too low. Thus, these cases do not involve consumers or other indirect buyers claiming that the price of goods to them has been increased as a result of antitrust violations; they involve claims by remote sellers that prices have been reduced for products which are transformed in character through several tiers of production and distribution before reaching food retailers. Thirty-four defendants have been involved in these cases. One of the plaintiffs' attorneys in testimony before the committee during the last Congress described the distributive tiers as including producers, range buyers, one or several levels of cattle feeders, feedlot operators, meat packers and retailers.[1] Thus, he concedes there are at least six or seven levels between those he is purporting to represent and the retail defendants. Not surprisingly there is disagreement among various plaintiffs' counsel as to the impact of the alleged violation—those seeking to assert the claims of producers will assert that the full amount of damage has been passed back to the first stage of production; those who represent feeders will assert that the full damage has been retained at that level. Also, not surprisingly, important factual claims of the plaintiffs' attorneys have changed with their changed perception of the state of the law following *Illinois Brick*.

These cases were dismissed in the fall of 1977 on the basis of the *Illinois Brick* decision, and plaintiffs' appeals are currently pending in the fifth circuit. The cattle litigation began in San Francisco in 1968 when six cattlemen brought suit against three grocery retailers, A&P, Safeway, and Kroger, claiming that the retailers have conspired to depress the price of beef. The impetus for filing the lawsuit was depressed livestock prices, which had then prevailed for several years. When the *Bray* suit was filed, however, plaintiffs' lawyers had no evidence of conspiracy, although they hoped to turn something up in the course of pretrail discovery.

Two and a half years later plainiffs' lawyers still had found no evidence of conspiracy. Plaintiffs' own lawyer was forced to admit in open court that his case "really isn't a strong conspiracy case." That lawyer was Maxwell Blecher, a member of the National Commission for the Review of Antitrust Laws and Procedures, and a lawyer who can be presumed to know evidence of conspiracy when he sees it.

After another 2½ years of looking for evidence of conspiracy, the cattlemen's lawyers represented to the Federal district court in San Francisco that "[A]s respects Safeway, plaintiffs' discovery has shown that in a number of areas the facts are different than those which plaintiffs had believed to exist when their complaint was filed" as "[P]laintiffs, taking into account all of the circumstances set forth herein * * * do not believe that prosecution of this case against Safeway is warranted." A similar representation was made as to Kroger and those two defendants were dismissed for a total settlement of $85,000. As any antitrust lawyer knows, payment of $42,500 in settlement of any antitrust case after 5 years of discovery is mere nuisance value.

The third defendant, A&P rejected a like nominal settlement and went to trial. The jury returned a verdict of over $10 million which, under the antitrust laws, was trebled to over $32 million. The case was later settled on appeal for $9 million, of which plaintiffs' lawyers received over 50 percent. The verdict in *Bray*, thus, was reached notwithstanding plaintiffs' attorneys own admission that there was no hard evidence of conspiracy. Subsequent evaluations of the record have supported the conclusion that there was no conspiracy.

Soon after the conclusion of the *Bray* case, the Antitrust Division of the Department of Justice made an exhaustive analysis of the case record, including a review

---

[1] Testimony of Robert O. Vaughan on S. 1874 before the Senate Subcommittee on Antitrust and Monopoly, 95th Cong., 1st Sess., p. 30 (1977).

of the discovery, the entire trial transcript, and the exhibits. I will quote just a few of the conclusions contained in the Antitrust Division's analysis:

"This large verdict—prima facie proof of a massive price-fixing conspiracy among the Nation's leading food retailers is, in my view, a shell with nothing of substance behind it.

"The jury's verdict is not difficult to understand. They could not have accurately assimilated and critically analyzed the mass of evidence presented. They were forced to rely primarily on the incomplete and sometime inaccurate representations of counsel. The judge's conduct of the trail and jury instructions were in some respects questionable, but his disposition of the defense motion for directed verdict, judgment notwithstanding the verdict, or a new trial was indefensible. Judge Carter, like defense counsel, failed to go to the record to check the accuracy of Alioto's assertions. As a result he made repeated factual errors and inferences unsupported by the evidence, and he demonstrated an unseemly eagerness to accept almost anything, no matter how speculative or irrelevant, as support for the verdict.

"The vast majority of evidence introduced in *Bray* was either immaterial or irrelevant, not only for the issues in that case, but for antitrust purposes generally. The plaintiffs' theory of the case was in many respects legally and economically unsound.

* * * * * * *

"The long-range importance of this case for the industry is uncertain and may turn upon what happens in similar cases which have been filed by cattlemen against the retailers in the wake of *Bray. If it has any impact, however, it will likely be anticompetitive. Bray* fostered and perpetuated misconceptions about the industry, most notably concerning the spread statistics. The antitrust laws were used to protect cattlemen from the exigencies of the marketplace, to punish size and efficiency of operation, and to further discourage efforts by retailers to minimize product costs. *The net effect is to benefit cattlemen at the expense of consumers"* (Pp. 60–61, 63, emphasis supplied.)

On the strength of that investigation Mr. John Shenefield, Assistant Attorney General in charge of the Antitrust Division, who has several times appeared before you in connection with the proposed legislation, advised Senator Clifford Hansen:

"In this investigation (concerning beef prices) information from a variety of sources was considered. * * * Three principal issues were considered: (1) the assertion that data concerning the so-called, 'farmer-retail price spread' indicated a likelihood of antitrust violations or of undue enrichment somewhere between the farmer's sale of livestock and the sale of beef on the retail grocery shelf; (2) the evidence presented during the 1974 trial in San Francisco in *Bray* v. *Safeway, et al.,* and (3) the allegation that published quotations in beef price reporting services had been manipulated by meat packers or others.

* * * * * * *

"Our study of the trial transcript in *Bray* v. *Safeway , et al.,* and our follow-up investigation of some of the questions raised by evidence presented at that trial resulted in a conclusion that action by the Department of Justice regarding the issues posed by that case was not warranted."

Mr. Shenefield's statement is attached.

[The statement referred to follows Mr. Rill's statement.]

As might be expected, the *Bray* verdict, however it was obtained, spawned dozens of suits by several hundred cattlemen across the country. Nevertheless, despite intensive publicity, these lawsuits, were joined by less than one-tenth of 1 percent of the Nation's cattlemen. There is, in fact, strong evidence that the majority of cattlemen do not favor the litigation. Several major cattle organizations have adopted positions critical of these suits, and a leading producer, W. D. Farr, testified last year against the legislation as it affects these cases. The cost of defense has been enormous.

The *Bray* case demonstrates that no large, or not so large, company can confidently go before a jury as a defendant in a complex antitrust case, no matter how strong its defense and no matter how speculative the plaintiffs' case. Most competent defense counsel would agree that when a large company goes before a jury as defendant in an antitrust case the burden of proof lies with the defendant to establish its innocence beyond a reasonable doubt. And if it fails to prove a negative—that it did not violate the antitrust laws—it will probably be held liable.

The burden and risk of defending antitrust litigation under these circumstances is greatly multiplied by the intrusion of numerous levels of seller-claimants, each expanding the number of class plaintiffs. The complexity involved in attempting to sort out the allegations of conspiracy and the alleged fact and amount of damages

among various levels of production and distribution create immense time and cost pressure on the defense of these actions. Moreover, the sheer numbers of purported claims which can be added by the addition of more and more remote tiers greatly enhances the uncertainties of outcome and risks of the wrong result, coupled with ruinous damages.

Under these circumstances, indirect seller suits are ideally designed to deny defendants their day in court, regardless of the merits of the action, and to provide an enormous impetus for settlement.

One especially blatant example of the questionable tactics of certain plaintiffs' counsel in these cases involves an almost incredible attempt to exact a settlement payment from several food retailers before they had been sued. In June 1977, some 1½ years after the bulk of the cattle cases had been initiated, an attorney who is lead counsel in no fewer than 11 identical cattle cases, wrote to several retailers advising them of his intent to join them in the litigation, but that they could avoid this risk and expense by paying the sum of $50,000. After having responded negatively to counsel's suggestion and having been sued, several of the defendants who received this letter promptly initiated the very exceptional procedure of filing a motion under Rule 11 of the Federal Rules of Civil Procedure questioning the good faith of that attorney in signing his name to the complaint. By order of the court, he was directed to furnish the factual grounds for his belief that the allegations of the complaint were supported. Rather than doing so, he agreed to dismiss the complaints against these defendants for a settlement amount which can only be described as ridiculously low.

Recently, I was told by another of the plaintiffs' lawyers that his attempts to discuss a settlement basis with other of the plaintiffs' attorneys more than 1 year ago had been rebuffed on the grounds that not enough lawyers' time had yet been expended on the case. Evidently, while more "lawyers time" was being contributed, *Illinois Brick* intervened and the retail cases were dismissed.

Incidentally, while plaintiffs would have you believe that they are thus out of court, this assertion is simply not true. There are presently pending cases being maintained by certain of these plaintiffs against meat packers to whom they are direct sellers. These cases are unaffected by *Illinois Brick.*

Testimony has been previously submitted demonstrating that the great preponderance of buyer antitrust cases are actions against direct sellers that are not affected by *Illinois Brick.* In this connection, while we cannot claim to have made an exhaustive study, we have attempted to identify the proportion of seller antitrust cases which are maintained as indirect actions. Two observations are pertinent: first, the number of all seller cases is infinitesimal compared with the number of buyer cases; second, other than *Bray,* we have been unable to identify any decided or settled case in the Federal reporter system in which indirect sellers asserting claims against their remote "customers" are the primary plaintiffs.

It is apparent that any benefit which would be conferred on indirect sellers and any enhanced deterrent effect which would result from overruling *Illinois Brick* as it applies to indirect seller actions is almost entirely theoretical and insubstantial and not an adequate justification for resurrecting the possibility of these cases.

I hope that the committee, before approving legislation such as S. 300, will give close attention to the complexities and questionable objectives of indirect seller suits, like the cattle litigation.

United States Department of Justice
WASHINGTON, D.C. 20530

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

31 OCT 1977

Honorable Clifford Hansen
United States Senate
Washington, D. C. 20510

Dear Senator Hansen:

This is in response to your letter of August 24, 1977, requesting further details about the Antitrust Division's investigation of beef prices.

In this investigation information from a variety of sources was considered. Those sources included contacts with the staff of the Joint Economic Committee, examination of some materials that had been submitted to that and other Congressional committees, and examination of documentary material regarding retail meat sales which had been submitted to the Federal Trade Commission in connection with its investigation of retail grocery prices. Three principal issues were considered: (1) the assertion that data concerning the so-called "farmer-retail price spread" indicated a likelihood of antitrust violations or of undue enrichment somewhere between the farmer's sale of livestock and the sale of beef on the retail grocery shelf; (2) the evidence presented during the 1974 trial in San Francisco in Bray v. Safeway, et al.; and (3) the allegation that published quotations in beef price reporting services had been manipulated by meat packers or others.

After consideration of data relating to beef prices and to the farmer-retail price spread, we concluded that this data did not in itself reflect a likelihood of undue enrichment or of antitrust violations in the beef industry. That is not to say, of course, that this data disproves the possibility of antitrust violations anywhere in the beef

industry. But it does mean that changes which appear to have occurred in the farmer-retail price spread are consistant with other explanations, such as changes in labor costs, and therefore do not provide evidence of possible antitrust violations. Our conclusions regarding the farmer-retail price spread data are consistent with the conclusions that have been reached in studies by the Federal Trade Commission and the Council on Wage and Price Stability. (See July 8, 1975 Report of the FTC's Bureau of Economics, "Economic Report on Food Chain Profits," and the May, 1975 Staff Report of the Council on Wage and Price Stability, "Marketing Spreads for Food Products.")

Our study of the trial transcript in Bray v. Safeway, et al. and our follow-up investigation of some of the questions raised by evidence presented at that trial resulted in a conclusion that action by the Department of Justice regarding the issues posed by that case was not warranted.

Our investigation of allegations concerning manipulation of beef price reporting services did indicate that it may be possible under certain circumstances for sources of information on beef prices to "manipulate" the published price quotations for beef items by providing misleading information to a beef price reporting service or by selectively reporting only information that would benefit the reporting party. Our concerns in this regard have been communicated by our investigative staff to the staff of the Department of Agriculture's Packers and Stockyards Administration, which has itself investigated this issue. However, we have received no allegations and have obtained no evidence that such manipulation of published beef price quotations has occurred in a manner that would be susceptible to criminal or civil prosecution under the antitrust laws. The Antitrust Division is aware of the allegations regarding this and other issues concerning beef prices which have been presented in private litigation that is now in progress. Should evidence of antitrust violations be yielded by that private litigation, the Division would of course give careful consideration to that evidence in determining anew whether action by the Department of Justice may be warranted.

Unlike the special mandate of the Federal Trade Commission to conduct and publish economic studies of industries in addition to conducting antitrust enforcement proceedings, it is not the normal practice of the Department of Justice to publicly announce the conclusion of antitrust investigations which do not result in criminal indictments, the filing of a civil complaint, or administrative action by the Department. Thus, the Antitrust Division has not formally communicated its conclusions regarding this investigation to any committee of Congress. In the process of coordinating the activities of our investigative staff and those of the Federal Trade Commission staff which was investigating retail grocery prices, our staff did communicate informally from time to time with the FTC's staff regarding the status of our investigation.

I hope that you will find this information to be responsive to your inquiry.

Sincerely yours,

John H. Shenefield
Assistant Attorney General
Antitrust Division

STATEMENT OF ROBERT ADERS, PRESIDENT, FOOD MARKETING INSTITUTE, ACCOMPANIED BY JAMES RILL

Mr. ADERS. Thank you, Mr. Chairman. I have a short prepared statement which I will read in part. I am appearing here today on behalf of the Food Marketing Institute which represents food retailers and wholesalers. We have about 900 members, some small, some large. Together they comprise about half of the total retail food sales in the country.

I would like to emphasize at the outset that supermarket operators deal directly with consumers. *Illinois Brick* or no *Illinois Brick,* our direct relation with our customers has always exposed us to suit for any alleged wrongdoing. We accept that and we are proud of our close relationship with consumers.

I would like to limit my testimony, therefore, to the peculiar way in which this bill affects food retailing. There has been abundant testimony by others with respect to the impact of the bill on

consumers, on business, on the courts, and on the economy in general. So I would like to speak only as to how this bill impacts food distributors and their customers.

Our interest in the case is unique. FMI and many supermarket companies are defendants in an action referred to as the beef litigation. We have heard a lot about the beef cases. My colleague, Mr. Rill, will speak more to the issue of the beef litigation than I will. But it is the beef cases that illustrate our unique interest and our unique concern.

Let me make one additional comment before I explain why. A new important dimension has been added to these hearings this year, and that is the testimony as the bill was introduced with respect to the impact of the bill on inflation. The case was made by Barry Bosworth and by Esther Peterson. As did others, they appeared on behalf of consumers, saying it would be in the interest of consumers for them to be able to sue in their role of indirect purchasers of overpriced products. I would like to turn that around this morning to talk about the reverse impact of extending coverage of this act to sellers and permitting them to sue down the chain of distribution to the retailer. I think this is a case that has not been made, a case on behalf of consumers as well as food marketing people.

I am deeply troubled by that, because even as indirect buyers have an interest in lower prices, so do indirect sellers have an interest in higher prices. What is the complaint in the beef litigation? It is that supermarkets have conspired to drive beef prices down. I would like to repeat that. We are accused of forcing prices down.

Even though these charges are groundless and wholly without merit, supermarket companies have been spending millions of dollars a year to defend those charges in which a small group of cattlemen in lawsuits, which were encouraged by certain opportunistic spokesmen, seek damages of $12 billion. Twelve billion is more than the total net assets of the companies in the actions. It is nearly 10 times the annual earnings of all supermarket companies, and these suits were filed by less than one-tenth of 1 percent of all cattlemen. Most cattlemen don't believe in these actions. They don't think there is any merit to the suits, that they are contrary to the interests of the cattle industry because they obscure the real problems in the industry: Changes in costs brought about by markets, by the uncertainties of weather, by the cattle cycle.

This committee heard testimony last year from W. D. Farr, a longtime cattleman from Greeley, Colo., and his statement is attached to mine.

Mr. Chairman, it seems very clear to me that the passage of this bill would permit ambitious plaintiffs lawyers to stir up indirect sellers of all types to sue for higher prices. In whose interest is that?

On page 12 of this committee's report last year on S. 1874, in discussing the history and the intent of the antitrust laws, it was stated that the right to sue for damages was intended to benefit consumers and not middlemen or others. That is the underlying purpose of our antitrust laws, to protect the consumer by outlawing practices that result in artificially higher prices.

So why then does this bill which purports to aid consumers include rights for indirect sellers whose avowed interest is in increasing costs to consumers? We believe in and we support the antitrust laws. We hold no brief for conspiracies or monopolies. We believe antitrust violations ought to be attacked by private and governmental action, but we don't think it is in the public interest to encourage remote sellers to sue indirect buyers.

The point is this: The threat of indirect seller litigation has a uniquely chilling effect on forceful individual buyer bargaining. Remote sellers, if the beef cases are an example, tend to file highly speculative and wide-ranging charges. Then they add several tiers of plaintiffs which makes the litigation enormously more complex, and the question of alleged economic injury has to be traced back through many levels of distribution on the basis of contrived economic theory and questionable hypotheses.

In addition, indirect-seller inclusion encourages substantially larger numbers of claimants, by combining the exposure to duplicate recovery with the threat of ruinous aggregate damage. The cost of litigation, uncertainty of an accurate result, the risk of loss, are all multiplied when the suit is maintained in behalf of indirect sellers. It is this combination of effects which is the principal concern of the food retailers.

Interestingly enough, the only reported litigation by an indirect seller against remote customers that has come to our attention are the beef cases. Even in those matters, the plaintiffs, including their spokesmen who appeared before this committee, have actions still pending against a group of packers. So they really don't need this bill to have their redress. They have a remedy against a party with whom they deal directly. In fact, I understand that there has been a recent settlement with one packer for $425,000. In other words, these cattlemen can have their day in court regardless of the outcome of this or similar legislation.

It appears, Mr. Chairman, that in the proposed legislation purporting to assist consumers and other buyers aid and comfort may also be given to those who complain that prices are not high enough. I find it difficult to believe that the Congress wants to support higher prices. There are enough uncontrollable factors now in the economy exerting upward pressure on food prices. Do you in your attempt to strengthen the antitrust laws really wish to extend this protection to indirect sellers and thus add to the pressure toward higher consumer prices? Won't the threat of indirect seller litigation be a disincentive for buyers to bargain for the best deal for the consumers?

If we enter into the marketplace in this very competitive food business handicapped by the constant threat of suits by some distant seller who attempts to blame the retailer for the vagaries of the marketplace, we are going to be discouraged from doing the best job we can for the customers. How can supermarkets bargain effectively with the direct suppliers with the threat of litigation filed by some remote supplier constantly pressing? In short, Mr. Chairman, if the rights of indirect sellers to sue are established by this legislation, who down the entire chain of distribution has any incentive at all to fight for lower consumer prices?

42-005 O - 79 - 9

In conclusion, I would like to urge you to weigh the problems associated with the inclusion of indirect sellers. I ask you to remember that the pressure up the chain of distribution is for low prices and down the chain of distribution is for higher prices. You must decide whether it is appropriate to add to that pressure for higher prices.

Thank you.

Mr. RILL. Mr. Chairman, my name is James Rill, and I am accompanying Mr. Aders today. I would like, if permission is granted, to insert a written statement which I furnished the committee in the record and to summarize it, say, in about 5 minutes, if that is agreeable to you.

Mr. Chairman, my purpose in appearing today is to complement Mr. Aders testimony and discuss some of the implications of the proposed legislation from the vantage point of an attorney with some practical experience in the indirect seller litigation of which Mr. Aders spoke. That is, of course, the beef industry antitrust litigation.

It is obviously not my purpose to discuss the merits of that case, but since this committee has heard so much testimony on that litigation, it seems to me that providing the committee with some of the background concerning those cases might be helpful, so that the record might be balanced.

As Mr. Aders suggests, the cattle litigation is unique insofar as we have been able to determine in antitrust litigation in that in those cases indirect sellers are suing supermarket chains claiming that a conspiracy existed such that the price paid through several tiers of distribution and production for live cattle was too low. In fact, although I can't say that our research has been completely comprehensive, that's the only case that we have been able to find in the Federal reports system wherein indirect sellers were suing over several tiers against remote persons alleged to be customers.

According to a witness who appeared before this committee last year there are some 35 defendants involved in the case, 12 law firms on the plaintiffs side, some 50 law firms on the defendants side, and at least 6 or 7 tiers or levels between the plaintiffs and the supermarket retail defendants. Not surprisingly, there is some disagreement among the plaintiffs, depending on which level they purport to represent as to where the impact of the alleged violation occurred. That is, those representing the cattlefeeders are alleging that the impact stopped with them whereas those who represent cow-calf operators claim the impact was passed back to those levels.

These cases were dismissed in the fall of 1978 on the basis of the *Illinois Brick* decision and the plaintiffs appeals are presently pending in the fifth circuit.

Prior to the initiation of the cattle litigation the plaintiffs made approaches to the various agencies of the U.S. Government, including the Antitrust Division of the Department of Justice, to seek their assistance in prosecuting the claims which they sought to assert.

The Justice Department had available to it the record in a case called *Bray* v. *Safeway,* which was the progenitor of the cattle cases. Having made a thorough review of the record, the Assistant

Attorney General in charge of the Antitrust Division, John Shenefield, a year ago wrote a letter to then Senator Hansen in which he concluded, and I will quote Mr. Shenefield's conclusion: "Our study of the trial transcript in *Bray* v. *Safeway* and our followup investigation of some of the questions raised by the evidence presented at that trial resulted in the conclusion that action by the Department of Justice regarding the issues posed in that case was not warranted." That conclusion by Mr. Shenefield was based on a lengthy memorandum which was submitted by the staff of the Antitrust Division to him, excerpts of which are quoted in my prepared testimony.

In effect, that memorandum concluded that there was not a shred of evidence to support the allegations of conspiracy. Nevertheless, these lawsuits were filed, have been joined in by less than one-tenth of 1 percent of the Nation's cattlemen and, as Mr. Aders has already testified, a number of cattlemen have already expressed opposition to these lawsuits. Several responsible cattle organizations have in fact adopted resolutions which are critical of the lawsuits, and last year William Farr testified before the committee as to his view of the lawsuits. He is a cattleman from Greeley, Colo., who is an experienced longtime leader of the livestock industry.

Nevertheless, the fact is that the burden and risk of defending antitrust litigation when you are representing a large company, or even a not so large company, is enormous. These burdens and risks are greatly multiplied by the intrusion of numerous levels of seller claimants, each expanding the number of nominal class plaintiffs.

The complexity involved in attempting to sort out the allegations of the conspiracy and the alleged fact and the amount of damages among various levels of production and distribution actually create immense time and cost pressures. The sheer numbers of purported claims which can be added by the accumulation of more and more remote tiers greatly enhances the uncertainty of outcome and risk of the wrong result which can be coupled with ruinous damages. In the "cattle" litigation they are seeking damages which exceed the net worth of all the defendants in the aggregate, according to the plaintiffs.

Under these circumstances, indirect seller suits are ideally designed, in effect, to deny the defendants their day in court because of the complexities and risks, regardless of the merits of the action, and to provide an enormous impetus for settlement which I would suggest primarily benefits the plantiffs' lawyers.

I would like to give you one example of the situation that arose in these cases which I think dramatically illustrates the problems faced in these types of cases. In June of 1977 some 1½ years after the preponderance of the "cattle" cases were filed, an attorney, who is lead counsel in no fewer than 11 essentially identical cases, wrote to several retailers who had not at that time been joined as defendants, advising them of his intent to sue them in the litigation. He explained that they could avoid the risk and expense of being involved, as he described it, in a complex multidistrict antitrust litigation by the simple expedient of paying the sum of $50,000. The retailers responded negatively to this invitation, and they were, in fact, joined in the litigation. Because of the curious

circumstances of this type of joinder several of the retailers filed a motion under Rule 11 of the Federal Rules of Civil Procedure, which is a highly unusual motion questioning the good faith of the attorney in signing his name to the complaint. By order of the court, this attorney was directed to file his basis for having reason to believe that the allegations of the complaint were true. He declined to do so, and while the rule 11 motion was still pending, settlements were arrived at in these cases, which can only be described as ridiculously low.

Recently I was told by one of the plaintiff's attorneys that nearly 2 years ago he had attempted to discuss settlement with his colleagues and they had advised him that there was not enough time involved yet in the case so that settlement discussions could become meaningful. Presumably, while the meter was running, and more time was being devoted to the litigation by the plaintiffs' attorneys. *Illinois Brick* intervened and the cases were dismissed.

The conclusion is, Mr. Chairman, that any theoretical benefit that might be conferred on indirect sellers as a result of this legislation is largely hypothetical, involves a class of cases which while they threaten our livelihood, the livelihood of the food retail industry, are not typical, are in fact unique in antitrust annals. This is not a situation where, as the State attorneys general allege, there are literally hundreds, even thousands of cases out there that are affected by *Illinois Brick.* That is not the case as it applies in this situation.

As Mr. Aders explains, the impact of this type of litigation has a particular chilling effect on buyers, making them unduly, perhaps noncompetitively cautious in their relationship with suppliers because of the complexity and risk of the overhanging threat of litigation. And I suggest to you that balancing any theoretical benefit for indirect sellers that might be involved in this litigation against the effective, forceful antitrust deterrent which results in direct private actions comes down clearly on the side of preserving the latter and not resurrecting the former.

Thank you, Mr. Chairman.

Senator THURMOND. Mr. Rill, how do you answer in brief Mr. Glenn Freie's statements before this committee, that his group needs a law such as S. 300? Mr. Freie testified, I believe, on February 1, 1979. Have you followed his group's litigation? Do you wish to comment on that?

Mr. RILL. Yes, Mr. Chairman, we have followed Mr. Freie's testimony in 1979, Mr. Freie's testimony also in 1978, and we completely disagree with all his factual assertions. He says that there is enormous evidence that he has that there is a conspiracy. This enormous evidence has been reviewed thoroughly by the Antitrust Division of the Department of Justice and found not to support the claims which he seeks to make. The preponderance of his testimony, and that of his counsel, has been devoted to what he claims to be problems in marketing between cattlemen and packers, in which we were not involved. He claims he is out of court as a result of the *Illinois Brick* dismissals of the suits against food retailers. That is not true.

His association, the association for which he is the chief spokeman and the lobbyist, has presently pending litigation against

meatpackers which is not at all affected by the *Illinois Brick* decision. And as Mr. Aders testified, there has been a settlement in that litigation of $425,000, which is pending court approval. So he is not out of court.

As Mr. Aders reminds me, that is only against one defendant. The defendants in the "meatpacker" litigation, the major defendants, are still in court. So I think Mr. Freie has made certain statements before this committee that will not bear up under close scrutiny.

I think that is all I have to say with regard to Mr. Freie's statement. He is still in court. The evidence that he claims to have has been reviewed by the Justice Department and found wanting.

Mr. CHUMBRIS. Will you please repeat that part about "he is still in court" because we had a little brief conference, we missed that one point?

Mr. RILL. I was explaining that the association that Mr. Freie represents is not out of court as a result of the *Illinois Brick*-based dismissals of the retail defendants. He has presently pending litigation against meatpackers in which he claims that meatpackers conspire to drive down the price paid to those that he represents, cattlefeeders. Those cases are not affected by *Illinois Brick*. Those cases are still pending in litigation, and one of the defendants has settled those cases for approximately $450,000. So he has very live litigation going.

I would also suggest to you that the bulk of Mr. Freie's efforts have been not primarily associated with this legislation but have been associated largely with the attempts to improve what he sees as defects in the marketing system between packers and feeders and other segments of the cattle industry. In that connection he is promoting legislation on which we have not developed a position which would establish a market reporting system.

So upon analysis, that may be, in effect, his primary objective rather than the pursuit of this legislation.

Senator THURMOND. I notice on page 8 of your statement that this is stated:

> Under these circumstances indirect seller suits are ideally designed to deny the defendants their day in court regardless of the merits of the action and to provide an enormous impetus for settlement.

Would you care to comment further on that?

Mr. RILL. Yes, Mr. Chairman. You understand that we are not testifying in any respect with regard to suits that may be brought by direct sellers against us or against anyone else. Those suits have been sustained and authorized since Mandeville Farms back in 1945, I believe. Indirect seller suits, however, have a particular adverse potential in the sense that they add multiple tiers of plaintiffs back from the direct seller reaching way back from the defendant remote customer.

In the "cattle" litigation alone you have the retailer, the distributor, the packer, the feedlot operator, perhaps more than one feedlot operator, the field buyer, and the cow-calf operator, which Robert Vaughn, a plaintiff's attorney testifying before this committee last year, conceded involves six or seven tiers between some of the plaintiffs and the defendants. Attempting to assess, in effect, a passback theory throughout these multiple tiers of production and

distribution, particularly where you are dealing with a product which changes its form throughout these tiers, has to be based on the most speculative kind of economic theory and the most speculative kind of statistical and related hypotheses. Continue that with the sheer number of additional nominal plaintiffs that are added as each of these tiers is piled onto the case, you have a great aggregate damage created which establishes an enormous overhanging risk on the defendants. So you decrease the number of damages that might be paid to any individual class member, but as you increase the numbers in the class back through each tier, you come up with numbers like Mr. Freie quoted to you 1 year ago, which produces a total damage claim in excess of the total net worth of all of the defendants combined.

Regardless of the merits of the case, no experienced defense lawyer is going to assure his client that he is going to be able to win it with all of those complexities and with all of those numbers of potential claimants. He assesses the risk of loss against even the solid merits of the defense. There is an enormous impulse for settlement.

The attorney representing the plaintiffs regresses back through these tiers and has considerable room to maneuver based on the numbers of people that they have never met really, that they represent in many cases. They have flexibility to settle for relatively large attorney's fees with relatively small individual damage claims being awarded to the nominal plaintiffs.

So I think that is why the indirect seller cases do create a unique opportunity, or at least a particular opportunity, for the exaction of large settlements benefitting the plaintiffs' attorneys.

Senator THURMOND. Senator Baucus, do you have any questions?

Senator BAUCUS. Thank you, Mr. Chairman.

I am curious why the arguments against indirect sellers being included in the legislation doesn't also apply to indirect buyers. As I listen to you, it sounds like the complexity of issues and the proliferation of plaintiffs are your chief concerns. Don't these concerns apply to indirect buyers as well as indirect sellers?

Mr. RILL. Our particular problem, the one that brings us to the table, of course, is the fact that there has been testimony on an indirect seller case or rather a group of indirect seller cases which threaten the livelihood, the existence of the defendants. So that is our particular focus. That is where our experience may be of special benefit to the committee.

Senator BAUCUS. But do you draw a distinction between indirect sellers and indirect buyers?

Mr. RILL. We think that the chilling effect that might result as to the sturdy bargaining buyers might be particularly adverse to the public interest in indirect seller type of cases. Of course, as far as buyers are concerned, food retailers are presently amenable to direct buyer litigation; the consumer, depending, of course, on the outcome of the Supreme Court's *Reiter* decision.

Senator BAUCUS. Let me ask the question a little differently. Do you feel that it is improper for a remedy for indirect sellers to be available or do you feel that the remedy should be available but only in legitimate cases?

And if the latter point is the case, shouldn't the answer be some better way to avoid frivolous suits or to penalize the kind of irresponsible plaintiffs who may not really have a claim?

Mr. RILL. I think there is a disproportionate, in effect, bargaining situation that exists because of the number of the plaintiffs and the complexity of the litigation. I think obviously there is merit in exploring some way of bringing redress to that through some means or other. It is very difficult in our system of jurisprudence, as you understand, Senator, where losing plaintiffs are not penalized by being forced to pay the defendants' attorneys fees.

I would like to comment briefly as to the thrust of your question relative to the remedy that would be accorded people injured. I think, first, that, insofar as indirect seller suits are concerned, the question assumes a situation which is largely theoretical, and not actual. We have attempted to study all of the sellers' suits as contrasted with the buyer suits that we have been able to locate. We have located slightly more than 20 in the Federal reporter system. Of those, we have only been able to find one in which the interests of indirect sellers as contrasted to direct sellers appears to be paramount. So it is not a situation where there are evidently numerous claimants whose rights, historic rights, are being cut off by the *Illinois Brick* decision.

I think that raises another point. And that is that in all of these instances, including these cases, there is a remedy which is being actively pursued against direct buyer.

Senator BAUCUS. If you found only one case brought by an indirect seller, it would seem to me that to provide the remedy to indirect sellers would not open up a floodgate of litigation.

Mr. RILL. It would bother us when they are claiming damages that exceed, in the aggregate, the total net worth of all the defendants combined. In the cosmic sense it may not be very important, but it is terribly important in our particular situation.

We see that these cases may, if the legislation is enacted, further encourage other similar cases where people looking at a low price situation which may be caused by a variety of factors are seeking a culprit which may not, and probably doesn't, exist.

Senator BAUCUS. Do you agree with the basic premises of the Clayton Act, and the Robinson-Patman Act? Do you agree that there should not be price fixing and that there should be free competition in the American marketplace?

Mr. RILL. I think Mr. Aders testified that he agrees with the premises under the antitrust law, and so do I.

Senator BAUCUS. If that is the case, why shouldn't the remedies be available? Why shouldn't standing be available to a greater number of people to enforce that ideal?

Mr. RILL. Because, Senator, the question of being able to show legally cognizable injury back through the several tiers, through multiplicities of nominal plaintiffs, invites an inaccurate result with ruinous consequences which generates lawsuits not vindicating competition but primarily benefiting counsel.

Senator BAUCUS. Why shouldn't remedies be available but perhaps with penalties that would discourage frivolous or unmeritorious actions?

Mr. RILL. I can only comment on the one proposal in that vein that I have seen, which is the bill reported by the House Judiciary Committee last year. That suggested a fee-switching where there was proof that suits had been brought, I believe, frivolously or vexatiously. That is simply a standard that no court is ever going to apply under our system. I don't think that fee-switching, however, is the ultimate answer. I think the ultimate answer is to look at the proximate, direct injury notion that underlies the antitrust laws. And I think it is clear from the testimony of others, as well as our own testimony, that those purposes are better served, certainly, in the seller situation by sustaining the direct action as the most effective private enforcement vehicle have the greatest deterrent effect consistent with the Clayton Act.

Mr. ADERS. May I? Just one further comment that perhaps needs a slightly different emphasis, and that is this: Certainly there should be a remedy to the public for an antitrust violation and if the damage for that violation occurs in sum or in part, there ought to be jurisdiction in the Justice Department, and there is. I have no concern about any responsible public official who would evaluate the evidence and bring such an action. My concern is illustrated by the "beef" cases, which were shopped at the Justice Department. They were told there was no merit. Nonetheless, they brought the actions. I think that the tendency of the "plaintiff's bar" to try to find potential victims for filing conspiracy actions is tremendously encouraged by this.

Senator BAUCUS. The cry, the mood of the public these days is for less government. Don't you think that it would be better to devise a system for private settlement of differences rather than for the Government to control everybody's lives? You are saying that because the Justice Department does not pursue an action, therefore there is an implication that the claims are not meritorious. The Justice Department has a limited number of people working there. They can only handle a limited number of cases. In addition, there are often very good reasons why the Justice Department doesn't pursue a certain case. More importantly it seems to me, we should devise a system where private parties can settle their differences privately or through the judicial process and not have to rely upon the Antitrust Division of the Department of Justice to handle their case.

Mr. ADERS. Conceptually, I can be with you on this. But having spent a couple of years in the Justice Department Antitrust Division, I know that there are any number of people in there who like to pounce on cases like this when it involves chain stores and the beef industry. It would be a very nice juicy case to file.

I don't know what the answer is, except that there needs to be some more responsible way of screening out spurious actions and the present system works fine.

Senator BAUCUS. When actions are spurious they should not be remedied. Do you agree though that the remedy should be available?

Mr. ADERS. I think the remedy is a public remedy. I don't necessarily hold that any remote party who feels injured should thereby assume a violation of the antitrust laws and be able to come into the court because of assumed economic injury and leap over the

proof of any antitrust violations and get into a long trial costing millions of dollars to defend. That is what is happening in these cases.

Mr. RILL. I think, just to add to that, if I might, the remedy, as I tried to explain, in these instances are largely theoretical, where you are dealing with numerous indirect sellers through multiple tiers of distribution. The risk of an incorrect result and the risk of ruinous damage resulting from that incorrect result, in our judgment, far outweighs this theoretical notion of equity. I don't mean to derogate it by so describing it. I think it impairs the effectiveness and the greater likelihood of a correct result where you have available the direct action or the prospect of a Government suit.

Senator BAUCUS. How many packers are there in the country?

Mr. ADERS. The relationship between the seller of the beef, the killed beef, that is the packer salesman and the packing companies, that is one cluster, and then the retailer-buyers is the other. You are asking what is the dimension of that?

Senator BAUCUS. What is the approximate number of entities from whom retailers buy directly?

Mr. ADERS. I am not intimately familiar with the packing business. The number of those is not something that I know about. There are a large number of regional packers throughout the country, a number of smaller, independent packers, and, of course, some whose names are well-known.

Senator BAUCUS. But it is true that there are not nearly as many packers as there are supermarkets. Isn't that true?

Mr. ADERS. No. The supermarket business is highly fragmented. I think the largest retailer buys at retail value about 4 percent of beef sold. So on the buying side, there is a tremendous diffusion of buyer impact at the packer level.

There are fewer packers selling to us than there are of us buying from them. Bear in mind also that about half of the retail value of beef now sold is not sold through supermarkets but through other means of disposition; fast food restaurants and institutions.

If you are getting to the question of buying power and so forth, the supermarket buyer is now a smaller part. Any one buyer and any one company is a very small part of the total impact on beef marketing. It was not always that way, but the numbers have changed a lot.

Senator BAUCUS. Mr. Chairman, I have no more questions. Thank you.

Senator THURMOND. Mr. Boies?

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

Mr. Aders, I was impressed by the point that you and Mr. Rill made regarding the need, particularly at this time of rapid inflation, to hold down the prices. You spoke of the danger that perhaps supermarkets and others might be discouraged by this bill from engaging in cooperative activity to try to hold down prices if they knew they might be subject to a lot of indirect seller suits. Could you give us some more elaboration on that? What kind of cooperative activity do you think might be discouraged?

Mr. ADERS. I think, if I may address the question of cooperation first, if you are speaking of cooperating with each other——

Mr. BOIES. That is what I am talking about.

Mr. ADERS [continuing]. You would get in trouble with the antitrust laws. What happens in the retail food business is that the retail marketplace reflects a startling identity of retail pricing, which many people assume to be the result of monopoly, particularly parallel decisions, when in fact nobody can afford to be any higher priced than anybody else. The fact that people behave in certain ways as if they were in some sort of a combination or agreement or cooperation, leads to the assumption sometimes that there must be such a combination or understanding. That then, in turn, leads to the filing of the lawsuits or investigations.

The tendency of the supermarket operator is to try to have in the weekly ad and in the stores the lowest prices possible in order to beat his competition. So many times they both guess as to what that price should be. That leads to an inference on the other side that they must have gotten together and decided what to do.

Mr. BOIES. Are you saying that supermarkets would be discouraged by this bill from competing in their prices to ultimate consumers?

Mr. ADERS. I think the questionable inhibition would fall upon the buyer himself as he views his buying transaction. I sat as general counsel for a large retail chain for many years and counseled with buyers as they entered into buying contracts. The great concern they have, and which we taught them as antitrust lawyers trying to keep them straight, is that they not get too good a deal. They wanted to get the right deal, but they didn't want to go too far because they have been told over the years how much trouble that will get them and their companies into. The fear of that remote seller, the one who is not there at the bargaining table, some day saying it was because your buyer was behaving illegally and that he was behaving the same way that that buyer was, that they had some sort of an understanding, is what would lead to cases like the "beef" case.

So the natural tendency of the buyers is to back off, say OK, the easy course of action is to take the price offered; and that will lead to higher prices ultimately.

Mr. BOIES. But is there any cooperative action that would be discouraged by this bill? In other words, are the supermarkets now engaging in some kind of joint effort to hold down prices that you think would be discouraged if this bill passed.

Mr. ADERS. They are individual companies doing all they can in conjunction with admonitions and pleas from the Government, including the Council on Wage and Price Stability, to increase productivity, to cut down costs. We are unable to get into discussion about price activity or buying activity together because of the antitrust laws. And we even are discouraged by counsel from discussing that with you or with an agency of Government. Our concentration is on improving our own efficiencies and hoping that others will do the same.

Mr. BOIES. So that independent of this proposed legislation your companies would be, in effect, precluded from getting together to do anything in a cooperative way to hold down prices? Is that correct?

Mr. ADERS. This industry has been under the spotlight for so long and is so afraid of adverse publicity from the inference of any

such thing that it often has been difficult for us to even have meetings. One of my ground rules in the association which I head is that I always have counsel at every meeting. Whenever competitors come into the same room, the lawyers admonish them first as to what they may or may not talk about.

Mr. BOIES. That is good for the market and lawyers.

Mr. ADERS. We have increased our business tenfold.

Mr. RILL. I am not comfortable with this discussion. [Laughter.]

Mr. BOIES. My point is that right now under the antitrust laws, irrespective of what we do with this legislation, the supermarkets are not going to be engaging in cooperative activity among themselves to attempt to hold down prices.

Mr. ADERS. That is exactly right.

Mr. BOIES. What we are talking about, as I understand it, is your concern that individual companies will be discouraged from bargaining for the best deal for fear that if they get the price too low, some indirect seller will be unhappy with that and will sue under the antitrust laws.

Mr. ADERS. Yes; exactly.

Mr. BOIES. That rationale doesn't have any applicability when we are talking about the other side of the equation. That is, the indirect purchases; correct?

Mr. ADERS. It would seem to me that the natural forces of the marketplace are different as you go up the chain of distribution from going down. As I made the point in my earlier testimony, the pressure down is for higher prices. So the counterpressure from us is the concern that I have. I don't want that inhibited.

Mr. BOIES. Just one other question. You say the supermarket industry is not particularly concentrated. If you had a situation, however, where the industry was effectively monopolized so that the indirect sellers were confronting, not hard bargaining by a fragmented industry but, in effect, price setting by a monopoly, would that in your view lead to different policy considerations?

Mr. ADERS. Let me make a brief response and suggests that Mr. Rill add to it. I have not thought about the implication of that, except it would be a completely different picture. I have looked at our industry and reached certain conclusions about the need for this kind of a law to protect the public or even remote sellers to find the nonexistent. I would be more concerned if you are talking about a concentrated industry.

Mr. Rill?

Mr. RILL. Mr. Boies, I think the circumstances that you raise again are extremely hypothetical. It seems to me, though, that any attempt to avoid the strictures of *Illinois Brick* could be readily attempted by imaginative plaintiffs, under your thesis simply by claiming that there was this monopoly or conspiracy to monopolize violations at the remote level. So I think your suggestion itself suggests an area where there could be abuse.

Further, I am not aware of any cases—again, our cases notwithstanding—in which there has ever been an allegation of monopoly by indirect buyers affecting remote sellers.

Third, I suggest that *Illinois Brick* should apply in a monopoly situation for the very simple reason that, of course, the case from which *Illinois Brick* drew its nourishmnet, *Hanover Shoe,* was a

monopoly case itself. So I think the same legal considerations do apply in a monopoly as well as a conspiracy case.

Mr. BOIES. I think you have missed my point. It is perfectly clear that under the law today, the same legal considerations apply, and *Illinois Brick* or *Hanover Shoe* or any of these cases apply to both section 1 and section 2 violations. My inquiry was directed at what kind of new legislation we ought to pass and what the policy considerations are. And in terms of a fragmented industry it seems to me that we want to encourage hard bargaining to hold prices down, because that benefits the consumer and because the sellers, since they are facing a fragmented industry, ought to be in a fragmented and competitive position themselves.

On the other hand, if you have a number of small businesses, farmers or others, who are trying to sell to, in effect, a monopsony, then it seems to me from a policy standpoint there are different considerations. And I hear the point that says that a plaintiff can always allege anything, but that is what the courts are there for. If the allegations get too out of hand, the courts can and do dismiss the cases.

Mr. RILL. I would only suggest that in monopsony that the most effective type of case that could be brought would be by the one dealing with the monopoly or the monopsony. The law books are full of those type of cases, and I don't see any need for indirect remote claimant to bring those actions, because it seems to me once again the complexities intrude.

Mr. BOIES. Are you familiar with the recent Supreme Court decision in *Blue Cross* against *Royal Drug* and other insurance companies?

Mr. RILL. Only generally. I haven't had an opportunity to study those cases and comment on them in any useful detail.

Mr. BOIES. Perhaps in subsequent written comments you could submit whether you believe that the principles that the Supreme Court articulate there with respect to whether purchasers ought to be subject to the antitrust laws and the extent to which they ought to be subject to the antitrust laws when they try to hold down prices are consistent with your position. I think that is a different case than you have, but I think it would be usedful to have your anaylsis of that.

Mr. RILL. I think there are substantially different considerations that apply. But we will certainly prepare an analysis for the committee on that issue.

Mr. BOIES. Thank you.

Thank you, Mr. Chairman.

Senator THURMOND. Mr. Rill, if you were directed to make the final decision on whether S. 300, so-called *Illinois Brick* decision, should become law or should be defeated, how would you decide? And would you please explain briefly as a summary, from the substantive point of view as well as other points of view, including the procedural point of view on which you discoursed at length in your statement?

Mr. RILL. Senator, I can only look at the bill, of course, as presently cast, and I deeply appreciate the exalted position you put me in. I would vote no on the legislation for the reasons suggested in my statement and Mr. Aders' statement. Insofar as the cases

that we have direct familiarity and concern with—and those are the only ones on which we can speak at the present time—the complexities, the costs, the risk of inaccurate results are so great and the diminished effectiveness of antitrust enforcement that we think would result from this legislation is such that in balance, insofar as we are concerned, and as related to our particular practical involvement, we feel this legislation in its present form is ill-advised and not in the public interest.

Senator THURMOND. Is ill-advised and not in the public interest?

Mr. RILL. Yes, Mr. Chairman.

Senator THURMOND. Do you recommend any kind of law, any changes in the *Illinois Brick* decision, or is it your thinking that it should be allowed to operate for a longer time to see how it works out?

Mr. RILL. From our particular perspective, Mr. Chairman, we are concerned with the impact of the legislation in resurrecting particular litigation which we have talked about at length and which other witnesses on the other side have talked about at length, which would have a potentially ruinous effect on the food retail industry.

We have not seen any proposed revised legislation which is responsive to our concern. And as a consequence, we can only look at the legislation in its present form and comment as we have on its serious adverse impact on us and we think on the public interest.

Senator THURMOND. So, so far as you see the situation at the present, do you feel it would be inadvisable to reverse the *Illinois Brick* decision unless somebody comes up with a proposal that hasn't been advanced so far?

Mr. RILL. We haven't seen the proposal. So far we have not changed the position that we have already expressed, Mr. Chairman.

Senator THURMOND. Mr. Aders, do you have any further statement to make?

Mr. ADERS. No, thank you, Mr. Chairman.

Senator THURMOND. I want to thank you gentlemen for giving us your views from both the standpoint of buying from the producer and from selling to the consumer. And I think your testimony here is going to be very helpful.

Thank you very much.

Now we have the American Bar Association counsel: Mr. David Foster, chairman, civil practice and procedure committee antitrust section; Harold Schmidt, vice chairman; Michael Baylson, Philadelphia, Pa.; Alan Weinschel, New York, N.Y.; and Kenneth Reed, Phoenix, Ariz.

[The prepared statements of David L. Foster, Harold R. Schmidt, Michael M. Baylson, Alan J. Weinschel, and Kenneth R. Reed follow:]

PREPARED STATEMENT OF DAVID L. FOSTER

I am David L. Foster, a member of the law firm of Willkie Farr & Gallagher of New York City.

My interst in the matters before this committee, and in antitrust law generally is substantial. I am chairman of the civil practice and procedure committee of the American Bar Association's antitrust section. In 1978, I served as cochairman of that section's *Illinois Brick* task force. That task force addressed the problems of

judicial administration which led the Supreme Court to decide *Illinois Brick* as it did, and presented to the section council a report and a legislative proposal at the spring meeting of the section in 1978. On October 6, 1977, I testified concerning *Illinois Brick* before the Subcommittee on Monopolies and Commerical Law of the House Committee on the Judiciary.

Before making my presentation I must emphasize that the views I express here as solely my own. I am not testifying today as a representative of the ABA or any of its sections or committees:

For purposes of clarity, my remarks will be divided into four sections. They are as follows: The case in favor of sustaining *Illinois Brick*; the inability of the proposed legislation of provide meaningful antitrust protection for indirect victims of antitrust violations; disadvantages which the proposed legislation will generate if enacted; and certain procedural innovations which should be considered for inclusion in legislation if the Congress persists in overruling *Illinois Brick*.

Point I

THE CASE IN FAVOR OF SUSTAINING *ILLINOIS BRICK*

In view of the voluminous materials which have been accumulated in extended prior hearings on legislation to repeal *Illinois Brick*, I shall refrain from extended comment on the general subject of the merit of such legislation. However, I think it important to summarize my own views, which I shall attempt to do in a few sentences.

First, the Supreme Court's decision in *Illinois Brick* seems to me to be sound in its recognition of grave problems of judicial administration which would arise from the maintenance of treble-damage actions by entities at different levels in a chain of distribution.

Second, the combination of *Illinois Brick* and *Hanover Shoe* strengthen private antitrust enforcement by ensuring that direct purchasers will be able to maintain actions expeditiously without the complications which inhere in multilevel suits.

Third, although there has been much debate in hearings considering the efficacy of direct suits, it is my experience that in general direct purchasers who have been injured do commence suit, and that while one may theorize that some may be hesitant to do so by reason of long-standing relationships with their suppliers, class action procedures enable even one direct purchaser to institute litigation for the entire level of distribution. Experience under existing law suggests that if *Illinois Brick* is not overruled, the class in such a suit would be sustained and there would be no substantial number of "opt outs."

Point II

THE PROPOSED LEGISLATION FAILS TO PROVIDE MEANINGFUL ANTITRUST PROTECTION FOR INDIRECT VICTIMS OF ANTITRUST VIOLATIONS

The proposed legislation to overrule *Illinois Brick* is deficient as a measure designed to protect indirect purchasers from antitrust violations. As Professor Phillip Areeda of the Harvard Law School testified before the House Judiciary Committee concerning a prior bill:

"H.R. 8359, and some other proposals as well, do not necessarily accomplish their objective of overruling *Illinois Brick*. To say that those indirectly injured may sue (or to say that recovery should not be denied for the reason that the plaintiff did not deal directly with the defendant) does not address the rationale of the *Illinois Brick* decision and therefore would not guarantee a different result. The Supreme Court did not deny standing to the *Illinois Brick* plaintiffs because they were indirect purchasers. The Court rested not on indirectness but on the difficulties of tracing damages and of avoiding duplicate recoveries. The proposed legislation does not reject those grounds for denying a recovery. Thus, the proposed legislation may be so narrow as not to accomplish its purpose while so broad as to cause mischief." [1]

If the proposed legislation is so construed it will provide little relief to indirect purchasers. For the most part, such purchasers will be unable to establish what portion of the overcharge was passed on to them. Once their inability to prove damages is established the Court will be able to dismiss their actions, not because they are indirect purchasers, but because of the difficulty of proving damages. Thus, while the proposed legislation may overturn the direct purchaser rule it may fail to overturn the Court's result.

---

[1] P. Areeda, statement before House Judiciary Comm., 3 (September 16, 1977).

Apart from difficulties of proof, it is likely that in most cases the new legislation will not result in actual distribution of damage rewards to downstream purchasers. Although the bill contains a provision for ascertaining both fact of injury and amount of damages on a class basis (a provision discussed further below), it provides no mechanism which would alter the presently prevailing practice of distributing funds pursuant to proofs filed by individual claimants. Experience with class action settlements suggests that only a portion (typically a small fraction) of potential claimants actually come forward to seek a share of recovery. Congress capitulated to this problem in passing the parens patriae bill when it provided in section 4E that money recovered in parens patriae suits be deemed civil penalties and be deposited with the State. In considering this section the House report conceded "that rarely, if ever, will all potential claimants actually come forward to secure their share of the recovery * * *. Section 4E commits the disbursement of the undistributed portion of the fund, which will often be substantial, to the discretion of the court." [2]

Accordingly, it must not be anticipated that the present legislation will have any significant effect in providing actual compensation to downstream purchasers.

Point III

THE PROPOSED LEGISLATION WILL GENERATE DISADVANTAGES IF ENACTED

In the course of the extended hearings on *Illinois Brick* legislation, it has often been observed that such legislation will undermine private enforcement of the antitrust laws. In my testimony before the House subcommittee on October 6, 1977, I pointed out that overruling *Illinois Brick* and *Hanover Shoe* would diminish incentive to sue of the direct purchaser, and would make it difficult for him to recover. This very concern was identified by the Supreme Court in both of the cases in question.

In addition, it has often been recognized in the hearings that the various bills which have been considered create grave problems of duplicate recoveries. The task force of the Antitrust Section identified the need for avoidance of multiple liability as the central challenge to any *Illinois Brick* repealer. The present Senate bill recognizes the problem but, I respectfully submit, fails in any way to deal with it.

Merely empowering a court, as does the proposed bill, to entertain a "passing-on defense" creates problems but presents no solutions. Notwithstanding the broadening of power of the multidistrict panel to transfer under 28 U.S.C. 1407 there is no guarantee that all possible actions arising from a single violation would be brought before the same judge at the same time. Even if one assumes that consolidated litigation would be typical, the possibility of exceptional circumstances must be recognized. Where separate proceedings exist, a court may fail to exercise its discretion in an appropriate manner, or may in fact be unable to do so. One obvious danger is that inconsistent decisions as to the fact of passing-on will be reached in different actions.

The risk of inconsistent determinations is apparent when one realizes the staggering complexity of the passing-on determination. One may assume in a typical distribution chain geometrically increasingly numbers of entities at each distribution level, with no certainty that any of those entities traded on the same terms. Thus, wholesaler A may in fact have absorbed all of a conspiratorial price increase, wholesaler B may have passed it all on, and other wholesalers may have priced at various intermediary positions. Under such circumstances, a determination on a class-wide basis would be either impossible or strikingly unjust. It must further be emphasized in passing that the existence of such complex issues will be forcefully pointed out by defendants opposing certification of class actions.

Point IV

PROCEDURAL INNOVATIONS TO BE CONSIDERED FOR INCLUSION IN ANY *ILLINOIS BRICK* REPEALER

The majority report of the antitrust section task force concluded that the theoretical solution to the multiple recovery problem was to combine all the claims arising from an antitrust violation into one suit. Multiple liability is avoided in such a suit by establishing a single damage calculation and apportioning that damage figure among the competing claimants. Once each claimant's share of the damage award is determined it is trebled and he receives that amount from the defendant. The defendant thus pays treble damages based on one estimation of actual damages to

[2] H.R. Rep. No. 499, 94th Cong., 2d Sess. 16 (1976).

which all claimants are bound. The risk of many different damage estimates by different courts resulting in multiple recoveries is eliminated.

There is no mechanism in existing law or in the bill to achieve such a result. The deficiencies of statutory interpleader, permissive joinder and the statute of limitations have been pointed out in prior hearings (and were covered in my October 6, 1977, statement to the House subcommittee). In the task force report, it was proposed that the *Illinois Brick* repealer should provide for the giving of notice by the court to all persons having possible claims, after which any claimant who failed to become a party to the litigation before the court would be forever barred from maintaining a suit.

While this approach was the best that the task force could devise, there are possible consitutional issues concerning adequacy of notice. Moreover, the price of such a provision is elimination of the "opt out" class in favor of an "opt in." It seems apparent to me that a court will be hopelessly handicapped in seeking to resolve "passing on" issues for an "opt out" class; it is not apparent that elimination of the "opt out" class is legislatively acceptable, or that even with an "opt in" class the action would be manageable. On the latter point, it is likely that in some circumstances a meaningful determination can be made, and that in other circumstances the decision as to who suffered how much damage will be at worst impossible, or at best will bog down the litigation for months or years of discovery and expert evidence on abstruse economic issues.

It must again be emphasized that the foregoing complexities are by no means the concern only of defendants. In a time when Congress is deeply concerned with proposals to expedite antitrust litigation, only the plainest of benefits could justify legislation which will inevitably add layers of complexity to treble damage cases. Furthermore, if defendants are as fond of delay as some commentators suggest, repeal of *Illinois Brick* will provide a powerful weapon to defeat class certification, or to tie up the cases indefinitely. Even if, as I believe, there is no general problem of delay improper defense tactics, it is nevertheless the case that competent lawyers acting in the utmost good faith will have to deal with issues which inevitably will greatly protract multilevel litigation.

Prepared Statement of Harold R. Schmidt

My name is Harold R. Schmidt. I am a member of the firm of Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, and I practice law in Pittsburgh, Pennsylvania and Washington, D.C. I am vice-chairman of the American Bar Association Antitrust Section Civil Practice and Procudure Committee.

I am pleased to have the opportunity to appear here today. As a matter of background, I would state that my own practice in the antitrust field and that of the firm of which I am a member is almost equally divided between representing plaintiffs and representing defendants. Accordingly, what I am about to say constitutes a balanced view calculated to achieve even-handed justice in dealing with a complex problem. Additionally, I wish to make it clear that the views I express are my own and I do not purport to speak for the American Bar Association or any component thereof.

It is especially significant that we are considering Senate bill 300 at a time when congressional leaders and others are concerned with the so-called litigation explosion and are considering means of streamlining litigation and making it more efficient, especially in the antitrust field. This is evidenced by the President's creation of the National Commission for the Review of Antitrust Laws and Procedures, which issued its report and recommendations on Janurary 22, 1979, and which has led to the introduction of another item of proposed legislation; i.e., Senate bill 390. There has also been formed, in the Department of Justice, the Office for Improvements in the Administration of Justice. That Office last year developed and has introduced Senate bill 3475, which deals with some of the problems that will inevitably arise in connection with the consequences of the enactment of Senate bill 300.

The purpose of my testimony here is to discuss one particular procedural aspect of the proposed legislation to change the rule of *Illinois Brick*.[1] Other participants of the panel of which I am priviledged to be a member will discuss other important procedural aspects. However, I would also say, from a substantive point of view, that the enactment of Senate bill 300, of any similar legislation will, in all probability, create more problems that it will solve. Speaking solely for myself, I am opposed to Senate bill 300, as presently drafted, and I urge that it be defeated.

---

[1] *Illinois Brick Company* v. *State of Illinois*, 431 U.S. 720 (1977).

Both substantively and procedurally, the elements of the *Illinois Brick* problem must be examined from the respective points of view of at least three foci of public interest: (1) public interest in the achievement of even-handed justice consistent with the effectuation of the purpose of the antitrust laws; (2) public interest in avoiding the proliferation of lengthy and expensive litigation and (3) public interest in enabling the courts to handle the increasing burden of complex litigation.

All three of the foregoing central points of public interest were dealt with by the Supreme Court in both the 1968 *Hanover Shoe*[2] decision and in the 1977 *Illinois Brick* decision. Both cases dealt with (1) the public interest in the achievement of even-handed justice consistent with the effectuation of the purpose of the antitrust laws by making it clear that there should be no duplication and/or proliferation of recovery against the antitrust violator and that there should also be no gaps in the recovery of damages so as to permit the antitrust violator to escape the payment of compensation for the full amount of damage, trebled, due to his violation.

Points of interest (2) and (3) were treated by taking into consideration the difficulty and impracticality of attempting to handle multilevel recoveries from a single antitrust violator.

A very apt summary of the position of the Supreme Court with respect to the above-numbered three foci of interest is contained in Judge Weis' statement for the court in In Re Sugar Industry Antitrust litigation, 579 F.2d 13 (3rd Cir., 1978) at 17: "* * * The court grounded its conclusion on several bases, including the possibility of exposing the defendant to multiple liability and the evidentiary complexities that would arise in apportioning the overcharge among those in the chain who had suffered injury. The court also exressed concern that if the direct purchaser could not make a full recovery of the overcharge, the wrongdoer would be able to keep some of the fruits of its illegality. * * *"

Regardless of an understandable desire for a simplistic solution of the problem, I do not believe that the expertise, knowledge and experience of the United States Supreme Court should be disregarded in dealing with it.

No one would dispute the fact that the antitrust laws are a fundamental and highly desirable aspect of our democratic freedom. We all know that political freedom goes hand-in-hand with economic freedom. However, even-handed justice is the necessary third essential in the achievement of that economic and political freedom.

The civil treble-damage action, which creates the possibility of private enforcement, has long been recognized as a salutary feature of our antitrust law and our free economic competitive system. however, no one has suggested that the situation should be made more punitive than it now is with the possibility of criminal sanctions and treble-damage civil actions. The antitrust violator should be fully liable, but should not be liable for more than three times the damage he caused.

Every practical litigator knows that where there is the possibility of varying kinds of litigation developed out of the same situation there is a great danger of inconsistent results and overlapping recoveries, mostly to the detriment of the ultimate payor of the damages. This is especially true in an antitrust context. In the antitrust field, once the inquiry proceeds beyond the scope of the direct relationship between the antitrust violator and his opposite number in the transaction involved, the situation has departed the bounds of proof and has become a venture into speculation.

In *Hanover Shoe* the Supreme Court determined that an alleged antitrust violator could not, as a matter of defense, prove that the plaintiff had "passed on" all or part of the resulting overcharge to its customers.

In that case, the court dealt with the attempt of the defendant to limit the principle that the victim of an overcharge is damaged within the meaning of section 4 of the Clayton Act to the extent of that overcharge. It pointed out that the defendant had argued that the rule should be subject to the defense that economic circumstances were such that the overcharged buyer could only charge his customers a higher price because the price to him was higher, and that in such circumstances the buyer suffered no loss from the overcharge. The opinion noted that a wide range of factors influence a company's pricing policies, so that normally the impact of a single change in the relevant conditions cannot be measured after the fact. It stated that it was equally difficult to determine, in the real economic world, what effect a change in a company's price would have on its total sales. Mr. Justice White, speaking for the court, stated (p. 493): "Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could

---

[2] *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued."

He concluded that the proof of what he considered "virtually unascertainable figures" would normally prove insurmountable but that, nevertheless, antitrust defendants would frequently seek to establish them and thus treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories. From a completely practical point of view, it was pointed out that the proof of passing on to the ultimate consumer might result in each consumer having such a small stake in a lawsuit and so little interest in attempting a class action that the use of a treble-damage action as an effective antitrust enforcement tool would be substantially reduced.

Another way of expressing the thought with which Mr. Justice White dealt would have been to advert to the general principle of the law of damages that recoverable damages must be proximate and reasonably provable rather than remote and speculative. A general rule of law in tort—and an antitrust violation is a statutory tort (cf. vol. 16, Von Kalinowski, Business Organizations, Antitrust Laws and Trade Regulations, Section 103[6])—is that the tortfeasor is liable only for the proximate results of his own conduct and not the independent act of another which intervenes after the tort or violation in question. Prosser, Handbook of the Law of Torts (4th Ed., West, 1971) at 236, et seq. This principle applies whether one uses the strict "proximate cause" test or the "target area" test. See In Re Multidistrict Vehicle Air Pollution, M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973), cert. denied, 414 U.S. 1116 (1973).

Aside from all of the discussion of economics in *Hanover Shoe,* what that case comes down to is that there are so many independent intervening factors which impinge upon the situation after the original violation that any attempt to have the original tortfeasor compensate everybody down the line in the chain of distribution amounts to expedition into the field of remote and speculative damages. Mr. Justice White was merely articulationg that principle couched in terms of economic theory and modeling.

In *Illinois Brick* the court stated that permitting the use of "pass on" theories under section 4 of the Clayton Act would essentially transform treble-damage actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge. It was observed that this would add new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness. The court pointed out that potential plaintiffs at each level in the distribution chain would be in a position to assert conflicting claims to a common fund—the amount of the alleged overcharge—by contending that the entire overcharge was absorbed at that particular level in the chain.

The possibility of such conflicting claims raises questions under Rule 19 of the Federal Rules of Civil Procedure which requires the joinder in an action of any person who: "* * * claims an interest relating to the subject of the action and is so situated that the disposition of the action may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or inconsistent obligations by reason of his claimed interest."

The rule then proceeds to set forth guidelines to be used by courts in determining how to proceed in cases where the joinder of "persons needed for just adjudication" is thwarted by venue or service of process considerations. Following these guidelines, courts might be inclined to dismiss otherwise meritorious Clayton Act actions because of the inability to join every conceivable injured party.

The opinion in *Illinois Brick* mentions a number of procedural possibilities such as the use of the Federal Interpleader Statute (28 U.S.C. section 1335) and the use of the above-mentioned Federal Rule of Civil Procedure 19 in order to solve the problem of distributing the amount of damage proven against the antitrust violator. Wholly aside from the fact that these devices are cumbersome, the plain fact is that they do not afford practical procedural methods to accomplish the hoped for result.

Research indicates that the interpleader statute does not apply in this type of situation, despite the fact that the antitrust violator will be in the position of the target of a number of people claiming against him.[3]

---

[3] The Federal interpleader statute 28 U.S.C. section 1335 states that a person may interplead a claim if, inter alia, that person: " * * * has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper * * * This requirement has repeatedly been held to be a jurisdictional condition precedent in interpleader actions. See, e.g., *New York Life Ins. Co* v. *Lee,* 232 F.2 811,

Footnotes continued on next page

The application of Rule 19 of the Federal Rules of Civil Procedure has been the subject of numerous court decisions which deal with the propriety of the inclusion of exclusion of particular parties (see, Wright, Law of Federal Courts, West, 1976), pp. 330 et seq. The situation with respect to class actions is so well known as not to merit further comment.[4]

What is really practical is the utilization of devices to ensure that all claims are presented in the same proceeding. This is not unusual. In Pennsylvania, as an example, in the eminent domain field, all claimants for compensation against the eminent domain taker are required to join in the same proceeding in order to make certain that the sum of the parts does not exceed the whole.

The Pennsylvania Act of June 22, 1964 special session, P.L. 84, art. V, section 507, as amended Dec. 5, 1969, P.L. 316, section 1; 26 Purdon Pa. Stat. Ann., sections 1–507 (Purdon) provides: "(a) The claims of all the owners of the condemned property, including joint tenants, tenants in common, life tenants, remaindermen, owners of easements, or ground rents, and all others having an interest in the property, and the claims of all tenants, if any, of the property, shall be heard or tried together and the award of the viewers or the verdict on appeal from the viewers shall first fix the total amount of damages for the property, and second, apportion the total amount of damages between or among the several claimants entitled thereto. (b) Claims for removal expenses, business dislocation damages and moving expenses may be heard or tried separately." See: *Porter* v. *Commonwealth,* 419 Pa. 596, 215 A.2d 646 (1966) and *Commonwealth* v. *Haydu,* 1. Pa. Commnw. Ct. 561, 276 A.2d 346 (1971).

Although the *Illinois Brick* opinion mentioned a number of procedural devices which could be used to accomplish the result I advocate, if the *Illinois Brick* and *Hanover Shoe* decisions are to be overruled by legislation, then the handling of the situation should not be left to an uncertain and time-consuming case-by-case disposition of the problems involved. The matter should be handled by a clear legislative mandate to the courts.

Accordingly, I believe a statute overriding *Illinois Brick* should include a means of combining in one forum all claims arising from a particular violation. This leads to the suggestion that there should be an increased and expanded use of transfer and consolidation by the Judicial Panel on Multidistrict Litigation and the expansion of venue for multilevel damage actions brought under sections 4A and 4C of the Clayton Act, as well as a notification procedure which would have the effect of precluding later assertion of claims arising from the antitrust violation in question.

The power of the Judicial Panel on Multidistrict Litigation should be expanded. The power to consolidate and transfer actions of the type contemplated by Senate bill 300 should be given to it. The panel should be given the power to transfer and consolidate such suits for both trial and pretrial. Concomitantly, venue should be expanded for antitrust damage actions so that the United States would be treated as a single forum for the service of a summons.[5] This would facilitate the bringing of suits in the consolidated forum and thereby reduce the need to rely on 28 U.S.C. section 1407 transfer, which often delays the proceedings.

Research demonstrates that there are no constitutional questions created by my suggestions. Antitrust cases are Federal question cases and venue in such cases is a matter of congressional discretion. *Robertson* v. *Railway Labor Board,* 268 U.S. 619, 622 (1925). There is no constitutional restriction in that regard. Accordingly, the suggested changes with respect to the Multidistrict Panel and venue are constitutionally acceptable.

Footnotes continued from last page

814–15 (9th Cir. 1956); *Westinghouse Electric Corp.* v. *United Elec. Radio and Mach. Workers,* 194 F.2d 770, 772 (3d Cir. 1952); *John Hancock Mutual Life Ins. Co.* v. *Yarrow,* 95 F. Supp. 185, 187 (E.D. Pa. 1951).

The amount of the deposit required to satisfy the jurisdictional prerequisite has been conclusively ruled upon by the courts. For example, in *Provident Mutual Life Insurance Company* v. *Ehrlich,* 374 F. Supp. 1134, 1138 (E.D. Pa 1973), modif. other gnds., 508 Fd 129 (1975), The Federal District Court for the Eastern District of Pennsylvania states: "Case law indicates that in a statutory interpleader action, for the court to have jurisdiction, the stakeholder must deposit the highest amount claimed by the defendants with the registry of the court." Accordingly, a court will not have jurisdiction over an interpleader action where an interpleading plaintiff deposits a sum smaller than that claimed by the claimants who are sought to be interpleaded. *Metal Transport Corp.* v. *Pacific Venture Steamship Corp.,* 288 F. 2d 363, 365 (2d Cir. 1961). The problems created by attempting to comply with the foregoing legislation in the antitrust situation are obvious.

[4] One thought that has not occurred to legal writers at the moment, as far as I now know, is that if the direct purchaser plaintiff recovers against a violator when there has been passing-on, the other people in the chain of distribution could sue for a portion of his recovery on the theory of unjust enrichment. Although this is a possibility, I do not believe that it is truly practical.

[5] The subpena power for pretrial depositions might be likewise expanded.

It is true that Senate bill 300 expands the jurisdiction of the Multidistrict Panel. However, it does not go far enough. As will be discussed by another member of this panel, provision should be included which will guarantee that all claims will be brought in one forum or be barred. My suggestion will tend to satisfy all three facets of public interest to be considered, as mentioned at the outset hereof: (1) it will avoid duplicative recoveries, (2) it will condense and consolidate potentially widespread and diverse claims, and (3) it will minimize the burden on the Federal judicial system.

It may be argued that this conclusion is impractical, as leading to a proliferation of complex problems for the judiciary. However, I suggest that if there is to be a complex problem, it is better to have one such problem handled properly and equitably than the proliferation of a multitude of similar problems in various sections of the country and at different times.

Prepared Statement of Michael M. Baylson

My name is Michael M. Baylson, and I am a partner in the law firm of Duane, Morris & Hechscher in Philadelphia, Pennsylvania. I am a member of the antitrust section of the American Bar Association, and participated in a task force appointed by that section to study legislation designed to overrule the decision of the United States Supreme Court in *Illinois* v. *Illinois Brick,* 431 U.S. 720 (1977).

Although the work of the task force included many topics relating to the legislation proposed to overrule *Illinois Brick,* my remarks before this committee will be limited to the need or desirability of provisions for notice of pending litigation to potential plaintiffs, or members of an alleged class, which may be necessary under constitutional due process considerations, or to provide for effective judicial administration of antitrust litigation brought by indirect purchasers. My remarks do not constitute any personal opinion that *Illinois Brick* should be legislatively overruled.[1] I am only attempting to set forth some of the problems in the notice area and to point out how proposed legislation does not adequately deal with these problems.

By way of introduction, the task force was instructed to draft legislation which would overrule *Illinois Brick* with particular attention to problems of judicial administration in handling claims of indirect purchasers. The majority of the task force recommended that all claims arising out of an alleged antitrust violation be consolidated in a single district, for both pretrial and trial purposes. The majority also recommended that all persons who may have been injured by the alleged antitrust violation should receive the "best notice practicable under the circumstances," particularly those persons that were not then represented in any already pending class actions.[2] Persons receiving notice would be required to institute claims within a specific period or they would be forever barred. If they were a member of a class represented by an existing plaintiff, they would be required to "opt-in."

The recommendation of notice to all potential plaintiffs, all persons who may have been injured by the alleged violation, was necessary for reasons of judicial administration and to protect defendants from an aggregate liability greater than the aggregate amount of damages suffered, which would be a lack of substantive due process. It is essential, to administer the potentially conflicting claims of direct and indirect purchasers at different levels of distribution, to have all potential claims arising out of an antitrust violation consolidated in a single district under one judge and to have notice go out to all persons who were possibly injured by the antitrust violation.

If there was no such provision, then there is no guarantee that all claims will be filed by a certain time and then adjudicated in a single proceeding. Merely waiting for the statute of limitations to run would unfairly delay those plaintiffs who filed claims early. Unless all claims of both direct and indirect purchasers are adjudicated together, a defendant who pays damages to its direct purchasers might also be held liable to indirect purchasers for the same damages, in a suit brought after the payment of damages to the direct purchasers. The potential of conflicting and overlapping claims was one of the major reasons given by the Supreme Court for its decision in *Illinois Brick.*

The majority of the task force believed that the only way to avoid these potentially overlapping and conflicting claims was to send notice to all potential plaintiffs, who were not already notified as members of a class approved by the court under Rule 23, Federal Rules of Civil Procedure.

---

[1] My personal opinion is that *Illinois Brick* should not be overruled by Congress.

[2] The majority also recommended that this broad notice to any potential plaintiff should only be given after a preliminary hearing determined that there was merit to the claim of an antitrust violation, and that defendants could waive the broad notice provision.

Needless to say, sending notice nationwide to all persons who may have been injured will be an extremely expensive and difficult provision to administer, and points up some of the difficulties inherent in enacting legislation to overrule *Illinois Brick* that is fair to all parties and capable of efficient, economic judicial administration.

In some cases, the very cost of sending notice, including the time of plaintiffs' and defendants' attorneys, secretarial work, postage, plus the clerical cost of answering questions, tabulating responses, et cetera, plus the cost of identifying the persons to be notified, could be greater than the damages recoverable by any one plaintiff, or even a whole group of plaintiffs at a particular level of distribution.

The ABA Antitrust Section *Illinois Brick* task force majority recommended a provision that the court "shall cause the best notice practicable under the circumstances" be given to all possible claimants, who would then have an obligation to "opt in" to a certified class under rule 23 or otherwise join the action by filing their own claim, within a deadline, or be thereafter barred from recovery.

The task force majority believed such a provision is constitutional, as long as the notice procedure established by the court complies with minimum due process standards.

The leading U.S. Supreme Court case on the sufficiency of notice to persons who may be legally bound by a proceeding in which they are not actual parties is *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 30 (1950). The basic rule that emerges from *Mullane* and *Schroeder* v. *City of New York,* 371 U.S. 208 (1962) is that notice to individual persons or entities is required when their names and addresses are "easily ascertainable," but that notice by publication will otherwise pass a constitutional test.

The Supreme Court also held individual notice to members of the purported class was required at the plaintiff's expense, in *Eisen* v. *Carlise & Jacquelin,* 417 U.S. 156 (1974). It is not clear from the opinion whether the court was merely construing the terms of rule 23(c)(2), or was expressing minimum constitutional due process standards.

Since most businesses maintain records identifying their customers, individual notice will almost certainly be required.

In my respectful opinion, pending legislation, such as S. 300, does not take into account the problems of judicial administration that would be encountered in allowing indirect purchasers to sue. I believe serious constitutional challenges can and will be made to legislation that would expose a defendant guilty of price-fixing to liability in excess of the illegal overcharge actually imposed on its direct customers.

From the standpoint of judicial administration, the claims of direct and indirect purchasers can only be adjudicated (with fairness to each other and to defendants) if they are handled at the same time in one forum by one judge. This can only be accomplished by a notice provision which would be expensive and administratively burdensome.

The Congress may wish to consider whether the benefits of allowing all indirect purchases to sue is worthwhile in view of the substantial problems of due process, the expense that would be incurred by all parties in meeting those due process requirements, and the burdens imposed on the court.

PREPARED STATEMENT OF ALAN J. WEINSCHEL

I am Alan J. Weinschel, a member of the law firm of Weil, Gotshal & Manges of New York City. I appreciate this opportunity to address the subcommittee.

I have practiced in the antitrust field for the last 9 years and have been involved in counselling both plaintiffs and defendants. I am a member of the antitrust section of the American Bar Association and am on the editorial board of its "Antitrust Developments" publication. I am also a member of the antitrust section of the New York State Bar Association and chairman of its Sherman Act section 1 committee.

I wish to state clearly here at the outset that the views I express today are solely my own; I am not representing the ABA or any of its sections or committees or the New York State Bar Association or any of its sections or committees. My remarks today will be directed at a rather limited subject: the implications of the possible inclusion in S. 300 of language which now appears in section 7 of S. 390 which makes substantive modifications to the scope of section 7 of the Clayton Act. The reason for the inclusion of these provisions in either S. 300 or S. 390 is somewhat mysterious, since the section 7 proposal was not, to my knowledge, addressed by the National Commission (whose recommendations spawned S. 390), nor do they have

even a remote connection to S. 300, which would modify the *Illinois Brick* rule. My view is that consideration of the issues raised by this proposal either in connection with the standing and proof of damage questions addressed by S. 300 or in the procedural reforms addressed in S. 390 is ill-advised.

The proposals embodied in section 7 of S. 390, simply put, deserve separate consideration on their own merits. This is so because the changes proposed are rather significant in terms of merger jurisdiction. Although one of the proposals—to apply section 7 to corporations which may "affect" commerce as well as those which are "in" commerce at least has some surface appeal, the other proposal—to extend Clayton Act section 7 jurisdiction to persons as well as corporations, presents a host of unanswered questions that merit treatment apart from the other weighty concerns dealt with in S. 300 and S. 390.

Section 7(3) of S. 390 would legislatively overrule the Supreme Court's holding in *United States* v. *American Building Maintenance Industries,* 422 U.S. 271 (1975); section 7 of the Clayton Act would thereby be applied to acquisitions among firms not engaged in interstate commerce. As an initial matter, there appears not to have been demonstration of the need for such an expansion. There has been no analysis of the frequency and magnitude of intrastate mergers, or of whether or not existing State antitrust legislation is adequate to deal with problems as may exist. Nevertheless, there is at least some surface merit in the concept of making Clayton Act and Sherman Act jurisdiction, in terms of the commerce requirement, coextensive. In this regard, if there is Sherman Act jurisdiction, for example, over price fixing by local corporations whose operations affect interstate commerce, then as a matter of symmetry, it can at least be argued that section 7 should apply to the complete elimination of competition among such firms by merger.

It is the second part of the S. 390 proposal—to extend the Clayton Act to persons as well as corporations—that in my view comes "out of left field".

From its inception, section 7 of the Clayton Act has applied only to corporations. There is no indication at all that any significant combinations or mergers have occurred among partnerships or individuals (other than the Department of Justice's allusion to accounting firms) or a demonstration that any such mergers whose effects "may be substantially to lessen competition" have nevertheless "slipped through" Clayton Act or other antitrust jurisdiction.

Indeed, there appear to be adequate remedies already enacted: Section 1 of the Sherman Act would presumably bar any combination whose actual effect is unreasonably to restrain trade. Cf, *United States* v. *First National Bank of Philadelphia,* 376 U.S. 665 (1964); section 5 of the Federal Trade Commission Act could be interpreted to bar a merger among noncorporate entities, whether having "actual" or "incipient" anticompetitive effects. CF., *FTC* v. *Brown Shoe Co.,* 384 U.S. 316 (1966), and finally, section 8 of the Clayton Act would bar an individual even after making an acquisition from serving as a director of two competing corporations.[1]

In addition to these apparently adequate remedies already on the books, one should also consider the effects of the proposed extension of the Clayton Act. First, would the current standards and rules of thumb (such as the Department of Justice Merger Guidelines) have any application to, for example, acquisitions by individual persons? How much of a stock acquisition by an individual with diverse holdings is "too much"? It should be noted here the "investment only" exception to section 7 has never been defined with any precision but may or may not be adequate protection for the investor. Thus, the effects of such legislation on individual investment decisions and on the securities markets is totally unknown.

The unknowns here, in other words, heavily outweigh the knowns. I would respectfully suggest, therefore, that the proposals embodied in section 7 of S. 390, or at a minimum the proposal to extend section 7 of the Clayton Act to "persons" be considered separately from S. 300 (since that bill deals only with *Illinois Brick* issues) as well as from S. 390 (because that bill deals with procedural reform). This proposal in other words should be fully analyzed on its own in terms of legislative need and potential effects. It constitutes too important a change in the statute to be placed in the shadow of other bills dealing with weighty but different antitrust issues.

PREPARED STATEMENT OF KENNETH R. REED

I appreciate having the opportunity to testify again today in support of legislation to overrule the Supreme Court's unfortunate decision in *Illinois Brick Co.* v. *State of*

[1] So long as one of the corporations has capital, surplus, and undivided profits of more than $1 million, 15 U.S.C. § 19.

Illinois, 431 U.S. 720 (1977). In my previous appearances before this committee on this legislation, I carried the unanimous recommendations of the National Governors' Association and the National Association of Attorneys General that the *Illinois Brick* decision be overruled as the law of this land. Today I am here as a member of the American Bar Association task force which considered "the problems of judicial administration" that arise when the *Illinois Brick* issue becomes involved with "multiple and complex claims, particularly class actions."

It is important to recognize the limited scope of the American Bar Association task force which considered *Illinois Brick*. We did not become embroiled in the question whether persons injured by egregious price-fixing should be denied any redress because they did not satisfy some archaic requirement of privity with the accused price-fixer. Nor did we address the procedural or evidentiary problems, if there are any of any significance, which occur when a single substantial plaintiff such as the State of Arizona sues a small number of conspirators with whom it dealt only indirectly. Rather, our concern was centered on the problems of judicial administration inherent in massive class actions and how *Illinois Brick* affected those problems.

In light of the question which is now actually before this committee, our task force's inquiry might be viewed as the cart standing before the horse. Overruling *Illinois Brick* is necessary because of the unfairness in denying recovery to an injured party simply because he failed to show an anachronistic talisman of privity of contract. Manageability of class actions under Rule 23, Federal Rules of Civil Procedure, implicates quite different issues. This committee can and should recommend legislation overruling *Illinois Brick* quite apart from the question whether lawsuits in which *Illinois Brick* is implicated may or may not proceed as manageable class actions.

Recent testimony before the House Subcommittee on Monopolies and Commercial Law supports this point. Arizona Public Service Company is the largest investor-owned electric utility in the State of Arizona and, as a member of the Business Roundtable, no one has ever accused it of being a revolutionary set upon uprooting the foundations of our free enterprise economy. I can fathom no reason why Arizona Public Service Company would want to further or endorse class action legislation. Nonetheless, Arizona Public Service Company's General Counsel Thomas E. Parrish appeared before the House subcommittee last week and soundly endorsed enactment of H.R. 2060, the House counterpart of S. 300. His reasons for endorsing the legislation were simple enough: it is in the economic self-interest of substantial purchasers such as Arizona Public Service Company or the State of Arizona to be able to recover for injuries perpetrated indirectly. He said: "Like other electric utilities, Arizona Public Service Company spends substantial amounts for capital construction and supplies. Our forecast of capital expenditures for the years 1979 through 1983 presently amounts to $1,490,417,000. This represents a sizeable exposure to our company from those who may be tempted to conspire to fix prices, especially if they will be insulated by the indirect purchaser defense." And he was quick to dispel the notion that enactment of this legislation would complicate lawsuits or create a "class action nightmare":

It is further argued that this bill "would spawn a litigation * * * nightmare." This argument overlooks the fact that before *Illinois Brick* five of the six Federal Circuit Courts of Appeals which had considered the question had allowed indirect purchasers to recover for overpayments they made. Since utilities were able to recover for overcharges paid indirectly in the *Electrical Equipment Conspiracy Cases* without any "litigation nightmare," I do not see how returning everything to where it was before *Illinois Brick* would create such a disastrous situation. Indeed, it was during the pre-*Illinois Brick* regime that a House Judiciary Committee report stated that private antitrust enforcement was "relatively effective" against violations high in the distribution chain.

Furthermore, claims that this resolution will create a "class action nightmare" seem to me to be a red herring. While there may be problems with the class action procedure, they will hopefully be fully aired in legislation to be considered by Senator DeConcini's subcommittee later this year. That is the forum to consider the problems with class actions. The fact is that H.R. 2060 is not a class action bill and the specter of a "class action nightmare" should not be raised as a reason why substantial indirect purchasers such as Arizona Public Service Company should be denied recovery for injury they sustain.

That, I submit, is the perspective from which this committee must evaluate the proposed legislation. The *Illinois Brick* decision should be considered in the context of a single plaintiff who has been injured indirectly by an antitrust violation. In that context, the need for and merit of this bill is incontestable. To become em-

broiled in the issues of manageability and typicality attendant to class actions is to allow the tail to wag the dog. Manageability and typicality are prerequisites for any class action and whether or not this bill is enacted, United States district courts throughout the country will have to consider those factors before certifying antitrust class actions. These issues are red herrings when considering the present *Illinois Brick* bill. They are inappropriate here and would better be considered by Senator DeConcini's subcommittee which I understand will be looking into possible class action reforms later this Session.

Since the *Illinois Brick* decision was founded in part upon considerations of judicial administration and since it was the mandate of the American Bar Association task force to consider "possible alternatives for dealing with the problems of judicial administration inherent in multiple and complex claims, particularly class actions," I would like to turn now to these issues. Since the Supreme Court founded its *Illinois Brick* decision upon notions of expediency rather than fairness, in the days following the *Illinois Brick* decision most all of us were willing to accept at face value the notion that the indirect purchaser rule would simplify otherwise complex antitrust litigation. We now have almost 2 years of experience under the *Illinois Brick* rule, and I am here to report to you that the promise of simplification is illusory and that the *Illinois Brick* decision has unnecessarily complicated and prolonged antitrust litigation.

Let me discuss my experience in In re Cement and Concrete Antitrust Litigation, MDL No 296, as a case in point. This case involves an alleged nationwide conspiracy to increase cement prices and to create a contrived artificial shortage in the production and sale of cement. While the litigation was begun prior to the *Illinois Brick* decision, I will confine myself to the period subsequent to that decision since that is when we would expect to see the promised efficiencies resulting from the Supreme Court ruling. Subsequent to the Supreme Court ruling we have seen additional lawsuits filed by direct purchasers of cement and, suprisingly enough, also by indirect purchasers of cement who are brave enough to attempt to climb the *Illinois Brick* wall.

Why indirect purchasers would elect to sue following *Illinois Brick* requires me to digress a bit. *Illinois Brick* established the general rule that only those who dealt directly with law violators be allowed to sue. It allowed certain exceptions to this pronouncement, however, for the case of "a preexisting cost-plus contract," where the middleman "is owned or controlled" by another in the chain of distribution, or in other unspecified cases where "market forces have been superseded." There are at least some indirect purchasers who see a clear violation of the antitrust laws, who recognize that they have been substantially injured by that violation and who will therefore file suit hoping to be able to establish that they come within one of the exceptions to the *Illinois Brick* rule.

The attorneys for these indirect purchasers are not the only ones who demonstrate ingenuity and industry in claiming exceptions to *Illinois Brick.* Counsel for defandants accused by direct purchasers of antitrust violations have the same incentive to read broadly the exceptions to *Illinois Brick* because in such suits those exceptions provide defenses which will reduce or eliminate any damage claims. Thus, even after *Illinois Brick,* we see defendants answering suits by direct purchasers by claiming that those direct purchasers "passed on" an overcharge pursuant to "a preexisting cost-plus contract," because the middleman was "owned or controlled" by another in the distribution chain, or because "market forces have been superseded." The height of this irony occurs in the *Cement* case where the same defendant will tell its direct purchasers that they cannot recover because they passed on the overcharges and then claim immunity from suit by its indirect purchasers based on *Illinois Brick.* All of this, I remind you, has occurred since the Supreme Court decision in *Illinois Brick.*

The promise of expediency and simplification is therefore illusory. Rather than seeing these cases expedited and streamlined, we now become embroiled with imponderable and undefined questions of whether "market forces have been superseded." We are moving farther and farther away from the fundamental questions of whether the law has been violated and, if so, how much injury has been sustained as a result. The final legacy of *Illinois Brick* then is to complicate and delay antitrust litigation rather than to simplify it.

Both the majority and minority of the American Bar Association *Illinois Brick* task force would eliminate this paradox by returning antitrust litigation to the basic questions of whether the law has been violated and, if so, the total damages sustained. Thus, the majority proposal speaks of a determination of "all such damages * * * sustained by those persons who directly purchased * * * or sold" to be followed by an appropriate allocation of this amount among those in the distribu-

tion chain. To the same effect, the minority suggests "that the court be empowered to bifurcate the issues of violation and aggregate amount of damages inflicted by defendants' illegal acts from the allocation of the aggregate damage award among the various injured persons."

These and the other problems addressed by the American Bar Association *Illinois Brick* task force deal almost exclusively with the problems attendant to class actions. They are problems which for the most part are common to all class actions whether they be antitrust cases affected by *Illinois Brick* or those dealing with schemes to steal money from unwary investors in violation of our securities laws. This committee should get on with its business of enacting legislation which would overrule the *Illinois Brick* decision and should refer to Senator DeConcini's subcommittee the problems we all recognize exist with the class action remedy in the antitrust area and in all other areas of the law.

PANEL OF AMERICAN BAR ASSOCIATION REPRESENTATIVES:

STATEMENTS OF DAVID FOSTER, CHAIRMAN, CIVIL PRACTICE AND PROCEDURE COMMITTEE, ANTITRUST SECTION; HAROLD SCHMIDT, VICE CHAIRMAN; MICHAEL BAYLSON, PHILADELPHIA, PA.; ALAN WEINSCHEL, NEW YORK, N.Y.; AND KENNETH REED, PHOENIX, ARIZ.

Senator THURMOND. Do you have a spokesman for the group or do you wish to speak individually?

Mr. SCHMIDT. Senator, I am Harold Schmidt. I have been asked by this group to make the introduction of the various people who will speak on this panel.

Senator THURMOND. Where are you from?

Mr. SCHMIDT. I am from Pittsburgh, Pa.

Senator THURMOND. Mr. Foster?

Mr. FOSTER. I am from New York City.

Mr. SCHMIDT. Mr. Baylson, on my right, is from Philadelphia; Mr. Weinschel is from New York; Mr. Reed is from Phoenix, Ariz. Mr. Reed is the chief counsel in the Antitrust Division of the Department of Justice in the State of Arizona. The rest of us are private practitioners in the antitrust field.

Senator THURMOND. If you will speak into the microphone, we can hear a little better. The acoustics in this room are not very good.

Mr. SCHMIDT. I want to say that I have submitted a draft of my statement which, unfortunately, was not completely corrected and edited. I would ask leave from the committee to edit and correct it and file it.

Senator THURMOND. Without objection, that will be granted and after your testimony is concluded, I believe that is sent by the staff to you for any corrections you wish to make.

Is anyone else going to testify this morning besides you of this group?

Mr. SCHMIDT. Senator, I think each of us is going to make a few brief remarks.

I would like to explain briefly, if I may, what our function is. We do not speak for the American Bar Association or any component of it, but, with one exception, as members of the Civil Practice and Procedure Committee we participated last year in a task force study of then proposed legislation to overrule *Illinois Brick* and *Hanover Shoe* and, as a result, some of us have had the opportunity to study the proposed legislation over a period of time.

Mr. Foster, particularly, on my right, who is Chairman of the Civil Practice and Procedure Committee, has testified previously on

this subject. We prepared a report, both a majority and a minority report, from the task force, which, in all candor, I must say was neither approved nor disapproved by anybody.

This underlines the fact that what we are about to say is our own personel views and we are here, simply to make available to the committee our views on the basis that we have some expertise with respect to the matters that the committee is considering.

I do not intend to take up the time of this busy committee to read or even to paraphrase extensively the material which I supplied in advance. As the chairman indicated, it will be made, after correction, a part of the record. Nor was our job or function on the task force I mentioned to pass on the question of the desirability of overruling *Illinois Brick* or *Hanover Shoe.*

Our function was to consider within the framework of the committee, which is the Civil Practice and Procedure Committee, what procedural devices could be used in order to assure the proper functioning of the antitrust laws in the area involved in *Illinois Brick* and *Hanover Shoe,* should there be a legislative override of those decisions.

Since we are speaking here for ourselves, I will take the liberty of saying, as a matter of my personal views, that I believe that S. 300, if passed in its present form at the present time, would create more problems than it would solve from a number of points of view.

I should mention that my own practice and that of the firm of which I am a member in the antitrust field is divided almost equally between representing plaintiffs and representing defendants.

So what I personally advocate is not any one-way street but a method of resolving this type of case expeditiously for the benefit of both plaintiffs and defendants.

Senator THURMOND. In other words, you are lawyer, open for business?

Mr. SCHMIDT. That is right, Senator.

Senator THURMOND. The plaintiffs or defendants.

Mr. SCHMIDT. I am always interested to hear people say that defendants cause delay and proliferate litigation. On the other hand, I hear people say plaintiff lawyers are the ones that benefit from this type of litigation and there should be some constriction on their efforts to do so, this despite the fact that the Supreme Court has said in any number of cases that the private attorney general, so-called, bringing a civil treble-damage action, whether it be a single-plaintiff-single-defendant case, or a class action or a multilevel action is an integral and essential part of our antitrust enforcement.

We are in a maze of paradoxes here. On the other hand, going down the middle of the road is the National Commission for the Review of Antitrust Laws and Procedure which, just less than 2 months ago, issued a lengthy report on the proper method of handling, or suggesting the handling, of complex antitrust cases and there has been formed in the Department of Justice the Office for Improvements in the Administration of Justice, which resulted in S. 3475, that was introduced in the last session.

Senator THURMOND. Mr. Schmidt, I might mention this: There has been complaint that some of the judges, too, have been at fault in delay in some of these cases.

Mr. SCHMIDT. I was going to come to that. I was talking specifically about the interest of the plaintiff because we represent the plaintiffs. We also talk about the interest of defendants because we represent defendants. I think we have to also think in terms, and I am sure this committee does, of the interest of the courts and the efficient administration of justice.

Recently, Congress authorized a very substantial number of additional judges and this, of course, if I may say, volunteering this as an interloper in passing, is a good thing, but will not take care of the litigation explosion and will not take care of the fact, if I may say so, respectfully, that every time a new question comes up, Congress in effect says let the Federal judiciary decide the difficult questions, such as under the Clean Air Act, the Clean Water Act, and similar citizen suits, and things of that kind.

A very small percentage of our gross national product goes for the administration of justice, both State and local. That is an admitted fact but I am not here to talk about that. However, as a lawyer who represents defendants who may be faced with prejudgment interest, as S. 390 is contemplating, if they are going to have to wait 4 years to get to trial, when you are trying to push it, it becomes an important factor.

I have looked, I think, speaking of my work on this task force, I have looked at S. 300 and that type of legislation from all three points of view. Representing a plaintiff, I would not want to be drawn into a numerous party proceeding with attempts to shift blame from one to the other, or create a divisive effect between plaintiffs and have a proliferation and prolongation to the disadvantage of the plaintiff.

We all know that many plaintiffs' lawsuits are prosecuted on a contingent fee basis and a plaintiff's lawyer who is operating on a contingent fee basis can be worn out as a matter of attrition by having to participate in proliferated deposition discovery and other things that the National Commission is thinking about.

On the other hand, I couldn't help hearing this morning what these gentlemen who preceded us said about the interest of the defendant and it is true, the defendant can also be prejudiced and in this particular case, where you are talking, in S. 300, about multilevel claims down the chain of distribution, you have the additional problem of possible duplicative recovery.

I think that the Congress of the United States and the policymakers who influence the trend and direction of the antitrust laws want, as we all do, to see a vigorous, effective enforcement of these laws.

But beyond the legally provided penalties, we do not want that to get into the area of what might be thought cruel and unusual punishment which is barred by the Constitution. This is what can happen when you have these lawsuits springing up in different parts of the country and without being centralized in one place.

Senator THURMOND. I might mention this. In another hearing we had, I propounded some very pointed questions to a judge. He was a Federal judge who was testifying, I believe. On the question of a

lawyer representing the defendant, for instance, the judge was using pressure here to proceed, maybe, and the defendant's client is using pressure to pursue every avenue of delay possible.

There is a question there as to whether the lawyer, if he doesn't do what the judge wants, as to whether he can do justice to his client and whether the lawyer might be subject to a lawsuit himself for negligence in not pursuing certain areas. It is a very delicate question there.

Mr. SCHMIDT. It is a very delicate question and one that is subject to a great deal of writing. Lawyers are officers of the courts, the courts to which they are admitted to practice. They are also advocates with a fiduciary obligation to their client, and I think that the feeling is that the actions of the attorney have to walk a tight rope between the two.

You must protect your clients within the bounds of ethics and propriety but you must also obey the decisions of the court. Sometimes it is necessary to do certain things and rely on the right to take an appeal to clarify the situation afterward. It is very difficult when you are in the courtroom to be faced with the possibility of some punitive action if you don't do what is required of you by the representative of the judicial power under the Constitution—an article III judge. However, in order not to unduly burden this record or the patience of the committee, I would say this: What most of us felt in the task force was that the one way that this could be handled, if something like S. 300 were passed, was to make sure that we did not have a multiplicity of difficult, complex, multitiered cases, that they should all be localized and centralized in one place, and if we were going to have a complex multitiered case, we would have it once and for all with everybody having a right either to get in, or to stay out and be barred.

If I represented a defendant in that kind of a case, what I would want would be to have the case tried on the basis of liability, then to have the amount of damages determined and then find some way to be out of the case and that all of the potential claimants litigate with each other as to the share they would have in the total amount of damages that would be determined.

I mentioned, and I quote in my paper, I hate to seem provincial, but we have a situation like that in the State from which I come—Pennsylvania—not in an antitrust context, but for many years it was found that governmental authorities and bodies that were condemning property were faced with a multiplicity of claims from various people whose property interests were affected by the taking.

So our legislature passed a statute which provides that in any such case the rights of everybody who has any kind of an interest, owner, lessor, sublessor, owner in part, holder of an easement, mineral rights under the property, in the case of coal which we are all interested in today, in certain circumstances, the right of surface support, are determined in one proceeding.

That proceeding first determines the amount. Then everybody can argue with each other as to what percentage of the amount he is to receive.

The problem from a defendant point of view with respect to these multitiered claims is that, assuming there is at the first level

of distribution either an overcharge or an undercharge, you have a series of independent intervening decisions, acts, and variations that are not necessarily the result, in fact, probably not the result of what the original violator did. Depending on the geographical area of the subsequent distribution, and the market conditions, there, you are going to have all kinds of variations.

I think that the Sherman Act and the Clayton Act contemplate that the original violation can be measured and quantified. That is difficult enough, in many cases, very difficult to prove what somebody who has been forced out of business would have made, had he not been forced out of business and lasted another 10 or 20 years.

But when that has been accomplished, there really isn't, in my personal judgment, any reason to keep that defendant in the case while a lot of other people attempt to prove to each other what portion they should have of the total damages which, of course, are trebled.

So we have recommended, it is in this paper, the localization of the litigation, and if I can use a play on words, the focalization of it as well, in one lawsuit, and have everything decided, if S. 300, or something like it, is to be passed.

Other people here will talk about various aspects as to how we think that should be done from a class action point of view, from a notice point of view.

Mr. Reed, who is a very strong advocate of S. 300, says he will tell you, because I read his paper last night, that opponents of S. 300 talking about duplicative recovery and judicial economy are putting the cart before the horse.

I would say that that point of view in the present state of the law is letting the horse out of the barn with no road to run on; or any direction particularly.

With that, I thank you, Mr. Chairman, and the others, for the privilege of talking here. At the appropriate time I will be glad to answer any questions if I can. Now, I will turn the microphone over to Mr. Foster.

Senator THURMOND. We will be glad to hear from you.

Mr. FOSTER. Mr. Chairman, Senator Baucus, others, I would like to touch upon four subjects today. I will not repeat in detail my prepared statement, which was a little bit late in getting to the committee, but I will just briefly talk about first the case in favor of sustaining *Illinois Brick;* second, the inability of the proposed legislation to provide any meaningful antitrust protection for indirect victims of antitrust violations; third, disadvantages of S. 300; and, lastly, I will discuss the task force's proposals as to items which should be in any bill which is passed if the Senate persists in overruling *Illinois Brick.*

After all of the hearings that have been held on *Illinois Brick* repealer bills over the past few years, there is little fresh to be said on the general subject of whether the decision should be legislatively overruled.

I will merely note my personal view that the decision is sound; it recognizes serious problems of judicial administration and attempts to resolve them by avoidance. I think that the decision is a spur to effective antitrust enforcement.

The principal issue that has been covered in the hearings in that regard is whether in fact direct plaintiffs will sue. There have been different views expressed on that subject.

I have the view that they will in fact sue because, again and again, I have been in cases in which they have sued—on the one side or the other, since like Mr. Schmidt, I handle both plaintiffs' and defendants' cases.

Furthermore, I note that it is not necessary for all to sue. A single direct plaintiff can commence a class action on behalf of an entire industry level. under present circumstances, an opt-out class would be available for such a case.

There is no significant record of opt-outs in any case in which I am familiar, so that the distribution level would generally be in, if any direct plaintiff wants to sue.

My third general statement about the desirability of the existing law is that any change in *Hanover Shoe* will create staggering complexities inconsistent with the effective administration of justice and inconsistent with forceful enforcement of the antitrust laws.

This has been talked about a lot. I won't belabor it again, but I lend my own agreement to those who say the existence of a passing on defense will decrease the incentive of direct plaintiffs to sue and will gravely increase the complexity of the cases which they do bring.

Senator BAUCUS. Before you leave that, do you have the language of S. 300 before you? Would you comment on whether the new language has an impact on *Hanover Shoe?*

Mr. FOSTER. I do indeed have S. 300 and I cannot find myself possessed of sufficient wisdom to fully understand the implications of the *Hanover Shoe* repealer if indeed it is that.

The bill, of course, says that the Court may, in its discretion, in order to avoid duplicative liability allow a passing on defense to be asserted.

It is not clear to me at all what the factors are which would inform the court's discretion, other than a possibility of duplicative liability, which is called out.

Duplicative liability is virtually always present in a multiple-level distribution chain. So I would in the one sense say that this means that in any case the *Hanover Shoe* defense could be set aside.

My concern with this particular *Hanover Shoe* adjustment is that while it recognizes the grave danger of multiple liability, it is wholly ineffective to deal with the problem. I can comment on that in more detail right now, or in a few moments, whichever your preference would be.

Senator BAUCUS. You go ahead and continue. You have addressed the point that I wanted to bring out.

Mr. FOSTER. In terms of the ineffectiveness of the bill as a device for compensating injured consumers, I would make two observations: The first is that the Supreme Court did not simply say in *Illinois Brick* that as a matter of judicial policy we will not permit indirect suits. What the Supreme Court recognized was that there are grave problems of proof.

This statute will not avoid the problems of proof that inevitably exist or if it does so, will do so only in an unjust manner.

It is stated, of course, in the bill that in an action where a class is presented, the issue of passing on or indirectness of damage can be proven on a class-wide basis.

I suggest that that legislative statement reflects an assumption as to the nature of trading practices on the distribution levels which is inconsistent with the real world.

Let us suppose, for example, that in a given industry we have wholesalers A, B, C, and D, who sell to retailers 1 through 50, who sell to 1,000 consumers. It would be normal rather than abnormal to find that on each of those distribution levels the business entities traded on somewhat different terms each from the other.

Thus, we would find that wholesaler A may very well have passed on the entirety of an overcharge made to him by increasing his price downstream. Wholesaler B alternatively may have passed on none of it. Wholesalers C and D may find themselves situated somewhere in between.

To say under those circumstances as this bill does that you can prove the existence of pass on, on a class-wide basis, absolutely mystifies me. Either the bill says that we will ignore reality of injury and in that regard we are always tempted to remember Abraham Lincoln's observation:

> If you call a tail a leg, how many legs are on a dog; five? No, four, because calling a tail a leg doesn't make it a leg.

I say that saying, in effect, that this may be resolved on a class-wide basis does not mean that you can, on a class-wide basis, make a just determination. So I find that the problems of proof which *Illinois Brick* itself identifies will be present in any repealer and certainly in S. 300.

The second problem on compensating private plaintiffs is simply that they do not come in and assert their claims.

The hearings in the past have heard a lot about this and I won't belabor it. I must say, however, that in my own experience it is quite surprising that even in class-action settlements where the only thing that the plaintiff has to do, a prospective class member, the only thing he has to do is identify himself. Relatively few, in one case I know, took the trouble even to send their name in for a hundred dollar bill.

So that I believe that the Congress itself recognized in parens patriae, when it passed that bill, that class actions do not really result in compensating consumers. Accordingly, in parens patriae, the alternative was adopted of giving the money to States for constructive purposes.

My suggestion is that that recognition—the appropriateness of which in the parens patriae legislation I do not address today—nevertheless indicates that the concern for consumers which is said to underly the *Illinois Brick* legislation is not going to be improved by that legislation.

My third general topic is the disadvantages which the proposed legislation will generate if enacted.

I have identified the fact that I think the provision for proof of the existence of pass on or the existence of indirect damages on a

class-wide basis is unrealistic and will not avoid the complexities of the cases.

Once you have the complexities of the cases, you have added enormously to precisely the problem which the Congress is seriously concerned with today, the complexities of antitrust litigation.

If, as many people seem to believe, antitrust defendants are strongly motivated to delay cases by all means fair or foul, it is clear that S. 300 will provide them with a powerful new weapon by which to avoid a prompt determination.

Alternatively, if, as I believe, the defendants are not in general guilty of improperly protracting cases, it is nevertheless true that S. 300 will inject into class-action litigation, indeed all antitrust litigation where distribution chains are involved, a new and complex element which must be resolved by any defendant's attorney in acting in the utmost good faith in order to represent his client.

The observation has been made by Mr. Reed that before *Illinois Brick* was decided by the Supreme Court we had lots of indirect purchaser cases and we didn't worry so much about the complexities that were generated.

My observation with respect to that would be that we do not have any track record whatever prior to *Illinois Brick* of litigating to judgment multiple-level distribution cases. It simply does not occur.

The observation that the cases were handled prior to *Illinois Brick* simply means that the complexities of litigating them were so staggering that the cases were settled.

The various distribution levels worked out some kind of an agreement with the defendants and they quit.

The general problem of the inducement or coercion of settlements by the class-action procedures is not our subject today, but certainly the literature is full of such observations. I merely note that the fact that cases were settled before the *Illinois Brick* decision does not mean that we have experience with efficient handling of multiple-level cases. We do not.

Mr. CHUMBRIS. Although the class action is different from the bill before us, is there a lesson that we can learn of the problems that the courts had with class actions as it relates to this bill?

Mr. FOSTER. I think the lesson for all of us is that the Congress should be somewhat hesitant to create additional problems for an overworked judiciary. Initially, class actions were very favorably received by the Federal district courts.

In more recent months, indeed, for a couple of years now, there has been increasing judicial tendency to be dubious about the maintainability of unmanageable class actions. The point is really that I think any new legislation in the litigation area ought to be addressed to resolution of controversies by the litigation process.

Settlements can be achieved in or out of court. Settlements are ignorant of considerations of due process. Settlements ignore the fundamental rights of the parties.

Litigated judgments, however, must occur in court; they must result from efficient judical proceedings; they must be in accordance with due process, and they must reflect in order to be just fundamental rights that are involved.

Mr. SCHMIDT. With the chairman's permission, we will turn the microphone over to Mr. Baylson.

Mr. BAYLSON. Good morning. My name is Michael Baylson, and I am a member of the law firm of Duane, Morris & Heckscher in Philadelphia. I participated in the task force that was described by Mr. Schmidt and Mr. Foster.

I would like to speak very briefly on a very limited aspect of this, and that is the problem of notice.

The task force concluded that if *Illinois Brick* were to be overruled that the only efficient way to handle this would be as Mr. Schmidt explained in more detail to have all claims brought in a single forum by a certain date, which would probably be well in advance of the expiration of the statute of limitations.

To get all possible claims before this single judge in a single forum, it would be necessary to give notice to anyone who possibly could be injured. I must say we debated this for days and we researched this and we really concluded that if the Congress did believe it was necessary to overrule *Illinois Brick*, that this was the only fair way to do it.

I would like to very briefly describe what we concluded about the notice problem. I think it is a substantial question for the Congress when drafting, if you agree with us, that this is the way to do it. Realizing what the Constitution requires in the way of notice, is it worth it or is there some other alternative or should *Illinois Brick* remain the law?

The Supreme Court has held on several occasions—and the citations are in my prepared statement—that the Constitution does require some minimum notice to anyone who is to be barred from asserting a claim. Therefore, if someone is potentially injured by a conspiracy to fix prices, for example, and they have one opportunity to present their claim, they must be notified of that opportunity so that they can protect themselves.

If there is a time limit that is shorter than the statute of limitations, the notice to them must include the time limit.

The Supreme Court has held that where the recipients of notice can be identified, they must receive individual notice, that advertisements or radio broadcasts are insufficient in the situation where their identity is known.

We are here talking about primarily business interests; that is, people who have purchased something, such as retailers or we are talking about wholesalers. We possibly may also be talking about consumers who have purchased something in the supermarket, and so forth.

The problem and the expense of notifying these people, I think, should be a substantial concern to the Congress in deciding whether *Illinois Brick* should be overruled. Their names and addresses are generally known, with the exception of the ultimate consumer, but, for example, you heard from the food marketing institute that they represent over 900 food marketing outlets and that that is only a portion of that industry.

If there was an allegation of price fixing by distributors of food, at a higher level of distribution, such that the members of the food marketing institute were the potential claimants, then notice

42-005 O - 79 - 11

would have to go out individually to all of those people. I think this would be very expensive.

If they were not represented by a class that had already been filed, then each member would have to receive, I would think, under the Constitution and the decisions of the Supreme Court an individual letter explaining what their rights were and explaining what their remedies were.

I think that the cost of postage is sometimes thought of as perhaps the only cost of notice. Well, very often, particularly in class actions, which I think we all have had some experience with, a great deal of time and effort and judicial intervention is required to determine exactly what should be in the notice.

There is always the responses to the notice. People who receive the notice have questions and these have to be handled. I think that if the Congress were to allow, in overruling *Illinois Brick*, recovery by all members of the injured public or private industry groups at every level of distribution—and I think that this is now what is contemplated by Senate 300—there could be tens of thousands of notices that would have to go out or possibly even more in some industries.

I really think that this would be a very expensive, and an administratively difficult burden on the parties. As you know, the Supreme Court held in the *Eisen* case that the plaintiff must bear the cost of notices. I am not sure that a lot of indirect purchaser plaintiffs would be willing to bear the cost of that notice. Maybe they would, or maybe their attorneys would.

But if you had a fragmented multilevel case with a different group of plaintiffs at every level of distribution, there is a substantial chance—and I say this from some experience—that the cost of notice including the cost of the attorney's time involved in getting the notice ready, litigating what goes in the notice and clerical efforts in responses to the notice, you could be running close to the amount of damages that would be recoverable by that particular level of distribution.

In my respectful opinion, Senate bill 300 does not take into account the problems of judicial administration that would be encountered in this notice area.

I think that there could be constitutional challenges if these notice requirements were not strictly adhered to because the Supreme Court has been very consistent about this and the *Eisen* case is a reaffirmation of the notice problem.

Thank you.

Mr. SCHMIDT. With your permission, I would like to ask Mr. Reed to speak next.

Mr. REED. Good morning. I am Ken Reed from the Attorney General's Office. I have a prepared statement I will ask to be included in the record.

Senator BAUCUS. Would you please summarize the highlights of your statement?

Mr. REED. I have spoken before this committee in the last session and when we had Governor Babbitt here a few week ago to express our position on the merits. I will not reiterate our position on the merits of Senate bill 300, which I support, other than to note that the question has arisen in previous hearings whether *Illinois Brick*

applies to the parens patriae legislation, the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

I think the fact that both the majority and the minority of the ABA task force that dealt with this question felt it necessary to propose remedial legislation dealing with Hart-Scott-Rodino Antitrust Improvements Act indicates the collective and unanimous judgment of our task force that the *Illinois Brick* does, in fact, affect adversely the parens patriae legislation.

One of the underlying concerns of the Supreme Court in the *Illinois Brick* decision and one of the goals which our task force had set before us was the question of expediting cases. I think that was the concern that underlaid the Supreme Court's decision.

I think in the weeks shortly following the Supreme Court decision in *Illinois Brick* we were all willing to accept at face value the notion that that decision might in fact expedite cases.

Now that I have nearly 2 years of experience under that decision, I am here to report to you that it has in fact not expedited litigation. Lawsuits filed subsequent to *Illinois Brick* have raised the plethora of exceptions. I think we see in the *Illinois Brick* decision the exceptions to that rule when we have imponderable standards such as whether "market forces have been superseded."

So what we have then is the defendants accused, for example, of price-fixing, defending lawsuits on the ground that the direct purchasers passed on any overcharge they sustained in a situation where market forces have been superseded or a cost-plus contract existed, or middleman in the chain of distribution is controlled by someone else in the chain.

By the same token, there are occasional brave indirect purchasers who recognize that an antitrust violation has occurred, who recognize that they have been substantially injured by an antitrust violation and then attempt to bring suit and bring themselves within one of these exceptions.

The net result is that we are finding ourselves in court spending months and months, if not years, of time taking discovery on, investigating, and considering these imponderable questions such as whether the market forces have been superseded in the chain of distribution; and getting away from the fundamental question which I think we are all concerned with, of whether a violation of the law has taken place, and if so, how much injury has been sustained as a result.

That this should be the central concern, whether a violation has taken place, the total amount of damages incurred, I think is shared by both the majority and minority of the *Illinois Brick* task force.

Mr. Schmidt pointed to the notion that from a defendant's point of view the best thing that could happen in these cases would be early determination of liability, did the defendant or did the defendant not violate the law, how much damage was sustained, and then get the defendant out of the case. That approach is reflected in both the majority and minority reports of the ABA task force; namely, restructuring procedures and suggesting an early preliminary hearing on the merits.

With *Illinois Brick* on the books, we are getting away from that; we are getting away from the early consideration of the merits and I am afraid we are protracting litigation.

I think the key point that our task force concluded is that it is necessary to simplify these matters and have consolidation of all lawsuits into a single forum. I think if all the plaintiffs are before the same court that many of these problems of vertical distribution can be resolved, by putting all the plaintiffs in the same court that provides the situation to which Mr. Schmidt addressed himself, of allowing early determination of liability, total damages, getting the defendant out of the lawsuit and letting the plaintiffs in the distribution chain determine themselves how the damages were sustained.

To do that we have to have everybody in the same forum. I think Senate bill 300 accomplishes that by the amendment of 28 U.S.C. 1407 to allow all of these cases to be consolidated in one forum for trial. Apropos of the unanimous recommendation of our task force, I think this need for consolidating all cases in one forum also speaks against another suggestion that we hear, and that is the notion that some of these matters should be resolved by amendments to State law, indirect purchaser suits should be brought in the State court and the direct purchaser suits brought in Federal court.

I think to the extent that is what happens, that the indirect purchaser suits are brought in each of the 50 State courts, direct purchasers' suits are consolidated into one Federal district court, we derogate the notion of judicial efficiency, consolidating everything in one forum and expose ourselves to exactly the sort of multiplicity of damage awards that the Supreme Court was concerned with in *Illinois Brick* and I think every member of the ABA panel that considered this question is also concerned with.

When we go beyond the amendment to section 1407, I think we are getting into issues of class action law which are not unique to *Illinois Brick,* issues of notice which Mr. Baylson addressed himself to, issues of manageability which are inherent in any rule 23 class action, are not unique to cases affected by *Illinois Brick* decision. We see them also in securities litigation; we see them in EEOC class actions, issues of class actions problems with class actions I think we are all aware of.

They are not unique to *Illinois Brick* decision. I would suggest that the proper forum for considering these problems is Senator DeConcini's subcommittee on judicial improvements. He introduced a bill last fall. From the testimony, I understand he is working with Attorney General Bell to revise that bill in response to the testimony. I think to the extent that there are problems in the class action remedy, we all recognize they are, that is the vehicle, that is the forum in which those questions should be addressed.

Thank you.

Senator BAUCUS. Thank you very much, gentlemen.

Excuse me; is there another witness?

Mr. SCHMIDT. Senator Baucus, we have Mr. Alan Weinschel, from New York, a partner of Mr. Ira Millstein, who is the last retiring chairman of the Antitrust section and probably familiar to the members of this committee, and we are asking this committee

to hear Mr. Weinschel's remarks on a matter that is not at the moment directly involved in S. 300 but with respect to certain aspects of the impact of section 7 of the Clayton Act, and, if we can, we would like to have those remarks incorporated in the deliberations of this committee.

Senator BAUCUS. Absolutely.

Mr. WEINSCHEL. Mr. Chairman, Senator Baucus, I appreciate the opportunity to inject a slightly different note here this morning. My own views on S. 300 relate to the subject that I am going to talk about this morning and that is really S. 390, which is a bill also before this committee designed to expedite antitrust procedures. I submit to you, that to the extent that S. 300 will result in the kinds of complexity and extension of antitrust cases that I think most of the witnesses have identified, that it is inconsistent with the goals of S. 390, and indeed with the goals of the National Commission to study the antitrust laws in terms of trying to cut down on the length of time it takes to try antitrust cases and try to streamline the procedures which are required to shepherd them through the courts.

Neither S. 300 nor S. 390 deals in a substantive way with the antitrust laws with one exception. It is that exception that I would like to speak briefly on this morning.

Section 7 of S. 390 suggests a change in Clayton Act, section 7. Specifically it suggests two changes. The first would change jurisdiction in section 7 of the Clayton Act so as to apply it to corporations which are engaged in activities which affect commerce as well as those corporations which are actually engaged in commerce—which is the current standard under section 7. Although I am not sure that a sufficient demonstration has been made of the need for legislation of that nature, there is certainly, at least on its face, some surface appeal in terms of making the in-commerce requirement of the Clayton Act and the in-commerce requirement of the Sherman Act coextensive. It is the second part of the S. 390 proposal that is more troublesome, and I would like to deal with it in a little more detail.

That second section would change the Clayton Act, section 7, to apply to persons as well as corporations. This is a substantive change in the antitrust laws which ought to be considered on its own merits quite apart from either S. 300 or S. 390. I am not sure that anyone at this point can fully explore all the ramifications of this provision, nor have I seen anywhere any indication of precisely why it is being included in S. 390 or precisely why it is being proposed at all. And, indeed, it does create a significant change in section 7 jurisdiction.

From its inception, section 7 of the Clayton Act has applied only to corporations. That was the intent of the framers of the act, and that was the intent of the amendments of the act in 1950. There has been no indication that section 7 of the Clayton Act has been unable to deal with the structural problems that it was designed to address.

Senator THURMOND. I wonder if you would mind writing a letter to us so that we can put it in the record.

Mr. WEINSCHEL. I have submitted a written statement, Mr. Chairman.

Senator THURMOND. You have a separate statement from this?

Mr. WEINSCHEL. I have submitted a written statement.

Senator THURMOND. That is a different bill.

Mr. WEINSCHEL. Yes. I did submit a written statement.

Senator THURMOND. Give us a statement on that bill that we could put in the record from you.

Mr. WEINSCHEL. There is such a statement. It was submitted yesterday.

Senator THURMOND. That would be helpful. And just discuss it, if you will, but specifically make the recommendations on it for changes.

Mr. WEINSCHEL. Certainly.

Senator THURMOND. That bill is going to be acted on in just a few days, by Wednesday of next week probably. So we have to have that, as quick as you can get it, before then.

Mr. WEINSCHEL. Mr. Chairman, my statement was submitted yesterday and I would ask that it be included in the record.

Senator THURMOND. Without objection, that will be done.

Mr. WEINSCHEL. The problem here is that first there are already available remedies for dealing with any structural problems which could exist with respect to individuals, partnerships or any other form of business organization other than a corporation. Certainly section 1 of the Sherman Act would apply to any substantial combination among noncorporate entities, section 5 of the Federal Trade Commission Act could be interpreted to apply to noncorporate entities, and section 8 of the Clayton Act would bar any individual from sitting on the boards of two substantial corporations.

This sort of substantive change in the Clayton Act jurisdiction has simply not been explored fully. It may be better off included in other legislation which has been introduced to amend the Clayton Act. But it really has no place in either an essentially procedural bill such as S. 390 or in the remedial kind of bill such as S. 300. I would submit to you that this sort of proposal is simply deserving of more study than it could possible get considering the weight of the matters that are being included in both S. 300 and S. 390. It is too important a proposal to simply shift to the background of either of these bills. It is deserving of separate consideration, and I would ask that this separate consideration either be in the form of a separate bill or, perhaps as I mentioned, inclusion in other bills which have either already been introduced or will be introduced which deal directly with section 7 of the Clayton Act.

Thank you.

Mr. SCHMIDT. Mr. Chairman, that concludes the presentation that we had planned and the members of the panel, I think, are available for any questions that anyone would care to put to them.

Senator THURMOND. Senator Baucus, do you have some questions?

Senator BAUCUS. I have no questions, Mr. Chairman. Thank you.

Senator THURMOND. Does counsel have some questions?

Mr. BOIES. Yes, Mr. Chairman.

Mr. Weinschel, I take it those comments all relate to S. 390. That is, you are not suggesting that S. 300 in any way makes a substantive change to the Clayton Act?

Mr. WEINSCHEL. No, Mr. Boies, but I had understood that there was a possibility that language of this nature might be included in the revised version of S. 300, and that is one of the reasons that I was asked to address the committee today. I do not in any way believe that the provisions of S. 300 address section 7 of the Clayton Act in any way.

Mr. BOIES. And even with respect to S. 390, I take it it is true that even if the amendments that you propose were adopted it is still the case that the provisions of section 7 would only apply if there was a finding that a merger or acquisition would tend to substantially lessen competition or tend to create a monopoly. That requirement would continue to exist?

Mr. WEINSCHEL. Yes, as I understand it. But I think one of the problems with the proposal in S. 390 is that determining whether there is likely to be a substantial lessening of competition may be an entirely different matter when it comes to, for instance, an individual person as opposed to a corporation. And, indeed, the chances of there being a substantial lessening of the competition, given the limited liability nature of the corporation, are so much more likely to be present with the corporation that I simply question the need to change the Clayton Act at this time in this way without at least a full inquiry into whether such a change is necessary.

Mr. BOIES. Perhaps my question wasn't clear. You are not suggesting, are you, that there is anything in S. 390 that would change the substantive standard of the Clayton Act which presently bars mergers that would tend to substantially lessen competition or tend to create a monopoly. Those are still mergers that would be prohibited. The only change is that you would prohibit those kind of mergers between persons as well as corporations?

Mr. WEINSCHEL. That is correct.

Mr. BOIES. With respect to S. 300, I would like to have each individual panelist's views quickly on a couple of questions that were raised by witnesses from the Food Marketing Institute. The distinction was drawn by Mr. Aders and Mr. Rill between suits by indirect purchasers and suits by indirect sellers. And, as I understand the point, the point was that joint action by sellers tends to increase prices while joint action by buyers tends to decrease prices, particularly in times of inflation, and that therefore there ought to be a distinction between indirect purchasers and indirect sellers suing under the antitrust laws.

Would you just give us your views as to whether you agree that we should make that distinction?

Mr. SCHMIDT. Speaking for myself, I don't see that distinction at all. I think it is a two-way street. In fact, one of the things that I was going to say and forgot, I find it a little incredible that nobody created any furor when *Hanover Shoe* was decided. That said that the defendant couldn't prove passing on but, if you will excuse the expression when the *Hanover Shoe* was on the other foot, and you couldn't have a recovery by an indirect purchaser, then we really had what has now developed into a very heated discussion, shall we say. But it ought to be a two-way street. It ought to work both ways.

Of course, this is why the task force, to the extent that there was unanimity, and it wasn't really all that unanimous, felt if we were going to overrule *Illinois Brick* we ought to overrule *Hanover Shoe.* And within the limits of Mr. Foster's comments, with which I agree, there seems to be some indication of the congressional intent to do that, if S. 300 is enacted.

I really don't think it is fair to draw any inferences from the fact that both minority and majority recommended certain types of legislation. We were specifically instructed by the council of the section not to get into the question of desirability of overruling *Illinois Brick* at all. That was not part of our mission. With that, I will turn the microphone over to Mr. Foster, who can express his opinion, and the others, on your question.

Mr. BOIES. As I understand it, your own views would be that if we were going to provide an action for indirect purchasers, we ought to for indirect sellers as well. We ought to either provide it for both indirect purchasers and indirect sellers or for neither?

Mr. SCHMIDT. That is right.

Mr. BOIES. Mr. Foster, is that your view, also?

Mr. FOSTER. That is my view, Mr. Boies.

Mr. BAYLSON. I would agree with that.

Mr. REED. I would share the view it should be symmetrical. I would make two further points by way of elaboration. Even overruling *Hanover Shoe,* I would think that since the committee report from last year indicates an intention to maintain existing notions of the target area and causation, and the bill speaks in terms of the chain of distribution, the result in *Hanover Shoe* would remain the same in light of the fact that the overcharge there was imposed upon a piece of machinery which was not resold. So I think even though it should be symmetrical, the result with *Hanover Shoe* would remain the same.

Mr. BOIES. I am trying to deal with the indirect purchaser and indirect seller point right now. As I understand it, you would agree with the other members of the panel that we ought to either overrule *Illinois Brick* as to both indirect purchasers and indirect sellers or neither?

Mr. REED. Absolutely. It should be symmetrical.

Mr. BOIES. Mr. Weinschel, is that true with you, also?

Mr. WEINSCHEL. Yes.

Mr. BOIES. Let me turn, then, to the question of *Hanover Shoe* and ask, assuming that we overrule *Illinois Brick* the way it is set forth in S. 300 at the present time, what would be your views as to whether we ought to overrule the result in *Hanover Shoe* as well. I focus specifically on the result in *Hanover Shoe* to pick up the point made by Mr. Reed, that perhaps the language presently in the statute might not change that result.

Mr. SCHMIDT. I would, speaking again for myself, I agree with Mr. Foster that, if that is the intent, then there should be some clarification, but I fully believe that if *Illinois Brick* is overruled, *Hanover Shoe's* result should likewise be overruled.

Mr. BOIES. Would you also do that?

Mr. BAYLSON. It is my respectful opinion that the actual judgment in *Hanover Shoe* is not as broad as the language of the Supreme Court in *Illinois Brick,* that there is a difference.

In the district court in *Hanover Shoe,* and I think this is very, very important, the district judge made a distinction there where you only had a middleman who merely bought and resold the same product without any change. That is the middle district of Pennsylvania. I think that is a very important opinion because the district court judgment was confined to those facts. The third circuit and the Supreme Court affirmed that judgment. The Supreme Court's language in *Hanover Shoe,* I think, was greatly expanded in *Illinois Brick.* The *Illinois Brick* opinion makes it seem like there is a perfect symmetry there, but the facts of the cases are very different and I think respectfully that sub B paragraph F, Senate 300, is confusing and is not really getting back to the symmetry.

I think it is a danger sign that will lead to great problems of interpretation by the courts as to what is actually meant.

Mr. BOIES. Let me pursue that just a moment, if I may. As I understand your point, the Supreme Court in *Illinois Brick* read the *Hanover Shoe* opinion much more broadly than the facts in *Hanover Shoe* would justify, or as the trial court decision in *Hanover Shoe* would justify?

Mr. BAYLSON. Yes. For example, in the cost-plus exception, which *Illinois Brick* talks about a great deal, in *Hanover Shoe* they really mention that as just one example of where you could get a cost-plus exception. But then in the *Illinois Brick* decision, the court made it seem like the *Hanover Shoe* language was etched in stone, whereas in *Hanover Shoe* is really dictum.

Mr. BOIES. Would you agree that under the present provisions of S. 300 there is some cutoff as to how far down the chain of distribution you go? Do you think that you go all the way down?

Mr. BAYLSON. I didn't read it as any cutoff, Mr. Boies. If I should have read it that way, I didn't. No. The way I see it, and this is one of the problems I think that those of us who have studied this have with it, is that there is no cutoff and it could conceivably extend to ultimate consumers who purchase something in a supermarket.

Mr. BOIES. As you interpret the present language of S. 300, would the purchasers of shoes be able to sue?

Mr. BAYLSON. Yes, sir.

Mr. BOIES. Is that your view, Mr. Foster?

Mr. FOSTER. I don't know the answer to that question.

Senator THURMOND. I can't hear you.

Mr. FOSTER. I don't know whether you—going back to the *Hanover Shoe* situation, if that is the question you are addressing, and a shoe machine that was leased pursuant to a monopolistic practice, shoes were made on the machine. And the obvious language of the bill that needs attention by me is the "chain of manufacture, production or distribution." The subject is of the greatest personal interest to me, because I have a case right now in which I have a liability judgment and I am most anxious for the damage trial not to get confused by assertion of passing on defenses.

But I really cannot positively say that this language in S. 300 may not be construed with such breadth that it will relate to a changed product. I would also respond to your general question about *Hanover Shoe.* It is my view that the overruling, if you will, of *Hanover Shoe,* and of *Illinois Brick,* should be symmetrical in the sense that if you are going to allow proof by a downstream

purchaser, then you should allow a defendant an opportunity to prove that the damages were passed on.

Mr. Baylson is quite eager to make a point.

Mr. BAYLSON. May I just add one thing? That is, the third circuit has recently held in the sugar industry case that where a purchaser bought a product that contained sugar, that he was not barred by *Illinois Brick.* So I think that the way the subsection A is written, it would include the purchaser of a shoe, at least in the third circuit.

Mr. BOIES. Let me ask just one more question which, perhaps, can be answered yes or no. If we overrule *Illinois Brick* along the lines presently set forth in S. 300, would you be in favor of us excluding private class actions on behalf of indirect purchasers, or if we are going to allow individual suits by indirect purchasers and State attorneys general to sue on behalf of indirect purchasers, should we also allow private class actions, if you have a view?

Mr. SCHMIDT. If you look at it as an evenhanded justice proposition, there is no reason to exclude anybody.

May I trespass on your patience for 1 minute? I would like to say one other thing about the purported quasi-repealer or override of *Hanover Shoe.* Section 4I(b), in *parens,* gives the court discretion to allow proof of passing-on defensively. That is either the matter of proof of causation or it is not a matter of proof. It is not a matter of judicial discretion.

Either you prove that there is a proximate relationship with respect to the overcharge or undercharge or the passing-on. This confuses judicial discretion with quantum of proof from a legalistic point of view.

Mr. BOIES. Would the rest of the panel agree with Mr. Schmidt's comment that if we are going to overrule *Hanover Shoe,* with respect to individual indirect purchasers, and with respect to State attorneys general's suits on behalf of indirect purchasers, we should allow private class actions on behalf of the indirect purchasers as well?

Mr. FOSTER. I would like to respond to that by touching upon the proposal of the *Illinois Brick* task force, which was that the price that you have to pay for making a rational determination of the passing-on issue is to get rid of the opt-out class. So, fundamental to me is that any *Illinois Brick* legislation must provide a means by which you allocate damages among parties actually present in a court.

I would, therefore, not favor opt-out classes in an *Illinois Brick* decision. I think it is hopeless to make fair determinations under those circumstances.

Mr. BOIES. But you could nevertheless have opt-in class actions?

Mr. FOSTER. Yes.

Mr. BAYLSON. My personal opinion is that class actions should be barred in *Illinois Brick* indirect purchaser situations because experience has shown that it is the plaintiffs' attorneys who are the primary beneficiaries of the class action and not the members of the class.

Mr. REED. I think the language "chain of manufacture, production distribution" in section 4I(a) would preserve the result in *Hanover Shoe.* The purchasers of shoes are not in the chain of

distribution of shoe machinery. I think the legislative history with that language in the last session made that point explicitly clear.

As to the question of excluding class actions, I do not think that the legislation should exclude them. Keep in mind we are dealing with a separate issue when we deal with class actions. Single plaintiffs, such as the State of Arizona or Arizona Public Service, which testified in support of this bill last week before the House, may have a very viable, important and easily provable claim. Whether that claim may be maintained as a class action on behalf of others similarly situated turns on questions such as manageability. Those criteria must be satisfied before a class action may be maintained. Those who would raise the specter of horrendous class action suits forget that the district judge before whom such a case is pending must first decide that the case is manageable, that the claims of the individual representatives are typical of all class members. So, you see, the specter of horribles being raised is, I think, a misdirected and misguided effort, that they should be addressed to the class action rules rather than this particular bill.

Mr. BOIES. Is it your view, then, if we overrule *Illinois Brick* at all, we ought to allow indirect purchasers to sue through private class actions?

Mr. REED. I think the question of whether an individual class action can be maintained should be decided by the district court before whom such a case is pending. I do not think there should be any exclusion of private class actions in S. 300.

Mr. BOIES. Thank you.

Thank you, Mr. Chairman.

Senator THURMOND. I would like to ask each of you this question, and if you can just answer briefly on it. It is a question I propounded to some other witnesses earlier. If you were directed to make the final decision of whether S. 300, so-called *Illinois Brick* bill, should become law or should be defeated, how would you decide? Would each one of you care, just starting here, to just give me an answer?

Mr. FOSTER. I would vote no on S. 300.

Mr. BAYLSON. I would vote no on S. 300.

Senator THURMOND. In other words, you would vote against the bill if you had to vote yes or no?

Mr. BAYLSON. Yes, sir.

Mr. SCHMIDT. On S. 300 as presently written I would vote against it. I would vote no.

Mr. WEINSCHEL. As presently drafted, I would vote against it.

Mr. REED. Mr. Chairman, I would vote for the bill. I would prefer to see subsection C of the bill deleted and dealt with separately and more comprehensively. As drafted, I would vote for this bill.

Senator THURMOND. Thank you. All of you seem to agree on the approach of having one forum to handle these type claims; is that correct?

Mr. SCHMIDT. That is correct, Senator. I don't think the present amendment to 1407 goes quite far enough, doesn't do some of the other things we talked about with respect to having nationwide venue, service of process, but it is a step in the right direction. But only a step.

Senator THURMOND. Do any of you dissent from that position? I suspect as we give our thought and consideration to your suggestions for such an approach we will have other questions that we will want to ask you at a later time, if you will cooperate in that way.

Mr. SCHMIDT. We will be pleased to cooperate in any way that the committee desires.

Senator THURMOND. Some legal experts have stated that Justice White's opinion in *Illinois Brick* should not be overturned for the reasons he set forth in that opinion, as the only logical approval to a very difficult and emotional problem in issue. As I construe from what you have said, you would probably favor not overturning the opinion as embodied in the present bill?

Mr. SCHMIDT. I would say this: I said this in my written statement, that no one, respectfully, should lightly overturn what the Supreme Court has given careful consideration to, having in mind the Supreme Court's familiarity not only with the thrust of the antitrust laws but the problem of the administration of justice by the Federal judiciary.

Senator THURMOND. Is there any dissent from that?

Mr. REED. Yes, sir, Mr. Chairman. I think the Supreme Court decision in the *Illinois Brick* is an unjust and unfair, improper result and I strenuously urge this committee and members of this Congress to overturn that decision so that those who have been injured by violations of the law will be afforded once again the opportunity to be made whole and recover the damages that they sustained.

Mr. FOSTER. Mr. Chairman, David Foster. I would say that I agree completely with the statement that the Chair just read to us, that the opinion should not be overruled because of the reasons set forth in the opinion. In addition to that, I would add the observation that there is nothing surprising or startling about either the *Hanover Shoe* or the *Illinois Brick* decision. If we move outside the emotion charged area of the antitrust law, we find that the trend of the damage decisions to award damages only to the directly injured person is one of the most powerful lines of decision in all of the common law.

It is such a strong doctrine that we find even in the case of cost-plus contracts that a party is entitled to get a windfall if he has been damaged, even though he has been fully compensated under a cost-plus contract. The decisions say, if he gets some money from somebody else, he keeps it. If that is the common law, neither *Illinois Brick* nor *Hanover Shoe* goes even as far as the generality of the common law. So the decision is hardly surprising.

Senator THURMOND. Is there any other comment?

Mr. REED. If I could respond, I think the common law is not quite as uniform as he would suggest. I would suggest if it is proper to hold a company such as Coca-Cola to be liable to an ultimate consumer when a bottle of soda contains a mouse, a dead mouse, it should also be held liable to that consumer when it overprices the bottle of soda pop which the consumer consumes.

Senator THURMOND. We want to express our appreciation to you gentlemen for coming here today. After counsel propounds a few questions, the meeting will stand adjourned. Wait just a minute.

Mr. PERWIN. I have very few questions. I wonder first if the panel would agree with Mr. Reed's testimony that in its rationale, the *Illinois Brick* opinion applies to *parens patriae* suits to the extent that the State is representing consumers of such suits of indirect purchasers, does anyone disagree that *Illinois Brick* applies to such suits? No disagreement at all? Thank you.

Mr. Schmidt, was it your testimony that the dangers of duplicative recovery would be precluded by procedural devices which provide for the consolidation of the multidistrict litigation?

Mr. SCHMIDT. Yes.

Mr. PERWIN. Can you think of any way that we might improve upon the provisions of S. 300 to the extent that they amend 28 U.S.C. 1407, to provide for such consolidation? Is there anything else we can do to assure that kind of consolidation?

Mr. SCHMIDT. I don't know whether I am authorized to volunteer what was the report of the task force, because nobody approved it, although I don't know that anybody disapproved it. But we did prepare both a majority and a minority draft of legislation, and I think that the majority proposal did include what we thought was technical language designed to do what you are referring to here. Having in mind, and I again stress that this is not official in any way, I would be happy to hand up with that understanding.

I am not in any way speaking for the bar association and I don't want to exceed my authority, I would be glad to hand up to the committee a draft of the majority proposal which deals with that subject.

In all fairness, there was a minority proposal as well and we talked about this last night and discussed the possibility of this coming up. Mr. Reed said, well, if you are going to submit the majority proposal, you ought to submit the minority proposal. Since I have been advocating the two-way street approach here, I think that is fair.

With your permission, I will hand them up. I have the majority proposal right here. if i may approach the table, I will bring it over.

Mr. PERWIN. Thank you.

Mr. FOSTER. While Mr. Schmidt is on his way up, let me touch upon the specific provisions which are contained in the majority report that address the question just made. The 1407 amendment is not enough because you have to have a forever-barred provision.

You have got to have something that says: "If, for whatever reason, a fellow does not come into the consolidated action and become a party, he is out of luck forever." Otherwise, you have this terrible problem of duplicative recoveries going on and on.

Mr. PERWIN. Mr. Foster, if I might ask just two additional lines of questioning very briefly, first was it your testimony that no significant price-fixing cases involved the primary force of indirect purchasers in which direct purchasers were not significant parties or did not "opt out" early?

Mr. FOSTER. I did not intend to so testify.

Mr. PERWIN. In testifying that S. 300 might undermine the enforcement thrust of price-fixing cases, was it not your implication that most of the significant actions are brought by direct purchasers and not indirect? What happens to those actions that are

brought exclusively or primarily by indirect purchasers in which the role of direct purchasers is minimal at best?

Mr. FOSTER. This was the subject which I touched upon. As I say, it has been covered extensively in the hearings. I myself find in my experience direct purchaser suits are common. I have not been confronted with the situation in which we had indirect suits with no direct suits.

Mr. PERWIN. In the *Illinois Brick* case, for example, was it not true that the direct party, purchaser parties to the suit, settled early at levels of settlement below even the single damage claim?

Mr. FOSTER. This is a subject that has of course been debated much in the prior hearings. I don't question the track record of the *Illinois Brick* case itself.

Mr. PERWIN. In the tetracycline litigation, was it not the case that no direct purchasers joined the action until after liability had been determined at least presumptively by the establishment of the settlement funds and that up until that very late time in this extensive litigation there were no direct purchasers involved?

Mr. FOSTER. I do not know that to be a fact.

Mr. PERWIN. Let me ask you one additional question. Was it your testimony that in the 9-year period between the Supreme Court's decision in *Hanover Shoe* and *Illinois Brick,* there was not a single price-fixing case involving both indirect and direct purchasers that was litigated to a final judgment?

Mr. FOSTER. I am unaware of any case in that entire period which involved class actions at different levels which was litigated to a judgment. That is correct.

Mr. PERWIN. What about cases that were not class actions?

Mr. FOSTER. I had not addressed that subject because I find the complexity of the process immeasurably increased by the opt-out class.

Mr. PERWIN. Thank you very much.

Mr. CHUMBRIS. We have a couple of questions from Tom Perry, on behalf of Senator Hatch.

Mr. PERRY. If I might address a couple of questions, Mr. Foster, I believe you indicated S. 300 would probably not significantly benefit consumers. Isn't it true that it quite possibly might adversely affect consumers?

Mr. FOSTER. All of the burden of my remarks that S. 300 will inhibit private enforcement of the antitrust laws suggest strongly that the legislation will have adverse implications for consumers; yes.

Mr. PERRY. What do you think would be the impact on small business?

Mr. FOSTER. I think the impact on small business, on a small business, caught up in the toils of one of these cases would be extremely adverse indeed. We must never lose sight of the fact that antitrust defendants are not all gigantic capital structures. I have represented companies with total assests of just a few million dollars charged with monopolizing lines of commerce. So that these medium sized companies and even much smaller ones can be caught up on lawsuits where the mere expense of defending is beyond the ability of the company to cope.

Mr. PERRY. Would anyone else on the panel like to respond to that?

Mr. SCHMIDT. I would just like to comment very briefly on that. Experience indicates that sometimes an overly aggressive prosecution and certainly that would be true in the case of a duplicative recovery, would have a very strong anticompetitive effect.

A judge, I think, of the U.S. Supreme Court, I cannot recall the precise opinion nor the Justice who said it, if it was a Justice of the Supreme Court who said that ultimately the cost of all judgments of whatever kind against a business enterprise are borne by the consumer.

So that if we are concerned about inflation, that is a factor that should make us careful about duplicative recoveries. If we are concerned about the anticompetitive effect of killing or overkilling a defendant, we ought to be careful of the same thing.

Mr. REED. My views are somewhat different. I think if you look at the proponents and the opponents of this legislation with consumer groups, State attorneys general, State Governors all advocating enactment of this legislation, and many defendants in antitrust cases opposing it, I think there is a judgment there by the consumer groups that this will help them. But I think it is no longer necessary for us to make an inference that this is proconsumer because of the consumer backing of this legislation.

The Hoover Institution at Stanford University, where a study was recently completed and it is to my knowledge the first empirical study which attempts actually to measure the deterrent effect of antitrust prosecution and while their data are preliminary, the conclusion of this study at Stanford University is that consumer class actions, indirect class actions, are effective and perhaps the only effective deterrent to antitrust violations and is supported by tracing price histories in markets where there have been such actions.

They have measured a marked downward trend in prices resulting from a deterrent effect of these indirect purchasers consumer class actions. So I would think it would be no longer needed to judge the merits of that argument by examining who supports legislation and who opposes it. I think we have definite empirical data to support the conclusion that this is a proconsumer piece of legislation.

Mr. CHUMBRIS. Would you supply us with a copy of that?

Mr. REED. I would be happy to, for inclusion in the record.

Mr. CHUMBRIS. I think Beverly Moore, one of the proconsumer witnesses, testified it probably would not significantly benefit the consumer.

Mr REED. That could well be. I would think the 350,000 households in Arizona will be receiving checks for overcharges in the dairy industry and 250,000 households in Arizona who have already received checks for overcharges in the bakery industry would tend to disagree.

Mr. PERRY. Won't this build antitrust actions in a situation where economists will really not know how much of the alleged price increases will be passed on to each level?

Mr REED. I would think not. I think antitrust damage actions now depend upon the testimony of the economists as to their

opinion about the amount incurred. As Mr. Schmidt previously testified, damages in antitrust actions cannot now be measured with absolute precision anymore than in a wrongful death case. Is it possible to measure with absolute precision the value of the death of a 42-year-old breadwinner and head of household?

I think the notion of absolute precision in damage awards is not something that is required in any area of the law, and particularly it is not required in the antitrust area.

Mr. FOSTER. I must disagree with Mr. Reed's observation in two respects. First, at the present in a normal price-fixing situation, section 1 case, as opposed to a merger case or a monopoly case, expert testimony in my experience is relatively unimportant. The damages are normally measured by some empirical observation of what has gone on in the marketplace. The jury looks at it, decides yes or no as to the plaintiff's damage theory.

There is absolutely no question, however, in at least my view, that under this bill the decision as to which level of distribution absorbed what amount of the damages will turn upon reams of economic testimony of the most abstruse nature.

Mr. PERRY. Would anyone else like to respond? I have no further questions.

Mr. CHUMBRIS. Before we leave, I wanted to bring to the attention of Mr. Reed that his Governor testified and he represents the legal department of the State of Arizona, that a request was made on page 117 of the record at the February 1 hearing where on behalf of the minority he requested a unanimous consent, and Senator Baucus granted the unanimous consent, that the attorneys general, and with the help of the Washington office, would obtain a list of each of the cases that the Attorney General had testified on that morning, the name of the cases, the courts in which they were pending, the amount of the damages and what other information might be helpful ot this committee.

I would appreciate it if you would check that, Ken, and also the representative of the Washington office to see how that is progressing.

Secondly, there was a request also of Mr. Shenefield to submit to the hearing the opinion that was issued by the Department of Justice as to the constitutionality of the proposed bill.

Ken, did you want to respond?

Mr REED. I believe as to Arizona the information you requested was included as an appendix to Governor Babbitt's prepared statement. I would defer to our Washington counsel to see what you do with the other 49 States, and I will relay the request to Assistant Attorney General Shenefield.

Mr. CHUMBRIS. I might make one other announcement that was agreed upon and, Joel, you listen to this, by Chairman Kennedy yesterday with Senators Thurmond and Hatch, that we will continue our program with a hearing on the 14th and a hearing on the 19th of this month, and then there will be a series of markup sessions. First, discussion and markup sessions, with a final vote on this bill on April 23, as we return from the Easter holidays.

Mr REED. Have the markup sessions been scheduled? What are the dates of the markup sessions?

Mr. CHUMBRIS. No. We talked informally of finishing on the 19th and then have a markup session the next day and possibly the 27th. But we were talking about a different time frame. So I would assume that the full committee under Chairman Kennedy will set the dates of discussion and markup. But the only issue that was resolved was that the final day for final vote, one way or the other, would be April 23, Monday, April 23 of this year.

Joel, do you have another question?

Thank you very much for coming, gentleman. I might suggest that if you would like to submit additional memoranda in view of the questions that we asked, please do so, because this is a very, very difficult bill that we have before us, but a very, very important one.

Thank you very much.

Mr BAYLSON. Mail it to your attention?

Mr. CHUMBRIS. I would send it to the chairman, Senator Kennedy, with a copy to the ranking member, Senator Thurmond.

Mr. SCHMIDT. What is the deadline for that?

Mr. CHUMBRIS. The sooner the better, but we do have a leeway since the final vote won't be until April 23.

Thank you very much.

[Whereupon, at 12:20 p.m. the committee was recessed, to reconvene subject to the call of the Chair.]

42-005 O - 79 - 12

ANTITRUST ENFORCEMENT ACT of 1979, S. 300

WEDNESDAY, MARCH 14, 1979

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 9:45 a.m., pursuant to call, in room 4200, Dirksen Senate Office Building, Hon. Strom Thurmond presiding.

Present: Senators Thurmond, Cochran, and Laxalt.

Staff present: Dave Boies, staff director and chief counsel for the majority; Joel Perwin, counsel for the majority; Peter Chumbris, counsel for the minority, Subcommittee on Antitrust; Henry Reumpler, counsel for Senator Cochran, and Al Regnery, counsel for Senator Laxalt.

Senator COCHRAN [presiding]. Will the hearing please come to order?

We are operating without a full team this morning. We have a competing hearing going on downstairs. Other members of the committee are there.

OPENING STATEMENT OF SENATOR COCHRAN

Before we begin the testimony, I would like to make the observation that in dealing with the proposed legislation, so-called *Illinois Brick* legislation, we are confronted with a task that is not very easy. I think the difficulties were touched on by Justice Byron White in the opinion in the *Illinois Brick* decision, when he indicated that any procedure to permit indirect purchasers to sue in antitrust cases would be counterproductive. In particular, he said, and I quote:

> However appealing this attempt to allocate and overcharge might seem in theory, it would add whole new dimensions of complexity to treble damage suits and seriously undermine their effectiveness, and the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.

It is now our responsibility as a committee to determine whether it is possible to draft legislation which would permit indirect purchasers to sue without making the cases so complex that the litigation would be interminable. The Supreme Court predicted that allowing indirect purchasers to sue would make cases up to 20 times more complicated. The cost of discovery alone would be staggering.

At a time when this committee is reassessing the burden on Federal courts and whether there is fair "access to justice," I am concerned about whether the *Illinois Brick* legislation would be contrary to those goals. I understand the witnesses who will be

appearing before the committee are expecially well prepared to address the complexity of this issue.

Our first witnesses are Prof. Richard A. Posner and Prof. William Landes, both of the University of Chicago. Professor Posner is professor of law there and Professor Landes is professor of economics. I understand the two witnesses will testify together.

If you could come forward, please. Welcome to the committee. Thank you for being here.

STATEMENTS OF WILLIAM M. LANDES, PH. D., PROFESSOR OF ECONOMICS, UNIVERSITY OF CHICAGO LAW SCHOOL, AND RICHARD A. POSNER, LEE AND BRENA FREEMAN PROFESSOR OF LAW, UNIVERSITY OF CHICAGO LAW SCHOOL

Senator COCHRAN. Professor Posner, why don't you begin?

Mr. POSNER. Thank you, sir. My name is Richard Posner and I will make a few points very briefly, since we have submitted a long statement, and then Professor Landes will discuss some economic points that we have also developed.

Senator COCHRAN. Without objection, Professor Posner, we will insert the entire written statement at the end of your oral testimony, and then you make whatever oral remarks you choose.

Mr. POSNER. Thank you. I will be very brief.

[The prepared statement of Mr. Posner follows:]

PREPARED STATEMENT OF WILLIAM M. LANDES AND RICHARD A. POSNER

Our names are William M. Landes and Richard A. Posner. Landes is a Ph. D. economist and a professor of economics at the University of Chicago Law School, where he teaches, among other subjects, antitrust economics. Posner is Lee and Brena Freeman professor of law at the University of Chicago Law School, former Justice Department attorney, and the author of numerous books and articles on antitrust law and enforcement.

We are here to testify concerning S. 300, a bill to amend the antitrust laws to overrule the Supreme Court's decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), and thereby permit indirect purchasers to maintain antitrust suits. Our statement is addressed to the conception, rather than details, of S. 300. Our conclusion can be briefly stated: So far as we are able to predict, S. 300, if enacted, would retard rather than advance the objectives of antitrust enforcement.

SOME THEORETICAL CONSIDERATIONS

As conventionally viewed, the objectives of private antitrust enforcement are twofold: To compensate victims of antitrust violations, and to deter antitrust violations. We regard the compensatory objective as secondary. Because effective antitrust deterrence would reduce the incidence of antitrust violations to a low level, the occasions for compensation would be few. Hence the focus of our analysis will be on the deterrent effects of S. 300. But in passing we note that S. 300 is unlikely to advance the compensatory objective of the antitrust laws, whatever weight is assigned to that objective.

To explain, as will be shown in a later part of this statement—as is, indeed, a premise of S. 300—the effect of a price increase due to price fixing or some other antitrust violation tends to be broadly distributed among the suppliers to, and among indirect and direct purchasers, mainly ultimate consumers, of, the producer whose price increases. S. 300 is unlikely to help these victims of price fixing much and it may even hurt them. Suppliers will ordinarily be barred by the rules of standing—which S. 300 would not change—from maintaining actions to recover the losses caused to them by price fixing. While ultimate consumers could in principle, if *Illinois Brick* is overruled, obtain damages, normally they could do so only through class actions. But the administrative costs of the consumer class action tend to eat up any damage award or settlement; usually very little compensation actually

trickles down to the individual members of the class.[1] Nor are *parens partiae* actions, an alternative to the class-action approach, the answer to this problem: Section 2e of the Clayton Act expressly recognizes the difficulties of effecting compensation throught this device.

Other indirect purchasers, such as retailers in a two-tiered—wholesale and retail—distribution system, are in better position to collect a meaningful judgement than the ultimate consumer. But since they, like direct purchasers, will often be able to pass on much of the cost of an unlawful price increase to their customers and suppliers, allowing them to sue may not further substantially the compensatory objective either.

Moreover, if as we argue below S. 300 is likely to reduce the overall deterrent efficacy of antitrust enforcement, the benefits that some consumers might obtain from being able to participate in indirect purchaser class actions would have to be weighed against the cost to other consumers. Other customers will pay higher prices because of antitrust violations that will occur because the deterrent effect of antitrust enforcement has been reduced, and they will not receive adquate compensation through the expensive, and from the individual class member's perspective ordinarily disappointing, class-action device.

We turn now to the question whether S. 300 will promote the deterrent objective of antitrust enforcement. From the deterrent standpoint, the most important thing is not who gets the proceeds of any judgement levied against the antitrust violator but that there be adequate incentives to bring suit and prosecute it to judgement.[2] This objective is more likely to be achieved by the rule of Illinois Brick, which favors direct-purchaser suits, than by indirect-purchaser suits. We shall demonstrate this through two basic points. First, the direct purchaser is the more efficient enforcer of the antitrust laws than the indirect purchaser and should therefore be given maximum incentive to bring antitrust suits. This is done by the rule of *Illinois Brick* since that rule ensures that the direct purchaser will not have to share his damage recovery with indirect purchasers. Second, even if both direct and indirect purchasers are equally efficient antitrust enforcers, deterrence is weakened if both have rights to sue; since no one proposes to bar direct purchasers from suing, this is a strong argument in favor of the rule of *Illinois Brick.*

1. The first purchaser is a more efficient enforcer simply because of his proximity to the violator. He deals directly with him and [probably] with his competitors and is therefore in a better position than a more remote purchaser to detect a conspiracy or other antitrust violation. Even if the remote purchaser were fully apprised that the price to him had risen because of some price increase by a remote supplier, it would be difficult for him to determine the reasons behind that price increase.

Not only does the remote purchaser lack direct knowledge of the business of the supplier who has raised prices, but he must undertake efforts—unnecessary for a direct purchaser to undertake—to determine which remote supplier is responsible for a price increase in goods or services purchased by the indirect purchaser. To explain, assume that price fixing occurs among producers of product A, increasing the price of A above the competitive price. Product A is an input into the production of a product that ultimately reaches consumers after successive stages in the production-distribution chain—hereinafter distribution chain. Assume further that producers of A are located at point n on the distribution chain, producers of products using A are located at n-1 additional forward points on this chain, and the consumer is located at point 0. [See figure 1.]

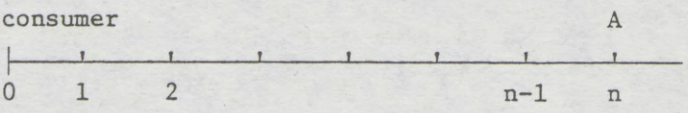


Figure 1

For example, if $n=4$, at point n are raw material producers fixing prices, at n-1 are manufacturers—the direct purchaser—and at n-2, n-3 and n-4 (=0) are wholesalers, retailers, and final consumers—the indirect purchasers—respectively.

[1] See Richard A. Posner, "An Economic Approach to Legal Procedure" and "Judicial Administration," 3 J. Legal Studies 399, 440 (1973).

[2] This assumes that the judgment approximates the social costs of the violation, adjusted to reflect the probability that the violator will be brought to bar. If that probability is less than one, the judgement should be larger than the estimated social costs of the violation, so that the expected cost of punishment to the antitrust violator will equal the estimated social costs. This is the economic rationale of trebling.

Since the increase in the price of A will be transmitted through the entire distribution system, each purchaser will experience an increase in the price charged by one of his suppliers—the supplier that connects him to the distribution chain which originates with the producers of A. Each purchaser, however, will be uncertain about the cause of the price increase. It may be due to a price-fixing agreement entered into by his supplier or it may be due simply to an increase in his supplier's costs due, for example, to an increase in the price of some input into the production of the supplier's product. The purchaser will have to invest resources in determining which of the two alternative explanations of the price increase is the correct one. Assuming that the legal rule entitles only the direct purchaser to recover for the antitrust violation, each purchaser will have an incentive to search over only one link or stage in the distribution chain, that is, the one directly above him. Since there are n links in the chain—from point 0 to point n–1 in figure 1—the maximum number of searches that will take place before the price-fixing scheme is uncovered is n.[3] In terms of figure 1, consumers at point 0 will search over firms at point 1, firms at 1 will search over firms at point 2, and so forth.

But suppose we modify the legal rule and permit any purchaser, direct or indirect, to recover damages from fixing the price of A. Now purchasers at point j will have an incentive to search for information on price fixing not only at point $j+1$ but also at points $j+2, j+3, \ldots, n$. If, for example, each firm on the distribution line in figure 1 produces its output using two inputs supplied by two different suppliers, then purchasers at j will search over one input supplier at $j+1$, two input suppliers at $j+2$, two at $j+3, \ldots$, and two at n. [The reason that the purchaser at j searches over one supplier at $j+1$ but two each at $j+2$ through n is that though his direct supplier's price has risen he lacks information on which of the two inputs produced at $j+2, \ldots, n$ has increased in price.[4] To uncover the price-fixing scheme at n, therefore, purchasers at j would have to search over $2(n-j)-1$ suppliers. Since each group of purchasers has a similar incentive to search over suppliers above them in the distribution chain, one can show that, when indirect purchasers are permitted to recover damages, the maximum number of searches equals n^2.[5] Alternatively, the average number of searches by a group of purchasers at point 0 to n–1 is equal to n. In comparison, when only the direct purchaser has a right to recover damages, the average number of searches by a group of purchasers at 0 to n–1 is equal to 1.

Searching for antitrust violation is a costly activity. It includes expenditures on discovery and litigation which involve the imputs of lawyers, economists, accountants, financial analysts, et cetera. If each unit of search costs \$X, then in the above example it will cost n\$X to uncover the price-fixing agreement when the legal rule gives the direct purchaser the exclusive right to recover and n^2\$X when the rule allows indirect purchasers also to recover. In the aggregate the indirect-purchaser rule increases the costs of searching for an antitrust violation by the amount (n^2-n) \$X compared to the direct purchaser rule.[6] From the social point of view this added

---

[3] Assuming each firm searches, the aggregate number of searches is n times the average number of firms or persons searching at each point. To simplify, we define a unit of search as all search activity from point i to j $(i \neq j)$ on the distribution chain.

[4] Suppose each firm in the distribution chain were supplied by two different firms. In this case, j would search over 1 supplier at $j+2$, 4 at $j+2$, 4 at $j+3$, 8 at $j+4$, and up 2^{n-j-1} at n. This would imply, for example, that if $n=4$, ultimate consumers might have to search over 15 suppliers [compared to 7 in the analysis in the text] to discover the price fix.

[5] The maximum number of searches equals

$$S_{max} = \sum_{j=0}^{n-1} [k(n-j-l) + 1]$$
$$= n(\frac{nk}{2} - \frac{k}{2} + 1)$$

where k is the number of inputs supplied at each point. When $k=2$, S_{max} simplifies to n^2.

[6] The difference in aggregate search costs is probably less than (n^2-n)\$X for two reasons.

1. The costs of an unsuccessful search are likely to be less than the costs of a successful one because the former will exclude various litigation expenditures once it is determined that the party was not fixing prices. If we let \$Y= the costs of an unsuccessful search and \$Y= the costs of a successful one, then aggregate costs are \$X + $(n-1)$\$Y and n\$X + $n(n-1)$\$Y under the direct and indirect purchaser rules respectively. The difference between them is $(n-1)$\$X + $(n-1)^2$\$Y which is obviously less than $(n-n)$\$X provided \$X \$Y.

2. When indirect purchasers are allowed to recover, there is an incentive for the various parties to avoid costly duplication of effort by agreeing to restrict their search activity, share in all search costs, and pool all information that is acquired. In the limit this would approach the result of the direct purchaser rule if the various parties agree to restrict their activity to their direct suppliers only. Since the costs of reaching a full agreement are positive and probably

Footnotes continued on next page

expenditure is a waste of resources since, by assumption, the antitrust violation is discovered under either rule.

To summarize this point, the direct purchaser is likely to be the least-cost enforcer—quite apart from the greater knowledge that he is likely to have regarding the reasons for his supplier's price increase—because (a) search activity, broadly defined, is an important component of private enforcement costs and (b) the direct purchaser's search cost is $X whereas the average indirect purchaser's cost is a multiple of this amount that is approximately nX.[7]

If all this seems terribly abstract and theoretical, it can be made concrete by reference to the facts of the *Illinois Brick* case itself. The alleged price fixers were the manufacturers of concrete blocks. They sold them to masonry contractors who in turn supplied their services to general contractors who in turn sold buildings incorporating the cement blocks to the ultimate consumers. For the ultimate consumers to have identified the source of the added cost of buildings—assuming the added cost, due to the price fixing of cement blocks, was even perceptible to them—would have required them to study the conduct of the general contractors, identify their suppliers, and trace the inputs used by those suppliers to their ultimate source. Only then would they have identified the manufactureres of cement blocks as the ultimate source of their injury. This is a highly complicated and expensive search process compared to what the masonry contractors—the direct purchasers of the cement blocks—would have had to undertake in order to determine that the manufacturers of the blocks were engaged in price fixing.

If we are correct that the first purchaser is the more efficient enforcer of the antitrust laws than the indirect purchaser, it follows that the rules of standing should be designed in such a way as to give the direct purchaser the maximum incentive to sue. This is done by the rule of *Illinois Brick,* which allows the direct purchaser to sue for the entire overcharge.[8] It is evident that if indirect purchasers were also allowed to sue to the extent they could prove injury, the incentive of the first purchaser to sue would be impaired. For if purchasers can sue to the extent that they are injured, then if multiple recovery is to be avoided, the seller, in a suit by the first purchaser, will be able to defend by showing that the first purchaser passed on part of the overcharge to someone having standing to sue. Insofar as the defendant succeeds in this defense, the incentives of first purchasers to sue are weakened—and in the limit vanish. The likelihood that violators will be detected is therfore also diminished.

Previous bills to overrule *Illinois Brick* have provided unequivocally that an antitrust defendant may defend a suit by a first purchaser by showing that the latter passed on all or part of the alleged overcharge. Such a provision is of course necessary to avoid multiple recovery. S. 300 also provides for such a defense, but the provision is rendered equivocal by the inclusion of the phrase "in the discretion of the court." We assume that the framers of the bill did not thereby intend that the court might exercise its discretion in order to permit double recovery. We assume—while deploring the failure of the bill to provide some guidance for the exercise of judicial discretion—that the intent was that the judge would determine whether a pass-on defense was necessary in the particular case to avoid double recovery. The parallel would be to the provision in last year's bill, S. 1874, which barred the pass-on defense where it was shown that the overcharge was passed on to someone who was barred, by the rules of standing or otherwise, from suing the antitrust violator. Such a provision was necessary so that the bill would not reduce the liability of

---

Footnotes continued from last page

prohibitive—because the interests of the parties will diverge on other issues such as the extent of passing-on—the costs of the indirect purchaser rule will always be greater than that of the direct purchaser rule.

However, there is a factor that works in the direction of increasing the costs of the indirect purchaser compared to the direct purchaser rule. We assumed constant costs of search at each stage of the distribution chain—$X in the text and a combination of $Y and $X in this footnote. If, however, the number of parties searching decreases as one goes from point 0—the ultimate consumer—to point n-1, the costs of search are likely to decrease as well. This, in turn, will widen the difference in search costs between the indirect and direct purchaser rules.

[7] The average or expected indirect purchaser's cost equals the aggregate costs of search when the indirect purchaser rule holds ($=n^2$$X) minus the direct purchaser's costs ($=$X) divided by the number of indirect purchaser stages in the distribution chain ($=n-1$). This in turn equals $n$$X$[(n-1/n)/(n-1)]$ which is slightly greater than $n$$X. We use the term "approximately" in the text because of the latter qualification as well as those noted in note 6 *supra.*

[8] Actually, the overcharge paid by the purchaser understates the social costs of the antitrust violation. It ignores both the injury to those who stop purchasing the product because of the price increase and the possibility that the antitrust violation may have raised the costs as well as price of the violator's product. These refinements do not affect the point being made here.

antitrust violators. We assume that the "in discretion" provision has a similar purpose, but the provision in S. 1874 was a clearer solution to the problem.

If, then, double recovery is to be avoided under S. 300 as under its predecessors, the question is squarely presented whether the predictable reduction in the incentive of direct purchasers to sue—because they face a pass-on defense—will be outweighed by the predictable increase in the incentive of indirect purchasers to sue. Since the first purchaser appears to be the more efficienct enforcer, the answer to the question appears to be "no." [Even if the direct and indirect purchasers are equally efficient, for reasons explained in section 2 below the incentive to sue will be lessened if indirect purchasers are allowed to sue as well as direct purchasers.]

The discussion of the passing-on defense suggests an additional reason why direct purchasers are more efficient enforcers. Where a passing-on defense is allowed—and, as we have pointed out, the allowance of such a defense is implicit in a decision to accord standing to indirect purchasers—the indirect purchasers who bring suit will normally be ultimate consumers, since the passing-on defense will often reduce the incentive of any intermediate purchaser to sue below the level at which litigating would be an attractive option for him. However, the lawyers who represent consumer class-action plaintiffs may lack adequate incentives to press for the largest possible judgment, even in meritorious cases. Their self-interest may be served better by agreeing to a settlement that provides for a relatively small judgment but large attorneys' fees—a settlement result also attractive to defendants.[9] And the individual class member's stakes are too small to give him any incentive to supervise the lawyer for the class. This is not to say that the consumer class action has no deterrent effect, but its deterrent effect may well be less than that of first-purchaser suits. Nor is *parens patriae* the answer, given its political character, which makes us doubt whether it can be relied upon as an adequate antitrust deterrent.

The existence of the passing-on defense suggests another respect in which the rule of *Illinois Brick,* limiting private enforcement to direct purchasers, provides for a more efficient scheme of private antitrust enforcement. The implementation of a passing-on defense, that is, the apportionment of damages among the various tiers in the distribution chain, involves extremely difficult problems of economic analysis and measurement. Efforts to solve these problems will make antitrust litigation even more cumbersome than it is already and will thereby directly reduce the efficiency of the enforcement process. In addition, when the price increase is traced through the entire distribution chain, it will often turn out that the price increase to the ultimate consumer or other indirect purchaser will be trivial in size. This reduces the likelihood that indirect purchasers will enforce the antitrust laws. In terms of our earlier discussion, the price increase to the indirect purchaser will often be so small as not even to trigger his search for the cause of the increase, a search that might in principle lead him to the antitrust violator. Both points will be developed here.

When a firm is chargerd a higher price for one of its inputs, say input A, because of an antitrust violation, its costs increase. It will try to offset the increase by raising its price. If its competitors are not affecterd by the cost increase, the attempt will fail and the firm either will go out of business or will contract its output—if by so doing it can lower its costs. Since there is no possibility, by assumption, of the firm's passing on the increased price of A to its indirect purchasers, the question of apportionment does not arise.[10]

In the more typical case, and the one that we shall focus on here, the increase in the price of input A affects not a single firm but an entire industry, or several industries. That is, all the sellers of a particular product, say product X, pay the higher price. Because the industry faces a downward-sloping demand curve for X, the reduction in supply brought about by the cost increase will generate a higher price for X. This is illustrated in figure 2. The increase in the price of input A to the producers of X—the direct purchasers—shifts the industry supply curve—which is also the industry marginal cost curve—upward from S to S', resulting in a price increase from P_x to P'_x to the indirect purchasers of A and a fall in output from X to X'.

---

[9] See Posner, *supra* note 1, at 440–41. And for empirical support for this proposition see Andrew Rosenfield, "An Empirical Test of Class-Action Settlement," 5 J. Leg. Studies 113 (1976), finding that attorneys' fees in antitrust class actions are inversely related to the size of the settlement. That is, the smaller the settlement, the larger the attorneys' fees—a pattern suggestive of the kind of "deal" that we worry about in such actions.

[10] The firm may be able to pass on part of the price increase in A to its suppliers. We discuss this later.

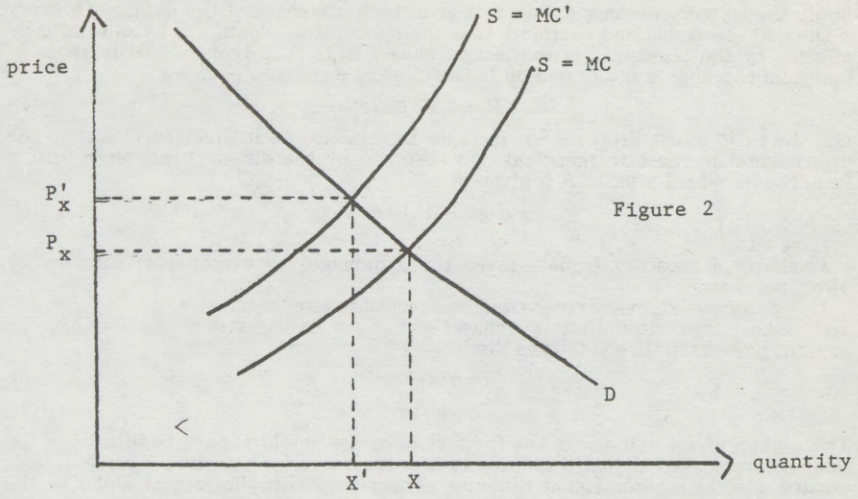


Figure 2

Notice that the proportional shift in the marginal cost curve at a given output in figure 2 is less than the proportional increase in the price of input A. That is,

$$\widetilde{MC}=\delta_a\widetilde{P}_a \tag{1}$$

where $\widetilde{MC}$ and $\widetilde{P}_a$ denote the percentage increases in marginal cost—at a given output—and price of A respectively, and δ_a equals the share of input A in the marginal costs of X.[11] For example, if input A's share of marginal cost is 20 percent and the antitrust violation increases P_a by 10 percent, then the marginal cost in figure 2 will shift upward by 2 percent.

Even if we cannot observe directly the increase in the price of X due to the shift in marginal cost when P_a increases because other factors operate simultaneously to affect the price of X, we can still calculate the magnitude of the increase in marginal cost that is shifted to demanders of X provided we have information on the elasticities of both demand and supply. If we denote the proportional increase in the price of X to indirect purchasers by $\widetilde{P}'_x$ $(=(P_x-P_x)/P_x)$, it can be shown that

$$\widetilde{P}_x=\widetilde{M}Ce^s/(e^s+e^d) \tag{2}$$

where e^s and e^d are the supply and demand elasticities respectively.[12] Substituting from equation (1) yields

$$\widetilde{P}_x=\delta_a\widetilde{P}_ae^s/(e^s+e^d). \tag{3}$$

Most estimates of elasticities of demand and supply are in the range of zero to one. An elasticity of demand of one would mean, for example, that a 1 percent increase in price would lead to a 1 percent decrease in the quantity demanded. If we let $e^s=.4$ and $e^d=.8$, and assume input A's share of marginal cost is 20 percent, then equation (3) shows that a 10 percent increase in the price of A will result in less than a 1 percent increase (.67 percent) in P_x. Even if we reverse the elasticities, letting $e^s=.8$ and $e^d=.4$, the increase in P_x is only 1.33 percent. Thus, indirect purchasers face a negligible increase in price in comparison to a direct purchaser whose input increases in price by 10 percent. This example is highly relevant to the analysis of relative enforcement efficiencies. It suggests that in many instances it will be very costly for the indirect purchaser to detect price fixing, because its impact on him will be so trivial. When this factor is combined with the reduced enforcement incentives of direct purchasers that result from their having to divide damages with any indirect purchasers who do sue, the possibility arises that no party will expend sufficient resources to uncover the price-fixing scheme.

Further, although our analysis indicates that the proportional increase in P_x—the price to the indirect purchaser—will ordinarily be relatively small, this does not

[11] *See* Gary S. Becker, "Economic Theory" 142-43 (1971). Note that equation (1) holds only when the price of other inputs in the production of A remain constant. If the price of other inputs on average increases as producers of X attempt to substitute away from A when its price increases, then $MC>S_a\widetilde{P}_a$. To simplify the presentation we shall assume that (1) does hold.

[12] *See* Carl Shoup, "Public Finance" 273-74 (1969).

imply that direct purchasers would receive the lion's share of the damage recovery if the suit succeeded and therefore that their incentives would not be substantially affected by the possibility of indirect-purchaser suits. The proportional increase in marginal cost that is not passed on to the indirect purchaser equals

$$\widetilde{MC}-\widetilde{P}_x=\delta_a\widetilde{P}_a\ e^d/(e^s+e^d), \tag{4}$$

and the ratio of the proportional increase in price to the indirect purchaser to the proportional increase in marginal cost absorbed by the direct purchaser resulting from the increased price of A is given by

$$\widetilde{P}_x/(\widetilde{MC}-\widetilde{P}_x)=e^s/e^d. \tag{5}$$

If we let

λ=share of recovery (equals three times damages or overcharge) received by direct purchaser

$1-\lambda$=share of recovery received by indirect purchaser

and assume that the indirect purchaser's share in damages is proportional to the amount passed on, then it follows that $(1-\lambda)/\lambda=e^s/e^d$ or

$$\lambda=e^d/(e^d+e^s) \tag{6}$$

$$1-\lambda=e^s/(e^s+e^d). \tag{7}$$

Thus, when $e^d=.4$ and $e^s=.8$, the indirect purchase would receive two-thirds of the total recovery even though the price to him increased by less than 1 percent. This creates a serious enforcement dilemma. The party with the largest stake in the recovery—the indirect purchaser—experiences a negligible increase in price, making it difficult for him to detect the antitrust violation. The party in the best position to detect the violation—the direct purchaser—has little incentive to do so because of his relatively small stake in any damage recovery.

The emphasis above is on the potentially deleterious effect of having to apportion damages among the direct and indirect purchasers on the incentives to bring private antitrust cases. A separate issue is the amount, and cost, of the information that is needed to make the apportionment, and hence the cost of private antitrust suits when indirect purchasers are permitted to sue. In particular, apportionment requires knowledge of the elasticities of supply and demand. Although econometric techniques are available that can in principle be used to estimate point elasticities, there are in practice many difficulties in such estimations.

(a) It is sometimes possible to estimate with a fair degree of precision either a demand or a supply elasticity. It is exceedingly difficult, however, to estimate both. Demand estimation is facilitated when demand is relatively constant but supply is shifting, so that the intersections between the—different—supply curves and the—constant—demand curve enable the points on the demand curve to be plotted. However, under these conditions, with supply shifting, the estimation of the supply curve is difficult. Conversely, where supply is constant but demand shifting, the estimation of the supply curve is facilitated because the intersections between the—constant—supply curve and the—different—demand curves enables points along the supply curve to be plotted. But then the estimation of demand is difficult. Thus the problem of identifying *both* demand and supply curves is often a statistical nightmare.[13]

(b) The above derivations are valid only for small changes around the initial equilibrium point. Typically, elasticities will vary at different points along the supply and demand curves, thus adding another degree of complexity to the estimation process.

(c) When there is only a single class of indirect purchasers, only two elasticity estimates are required. Each time an additional class is added two more elasticity estimates are required. Thus, statistical problems multiply as the distribution chain lengthens.

(d) Elasticities depend on the amount of time buyers and sellers are given to adjust to the price change. If there is a lag between the price-fixing agreement and its discovery—as there must be for damags to occur—then the amount of passing on each period will depend on the relative changes in the demand and supply elasticities. Accurate apportionment would therefore require estimating the change in elasticity over time.

In summary, to construct the empirical counterparts of the curves in figure 2 in a particular legal case would present severe difficulties of proof. There would be a serious danger of inconsistent determinations of the key parameters in the various

[13] For a classic statement of these difficulties see Elmer J. Working, What Do Statistical 'Demand Curves' Show?, 41 Q.J. Econ. 212 (1927), reprinted in Readings in Price Theory 97 (Am. Econ. Ass'n ed. 1952).

indirect-purchaser actions, raising the specter of multiple recovery in some cases and inadequate recoveries in others; the alternative would be massive and potentionally unmanageable consolidation of a myriad of separate claims. In this perspective, a considerable advantage of the direct-purchaser action is that the number of direct purchasers from a particular supplier is normally many fewer than the number of indirect purchasers, thereby facilitating effective antitrust enforcement.

Our concern with encumbering the trial of antitrust cases with incidence analysis is not aesthetic in character; nor is it based on a distaste for introducing economic analysis into antitrust litigation. But the injection of difficult empirical economic issues into an antitrust suit is a source of added cost and uncertainty that can be justified only if there is a clear gain in the effectiveness of antitrust enforcement. From the standpoint of the deterrent objectives of the antitrust laws, allowing indirect-purchaser suits—and thereby opening the way to the pass-on defense and its associated economic complexities in direct-purchase suits—will be a loss, not a gain, to antitrust enforcement.

One final point on the question of apportioning damages between direct and indirect purchasers should be mentioned. Although our analysis has stressed enforcement costs and incentives, it can also tell us something about compensation. To be sure, under S. 300 the ultimate indirect purchaser—the consumer—could recover for the illegal overcharge, at least if we ignore incentive effects and aministrative costs. It does not follow, however, that other indirect purchasers and the direct purchaser, all of whom may receive a share of the recovery, are in fact injured. For example, in the process of adjusting to the increased price of input A, the direct purchaser will substitute towards other inputs. Provided their supply curves are not perfectly elastic, the prices of these inputs will increase or decrease depending on the relative size of substitution and output effects. Since no one to our knowledge has propsed that owners of complementary and substitutable inputs be given rights to bring suit and recover, it follows that many injured parties will not recover damages for antitrust violations even if *Illinois Brick* is overruled.

One argument that direct purchasers may be less efficient enforcers than indirect purchasers should be considered before we move on to our second point—which is that even if they are equally efficient enforcers, the overall efficiency of private antitrust enforcement would be reduced by allowing both types of purchaser to sue. The argument is that the first purchaser may be reluctant to sue his supplier lest an ongoing relationship beneficial to the purchaser be disrupted. However, a neglected point is that the direct purchaser's acquiescence in his seller's antitrust violations will normally be a compensated acquiescence. A rational profit-maximizing firm will not abandon a legal right worth x million dollars unless it receives concessions of equivalent value to it. From the standpoint of deterring antitrust violations, these concessions constitute a form of antitrust damages. If a supplier wants to buy his purchaser's silence, the price he will have to pay is, in effect, his punishment for the illegal activity that he is trying to conceal. In any event, the idea that purchasers are bashful about suing their suppliers today is unrealistic, almost quaint. Firms now bring antitrust suits at the drop of a hat—and are subject to severe criticism, and potentially to shareholders' derivative actions, if they forego an opportunity to bring a meritorious suit. Nor is it realstic to believe that potential antitrust plaintiffs fear retaliation by a sued supplier—retaliation would simply clinch the plaintiff's original case as well as give him an additional antitrust cause of action.

Empirical evidence on the alleged reluctance of purchasers to sue their suppliers is difficult to come by. However, the large number of private antitrust suits alleging price fixing that are brought each year, coupled with the fact that most of them appear to be direct-purchaser suits,[14] provides at least suggestive evidence in support of our view that direct purchasers are not reluctant to sue their suppliers.

2. Now let us assume—unrealistically, as the above analysis indicates—that direct and indirect purchasers have identical total and marginal costs of enforcement.

---

[14] Some evidence on the relative importance of direct and indirect purchaser suits is available in the appendices to written statements in hearing before the subcommittee on Antitrust and Monopoly of the S. Comm. on Judiciary, 95th Cong., 2d Sess., pt. 2. For example, on pp. 26–31 a study of antitrust cases in the southern district of New York in 1977 indicated that out of a total of 69 suits brought by purchasers, 66, or 96 percent, were direct-purchaser suits. On pp. 361–72, a similar study of 197 pending cases in the northern district of California showed that out of a total of 163 purchaser suits, 67 percent were direct-purchaser suits, 23 percent were indirect-purchaser suits, and the rest involved both direct and indirect purchasers. On pp. 375–78 a study of 53 pending cases in the district of Arizona revealed that out of a total of 32 purchaser suits, 81 percent were direct-purchaser suits, 3 percent were indirect, and the rest involved both direct and indirect purchasers.

Even so, we shall show that a legal rule that apportions the recovery according to the damages suffered by each party will weaken deterrence.

To simplify the analysis, assume that there are only three parties in the distribution chain—an indirect purchaser [consumer], direct purchaser [retailer] and supplier [manufacturer]. Assume further that price fixing occurs at the manufacturing level, and as before let λ and $(1-\lambda)$ equal the share of recovery received by the direct and indirect purchaser respectively. Provisionally, we make the further simplifying assumption that the recovery does not include reimbursement of attorney fees and other litigation expenses. Our qualitative results are not affected by this assumption

If the legal rule only permitted recovery by the direct purchaser, which is the rule of *Illinois Brick,* λ would equal 1. Although the indirect purchaser would have no incentive to spend resources on enforcement, the direct purchaser's incentive would be maximized by this rule. In deciding on his optimal enforcement expenditures the direct purchaser would attempt to maximize π^d, the difference between his expected recovery and his costs of enforcement. Formally, he would maximize

$$\pi^d = pR - C^d(y) \tag{6}$$

which yields the following first-order condition:

$$p_y R - C^d = O \tag{7}$$

where p is the probability of discovering and convicting the antitrust violators, R the recovery, C^d the direct purchaser's enforcement costs, and y the inputs of enforcement resources.[15] Both p and C^d are assumed to be positive functions of the inputs of y—that is, $p-p(y)$ and $C^d=C^d(y)$ where an increase in y increases both the probability of apprehending and convicting the violator ($p_y>0$) and the costs of enforcement ($C^d>0$). Put differently, $p_y R$ and C_y^d denote respectively the marginal returns and marginal costs of enforcement with respect to an increment in y, and equation (7) states that in equilibrium the enforcer will equate marginal returns to marginal costs. This is illustrated in figure 3 where y equals the equilibrium level of y.[16]

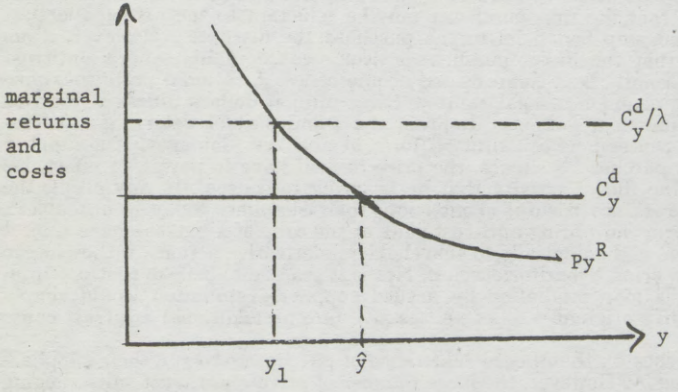


Figure 3

Now suppose that the indirect purchaser is also allowed to recover. The direct purchaser would still maximize his expected gain from enforcement, $\lambda pR—C^d(y^d)$, which yields $p_y R—C_y^d/\lambda=0$ (8)

[15] Note that $y=y^d+y^i$ where y^d=the direct purchaser's inputs and y^i=the indirect purchaser's inputs. Since $y^i=0$, we have $y=y^d$.

[16] We assume that the second-order conditions for a maximum are also satisfied when $p_y R - C^d=0$. This would occur, for example, if there were diminishing marginal returns from enforcement and constant or increasing marginal costs. To simplify the presentation we assume diminishing marginal returns and constant marginal costs.

(8)

But when $\lambda<1$, this is equivalent to an increase in the direct purchaser's marginal costs of enforcement, leading to a reduction in his inputs of y from y to y_1 in figure 3. To illustrate, let λ equal .5 and C_y^d equal \$1. It follows that the direct purchaser will increase his enforcement inputs only up to the point where \$1 in marginal costs generates \$2 worth of marginal returns, because he receives only 50 percent of those returns.

Although the direct purchaser's incentives are reduced, it might be reasoned that this reduction would be offset by the creation of incentives for the indirect purchaser to engage in enforcement activity. One might argue, moreover, that this is the likely outcome since the direct and indirect purchaser's enforcement costs are, by assumption, identical. But, surprisingly, this is not the case. In fact, in the example given the indirect purchaser has no incentive to add even a dollar in expenditure.[17] At y_1 units of enforcement inputs in figure 3 the marginal cost of an additional input to the indirect purchaser equals \$1 but aggregate marginal returns are slightly below \$2. From the indirect purchaser's viewpoint, therefore, a 50 percent share of these marginal returns is less than his dollar marginal cost. One can reverse the sequence, that is, have the indirect purchaser initially spend y_1 and show that the direct purchaser will then choose to spend nothing, without altering the fundamental result that enforcement and hence deterrence of antitrust violations will fall within nonexclusive enforcement rights.[18]

If we relax the assumptions of identical enforcement costs and λ equal to .5, enforcement will be carried to the point where

$$p_yR - \min\ (C_y^d/\lambda,\ C_y^i/(1-\lambda)) = 0 \qquad (9)$$

where min (·) denotes the minimum of either the direct or indirect purchaser's marginal costs adjusted upward by his respective share in the recovery. As (9) shows, when the parties have identical enforcement costs, the level of y is lowest under an equal sharing rule. It also follows that if $C_y^d<C_y^i$, the level of enforcement is greatest when $\lambda=1$—that is, the rule of *Illinois Brick*.[19]

The dilemma of less enforcement with nonexclusive rights is simply an application to antitrust enforcement of a well-known economic problem—namely, external economies. Each party's expenditure on enforcement confers a benefit on the other parties but no one has an incentive to take account of this external benefit in determining the level of his expenditures. These are, however, incentives to try to internalize the external benefits, thereby bringing the level of enforcement closer to the λ level in figure 3. One possibility is full cooperation and sharing of costs. For example, if $\lambda=.5$ and the two parties cooperated fully, they might be able to agree to contribute \$.50 each per unit of y costing \$1. Full cooperation would push their joint expenditures on y up to y. Cooperation, however, is costly. Not only may the parties' interests diverge on certain issues, for example, the amount of passing-on, which determines λ, but there are powerful incentives for the parties to free ride. These incentives, in turn, are likely to be greater the more numerous the indirect purchasers. In sum, the analysis suggests that with nonexclusive rights the parties will not be able to internalize fully the external benefits created by their enforcement efforts, and therefore that less enforcement will result compared to the rule of *Illinois Brick*.

---

[17] He would, however, still have to spend the minimum amount necessary to maintain himself as a party to the suit. If these expenditures were counted as part of y then y would still not increase above y_1 in figure 2 because the direct purchaser would cut back on his y to maintain $y=y_1$.

[18] The fact that the outcome does not depend on the sequence implies that though y_1 is the ultimate solution we do not know how the costs of y_1 will be allocated between the two parties.

[19] When C is included as part of the recovery the general solution to y is

$$p_yR - \min\ \left(\frac{C_y^d\,(1-p(1+e))}{\lambda},\ \frac{C_y^i\,(1-p(1+e))}{(1-\lambda)}\right) = 0$$

where e is the percentage change in p for a 1 percent change in y. This has the effect of lowering the plaintiff's marginal cost—since there is only a $1-p$ probability that he will bear these costs—and increasing the level of enforcement compared to the example in the text. Our result, however, that enforcement is maximized with exclusive rights assigned to the lowest cost enforcer—direct purchaser—still holds. Note further that if the defendant's costs were assessed against the plaintiff when the prosecution was unsuccessful, this would offset to a large extent the addition to recovery of the plaintiff's costs when the prosecution is successful.

EMPIRICAL ANALYSIS

Although we think the theoretical case for believing that S. 300 would, if enacted, actually reduce the deterrent efficacy of antitrust enforcement is persuasive, the question is ultimately an empirical one. Unfortunately, the *Illinois Brick* decision is so recent that its effect on antitrust enforcement cannot easily be gauged. The studies by Handler and by Kirkham presented at previous hearings of this subcommittee provide indirect evidence.[20] They show that first-purchaser suits are far more numerous than indirect-purchaser suits. This means, as a matter of simple arithmetic, that if S. 300 had an equal but opposite effect on first- and indirect-purchaser suits—decreasing the former, and increasing the latter, by the same percentage—the negative effect would outweigh the positive: the total number of suits would fall. The studies also show—what everyone knew—that there are an immense number of direct-purchaser suits and no evidence of bashfulness on the part of such purchasers about suing.

It should be feasible, however, to study the possible impact of *Illinois Brick*—and hence of bills such as S. 300 which would overrule *Illinois Brick*—on the effectiveness of antitrust enforcement in a somewhat more systematic fashion. Two approaches are possible. The first is to examine the effect of earlier antitrust decisions, mainly *Hanover Shoe* (*Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968)), which strengthened the incentives of direct purchasers to sue. Although our theoretical analysis stressed the probable adverse consequences on private enforcement of measures that weakened the incentives of direct purchasers, the converse also follows, that is, strengthening the direct purchase's incentives should increase the level of enforcement. It follows, therefore, that the Supreme Court's holding in *Hanover Shoe*—as well as similar holdings in lower courts in the electrical machinery cases—that barred a defendant from arguing that the direct purchaser was not injured by the illegal overcharge because he had passed it on to indirect purchasers would substantially strengthen the direct purchaser's incentive to uncover and prosecute the violation. Thus, we predict an increase, other things being equal, in private enforcement in the period following *Hanover Shoe* compared to the period before.

The second approach involves examining the effect on enforcement of *Illinois Brick*. The rule of that case—which was also the rule in many lower courts prior to *Illinois Brick*—gives the direct purchaser the exclusive right to enforce the violation and recover for the entire overcharge. According to our theoretical analysis, we would predict that, other things being equal, *Illinois Brick* would increase the level of private enforcement. Moreover, since two circuits—the third and eighth—and three districts—N.Y. Southern, Ohio Northern, and Colorado—had already adopted the rule of *Illinois Brick* prior to the Supreme Court's 1977 decision,[21] we would predict that any increase in private enforcement after 1977 would take place primarily in those circuits and districts not having an *Illinois Brick* rule before 1977. A major difficulty with this analysis, however, is that data are available for only a single year following the *Illinois Brick* decision and thus observed changes from 1977 to 1978 may be an unreliable indicator of permanent effects.

To study the above questions, we used published data on private antitrust cases filed in the district courts. Because of the serious limitations of these data, our conclusions are highly tentative.

We note at the outset two serious data problems that in principle can be overcome in future work, and a third that probably cannot be.

(a) Annual published data on private antitrust cases are for cases commenced—that is, filed. If, for example, five plaintiffs commence a suit against a defendant—or group of defendants—for the identical violation, such as price fixing, this will be recorded as five separate cases. Yet for our purpose it should only count as a single suit because we are interested only in the enforcement of the antitrust laws against the defendant. This factor creates a particularly strong bias against finding a positive effect on enforcement of *Illinois Brick* because the typical case involving indirect purchasers will tend to have more plaintiffs and thus more filings. To illustrate, suppose that when indirect purchasers are able to recover damages there are two filings per defendant—one by the indirect and the other by the direct purchaser—while when only direct purchasers are able to recover there is a single filing. Then the initial effect of *Illinois Brick* in a district that had previously permitted indirect purchaser suits would be to reduce the number of filings by 50

---

[20] See note 14 *supra*.

[21] Our sources are the district court opinion in *Illinois Brick*, 67 F.R.D. at 464 n.1, and the Senate report on last year's bill to overrule *Illinois Brick*, S. 1874, at pp. 10–11. The sources are not totally consistent, and we have had to exercise judgment in classifying states in terms of their pre-*Illinois Brick* position on indirect-purchaser suits.

percent, say from 100 to 50. If *Illinois Brick* increases, as we predict it would, the incentives of direct purchasers to sue, we might observe 75 filings after *Illinois Brick*—the additional 25 reflecting the added incentive given to the direct purchaser. There would be a clear increase in deterrence yet an examination of filings in this district would show a drop of 25 cases, leading to the erroneous conclusion that *Illinois Brick* had reduced the level of enforcement against antitrust violations.

(b) The published data on private antitrust cases refer to all types of cases. Many involve no charges of price fixing and no direct and indirect purchasers, for example, suits by competitors and franchises. Hence data on total private cases may be a poor approximation to the number of suits brought by direct and indirect purchasers for an illegal overcharge. For example, yearly variations in the number of antitrust suits brought by competitors would generate variations in cases commenced in a district that are unrelated to the direct-indirect purchaser issue.

(c) Number of case filings is in any event a poor proxy for the effectiveness of antitrust enforcement, just as number of nuclear wars is a poor proxy for the effectiveness of the nuclear deterrent. If the rule of *Illinois Brick* is more effective than a rule under which indirect purchasers are permitted to sue in deterring antitrust violations, then one might observe a drop in the number of cases filed, yet this would be completely consistent with the fact that *Illinois Brick* has increased the effectiveness of private antitrust enforcement.

Subject to these qualifications, we have attempted to determine the effect of *Hanover Shoe* and of *Illinois Brick* on the number of private antitrust cases filed. Table 1 shows that private antitrust case filings in the district courts have risen dramatically since 1960 both absolutely [column 1] and relative to all private civil cases [column 2]. For example, private antitrust cases grew by about 500 percent,[22] and their share of all private civil cases grew by nearly 250 percent in the 1960–61 to 1977–78 period. Moreover, column three indicates that private antitrust cases increased at a much more rapid rate than Government civil antitrust cases.

---

[22] As noted earlier, we do not know the breakdown between direct and indirect purchaser suits. But since direct purchaser suits constitute the vast majority of private suits in the three districts that have been studied [*see* note 14 *supra*], it is likely that most of the growth in private antitrust suits is due to direct purchaser suits.

Table 1

Private Antitrust Cases Commenced
in U.S. District Courts, 1960 - 1978

Year	Priv. Antitrust Cases[1] (1)	Ratio of Priv. Antitrust to Private Civil Cases[2] (2)	Ratio of Gov't Antitrust to Private Antitrust Cases[3] (3)
1960	228	.0061	.2632
1961	378	.0101	.1111
1962	2005	.0500	.0204
1963	380	.0096	.1368
1964	363	.0090	.1652
1965	472	.0116	.0805
1966	722	.0174	.0499
1967	543	.0131	.0718
1968	659	.0152	.0728
1969	740	.0162	.0581
1970	877	.0174	.0593
1971	1445	.0257	.0415
1972	1299	.0227	.0616
1973	1152	.0197	.0469
1974	1230	.0197	.0325
1975	1375	.0193	.0407
1976	1504	.0199	.0339
1977	1611	.0213	.0292
1978	1435	.0191	.0293
1960-1968	5750	.0159	.0722
1969-1978	12668	.0202	.0414

1. Includes electrical industry cases (37 in 1961, 1739 in 1962, 97 in 1963, 46 in 1964, 29 in 1965, 278 in 1966, and 7 in 1967).

2. Private civil cases exclude prisoner petitions.

3. Government antitrust cases are civil only and include 9 electrical machinery cases in 1961, 2 in 1962 and 3 in 1963.

The difficult and central question is how one determines the relative importance of factors that may have contributed to the growth in private antitrust cases. Ideally, one would like to separate out the effects due to *Hanover Shoe* and *Illinois Brick* from other factors affecting the growth of private antitrust cases. Although we have not examined systematically all relevatnt factors, columns two and three enable us to standardize in a rough way for some of them. Part of the growth in private antitrust cases is due, no doubt, to a general growth over time in litigation which may be due in turn to increases in the number of lawyers, in the number of transactions—because of increases in national income—and to what has been commonly referred to as the growing litigiousness of our society. Column 2, in effect, allows us to standardize for some of these forces because there we examine the growth of private antitrust cases relative to all private civil cases in the federal courts. Other possible factors in the growth of private antitrust cases, besides the general factors that we attempt to control for in column two, are an increasing incidence of antitrust violations and changes in the number of Government antitrust suits—since private plaintiffs can often take a "free ride" on the Government's case. Column three attempts to correct for these factors by relating the number of private cases to the number of Government cases filed.

After all of these corrections are made it is still evident that the number of private antitrust suits has been increasing rapidly. It is at least possible that the strengthening of the direct purchaser's incentives to sue brought about by the *Hanover* decision in 1968 is a factor in the growth of the private antitrust suit. For we observe from table 1 that the ratio of private antitrust suits to all private civil cases averaged .0159 in the 1960 to 1968 period but rose to .0202 in the 1969 to 1978 period. Thus, the share of private antitrust suits increased by about 27 percent in post-*Hanover* period.[23] Similarly, the ratio of government civil to private antrust cases fell from an average of .7022 to .0414 in the pre- to post-*Hanover* periods.[24]

The foregoing analysis provides some—though very limited—support for our theoretical analysis, which predicted that *Hanover Shoe* would strengthen antitrust enforcement by increasing the direct purchaser's incentive to sue, the direct purchaser being in our analysis the more efficient antitrust enforcer than the indirect purchaser. However, when we ask what has been the effect on antitrust enforcement of *Illinois Brick,* the data are ambiguous and difficult to interpret. A principal problem is that post-*Illinois Brick* data are available for only 1 year [fiscal 1978], and a single year's experience is too limited to enable confident inferences regarding the effect of *Illinois Brick* to be drawn. This important caveat should be borne in mind in interpreting the empirical analysis that follows.

From table 1 we see that private antitrust cases fell by 10.9 percent [column one] between fiscal 1977 and fiscal 1978—10.3 percent relative to all private civil cases [column two]. Before drawing any firm conclusion regarding the impact of *Illinois Brick,* one should note that these reductions are no greater than some reductions in earlier years. For example, private antitrust cases dropped by 10.3 percent from 1971 to 1972 and 11.3 percent from 1972 to 1973. There are similar declines of 11.7 and 12.3 percent in these two years for the ratio of private antitrust cases to all private civil cases [column two].

Table 2 divides the district courts into three clases: direct-purchaser districts [column one]; indirect-purchaser districts [column two]; and uncertain districts [column three]. The first class barred indirect-purchaser suits prior to the Supreme Court's decision in *Illinois Brick;* the second permitted them; and in the third class the permissibility of indirect-purchaser suits was unsettled. Inevitably some subjective judgment entered into this classification of districts.[25]

Table 2 indicates that the decline in the number of private antitrust cases filed in 1978 compared to the number filed the year before was concentrated in districts where indirect-purchaser suits had been allowed prior to *Illinois Brick.* Although this result may seem at first glance to contradict our theoretical argument that

---

[23] If we exclude the electrical machine cases the difference between the pre and pose-*Hanover* period is even more marked—a more than 100 percent increase from .0097 to .0202

[24] One factor militates against attributing all of the difference between the pre and post-*Hanover* period to the impact of that decision—namely, the more or less continious growth in private antitrust cases dating back to 1960. If *Hanover* were the sole factor [after adjusting for the overall growth in litigation—one might have expected that the ratios in column two would have remained relatively flat prior to 1968, would have increased sharply between 1968 and 1969, and would have been relatively flat thereafter. Instead we observe a gradual increase—except for 1962—beginning in 1960 and peaking in 1971. A possible reason for this increase is that the number of lower courts that had anticipated *Hanover* were gradually increasing from 1960 to 1968 and that after *Hanover* was decided there was a lag in the response of plaintiffs to the new rule in districts in which *Hanover* had not been the rule. The net effect would then be the continuous growth from 1960 to 1971 observed in column two.

[25] See note 21 *supra.*

Illinois Brick strengthened antitrust enforcement—as well as our earlier empirical findings concerning the impact of Hanover Shoe on the number of case filings—a closer analysis suggests that the statistics provide no probative evidence that *Illinois Brick* has reduced the amount of private activity.

The further breakdown in table 2 in the indirect-purchaser districts shows that four districts [columns four-seven] account for virtually all of the drop in private antitrust cases even thought the four account for only 36 percent of the private antitrust cases filed in the indirect purchaser districts. An analysis of the annual variations in the four districts suggests that the sharp drop from 1977 to 1978 was probably unrelated to *Illinois Brick.*

Table 2

Private Antitrust Cases
in District Courts 1968 - 1978
Classified by Direct and Indirect
Purchaser Rule

	Direct Purchaser Only (1)	Indirect Purchaser Permitted to Sue (2)	Unclear (3)	Indirect			
				Arizona (4)	California North (5)	California Cent. (6)	Ill. North (7)
1969	241	360	139	14	100	48	88
1970	317	417	143	20	90	48	81
1971	628	624	193	15	184	104	86
1972	389	655	255	11	150	98	101
1973	355	544	253	14	81	82	95
1974	316	615	299	22	76	78	65
1975	399	643	333	20	94	78	78
1976	429	756	319	19	164	88	96
1977	419	850	342	42	110	89	137
1978	404	691	340	22	71	69	87

Source: Note 21 and the Administrative Office of the U.S. Courts.

1. District of Arizona. Although the number of cases dropped by 20 from 1977 to 1978, this decline may have been due not to *Illinois Brick* but to the fact that the number of cases filed in 1977 was far greater than in any previous year. The 42 cases filed in 1977 is an outlying observation relative to the norm of the prior three years—19 to 22 cases—and thus the drop from 42 to 22 after *Illinois Brick* appears to be simply a return to the normal trend. Put differently, if one wanted to attribute the 1977 to 1978 change to *Illinois Brick* one would have first to explain the dramatic increase from 1976 to 1977 and show that it was not a transitory increase but somehow represented a permanent shift to a higher level of enforcement in Arizona.

2. Northern District of California. Here we observe a reduction in 39 cases between 1977 and 1978, but, inexplicably, we also observe an even larger reduction of 54 cases between 1976 and 1977. Moreover, there was a still larger drop of 69 cases between 1972 and 1973. It is misleading to attribute the decline in 1977 to 1978 to *Illinois Brick* when even larger declines were observed in two of five years prior to *Illinois Brick.*

3. Central District of California. The decline of 20 cases between 1977 and 1978 may be the result of *Illinois Brick*—but, again, there was a drop of similar magnitude between 1972 and 1973.

4. Northern District of Illinois. The 70 case reduction between 1977 and 1978 may be the result simply of the abnormally sharp increase in cases in 1977, and possibly 1976. Again, unless there is some reason to believe that the 1977 figure represented a permanent increase in the level of antitrust enforcement, it would be incorrect to attribute the subsequent decline to *Illinois Brick.*

The empirical analysis is thus inconclusive. The increase in case filings following *Hanover Shoe* provides some limited support for our theoretical argument that direct-purchaser suits are a more efficient method of private antitrust enforcement than indirect-purchaser suits. The decline in private antitrust filings following the decision of *Illinois Brick* in 1977 certainly does not support our theoretical argument; but a close look at the trends in the handful of districts in which that decline is concentrated rebuts any effort to attribute the decline to *Illinois Brick*. A further problem which has bedeviled our empirical analysis is that the administrative office of the the U.S. courts, from which our data come, classifies every separate plaintiff filing as a separate case; since there are typically more indirect purchasers than direct purchasers, this means that a substitution of the latter for the former would be reflected in a decline in the number of case filings that would convey a totally misleading impression of the effect of the substitution on the effectiveness of antitrust enforcement.

CONCLUSION

Our theoretical analysis has shown that the rule of *Illinois Brick*, which bars indirect purchasers from bringing private antitrust damage actions, is probably the soundest rule from the standpoint of maximizing the effectiveness of antitrust enforcement. Such empirical analysis as we were able to bring to bear on the question was inconclusive, but we are left with the conviction that S. 300 would be an unwise law.

We will close this statement by referring briefly to two rather emotive issues that have been injected into the debate over S. 300. The first, for which Mr. Bosworth is responsible, is the question of the possible impact of S. 300 on inflation. Economists differ over the question whether antitrust enforcement is likely to have any effect on the inflation rate—we ourselves are inclined to be skeptical—but whatever the answer to this question is, it would not, in our view, provide support for S. 300. If our analysis of the bill is correct, its result will be to reduce the effectiveness of antitrust enforcement and thus to drive up prices in the industries subject to antitrust laws. This result will not help to reduce the rate of inflation.

The other issue, which arose when one of us testified last year on the predecessor bill to S. 300,[26] is whether it is inconsistent with the character of a private antitrust action for a first purchaser to pocket the entire antitrust damage judgment, when he may have passed on most of the overcharge on which the judgment is based to suppliers or customers. In these circumstances, the judgment is indeed mostly windfall. But anyone who worries about the windfall element in such a judgment should reexamine the entire structure of private antitrust enforcement. Two-thirds of every private antitrust damage judgment—the punitive component of the judgment—is a windfall to the purchaser. In a class action, most of the judgment may end up in the pockets of lawyers and state treasuries—and this will also be true of *parens patriae* suits—rather than in the pockets of the people who were actually harmed by the antitrust violation. The windfall element cannot be purged from the private antitrust suit without a complete restructuring of antitrust enforcement. Until that is done, society can afford to allow some direct purchasers to enjoy a little more windfall if, as our statement has argued, the direct-purchaser suit is on balance a more effective instrument of antitrust enforcement than the indirect-purchaser suit.

Mr. POSNER [continuing]. We start by asking what are the objectives of the antitrust laws and how will this bill to overrule *Illinois Brick* contribute to those objectives. Certainly the major objective of the antiturst laws, including the private enforcement sections of those laws, is to deter antitrust violations. The most important thing is to control the antitrust problem, reduce the incidence of violations; that will automatically take care of most of the problem of compensating victims of antitrust violations because the number of victims will be few.

However, even from the limited standpoint of compensation, we think there are serious problems with overruling *Illinois Brick*. The basic problem is that when a price increase becomes passed on

---

[26] See Hearings, *supra* note 14, at 50–51.

down the chain of distribution or incorporated into new products, the amount of damage to the individual indirect purchaser tends to be so small that there is no practical method of compensating him. Ordinarily, very little of any damage award actually trickles down to the indirect purchaser. The lawyers in class actions or the State attorneys general in *parens patriae* actions get on the lion's share of any recovery. Therefore, we don't think this bill can be defended on compensatory principles.

With regard to the deterrent objective of the antitrust laws, we think there are several reasons why it is more efficient to concentrate the right of action in the first purchaser than to allow indirect purchasers to sue. One consideration is that the first purchaser knows more about the conduct, motives, and circumstances of the person who sold him the product. If the price of that product is unexpectedly high, the first purchaser is in the best position to know whether there may have been a price fixing conspiracy.

Apart from the knowledge that the first purchaser has of his supplier, indirect purchasers would have to undergo a complicated search procedure in order to discover whether some price hike that they have to pay reflects a price-fixing conspiracy somewhere in the chain of production or distribution. If you observe that the price of some product you buy is higher than it was last week, in order to find out whether there is any antitrust culpability for that price you must find out where your suppliers purchase their inputs, how those inputs are priced, and whether there may be some violation somewhere in the chain of distribution.

These considerations that show that the first purchaser is a more efficient enforcer of the antitrust laws than indirect purchasers might not be decisive if you could somehow get all the possibly affected purchasers in there as plaintiffs. However, as S. 300 and its predecessor bills recognize, if indirect purchasers are to be allowed to sue, then defendants must be allowed some sort of set-off—that is to say, they must be allowed to show that a first purchaser passed on a portion of the overcharge to the indirect purchasers. Once the pass-on defense is injected into the antitrust suit, the incentive of direct purchasers to sue is reduced because they know that they face a pass-on defense which may deprive them of any benefits of the lawsuit.

So once a judgment is made, as we think it can be made, that the direct purchaser is the more efficient enforcer, we think it is important to make him the only enforcer so that he does not face the pass-on defense and has maximum incentive to enforce the antitrust laws.

Sometimes it is argued that direct purchasers are reluctant to bring antitrust suits against their suppliers because that might disrupt cosy relationships. But the experience, at least in recent years, has been that firms of all sizes bring antitrust suits at the drop of a hat; that they are not inhibited by historic supplier-purchaser relationships against bringing lawsuits when they have a valid cause of action. Indeed, firms are subject to criticism and to potential stockholder derivative actions if they fail to prosecute their claims. In short, we think the alleged reluctance of the direct purchaser to sue has become a myth.

Last year when I testified on the predecessor to S. 300, the question arose whether it wasn't windfall for a direct purchaser to be allowed to bring a suit even though he might have passed on some portion of the overcharge to his customers. And I noted at that time that the windfall issue is a false issue, because it is of the essence of private antitrust enforcement, where damages are automatically trebled, that two-thirds of all damage recoveries are a windfall component. Furthermore, I note that before the *Illinois Brick* decision was rendered, nobody used to complain about the windfall element involved in direct-purchaser suits.

The fact of the matter is, and Dr. Landes will elaborate on this point, that tracing the incidence of a price increase throughout the entire chain of production and distribution is so complicated that it will never be possible in fact to match up a damage award with actual injury to particular plaintiffs and, therefore, the windfall element, or the occasional mismatch of actual harm and damages recovered, is a permanent feature of private antitrust enforcement. Unless private antitrust enforcement is rethought from the ground up and profoundly altered, the windfall element is something we must accept.

I will turn over the microphone to Dr. Landes, who will discuss, among other things, the practical problems in apportioning damages among the plaintiffs where indirect as well as direct purchasers are allowed to sue.

Senator COCHRAN. Thank you.

Mr. LANDES. This is an unusual division of labor for the economist to talk about practical problems. [Laughter.]

My name is William Landes. I am professor of economics at the University of Chicago.

Professor Posner addressed the question of why the costs of enforcement are likely to be lower when the direct purchaser is given the exclusive rights to sue rather than when both the direct and indirect purchasers are permitted to bring suit. I would like to discuss an issue that also bears on the cost of enforcement and which also favors a direct purchaser rule; that is the question of how one apportions damages among various direct and indirect purchasers.

This is a critical issue. The efforts to apportion damages will make antitrust litigation more costly and to the extent it is more costly, this will generate less enforcement.

Apportionment, in principle, can be solved theoretically. In our paper we discuss this and present a number of equations to show how one can apportion damages between direct and indirect purchasers. To implement the theory, however, involves very difficult statistical problems. To put it bluntly, it is really beyond the capability of the most sophisticated econometric methods to estimate with precision the parameters necessary to apportion damages. Let me elaborate on this point because it has been asserted to the contrary by Mr. Bosworth that it is a simple task to apportion damages using available statistical techniques.

When we take the simplest example, that of a single direct purchase and a single indirect purchaser, we show in our paper that to apportion damages one would have to be able to estimate two elasticities: The elasticity of demand of the indirect purchaser

for the product, say product *X*, and the supply elasticity of the direct purchaser who produces *X*. That is, suppose the direct purchaser is purchasing product A, which is subject to price fixing, and A is incorporated into the production of *X*. To apportion damages we would have to estimate both the supply and demand elasticities of product *X*.

There are various problems involved in this type of estimation.

First, the data requirements are substantial. One requires price and quantity data as well as data on other variables across different geographic areas at a moment in time or over a specified time period. Preferably, one would like both time series and cross-section data. Although it sounds simple to obtain price and quantity data, it is often enormously difficult in practice to figure out, for example, what precisely is the price of a product. But even putting to one side data problems, there are still a number of other difficulties in estimating the demand and supply elasticities.

Second, it is sometimes possible to estimate either a demand or supply elasticity with a very high degree of precision. On the other hand, it is almost impossible to estimate both with precision. This problem was pointed out in a classic article by working more than 50 years ago. Although there have been advances in econometric techniques during this period, such as the development of simultaneous equations methods, it still is extraordinarily difficult to identify both a demand and supply curve form data. The reason is that if the data make it fairly easy to estimate a demand curve, it is then difficult to estimate a supply curve. Alternatively, if the data favor supply estimation, it becomes difficult to estimate a demand curve.

Third, the elasticity formulas used in the text to apportion damages are valid only for small changes in price. For a large price change you will have different elasticities at different points along the curve. In most estimations of demand and supply curves, the most convenient functional form is a constant elasticity curve. Since this approximation may yield inaccurate estimates for large price changes, alternative functional forms will be required to estimate elasticities at different points. This adds an extra degree of complication to the empirical analysis.

Fourth, elasticity estimates are typically sensitive to the other variables included in the analysis. One can envision arguments over what variables other than price and quantity should be included, because if you leave one out or insert another, that is likely to have an impact on the elasticity estimates.

Fifth, the example we gave in our paper required only two elasticity estimates, because there was only a single indirect and direct purchaser. If you have more than one indirect purchaser, for example, two, then you would need four elasticity estimates. If you had three indirect purchasers, you would need six elasticity estimates. Although it may be possible to estimate two elasticities with precision, once you go beyond two it boggles the mind to think about how one would actually go about estimating all these demand and supply elasticities. I don't think this problem has ever been thought through.

Sixth, is the problem that elasticity estimates depend on the period of time. The longer the period of time that buyers and

sellers have to adjust to changes in prices, the greater will be the elasticities. If you want to apportion damages correctly over a period of time, one would have to make different elasticity estimates for different periods of time; for example, elasticity of demand estimates for a 2 month period, 4 month period, 6 month period, and so forth following the antitrust violation.

A final point is that if you really were confident that you could estimate elasticities of demand and supply, this would have far-reaching implications on how one approaches antitrust law in general. For example, in a section 7 merger case, there would be no reason to focus on market shares if you could estimate the elasticity of demand faced by the two firms that were proposing to merge. If so, you could determine to what extent the two firms together would be able to raise price above the competitive price. It would be foolish to worry about market shares since they are at best a crude and imperfect proxy for judging the likely impact of the merger.

To summarize, our objection to apportioning damages is not based on any distaste for introducing economics or statistics into antitrust law. It is that to construct the empirical counterparts to the curve or equations in our paper is an extraordinarily difficult problem. When you add these costs to the implication of the theoretical analysis that suggests there will be no gain in enforcement, actually a weakening, from allowing the indirect purchaser to bring suit, there doesn't seem to be any purpose in permitting indirect purchasers to recover. If your objective is to increase private enforcement of the antitrust laws, the best way to weaken it is to overrrule Illinois Brick.

I might add one more thing. We also attempted in our paper, to do some empirical analysis of the impact on enforcement of strengthening the incentives of the direct purchaser. If there are any questions on that, I would be happy to respond to them, but I think it would take too long to summarize the results.

Senator COCHRAN. Thank you very much.

One question that I would like to ask is what is your impression about the impact of this legislation on inflation?

The reason I ask is we had some earlier testimony before the committee from Barry Bosworth indicating that the legislation would actually have a good result in terms of keeping down increased costs of goods to consumers.

Mr. LANDES. I think there are two responses. One is that permitting only direct purchasers to sue would actually increase the level of enforcement of the antitrust laws. To the extent that you believe antitrust enforcement is related to inflation, then you would have to come out in favor of Illinois-Brick.

There is another and more subtle point, which is that there is very little relationship between antitrust enforcement and inflation. Let me try to explain. Monopoly or collusion generates high prices, whereas inflation is concerned with the rate of change of prices. If you have monopoly in one sector, prices are high there. This will release some resources from that sector, tending to lower prices in the other nonmonopolized sector. There is no reason why the price level would vary with the degree of monopoly. Inflation is

a monetary phenomenon that has to do with the rate of change of prices and has absolutely nothing to do with the antitrust laws.

Therefore, there are two responses to your question. The first is that since antitrust laws have some bearing on inflation, you want more effective enforcement. And we believe Illinois-Brick would be more effective enforcement. The second is that antitrust laws have nothing to do with inflation.

Senator COCHRAN. In the statement that was submitted there is an indication that you feel that permitting indirect purchasers to sue would reduce the incentive for direct purchasers to bring an action.

This may be an understatement in fact. I ask you to commment about it. Is the threat of a pass-on argument being raised by indirect purchasers so overwhelming regardless of the merits of the action that direct purchasers might be very reluctant to commence litigation?

Mr. POSNER. Senate bill 300 has fogged the issue to some extent by leaving to the discretion of the judge whether to allow a pass-on defense. This is an extraordinary grant off judicial discretion and its precise effect on the incentives of purchasers to sue is unclear. But in general, if I were a defendant's lawyer, I would like to use the pass-on defense in order to defeat the direct purchaser's action and then use concepts of unmanageability to deal with the indirect purchaser. So I do think that the bill gives the defendant a potential weapon which would reduce the effectiveness of private antitrust enforcement.

Senator COCHRAN. On page 12 of your prepared statement, you indicate the possibility that class action attorneys might settle cases and take a large part of the award.

Is this a typical situation now in other types of class action cases? Could you comment?

Mr. POSNER. I don't know that an actual effort to measure the size of this problem has been made. We do cite in our statement one study, however, which suggests that class-action plaintiffs' lawyers' fees tended to be higher when the case was settled than when it was litigated. That suggested to us the possibility that there may sometimes be a cosy "deal" between defendants' and class-action plaintiffs' lawyers in which the class-action plaintiffs' lawyers are compensated for not pressing for maximum damages. I can't say that proposition has been proved, but it is a danger and a suspicion and to the extent it is true it makes us very reluctant to rely on the class action as a primary device for enforcing the antitrust laws. Of course, to the extent that you allow a pass-on defense and shift the focus of enforcement from the direct purchaser to the indirect purchasers, there will be greater reliance on the class action as the primary method of private antitrust enforcement in price-fixing cases.

Senator COCHRAN. There is an interesting comment in your testimony on page 21 where you talk about the fact that direct purchasers are not in fact embarrassed or intimidated in being confronted with a situation where they think action against their supplier is indicated.

But even if they don't sue, then there is some kind of accommodation that is possible with the supplier reducing prices or making other concessions to the purchaser so that suit won't be brought.

Doesn't this, though, assume that there is no pass-on pursuing that argument?

Mr. POSNER. Yes. It assumes it in the sense that if there is a pass-on defense to the extent it is effective a direct purchaser really has no leverage with his supplier. He can't threaten to bring a serious lawsuit since the supplier will have a pass-on defense. So what we refer to as a kind of informal enforcement method where by a supplier will grant concessions to direct purchasers who have credible antitrust causes of action, would be weakened by legislation of this sort.

Senator COCHRAN. I think your testimony and the statement that you have submitted is very helpful to the committee. In behalf of the committee I want to thank you for being here and helping us in theis way.

Thank you very much.

Our next witness that we have scheduled to testify before the committee this moring is Francis Kirkham, an attorney from San Francisco. Mr. Kirkham, welcome to the committee. You have a prepared statement. Thank you very much. We will incorporate that in the record at the end of your oral testimony and you may proceed as you wish.

STATEMENT OF FRANCIS R. KIRKHAM, ATTORNEY, SAN FRANCISCO, CALIF.

Mr. KIRKHAM. Being a lawyer and concerned with the record, I haven't heard the statement that Professor Landes' statement will be incorporated in the record, but I assume that that is taken care of.

Senator COCHRAN. Yes, sir. We did that. Thank you.

[The prepared statement of Mr. Kirkham follows:]

PREPARED STATEMENT OF FRANCIS R. KIRKHAM

On April 24, almost a year ago, I testified before this committee in opposition to the enactment of S. 1874, last year's counterpart to S. 300. On that occasion I mentioned my many years of experience in the antitrust field, all of which convinced me that S. 1847 should not be characterized as a bill "to restore fair and effective enforcement of the antitrust laws," but, rather, as a measure which would grievously impair, if not preclude, the fair and effective enforcement of those laws. I respectfully request that the committee give renewed consideration to the points I made. Every objection I stated at that time applies to the present bill; not a single objection has been answered in testimony before this committee or otherwise.

I shall not repeat my earlier testimony but do wish to recall these highlights.

Much was made in those hearings—and has been repeated here—of a belief that in order to provide effective enforcement of the antitrust laws, the decision of the Supreme Court holding that indirect purchasers do not have claims must be reversed because direct purchasers will not sue their suppliers. In response to that suggestion, Professor Handler, before his testimony last April, reviewed all available complaints in nongovernmental antitrust actions pending in the southern district for New York and found that of 69 pending cases brought by purchasers or sellers of goods and services only three had been brought by indirect purchasers; 66 had been brought by direct purchasers.

Professor Handler's study was criticized by the attorney general of Arizona as being nontypical because, he said, New York had been notoriously hostile to suits by indirect purchasers. Partially in response to this, and partially as an independent project, I had an examination made of all pending nongovernmental antitrust suits

in the northern district of California, a district, incidentally, which has one of the largest concentration of antitrust suits in the country. In view of the statement of the attorney general of Arizona, I also had a review made of cases pending in the district court for the district of Arizona. Results of my surveys were submitted to the committee. These surveys could hardly be criticized as taken in an area where the courts were hostile to suits by indirect purchasers. The ninth circuit, which includes both Arizona and California, was the only circuit which had held categorically, before *Illinois Brick,* that indirect purchasers had standing to sue. Nevertheless, our surveys corroborated in every way the survey of Professor Handler. In the northern district of California, except for the sugar cases, which had been consolidated there from all over the country, not a single suit by an indirect purchaser or seller was on file. If the Sugar cases are included, 37 cases, or 23 percent, were brought by indirect purchasers, 16 cases, or 10 percent, were brought by both direct and indirect purchasers, and 110 cases, or 67 percent, were brought by direct purchasers.

In Arizona the results were similar. Of the 32 pending cases which involved purchase or sale of a product or service, 26 had been brought by direct purchasers, 5 by both direct and indirect purchasers, and only one by indirect purchasers.

These figures establish that the backbone of antitrust enforcement before *Illinois Brick* was the suit by the direct purchaser. It simply is not true that the first purchaser has no incentive to sue, will not sue, and is not the most logical and effective enforcer in the private sector of the antitrust laws.

These studies, however, brought out other highly significant facts. We learned that in northern California, of the 110 cases brought by direct purchasers, 106, or 96 percent, involved plaintiffs who later resold the item. Thirty-eight of the cases [36 percent] involved sales of the product in the form in which it was originally purchased; 68 cases [or 64 percent] involved sales in an altered form. In Arizona, of the 26 cases involving direct purchasers, 21 involved plaintiffs who later resold the product. In four cases some plaintiffs had, and some had not, resold the product. Only one case was pending which had been brought by the ultimate consumers. Of the 25 resale cases, 11 involved resale in the same form, 9 involved resale in a different form, and 5 involved situations where some plaintiffs resold the item in the same form and some resold it in a different form.

If we turn to the relatively few suits brought by indirect purchasers, the facts are equally significant. Professor Handler learned that the 3 indirect purchaser suits in the southern district of New York were brought by purchasers who had later resold the product in suit or used it to make something else which the purchaser had sold. In the northern district of California, we learned that of the 37 cases where indirect sales were involved, 29 of the plaintiffs [68 percent] had resold the product to another person. Of these 25 resales, only 7 [28 percent] involved a sale in the same form, while the remaining 18 [72 percent] involved sales in a different form. In Arizona, the one case brought by indirect purchasers did not involve resales, but the 4 cases involving both direct and indirect purchasers involved resales, but the 4 cases involving both direct and indirect purchasers involved resales, 2 of the product in the same form, and 2 after some modification of the item.

Mr. Shenefield, under questioning by Senator Thurmond in the February hearings, stated that the Department of Justice had made no effort to determine the ratio of cases filed by direct purchasers versus indirect purchasers. However, with no foundation whatsoever, he then went on to suggest that the statistics submitted by Professor Handler and me "may well be highly selective;" that the southern district of New York's rules on standing may have "affected the outcome"; that nationwide statistics might be different from those in Tucson and Phoenix. I know of no rule in New York that made that forum hostile to suits by indirect purchasers, and certainly the ninth circuit was the most hospitable of all to such suits. If nationwide statistics are any different Mr. Shenefield should come forward with them. I don't recall off-hand any single piece of legislation proposed in my lifetime more seriously threatening the effective enforcement of the antitrust laws then the bill now under consideration. Surely, such legislation deserves careful consideration by the Department of Justice. Mr. Shenefield passed the matter off by saying that it didn't seem to him "likely" that permitting a pass-on defense to direct purchaser suits would adversely affect antitrust enforcement, because, said he, "People will sue if they have a chance to recover, and the question is the distribution of damages, rather than the amount of damages" [transcript of hearings, February 1, 1979, p. 26]

But that is just the point. People will not sue if they do not feel they have a chance for a meaningful recovery. Under the present law the direct purchaser feels that he has this chance. If, however, he must face a pass-on defense and find the

damages he hoped to recover passed-on—or, to use Mr. Shenefield's term, "distributed"—to subpurchasers and sub-subpurchasers down the line, his chance to recover will simply turn into a chance to embroil himself in a lawsuit so complex as to have no ending, with no reasonable prospect of meaningful recovery. Mr. Shenefield is right when he says it is a question of distribution of damages. But when damages are fragmented among hundreds, thousands, and even millions of people, the chances of meaningful recovery by anyone but the lawyer becomes remote, and the burden upon the courts and the community intolerable.

The testimony of Governor Babbitt of Arizona before this committee on February 1 helps to demonstrate what I have in mind. He speaks of a recovery on behalf of the citizens of Arizona of $2.1 million in the asphalt cases; $2.5 million in the bread cases; about $4 million in the milk cases.

I have two comments on these cases and similar cases.

In the first place, although Governor Babbitt speaks of the Asphalt cases going "to judgement" and of the State "winning" the case, the recoveries in each of these three cases were the results of settlements. The same is true, of course, of the nationwide drug cases and of the California potato chip cases, both of which groups of cases Senator Kennedy, in his opening remarks on February 1, referred to erroneously as having been "won" by the plaintiffs. Indeed, the only two drug cases that were tried were won by the defendants. There is no way a consumer class action of the type of these cases can be tried in accordance with accepted standards of justice. I know of not one single large consumer class action that has been tried to final judgment. Because of the enormous exposures of these aggregated claims, defendants, as a practical matter, are denied their day in court and are driven to settlements.

My second comment is that the ultimate irony in this whole system is that these settlements, large as they are, rarely, if ever, involve meaningful compensation to consumers, although they do involve most meaningful compensation to lawyers, and this includes payments to lawyers for the defense as well as for the plaintiffs. In my testimony last year, I referred to a check for $1.78 I received—out of the blue—which turned out to be my share, as a member of a class on whose behalf a settlement had been made, of alleged overcharges on telephone calls made in hotels in New York City. I did not know at the time, and I still do not know, the name of my attorney whose diligence discovered this grievous wrong done to me and who brought the suit on my behalf. But I do know that he received a fee several hundred thousand times the amount of my recovery. No court ever determined that I had in fact been a victim of a violation of the antitrust laws. And, if I had been, I still was not entitled to any damages, because I had passed on any overcharges to my client when I sent him the bill for my hotel accommodations.

As our civilization becomes more complex, as our population increases, inevitably more and more elbows are going to be bumped; more inconveniences suffered. If for each and every toe stepped on, however lightly, our law is going to furnish a civil remedy to provide compensation of a dollar or $2, $3 or $10, our system of jurisprudence will simply collapse under its own weight.

Consider this example one suggested to me by my old friend Judge Rifkind: A negligent driver runs out of gas in the Holland Tunnel, traffic is backed up for blocks if not miles; tempers are frayed, gasoline is wasted; appointments are missed; workers are late, et cetera, et cetera. These inconveniences are real, but to make each the subject of a vast class action against the wrong-doer would fill the courts for a lifetime and result in no meaningful compensation to each of the thousands whose irritation was real but whose damages were remote and *de minimis.* Governor Babbitt's figure of $10 each to a large number of his State's citizens aggregates into a nice round figure for political purposes in the bread cases, but the recovery as compensations to each citizen is a travesty, and particularly when we keep in mind that these amounts are not adjudicated damages but settlements coerced by the nature of the claims and the class actions.

The foregoing emphasizes the magnitude of the blow to antitrust enforcement which passage of the bill before us would bring. The necessary corollary of granting a cause of action to indirect purchasers is affording a pass-on defense to claims of direct purchasers, and to the successively diminishing claims of indirect purchasers down the line. Many, if not most direct purchasers pass-on some or all of their overcharges. Subsequent purchasers in turn pass on the overcharges, in whole or in part, to others in the many levels of distribution and fabrication until ultimately the product, or a product incorporating the product, reaches the ultimate consumer. Thus most causes of action for antitrust enforcement would become so fragmented between direct purchasers, indirect purchasers, subindirect purchasers, manufacturers and sellers of products incorporating the purchased product, that there are few

persons at any level of distribution motivated to bring a treble damage suit, except, of course, the ultimate consumer.

And consider for a moment what this means. Ultimate consumers are numbered in the tens of thousands, hundreds of thousands, or millions. Rarely, if ever, will any of them—except direct purchasers or indirect cost-plus purchasers—be able actually to prove any damage, for example, the purchaser of a home with a price-fixed plumbing fixture which has gone through several levels of distribution. But here is where, if the law permits it, these residues of the fragmented damages, if any, can be brought together by a small sophisticated segment of the bar into consumer class actions which will pyramid miniscule claims into sums so vast as to create a weapon potentially destructive to defendants, particularly when they can be put in the hands of an unskilled jury.

I note that several witnesses before this committee, in the hearings on February 1, including Mr. Shenefield and Governor Babbitt, sought to separate the problems of class action from those of *Illinois-Brick*. In substance, they said, let's deal with *Illinois-Brick* now and we can deal with class actions later. But the two are inseparable. Senate bill 300, or any like bill conferring a cause on action of indirect purchasers, with the necessary corollary of a pass-on defense, would fragment antitrust recoveries among so many people that class actions by consumers can be expected to become the dominant part of the antitrust trebel damage picture.

The class action already is a blot on our judicial processes. Senate bill 300 can only increase this blemish. A study by the American College of Trial Lawyers several years ago disclosed that in just one Federal judicial district in this country, the southern district of New York, class actions were pending involving a total of some 400,000,000 claimants—double the population of the United States! The mere statement of this fact is shocking to reasonable men. No rational system of jurisprudence can tolerate such a situation. Further, it brought a chill to me to read Assistant Attorney General Shenefield's response to Senator Metzenbaum's inquiry as to the amount of the "overcharges" that would go unchallenged if S. 300 were not made retroactive. Mr. Shenefield replied that he felt this amount would be "almost beyond definition it is so large" [hearings of February 1, p. 37]. This is only a tithe of the amounts that would be thrown into consumer class actions by this bill—not to be litigated, but to be disposed of by *in terrorem* settlements without regard to guilt or innocence.

If we are to justify, then, a bill which will fragment antitrust recoveries among thousands, or hundreds of thousands, or millions of people, with all of the attendant problems of proof of pass-on and with the inevitable aggregating of all of these claims into enormous class actions, it must be on the basis of providing a deterrent to antitrust violations rather than of attempting to compensate injured persons. But if a stronger deterrent than now exists is thought necessary it seems to me that it should be plainly exacted as such, rather than attempting to create a civil remedy which produces a morass in the courts and a devastating burden upon the economy. If the present fines and imprisonment are thought insufficient, they can be increased—although in my view I think the greatly increased penalties now provided have yet to be appraised. I think I read some place in the testmony earlier given to this committee that the witness testifying was satisfied that a corporate officer would certainly be willing to go to jail for 30 days in return for several million dollars of overcharges. This witness, I think, overlooks the fact that the person who would go to jail would not receive any of the overcharges. The money would go to the corporation; the officer would go to jail—and thereafter, undoubtedly, be unemployed. In the nearly 50 years of my practice I have yet to find an officer of a corporation who would be willing to go to jail in order to get a few more million dollars for the corporation.

What I have said touches what seems to me to be the most serious of the proposed bill's defects. However, let me add just one or two comments on points which I know others will discuss in more detail. The provisions of section 4I.(b) and (c)(1) and (2) present serious constitutional as well as policy problems.

Section 4I.(b) provides that, in order to avoid duplicative liability, a defendant may prove a pass-on by the plaintiff. But whether or not such proof can be made is placed in the unrestricted discretion of the court.

To place in the absolute, unguided discretion of the court the power to allow or to deny a defendant the right to prove a pass-on seems not only a piece of unwise and unprecedented legislation, but also, clearly, an unconstitutional delegation of legislative power. It purports to place in the hands of the judge the unfettered right to create a cause of action in a plaintiff for a particular wrong [by denying a pass-on defense] or to take away the cause of action for the same wrong [by permitting proof of pass-on]. A plaintiff either has a cause of action against a defendant or he does

not. Conversely, the defendant is liable to the person having the cause of action, and to no one else. It may be that the cause of action against the defendant may be split up between several purchasers in the line of distribution as this bill attempts to do, no matter how wise or unwise such a provision may be, but under our system of due process the cause of action cannot whimsically be given or taken away from persons in the line of distribution depending solely on the untrammeled discretion of the judge.

Paragraph (c)(1) purports to adopt the fluid recovery which the second circuit in *Eisen* held unconstitutional (*Eisen* v. *Carlisle & Jacuquelin*) (2 Cir. 1973) 479 F.2d 1005, 1018; issue reserved, 417 U.S. 156, 172 n. 10). This provision is not only unconstitutional, it is a total distortion of reality and a vindictive, unwarranted, lethal weapon against business, large and small, innocent and guilty.

I should also say that, for reasons gone into at length in the prior hearings, if a bill of this kind is to be passed it should be made applicable only to price-fixing and only to sales of the product in the same form as it is purchased; there should be no vicarious liability that is, a defendant should be liable only for overcharges on its own sales; and the statute of limitations should be amended to provide such specific period, long or short, as Congress deems appropriate, but at the same time make it clear that the statute is not tolled by "fraudulent concealment." Fraudulent concealment is now routinely pleaded in antitrust suits to expand the scope of such suits over periods going back a quarter of a century or more. This, I believe, is contrary to the intent of Congress when it passed the statute and its correction is imperative if a bill like S. 300 should be passed to expand consumer class actions.

May I close with this thought. The hearings on February 1, and the hearings last year, disclosed what, at least as far as my experience goes, is the most extraordinary line-up in support of a piece of legislation ever seen. The minority report last year, indeed the majority report also disclosed, if nothing else, that serious questions of policy and constitutionality are raised by this bill; that reasonable men and highly responsible organizations consider it unwise and hurtful; that eminent scholars feel it will seriously impair the enforcement of the antitrust laws, which are the foundation of our free enterprise system. Many opinions pro and con were expressed to this committee. Yet every one of the 50 attorneys general of every State in the Union, and every one of the 50 Governors of every State in the Union, without a single exception, and without the slightest pause or qualification, appeared here in person or by proxy to endorse the bill. Not a single one of these 100 political leaders apparently shares the view of many in this body, and of many elsewhere in public and in private life in this country, who feel doubt if not dismay.

The reason, I believe, is obvious and will, I know be kept in mind by the members of this committee, who are, of course, familiar with the political scene. No one of these officials suggested that he was speaking objectively or giving his opinion from the standpoint of the rule of law or the general welfare. Each spoke as an advocate seeking to obtain a bill which would give his office the power to claim vast sums of money, as much, according to some, as a billion dollars or more, for the voters in his State.

I know violations of the antitrust laws exist and should be punished, but if my experience is any guide, the actual amount of damages suffered by the ultimate consumers in these States is a small fraction, indeed, of the amounts mentioned. Moreover, for the reasons I have stated, S. 300 could seriously impair the enforcement of the antitrust laws in those States by depriving most direct purchasers of an effective remedy.

Mr. KIRKHAM. Almost a year ago I testified before this committee in opposition to enactment of S. 1874, the counterpart to S. 300, and I respectfully request that the committee give new consideration to what I said then because everything I said on that occasion applies to this bill. Nothing that I said, as far as I have seen, has been answered by any of the testimony that has been given before this committee.

Much was made in those earlier hearings and again today—in fact, Senator Kennedy emphasized it in his opening statement—of the belief that in order to provide effective enforcement of the antitrust laws, Illinois Brick must be reversed because the direct purchasers will not sue their suppliers.

In response to that suggestion last year, Professor Handler, before his testimony last April, reviewed all available complaints in the southern district of New York in nongovernmental suits and found that of the 69 cases pending, only three had been brought by indirect purchasers.

Professor Handler was rather severely criticized by Mr. Scott of Arizona as having submitted a biased report to this committee because, he said, New York is notoriously hostile to suits by indirect puchasers and, therefore, the sample was an unfair one.

I have known Milton Handler for a long time, and I rather resented that suggestion, and in response to that, and also as an independent study, I had an examination made of all nongovernmental suits pending in the nothern district of California, which has the largest concentration of plaintiffs' suits in any district in the country and also of Mr. Scott's district in Arizona.

These surveys could hardly be criticized as having been made in a hostile atmosphere because the ninth circuit is the only circuit that had categorically held in Western Asphalt that the indirect purchaser did have a cause of action.

Our survey there corroborated 100 percent what Professor Handler found in New York. In the northern district of California, except for the Sugar cases that have ben consolidated there from all over the country, there is not one single suit pending that had been brought by an indirect purchaser.

If the Sugar cases are included, then there were 37 of those numerous cases or 23 percent that have been brought by indirect purchasers, 16 by direct and indirect purchasers, and 110, or nearly 70 percent, that had been brought by direct purchasers.

In Arizona, the results were similar. Of the pending 32 cases there, 26 have been brought by direct purchasers, 5 by direct and indirect and only 1 by an indirect purchaser.

These figures established that the suit by the direct purchaser is the backbone of antitrust enforcement, and I am talking from the stanpoint of the lawyer out in the arena.

We have heard some very impressive technical testimony, but this is what happens. It shows that before Illinois Brick it was the suit by the direct purchaser that was the backbone of antirust enforcement.

It simply is not true that the first purchaser has no incentive to sue, will not sue and is not the most logical and effective enforcer in the private sector.

As I said last year, I hear over and over again, after all that has been said, and Senator Kennedy repeated again this year, that the first purchaser will not sue. It is just like Alice in Wonderland: "What I say three times is true." Well, it just isn't.

Incidentally, I don't know where Senator Kennedy got the statistics—maybe Mr. Boies can tell me—that since 1960, 25 percent of the suits have been brought by indirect purchasers and 66 percent by direct and indirect. I don't know where those figures come from.

But the figures I have given you were not the only relevant figures, and in a way not even the most significant, from the standpoint of what we are considering today.

We also learned that in Northern California, of the 110 cases brought by direct purchasers, 96 percent or 106 of them involved

plaintiffs who later resold the items. The largest percentage of those, 64 percent of them, resold them in a different form.

In Arizona, of the 26 direct purchasers, 21 later resold the product.

If you turn to the relatively few suits brought by indirect purchasers, the three, in New York, each one of those was brought by an indirect purchaser who later resold the product.

So you have your problem of pass-on in those suits as well as in the direct purchaser-cases.

In the Northern district of California, of the 36 cases which were indirect, 29 of those or 68 percent, had been resold by the plaintiff.

So the largest majority of direct and indirect purchasers who sued before Illinois Brick were faced with a pass-on defense.

Mr. Shenefield, under questioning by Senator Thurmond in the February hearing, stated that the Department of Justice had made no effort to determine the ratio of cases filed by direct purchasers and indirect purchasers.

However, with no foundation whatsoever, he suggested that the statistics submitted by Professor Handler and me "might well be highly selective" and that the southern district of New York's rules may have affected the outcome and that nationwide statistics might be different.

I know of no rule in New York that is hostile to indirect suits and certainly the ninth circuit is not—as I have stated.

If there are nationwide statistics that are different, then certainly I think Mr. Shenefield should come forth and give them to this committee.

I know of no single piece of legislation in the nearly 50 years that I have practiced law, most of which has been spent in the antitrust field, that more seriously threatens the effective enforcement of the antitrust laws than does this bill, and surely such legislation deserves the careful research and attention of the Department of Justice.

Mr. Shenefield passed the matter off by saying it didn't seem to him likely that permitting a pass-on defense of the direct purchasers would adversely affect antitrust enforcement because he said, and this is important, he said, "People sue if they have a chance to recover and the question is distribution of damages rather than the amount of damages."

Well, of course he is right. People will not sue if they don't think they have a reasonable chance to recover and they will sue if they think they have a reasonable chance to recover. Of course it is a question of distribution of damages.

Is the man suing going to get it or is he going to find it distributed among a whole group or people down the line after he has gone through the trouble of bringing the lawsuit: distribution to purchasers, subpurchasers, sub-subpurchasers, manufacturers of the product who then incorporate a portion of it into another product, so on down the line.

So Mr. Shenefield is right when he says it is a question of distribution of damages. But when those damages are fragmented among hundreds, thousands, indeed, in many cases, millions, of people, the chances of meaningful recovery by anyone but the

lawyer becomes very, very remote. The burdens upon the courts, and the community, believe me, are intolerable.

The testimony of Governor Babbitt of Arizona was particularly interesting to me on February 1, because he helped demonstrate what I have in mind. He speaks of a recovery on behalf of the citizens of Arizona of $2.1 million in the Asphalt case; of $2.5 million in the Bread cases and about $4 million in the Milk cases.

I have two comments on these cases and similar testimony. In the first place, although Governor Babbitt speaks of the Asphalt cases going to judgment and the State winning the case, the recovery in each of the three cases he referred to were results of settlements.

The same is true of the Drug cases and the Potato Chip cases which Senator Kennedy referred to in his opening statement as having been won by the plaintiffs. Indeed, the only two Drug cases tried were won by the defendants.

There is no way in which a consumer class action of the type of these cases can be tried in courts within accepted principles of justice. I don't know of a single large consumer class action that has been tried to final judgment and certainly I know of no case in which the pass-on defense has been tried. But because of the enormous exposure of these aggregated claims, defendants, as a practical matter, are denied their day in court and are driven to settlements. That is the way these figures cumulate.

My second comment is that the ultimate irony in this whole system is that these settlements, large as they are in the aggregate, are rarely, if ever, meaningful compensation to the consumers. They are certainly meaningful compensation to the lawyers and, believe me, this includes defense as well as plaintiff's counsel, all of which, of course, has to come out of the hides of the consumers. The tooth fairy doesn't bring these enormous sums of money. They come out of the hides of the consumers. It is a cost of production.

My testimony last year referred to a check for $1.78 that I received, right out of the blue, which turned out to be my share as a member of a class action on whose behalf a settlement had been made of alleged overcharges on telephone calls made in New York City. I didn't know at the time, and I still don't know, the name of my attorney whose diligence discovered this grievous wrong that was done to me, and who brought the suit on my behalf.

But I do know that he received a fee of several hundred thousand times the amount of my compensation, and that no court ever determined in fact that I had a cause of action. It was an in terrorem settlement. And if there had been a cause of action, I wouldn't have been entitled to any damages because I had passed them on to my client when I sent him a bill for my expenses.

As our civilization becomes more complex, and as our population increases, inevitably more and more elbows are going to be bumped; more inconveniences suffered. But if for each and every toe that is stepped on, however lightly, our law is going to furnish a civil remedy to provide compensation of a dollar or $2 or $3 or $10, then our system of jurisprudence will simply collapse of its own weight. For a 1,000 years or more there has been a maximum that every first-year law student can quote in Latin, which is the

basis of the most fundamental principle in our law: That the law does not concern itself with trifles.

Consider this example as once suggested to me by Judge Rifkin, my old friend: A negligent driver runs out of gas in the Holland Tunnel. Traffic is backed up for blocks, if not for miles. Tempers are frayed, gasoline is wasted, appointments are missed, laborers get to work late, and so on. These inconveniences are real. They occur because of the nature of our civilization. But to make each of them the subject of a vast class action against the wrongdoer would fill the courts for a lifetime and would not result in any meaningful compensation. The damages are remote and de minimis, and that is what I think of Mr. Babbitt's recovery of $1 or $2 to the citizens of Arizona. But in the aggregate, they make a nice round figure for political purposes, I do admit that. But the recovery for the individual is a travesty; it is a disgrace to our system of jurisprudence.

That really, to my mind, is the heart of the problem. And, of course, I have talked about this many times. After nearly 50 years of practice, and when you begin approaching 75th birthday, you begin to worry more about what is right and wrong instead of what I can win and what I can lose. I am very concerned about the rightness and the wrongness of what is happening here.

Ultimate consumers in these cases, where you fragment the cause of action, are numbered in the tens of thousands, hundreds of thousands, or even millions. Rarely, if ever, will any of them, except only the direct purchaser or the cost-plus purchaser—which is covered by Illinois Brick—rarely will any of them, for reasons so eloquently stated in that opinion, ever be able to prove any damage.

But here is where, if the law permits it and if it is aggravated by S. 300, these residues of fragmented damages can be brought together by a small and sophisticated segment of the bar into consumer class actions which will pyramid minuscule claims into sums so vast as to create a weapon potentially destructive to the defendants, particularly when they know that the claims can be put in the hands of an unskilled jury.

I note that several witnesses before the committee in hearings on February 1, including Mr. Shenefield and Governor Babbitt, sought to separate the problems of class action from those of Illinois Brick. In substance they said let's deal with Illinois Brick now and we can deal with class actions later. But the two are inseparable. S. 300 or any like bill conferring a cause of action on indirect purchasers with the necessary corollary of a pass-on defense, would fragment antitrust recoveries among so many people that class actions by consumers will be the order of the day.

A study by the American College of Trial Lawyers several years ago disclosed that in just one judicial district in this country, the southern district of New York, there were pending class actions involving 400 million people, double the population of the United States. The mere statement of that fact is shocking to reasonable men and no rational system of jurisprudence can tolerate such a situation. It brought a chill to me when I read Mr. Shenefield's response to Senator Metzenbaum's inquiry as to the amount of the overcharges that would go unchallenged if S. 300 were not made

42-005 O - 79 - 14

retroactive—I am only talking about a little period, measured by making the bill retroactive—and note that these are also overcharges that are alleged, not overcharges that in fact occurred. Mr. Shenefield replied that he felt this mount would be "almost beyond definition it is so large." This is only a tithe of the amounts that would be thrown into consumer class actions by this bill, not to be litigated but be disposed of by in terrorem settlements without regard to guilt or innocence.

So if we are going to justify a bill which will so fragment antitrust recoveries, it has to be not on the basis of compensation, but upon the basis of providing a deterrent for antitrust violations, and it does seem to me that if we are going to enact a deterrent, then we should enact a deterrent, as such, rather than attempting to create a civil remedy which produces a morass in the courts and a devastating burden on the economy. If the imprisonment now provided is insufficient, then increase it. Somebody told me, "make it beheading, if that is where one places the antitrust offense as compared to other crimes. But there should be a deterrent that is not a phony civil remedy.

I read someplace the testimony of a witness who said that a corporate officer would certainly be willing to go to jail if he could get several million dollars in overcharges for his corporation. Well, this witness, I think, overlooks the fact that the officer who went to jail would not be getting the money. His corporation would be getting the money. The officer would go to jail and probably be out of a job. But I will say this, that in the nearly 50 years I have practiced law, I have yet to find a corporate officer willing to go to jail in order for his corporation to get a few million dollars, and I don't think there is one.

I have spoken to things that concern me most, the heart of this thing. But let me add just one or two comments—I am sure they will be discussed more by other people—on other aspects of this bill.

Section 4I(b) leaves it in the unrestricted discretion of the judge, whether a defendant may prove a pass-on by the plaintiff. To place in the absolute, unguided discretion of the court the power to allow or deny a defendant the right to prove a pass-on seems not only a piece of completely unprecedented and unwise legislation, but also, to me, an unconstitutional delegation of legislative power. It is up to the Congress to provide what causes of action a citizen shall have and it is up to the courts to enforce them. This provision purports to place in the hands of the judge the unfettered right to create a cause of action in the plaintiff for a particular wrong by denying a pass-on defense, or to take away a cause of action for the same wrong by permitting it. Either the plaintiff has a cause of action against the defendant or he doesn't, and conversely, the defendant is liable to the person having the cause of action and to no one else.

It may be that the cause of action can be split up, wise or unwise as it may be, as this bill would purport to do. But under our system of due process, the cause of action cannot whimsically be given or taken way from persons in the line of distribution depending solely on the untrammeled discretion of the judge.

Paragraph c(I) purports to adopt the fluid recovery which the second circuit in Eisen held unconstitutional. I know this will be commented on. I can only say that such a provision is unconstitutional, is a total distortion of reality, and is a vindictive, unwarranted, and lethal weapon against business, large and small, innocent and guilty.

For the reasons that I stated last year, I also certainly feel strongly that if a bill of this kind is to be passed, it should be made applicable only to price fixing and only to sales of product in the same form as the form in which it is purchased. And if small business is going to be protected against destruction, there should certainly be no vicarious liability; that is, the defendant should be liable only for overcharges on its own sales. That applies to—well, take the sugar cases. The smallest company in the sugar cases under our present law is responsible for the sales made by every other company in the Nation. So that the possible recovery against the smallest company is several hundred times its assets. If we are going to have a statute of this kind, certainly a company should be liable only for its own sales.

And one other important thing that I hope you will give consideration to, is the statute of limitations should be amended to provide some period, make it whatever Congress wishes to be made, but some period that is specific. At the present time, concealment is routinely pleaded in every case. There is as a practical matter, no statute of limitations, except as it is negotiated in or out. Discovery knows no bounds. I believe this was clearly against the intention of the Congress when it passed the statute of limitations and if we are going to expand this class action, then certainly we should do something about confining it to one lifetime instead of ten.

Let me close with this thought, please. I hope you will understand. The hearings on February 1, and the hearings last year disclosed what, at least as far as my experience goes, is the most extraordinary lineup in support of a piece of legislation that I have ever seen. The minority report last year and indeed the majority report, disclosed if nothing else, that serious questions of policy and constitutionality are raised by this bill; that reasonable men and highly responsible organizations consider it unwise and hurtful; that eminent scholars feel it would seriously impair the enforcement of the antitrust laws, which are the foundation of our free enterprise system. Yet every one of the 50 attorneys general of every State in this Nation, and every one of the governors of every State in this Nation, without a single exception and without the slightest pause or qualification, appeared here in person or by proxy to endorse the bill. Not a single one of them, of the 100 political leaders, apparently shares the view of many of this committee, and of many elsewhere in public and private life who feel doubt, if not dismay. The reason I believe is obvious, and I know it will be taken into consideration by the members of this committee who are familiar with the political scene. No one of these gentlemen suggested that he was speaking objectively or giving his opinion from the standpoint of the rule of law or the general welfare. Each spoke as an advocate, seeking to obtain a bill which would give his office the power to claim vast sums of money—as much,

according to some, as a billion dollars or more, for the voters in his State.

I know that violations of the antitrust laws exist and should be punished. But if my experience is any guide, the actual amount of damage suffered by the ultimate consumers in these States is a small fraction, indeed, of the amounts that were mentioned. And I close by reiterating that for the reasons I have stated, the citizens of those States could be much more greatly harmed by the serious impairment of the enforcement of the antitrust laws which the enactment of this statute, in my opinion, would bring.

Senator COCHRAN. Mr. Kirkham, I want to congratulate you for your statement, your eloquent presentation of it to the committee. It will be helpful to us as we consider this proposal further.

I was curious about the survey that you conducted and am interested in that. I wonder if Mr. Shenefield has been given the benefit of the information that you obtained as a result of that survey.

Mr. KIRKHAM. It is in the record last year. Incidentally, as a matter of interest, it was made by the grandson of the late Chief Justice Warren, who is a very effective young lawyer in our firm and he and the staff made a study, a direct study of all the cases, and his report was submitted to me. I, in turn, put it in as part of the record in this case, in the earlier hearing. So Mr. Shenefield has it available.

Senator COCHRAN. That was both the survey in the ninth circuit, the northern district of California and in Arizona as well?

Mr. KIRKHAM. And in Arizona. Each case is listed and they are categorized.

Senator COCHRAN. To get it straight in my own mind, was that then the survey being described by Mr. Shenefield in his testimony before this committee on February 1, and not the survey in the New York District?

Mr. KIRKHAM. He spoke of both of them. He said that Mr. Handler's survey might be suspect because of the supposed—I don't know of any basis for it—antipathy the second circuit has toward filing indirect actions. The circuit never ruled on that and there were cases there that were favorable to it. But he also said that it well may be that our survey was not typical of the Nation at large. I repeat, as Mr. Handler said last year, I don't know what the survey at large is. You can only do so much in a given time. But if there is anything wrong with our survey and the nationwide survey is different, certainly in a matter of this importance I would think Mr. Shenefield would come forward with some facts.

Senator COCHRAN. You mentioned the problems that you see with the provision of the bill that gives the court the discretion to permit the pass-on defense. I wonder whether or not you would prefer seeing in the legislation language that was included in the bill last year, S. 1874, which barred the pass-on defense where it was shown that the overcharge was passed on to some one who was barred from bringing an action by reasons of standing or otherwise from suing the antitrust violator.

Mr. KIRKHAM. You are asking me whether I would prefer death by hanging or shooting. [Laughter.]

I think it would be utterly imposible to enforce or handle the latter type of provision and the one that we have in S. 300 is, Senator, unbelievable. It says in effect, we the Senate of the United States, give to the district judge, any district judge, the right to create a cause of action in some way under the antitrust laws. I have never seen anything of that kind. I wonder if your learned counsel for the committee has.

Senator COCHRAN. Your recommendation to the committee would be simply to delete this section entirely, not to have that provision in it?

Mr. KIRKHAN. You have to have a pass-on defense. I would delete the provision about discretion. You have to have a pass-on defense or you are going to have multiple liability over and over, trebled, not once, but trebled. It is impossible to have a suit by an indirect purchaser without having a pass-on defense. It is impossible logically, too, because one person has a cause of action or he doesn't have a cause of action.

Senator COCHRAN. You would just eliminate the discretion of the judge?

Mr. KIRKHAM. I would eliminate the bill. [Laughter.]

I am not being facetious.

Senator COCHRAN. I understand.

Mr. KIRKHAM. I am being very serious.

Senator COCHRAN. Senator Laxalt, do you have questions of the witness?

Senator LAXALT. Yes, very briefly.

First of all, I, too, Mr. Kirkham, want to congratulate you on an excellent statement. I might say that during the course of last year that I spent with Mr. Boies and Mr. Kennedy many, many hours in an effort to reconcile *Illinois Brick,* to comprise the legislation. But the more that we got into it, at least from our viewpoint, the fewer problems we seemed to solve and the more that we raised in terms of the implications of the legislation itself and the constitutional implications that are raised.

I think that the statistics that you brought to bear here are going to be highly significant. I might say, Mr. Chairman, that we will cause these to be sent downtown so that Mr. Shenefield will have an opportunity to meet them because I think the statistics are terribly important, bearing on a thread of contention last year to the effect that direct purchasers for whatever reason would not bring these suits. It is clear, and I suspect at the time, although we couldn't tie it down, that it simply wasn't the case.

Mr. KIRKHAM. Think what would have happened to the electrical cases if the direct purchaser had not had the power to sue. They wouldn't have been tried.

Senator LAXALT. I might say, too, that we attempted in some fashion to come up with some kind of solution on the public side, the fact that you had unanimity among the attorneys general and governors was no great mystery. That was just due to some effective work here on the part of their representatives. I think that they approached the problem purely from their parochial standpoint, as they should have. They were looking to protect their parens patriae cases which I would think in many cases would return a lot of political dividends. But that is a part of this busi-

ness anyhow. But the fact is that your presentation, I think, will help factually insofar as the surveys are concerned.

I think, and I hope, that this committee, if we get that far, the Senate finally will come down to the basic proposition that this is one of the many areas where legislation just isn't going to do the job. I think you best leave it in the courts. The more I deal with *Illinois Brick,* the more I come down to the fact that the Supreme Court acted very properly, very wisely coming down to the decision, because the more that you look into the implications of this, the more that you look to see who is truly benefited. If I could come down in my head to a conclusion that we are depriving a lot of consumers out there, without a legal remedy, if I come to that conclusion, I might view it differently. But the more I look at this, the more I come to the conclusion that just isn't the case. The only ones who are beneficiaries are a lot of public interest lawyers around this country that get fat fees and most of the consumers come away with the kind of de minimis settlement that you got in the phone case.

That is essentially what we are doing here. I think we are going about it in the wrong way. We have ample remedies as far as price fixing is concerned on the criminal side. And that to me is ample deterrent. So far as my thinking is concerned, it has been very valuable. I think it has been valuable probably to the whole committee, because we will make certain that these points are brought to the attention of the Whole Committee.

Mr. KIRKHAM. Thank you. I don't know what the state of the record is, but if it is necessary that I suggest that the surveys that were made become a part of the record in this case, I do suggest it.

Senator COCHRAN. I certainly think that is appropriate. Without objection, those surveys will be included.

Are they submitted? You mentioned that they had been submitted earlier.

Mr. KIRKHAM. They are printed in the earlier hearing. I can have them reproduced and submit them to the committee.

Senator COCHRAN. We could do that here, and we will see that it is done without objection. They will be made a part of this record.

[The material referred to can be found in the appendix.]

Senator COCHRAN. Thank you for pointing that out. Thank you very much for being here.

Mr. Kirkham, since you referred earlier to some statistics that were included in the statement of the chairman of the committee, Senator Kennedy, and directed a question to his counsel, I have agreed to permit counsel to respond to that inquiry, to make a comment about the statistics that you requested.

Senator LAXALT. As far as I am concerned, Mr. Boies will be free to ask whatever questions that he wishes, because he has been in the middle of all of this. He is extremely competent.

Senator COCHRAN. I think that is appropriate.

Senator LAXALT. He would add greatly to this record.

Mr. BOIES. Thank you very much.

First, Mr. Kirkland, I would also like to join in congratulating you on a very eloquent and forceful presentation. Not one that I think I entirely agree with, but one that was put very well.

You asked where Senator Kennedy had gotten the statistics that approximately two-thirds of private antitrust actions involve indirect purchasers. Do you recall that?

Mr. KIRKHAM. Yes.

Mr. BOIES. Have you had an opportunity to review the transcript of the hearing that was held before the committee on February 1 of this year?

Mr. KIRKHAM. Yes. If it is in that transcript, I don't recall reading it. I must have missed it.

Mr. BOIES. Let me direct your attention to pages 17 and 18 of that transcript where the Assistant Attorney General, Mr. Shenefield, testifies that according to the Justice Department's records approximately two-thirds of all private actions involved indirect purchasers—I don't know whether your statistics agree or disagree with that, but to the extent that you have any information that would indicate that Mr. Shenefield's testimony before this committee was in any way inaccurate, I know that the entire committee would be very interested in having them.

Mr. KIRKHAM. I think, Mr. Boies, if you look elsewhere in the statement that Mr. Shenefield said he did not have statistics, the actual statistics.

Mr. BOIES. I beg your pardon, sir?

Mr. KIRKHAM. Mr. Shenefield said that he did not have actual statistics.

Mr. BOIES. The portion that I had in mind commences at line 18 of page 17. It is a question from Senator Metzenbaum which reads:

> Senator METZENBAUM. On a scale of 0 to 100 from a deterrent standpoint what percentage of the deterrent is eliminated if we don't do something with respect to the Illinois Brick decision?

Mr. Shenefield responded:

> I think my answer to that would be something like this. Private actions as compared to Government actions I have always thought of as being more important for antitrust enforcement, something on a 60 to 40 basis. Of all private actions a larger number as I understand our records show are indirect purchaser actions, maybe as many as two-thirds of all private actions, two-thirds of 60 percent is about 40 percent, or nearly half in the antitrust enforcement situation is wiped out by Illinois Brick.

That was the portion of the testimony that I was referring to.

Mr. KIRKHAM. That was the source of Senator Kennedy's information? I think you will find elsewhere Mr. Shenefield's statement that he does not have statistics, and I don't know where he got that figure.

Mr. BOIES. Where was that statement of Mr. Shenefield?

Mr. KIRKHAM. I will have to look for it.

Mr. BOIES. I beg your pardon?

Mr. KIRKHAM. I will have to look for it.

Mr. CHUMBRIS. I think the point you have reference to is the reference by Senator Thurmond to Mr. Shenefield: "Has your department made a survey," and he said it has not. Senator Thurmond says would you please make a survey and he says I will and I will submit it for the record. So that is the point I think you raised.

Shenefield or the Department of Justice has not made a survey in the type that Dr. Handler and you have submitted for the record.

Thank you, Mr. Chairman.

Mr. BOIES. Was it only the fact that the Department had not made a new survey that you were referring to when you said you thought Mr. Shenefield said he did not have any statistics?

Mr. KIRKHAM. I do not know where that figure comes from. If there is any basis for it, I certainly think Mr. Shenefield could supply it, and apparently he is going to.

Mr. BOIES. You mentioned I believe that the cases involving indirect purchasers were invariably settled. Do you recall that?

Mr. KIRKHAM. Yes.

Mr. BOIES. One of the cases that you mentioned was the asphalt cases. Those were in California, were they not?

Mr. KIRKHAM. Yes.

Mr. BOIES. Your firm was involved in those cases. Is that correct?

Mr. KIRKHAM. That is correct.

Mr. BOIES. Were those cases settled?

Mr. KIRKHAM. Yes.

Mr. BOIES. After your firm lost as appeal to the Ninth Circuit?

Mr. KIRKHAM. Yes.

Mr. BOIES. Were any of those cases tried?

Mr. KIRKHAM. None was tried. That is kind of interesting. I am glad you mentioned it. In those cases, the first case was brought by a direct purchaser and then later on the other cases followed. At about the time of bringing that—well, prior to the time the suits were brought, there had been an investigation in New Mexico, a grand jury investigation, and they found nothing wrong.

About the time the State cases were brought, the Government impaneled a grand jury and it took testimony and millions of documents for 18 months and reached a conclusion that there was no basis for an indictment. Thereafter and before trial, the cases were settled.

Mr. BOIES. How much money was paid to indirect purchasers by your clients in the asphalt cases?

Mr. KIRKHAM. There was about $31 million, as I recall the total thing. There is an interesting point there, too because I don't know what has been the ultimate result in that case, but the United States paid about 90 percent of that. We tried to raise the indirect purchaser defense, as I recall.

I was not personally in those cases, Mr. Boies, so I, like most cases, I sort of head about it from the outside. But I know there was an effort, I think, to say that the United States had the cause of action instead of the States for 90 percent of this. I suppose maybe the statute of limitations had run. I would hope so.

Anyway, it was all part of a good defense: That the States in those cases only were entitled to about 8 percent of the recovery; the United States was entitled to the rest. I don't know how they worked it out. I heard there is some kind of a treaty arrangement between the States and the United States, in which they divide up these recoveries. I am not sure.

When you decide, when you figure out the amount of money that is involved in the sale of all the asphalt that has gone on all of the roads of all of the seven Western States, and think of what that amount means, and you find a company, say Standard Oil of California that happened to be the client of my firm, that can get rid of

that case for $7 million of $8 million, that company is not going to try that case. Our system of law doesn't supply it with a remedy.

Mr. BOIES. The asphalt cases were, of course, appealed up to the appellate courts on the question of whether indirect purchasers can sue.

Mr. KIRKHAM. That is right. That was the first case.

Mr. BOIES. The court in the ninth circuit held that the indirect purchasers could sue?

Mr. KIRKHAM. That is correct.

Mr. BOIES. You referred to the statistics in California relating to the kind of actions that had been brought. I believe that you testified earlier that you believe that passage of S. 300 or any similar bill overruling Illinois Brick would very substantially deter private enforcement of the antitrust laws. Is that correct?

Mr. KIRKHAM. That is correct; yes, sir.

Mr. BOIES. Have you found in your experience in the northern district of California where you practice and where indirect purchasers have been allowed to sue that private antitrust enforcement has been sparse and ineffective?

Mr. KIRKHAM. There hasn't been really time enought for any picture to emerge, Mr. Boies. There are suits brought by indirect purchasers. There are suits brought by people representing homeowners that had bought gas furnaces, bought homes in which gas furnaces had been installed, in which the heating elements of some kind in those gas furnaces were charged as having been price fixed.

Those cases were dismissed, but I don't think you can say there is any pattern. But I know this: That I don't see how any one of those indirect purchasers could have ever proved a cause of action. I know that if direct purchasers had been faced with indirect purchasers having a cause of action, it would certainly have discouraged suits by the direct purchasers.

Mr. BOIES. The Asphalt decision held authoritatively in the ninth circuit that indirect purchasers could sue, did it not?

Mr. KIRKHAM. That is right.

Mr. BOIES. That was when, sir?

Mr. KIRKHAM. 1974, was it?

Mr. BOIES. It believe it was about 1974. In the period of time, subsequent to 1974 in the northern district of California, and in the ninth circuit generally, was it your experience as an attorney practicing in that area that private enforcement of the antitrust laws was greatly deterred, that Max Bleecher stoppped bringing private enforcement actions?

Mr. KIRKHAM. Max Bleecher doesn't like indirect purchaser actions. I think if he were here he would tell you that.

Mr. BOIES. He hasn't had problems bringing antitrust enforcement actions in the ninth circuit, nor have the others; is that correct?

Mr. KIRKHAM. But they are largely direct purchaser actions. The survey we made was made years after asphalt. I don't know what was filed between asphalt and the time of our survey.

Mr. BOIES. That is precisely my point—the fact that indirect purchasers are allowed to sue does not discourage direct purchaser law suits.

Mr. KIRKHAM. I just don't know that, but I do know that as of the time we made the survey, there was not a single suit by an indirect purchaser except the sugar cases.

Mr. BOIES. Of which there were 37?

Mr. KIRKHAM. How many were there, about 200, about 200 sugar cases consolidated.

Mr. BOIES. Of which 37 were indirect purchasers?

Mr. KIRKHAM. Thirty-seven.

Mr. BOIES. But what I am saying is that direct purchasers in the ninth circuit weren't substantially deterred from bringing their actions by virtue of the fact that the ninth circuit had adopted the asphalt; correct?

Mr. KIRKHAM. It is hard for me to say in that short period of time because I think every lawyer thought that there was certainly a very great chance that the asphalt case would not live. It was such a startling, improper, improvident and dreadful decision that some time it had to be taken up by the Supreme Court and reversed.

Unfortunately, we had the case that should have been reversed. It could have saved $30 million. We had 50 attorneys general filing briefs amicus curae. But the Supreme Court said no. Under certiorari in the next term or two they said yes, and overrruled it.

Mr. BOIES. It is the case, is it not, that the ninth circuit in general, in California in particular, have seen a very large number of private antitrust enforcement actions?

Mr. KIRKHAM. Yes.

Mr. BOIES. Since 1974?

Mr. KIRKHAM. We have a very active plaintiff's bar, very capable plaintiff's bar. It makes it tough.

Mr. BOIES. I have had some experience with them as a defendant's lawyer.

Mr. KIRKHAM. I know that.

Mr. BOIES. One more question.

This $1.78 check that you referred to, that wasn't an indirect purchaser lawsuit, was it? That was a direct purchaser lawsuit?

Mr. KIRKHAM. It was direct purchaser lawsuit; yes.

Mr. BOIES. The fact that you had this de minimis recovery is a function of the nature of the cause of action and the nature of class actions generally, and not whether or not it was an indirect purchaser suit or direct purchaser lawsuit.

Mr. KIRKHAM. Exactly. The class action should not be permitted in that type of case and, above everything else, it should not be expanded in the type of bill such as S. 300.

Mr. BOIES. Thank you. I appreciate your views.

Senator COCHRAN. Thank you; thank you again, Mr. Kirkham, for being here with us.

Before the next witness comes before the committee, I am going to take about a 2-minute break. I will be right back.

Senator COCHRAN. The committee will come to order.

Our next witness is Philip Lacovara, an attorney here in Washington, D.C. Good morning.

We have a copy of your statement, Mr. Lacovara, which we will make a part of the record at the end of your oral testimony. You

may proceed to expound extemporaneously or read your statement in whatever fashion you choose.

We are glad to have you here this morning. We appreciate your coming to testify before this committee.

STATEMENT OF PHILIP A. LACOVARA, ATTORNEY, WASHINGTON, D.C.

Mr. LACOVARA. Thank you, Senator. I will only summarize the statement. It is rather lengthy and in the form of a memorandum of law. I do want to say at the outset that, even though the statement deals only with the constitutional and policy objections to retroactive application of the Illinois Brick legislation, I want to adopt the comments that Mr. Kirkham, for example, has made in opposing the substantive provisions of the bill itself.

[The prepared statement of Mr. Lacovara follows:]

STATEMENT OF PHILIP A. LACOVARA

Mr. Chairman, I am a partner in the law firm of Hughes Hubbard & Reed and I am in charge of the firm's Washington office. My firm serves as trial counsel to several clients in antitrust cases. I appeared before this committee 1 year ago to speak about the constitutionality of the retroactivity provisions of S. 1874, 95th Congress. I am testifying again today on behalf of the Bristol-Myers Company to discuss the legal objections to the proposed retroactively of the successor to that bill, S. 300.

Senate bill 300 is subject to the same constitutional and policy defects that prompted the sharp objections to S. 1874, and the changes that have been made in the substantive terms render S. 300 even more constitutionally suspect than its predecessor bill.

I. STRUCTURE OF THE BILL

Senate bill 300, like S. 1874, would amend the Clayton Act to overrule the Supreme Court's decision in *Illinois Brick* v. *Illinois*, 431 U.S. 720 (1977). Unlike its predecessor bill, however, S. 300 would not symetrically overturn the result in *Illinois Brick's* antecedent, *Hanover Shoe, Inc.* v. *United Shoe Machinery, Corp.*, 392 U.S. 481 (1968).

The rights and liabilities of parties to private antitrust cases would be drastically shifted by this asymmetrical alteration in the antitrust laws. Under *Hanover Shoe*, defendants have been subject to liability in suits brought by direct purchasers of their products regardless of the purchaser's ability to pass on some of the overcharge to parties further down the distribution chain. Senate bill 300 would create a new cause of action against these same defendants, to be asserted by indirect purchasers who, under the Court's decision in *Illinois Brick*, have had no cause of action. While authorizing the unrestricted use of the "pass on" theory as a basis for claims by new classes of plaintiffs, S. 300 would only allow the defendants to show a "pass on" by direct purchasers—and to thus avoid duplicative liability—if the district judge chose to exercise discretion to permit the defense. If the judge allowed the defense, he would be diluting the direct purchaser's claim. If he denied it, he would be compounding the defendant's liability for the same conduct.

Finally, S. 300, like S. 1874, would fail to cap the defendant's liability by establishing the actual initial overcharge as the quantum to be trebled and of damages allocated among various levels of claimants.[1] In application, these bills would allow a court to assess against a defendant an unpredictable amount of subsequent markups and consequential damages claimed by indirect and direct purchaser plaintiffs.

Senate bill 300 would apply its amendatory provisions retroactively to any action that is pending on the date that the act is enacted or is filed thereafter. Senate bill 1874 would have applied to any action pending on the date that the *Illinois Brick* case was decided, June 9, 1977, or was filed thereafter. Although the scope of S. 300's retroactivity provision appears narrower than that of S. 1874, it is not.

Few, if any, of the antitrust cases that were pending when *Illinois Brick* was decided and that were affected by it have been finally resolved in the interim. As a

[1] That was the approach taken in the last Congress by the House Judiciary Committee's *Illinois Brick* bill, H.R. 11942, 95th Cong. Unfortunately, the bill now pending before that committee, H.R. 2060, 96th Cong., is identical to S. 300 and omits this cap on liability.

result, S. 300 would attempt not only to change important rules of law for conduct that occurred long ago, but would also endeavor to upset two years' worth of litigation in many antitrust cases, including cases in which non-final dismissals have been entered or settlements reached.

Even apart from pending cases, the application of new rules of substantive law in cases not yet filed would also be retroactive to the extent that the new rules apply to prior conduct, as S. 300 evidently intends. Thus, despite the artful formulation of the effective date provision, the committee must realize that the bill would have substantial retroactive impact.[2] Its validity and propriety must be tested in this light.

My testimony will address three particular problems of retroactivity: First, why the retraoctive dilution of individual claims and expansion of total liability under this bill would be an unconstitutional denial of due process to direct purchaser plaintiffs, and to defendants; second, why the principle of separation of powers prevents Congress from repudiating decisions of the Supreme Court and directing lower courts to apply different rules of law in pending cases; and third, why, in any event, the enactment of retroactive legislation on this subject is an unreasonable and unwise exercise of legislative powers.

II. RETROACTIVE APPLICATION OF S. 300 WOULD CONSTITUTE A DENIAL OF DUE PROCESS

A. Our legal system abhors retroactive legislation

James Madison announced our Nation's rejection of retroactive laws when he declared that such legislation is "contrary to the first principles of the social compact and to every principle of social legislation." The Federalist No. 44. Madison's comments were derived from the harsh lesson of experience:

"The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential spectators, and snares to the more industrious and less informed part of the community." *Id.*

Chief Justice John Marshall made this policy manifest in our judicial system. As early as 1801, in *United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110 (1801), he warned courts adjudicating rights between private individuals to "struggle hard against a construction [of a statute] which will, by a retrospective operation, affect the rights of parties. . . ." As the Court later put it, the rule of prospectivity is "one of obvious justice" because it "prevents the assigning of a qualtiy or effect to acts or conduct which they did not have or did not contemplate when they were performed." *Union Pacific R.R.* v. *Laramie Stock Yards Co.,* 231 U.S. 190, 199 (1913).

This aversion toward legislation that applies retrospectively is well founded, for a person should be able to assess his conduct with reasonable knowledge of its legal consequences. He should also be able to expect stability in the rights or liabilities that attach to his conduct or to the acts of others. In a lawful society each of us plans his future with the expectation that the legal status of arrangements entered into today will not be upset tomorrow by a change in the law that applies to past conduct. Indeed, it is no understatement to say that the ability to plan for the future depends upon respect for stability of past legislative arrangements.

The framers affixed their aversion toward retroactive legislation in a number of clauses in the Constitution. Article I, § 9, cl. 3 prohibits Congress from passing any "ex post facto law." In *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386 (1798), this prohibition was held to apply directly only to retroactive criminal statutes, but the principle it embodies is surely broader.

In fact, the Supreme Court recently noted that "[t]he earliest instances of nonretroactivity in the decisions of this Court—more than a century ago—came in cases of nonconstitutional, noncriminal State law. . . . And, in the last few decades, we have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases." *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 106 (1971) (citations omitted).

The Contract Clause, Article I, § 10, cl. 1, forbids the States to pass a "law impairing the Obligation of Contracts." Although this prohibition upon retroactive civil legislation directly controls only State action, here too the underlying policy

---

[2] Laws that have an impact on activity occurring on or before the effective date of legislation are retroactive. "To be wholly prospective, . . . [the law] would have to apply only to [an activity] established after the effective date of the act." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.,* Nos. 77-2146, 77-2147, slip op. at — n.21 (7th Cir. Jan. 23, 1979). *See generally* Hochman, "The Supreme Court and the Constitutionality of Retroactive Legislation" 73 Harv. L. Rev. 692 (1960).

has a broader sweep, reflecting the basic principle that legislation should not interfere with vested rights and liabilities or with existing legal relationships.[3]

The direct restraint upon the Federal Government's power to enact retroactive civil legislation lies in the due process clause of the fifth amendment. Legislation that, considering its retroactivity, is arbitrary or unreasonable or harsh and oppressive, constitutes a denial of due process. *Railroad Retirement Board* v. *Alton Railroad,* 295, U.S. 330 (1935); *see also United States Trust Co.* v. *New Jersey,* 431 U.S. 1 (1977); *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976).

B. Factors articulated by the Supreme Court to test retroactive legislation establish invalidity here

Our system's aversion to retroactive laws is vividly illustrated by the decisions concerning the impairment of contracts. In *Alllied Structual Steel Co.* v. *Spannaus,* 46, U.S.L.W. 4887 (U.S. June 28, 1978), for example, a company challenged the constitutionality of Minnesota's new pension law, which attempted to require greater pension benefits for past service. The Court agreed with the company that the law was invalid because the law impermissibly altered the contractual relationships existing between employers and employees by imposing pension obligations exceeding those voluntarily agreed upon by the parties. The Court reached its decision by carefully delineating the exceptional circumstances under which state laws abridging contract rights may survive and concluding that, in the absence of extraordinary justifications, the retroactive burdens of the pension law were indefensible.

The facts in the leading case, *Home Building & Loan Association* v. *Blaisdell,* 290 U.S. 398 (1934), establish the exception. The mortgage moratorium legislation enacted by Minnesota in Blaisdell at the depth of the Great Depression was in direct conflict with lenders' contractual foreclosure rights. Five extraordinary factors justified the law's otherwise unlawful intrusion upon these rights: (1) The State had declared in the act that it was an emergency measure to protect homeowners; (2) the law was enacted to protect a basic societal interest, not to advantage particular individuals; (3) the legislation was no broader than required to meet the emergency; (4) the conditions imposed were reasonable; and (5) the legislation was to be in effect only during the emergency period. Had these factors been absent, the law would have been invalid under the contract clause.

As the Court in Allied Structural Steel explained, the cases announced in Blaisdell's wake have made it clear that the Court requires proof on all five principles before it will sustain retroactive laws against a contract clause challenge.[4]

The Court also explained its recent contract Clause decision in *United States Trust Co.* v. *New Jersey,* 431 U.S. 1 (1977); where it held unconstitutional the dilution of the rights of bond-holders. In the case, the Court acknowledged the traditional deference usually given to State laws designating social and economic goals, but gave renewed force to the accompanying rule that "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." 431 U.S. at 22. The Court emphasized that retroactive impairment of the rights of the bond holders was unnecessary, since there were reasonable "less restrictive" alternatives to achieve the state's goal of developing mass transportation. 431 U.S. at 30–31. The Court evaluated "with particular scrutiny"[5] the laws that modified the bondholders' contractual rights, and decided that, since the legislation was neither necessary nor reasonable, it violated the contract clause.

This stricter scrutiny applies as well to any law that may have a retroactive impact. In *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976), the Court distinguished retrospective from prospective laws precisely by the level of scrutiny used to measure their constitutionality. The Court explained that Congress has far less constitutional power to change the law retroactively than it does to decide that the law should be different for the future:

"It does not follow, . . . that what Congress can legislate prospectively it can legislate retrospectivley. The retrospective aspects of legislation, as well as the

---

[3]*See Allied Structural Steel Corp.* v. *Spannaus,* 46 U.S.L.W. 4887, 4895 n.9 (U.S. June 28, 1978) (dissenting opinion); *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 448 (1934); *see also Hochman, supra,* at 695.

[4]*See, e.g., W. B. Worthen Co.* v. *Thomas,* 292 U.S. 426 (1934) (Arkansas law retroactively exempting proceeds of life insurance policy from collection by beneficiaries' creditors violates contract clause since it was not specifically and narrowly designed to meet a serious temporary emergency of general concern); *W. B. Worthen Co.* v. *Kavanaugh,* 295 U.S. 56 (1935) (Although public purpose supported Arkansas law interference with mortgage holder's contract rights, law was invalid since its provisions were too harsh to accomplish purposes suggested); *Triegle* v. *Acme Homestead Ass'n,* 297 U.S. 189 (1936) (Louisiana law modifying rights of building association members violated contract clause despite suggestion of public interest).

[5] 46 U.S.L.W. at 4890 (emphasis added).

prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." 428 U.S. at 16–17.[6]

These cases reveal one of the fundamental errors in the legal analysis offered by the Justice Department in the last Congress in its effort to justify retroactive overruling of *Illinois Brick* and *Hanover Shoe*. *Cf.* opinion letter by John H. Harmon, office of legal counsel, dated June 19, 1978, in House Committee on the Judiciary, report on Clayton Act amendments of 1978, H. Rep. No. 95–1397, 95th Cong., 2d Sess. at 38 (1978) (hereafter Office of Legal Counsel Letter). The opinion letter misleadingly suggests that the test for retroactive laws is "much like the rational basis test" commonly invoked in evaluating equal protection cases.

An equally cautious analysis of retrospective laws is to be found in *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974). The Court held that retrospective legislation violates the due process clause when it inflicts a "manifest injustice." 416 U.S. at 711, 716–21. The Court explained that the concerns "relative to the possible working of an injustice center upon (a) the nature of and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717.[7] Measured either by the standards articulated in Blaisdell, Turner Elkhorn Mining Co., or Bradley, the retroactive application of S. 300 would be fatally defective.[8]

There is no emergency that requires retroactive application of the bill, nor is there any basis for Congress to declare the existence of an emergency. Thus, *Blaisdell* factor one is not present. Although the second *Blaisdell* factor is implicated—society's "basic interest" in the enforcement of the antitrust laws—that interest may be completely safeguarded by giving the bill only the prospective effect that is traditional in this field. Society's enforcement of the antitrust laws against pass violations can be effectively vindicated by direct purchasers, who have been the mainstay of private antitrust enforcement for over 60 years. Thus, *Blaisdell's* third test, that the law be narrowly tailored to remedy the societal interest, is contradicted when such alternative, less drastic solutions to the problems are available.

Furthermore, retroactive legislation here would permanently destroy, not merely to postpone, rights that have vested in direct-purchaser plaintiffs to recover full damages. They may be totally divested of their causes of action. Senate Bill 300 would also create whole new classes of plaintiffs—indirect purchasers—who could sue. The liability they inflict upon defendants in pending suits is patently unreasonable. Since S. 300 would make the "pass on" defense discretionary, defendants may be subject to multiple liability if direct and indirect purchasers pursue claims. In the Supreme Court's discussion of the "pass-on" theory in *Illinois Brick*, the Court assumed that it would be permitted symmetrically, if at all. The opinion noted that this, at least, would reduce the "substantial risk of multiple liability for defendants . . ." Even in that event, however, as the Court noted "the possibility of inconsistent judgments obtained by conflicting claimants remains nonetheless," 431 U.S. at 737 n.18. These destructive features of S. 300 may not validly be imposed retroactively. The burden of this liability would be further magnified since both direct and indirect purchasers could recover consequential damages and indirect purchasers would be permitted to recover for intervening markups. These consequences would retroactively enlarge the quantum of liability that was foreseeable and that attached when the antitrust violation occurred. Thus, *Blaisdell* factors four and five, testing whether the law is reasonable, are absent.[9]

The constitutional viability of S. 300 is suspect under the Turner Elkhorn Mining Co. test as well. The initial inquiries ask whether the burdens imposed were foreseeable and whether any actions were taken in reliance on the law as it then existed.

---

[6] *See Daughter of Miriam Center for the Aged* v. *Matthews*, No. 78–1050, slip op. (3d Cir. Dec. 29, 1978) (special scrutiny required for retroactive laws which "interfere with the legally-induced and settled expectations of private parties.")

[7] The *Bradley* tests were recently applied by a Federal district court in Maryland to hold unconstitutional the retroactive application of an amendment to the Age Discrimination in Employment Act. The district court in *Maryland* v. *Baltimore and Ohio Railroad*, 461 F. Supp. 362, 382 (D. Md. 1978), noted that private rights were at stake, as well as the public interest. It concluded that the "ability of individuals and businesses to justifiably rely on current reasonable interpretations of existing law in arranging their activities and relationships" was as important as the national concern for age discrimination.

[8] The Supreme Court has addressed the retroactivity problem in other situations where statutes interfere with existing rights and liabilities. In *United States* v. *Larionoff*, 431 U.S. 864, 878–82 (1977), the Court interpreted the 1974 repeal of the military's variable reenlistment program to apply only prospectively, noting that had Congress intended retroactive application "serious constitutional questions would be presented." *Id.* at 879.

[9] Applying this test, the Supreme Court has held unconstitutional the legislation cancelling government war risk life insurance policies. *See Lynch* v. *United States*, 292 U.S. 571 (1934) (Brandeis, J.).

This examination is similar to the initial inquiry pursued by the Court in *Allied Structural Steel Co.* v. *Spannaus, supra.* Before it focused on *Blaisdell,* the Court in *Allied* decided that the Minnesota Pension Act too severely restricted contractual rights because it changed the parties obligations in an area where "the element of reliance was vital," 46 U.S.L.W. at 4891.

Many business judgments involve an assessment of potential risks. This calculus is especially important where the contours of the law are unclear, as they often are in the antitrust field. It is impermissible to reach back in history to make substantial changes in the financial consequences of business decisions if it turns out that those decisions were erroneous.[10]

All parties to pending antitrust suits also have legitimately relied on and acted upon the Supreme Court's declarations of their respective rights and liabilities in *Illinois Brick* and *Hanover Shoe.*[11] Direct purchasers have properly assumed that, if their suits are successful, their enormous investment of time and money in the litigation will be rewarded by treble the full amount of the overcharge. Moreover, the strategy pursued by both sides in pending litigation—from discovery through settlement or nonfinal judgment—has assumed an alignment of parties and allocation of rights and obligations consistent with the Supreme Court's pronouncements.[12]

Finally, under *Turner Elkhorn Mining Co.,* we examine whether the retroactive legislation reasonably allocates the burdens. Although defendants in antitrust cases might be aware that consequential damages are available to direct purchase plaintiffs, the extent of such injury is frequently unpredictable. The consequences of this liability are already harsh. But, if indirect purchasers, who were unforseeable plaintiffs, enter the case with additional layers of these speculative damages—all of which would be tripled—the severe results are unreasonably increased.

The same conclusions follow under the *Bradley* analysis. In most of the cases that would be affected by retroactive application of S. 300, only private parties are involved. Bradley carried forward the early observation by Chief Justice Marshall that "manifest injustice" is more likely to flow from retroactive legislation that affects "private cases between individuals." See 416 U.S. at 717. In this setting, there is the least weighty justification for retroactively changing the relative rights and liabilities of the parties.

The second factor, the nature of the rights, also points sharply against the validity of retroactive legislation. The Court in *Bradley* explained that it has regularly refused to apply an intervening change in law "to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional," 416 U.S. at 720 (citing cases).

Senate bill 300 would fundamentally alter basic legal relationships that were established when the challenged conduct was performed. Not only would it enlarge the class of potential plaintiffs to include indirect purchasers who never dealt with the defendant, and have had no legal claims against him, but it would also make the direct purchasers' entitlement to recoup the full amount of the overcharge they paid to the defendant totally dependent on the discretion of the court. The creation of wholly new liabilities and the dilution or destruction of existing claims are precisely the kinds of legislative mischief the Constitution forbids.

The third factor listed in *Bradley,* the nature of the impact of the change in law, also undermines retrospective application here. Dramatic realignment of the parties to pending antitrust litigation would certainly "impose an additional or unforseeable obligation upon" the parties beyond what they were exposed to when they acted or when they initiated their litigation, 416 U.S. at 721. Defendants would be faced with both more complex litigation involving direct purchasers and wholly new claims by the new class of claimants. Direct purchasers would have their rights diluted.

Furthermore, the potential entry of indirect purchasers into pending litigation may cause courts to reopen verdicts or settlements that have already been entered in favor of the direct purchasers. Alternatively, if such verdicts or settlements are

---

[10] *See also Maryland* v. *Baltimore & Ohio Railroad,* 461 F. Supp. 362 (D. Md. 1978), where the Court refused to apply retroactively the amendments to the Age Discrimination in Employment Act, which intruded upon the parties' right to rely on settled interpretations of the law. "To apply [the law] under these circumstances would work a manifest injustice on the right of these defendants, as private entities, to go forward with a course of action which they validly believed was in conformance with the best interpretation of the law at that time." *Id.* at 383.

[11] *Accord Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 107 (1971.) (Parties are expected to rely on the law governing the case as it then stands.)

[12] In *Chevron Oil Co.* v. *Huson, supra,* the Supreme Court stated its reluctance to retroactively apply laws that abruptly alter a lawsuit where discovery had already begun.

not opened up, the defendants hit with claims from indirect purchasers would inevitably be facing duplicative exactions—all trebled—for the same transaction.

The diluting effect of these proposed changes on direct purchasers' interests has already been recognized. In re Anthracite Coal Antitrust Litigation, 79 F.R.D. 707 (M.D. Pa. 1978), the district court approved a settlement for a class of direct purchasers that was smaller than the court might otherwise have required because, the court explained, the enactment of a retroactive statute overruling *Illinois Brick* and *Hanover Shoe* in the middle of the litigation would leave the direct purchasers' class with sharply eroded claims. 79 F.R.D. at 713. Conversely, in judging the fairness of the settlement to the defendants, the court predicted that the "number of such indirect purchaser suits could be extremely numerous and would subject the defendants to an additional risk of liability," 79 F.R.D. at 714.

There is also the real specter of duplicative liability, a prospect that is even more threatening under S. 300 than under its predecessor because the pending bill does not guarantee a defendant the right to assert a "pass on" defense. The constitutional dangers that flow from overruling *Illinois Brick* without unequivocally changing *Hanover Shoe* as well were acknowledged in a staff memorandum prepared for the House of Representative's Committee on the Judiciary:

"The basic problem here is that, under *Hanover Shoe,* the first purchaser could recover the entire overcharge because the defendant would be unable to assert that it had been passed on to other purchasers. Thus, if *Illinois Brick* is repealed—but not *Hanover Shoe*—the second and third purchasers could also recover additional portions of the same overcharge, as the defendant is barred from proving the first purchaser passed on the defense to others.

"If this happens the defendants have paid treble damages for the same injury twice. This is clearly an unacceptable result, and possibly unconstitutional." See Staff of House Committee on the Judiciary, 95th Cong., 1st Sess., *Memorandum on Antitrust Law Revision,* Dec. 8, 1977, at 11. Despite this clear warning, both S. 300 and its House companion, H.R. 2060, now recklessly not only threaten duplicative liability but propose to inflict it retroactively. The Constitution, however, will not tolerate that manipulation.

C. There are no constitutional justifications for retroactive application of S. 300

During the course of congressional consideration of bills to overrule *Illinois Brick* and *Hanover Shoe* several arguments have been offered to support the constitutionality of retroactive application. The Justice Department—a litigant with pending cases it wants to restuscitate—has advanced the principal arguments on this point. Upon analysis, however, those arguments dissolve into thin air.

1. ANALOGY TO RETROACTIVE TAX LEGISLATION IS INAPPOSITE IN THE ANTITRUST CONTEXT

The Senate Judiciary Committee's majority report on S. 1874 justified retroactive application upon an analogy to *United States* v. *Jefferson Electric Manufacturing Co.,* 291 U.S. 386 (1934).[13] The office of legal counsel's opinion letter to the House Committee on the Judiciary, regarding amendments to the Clayton Act, also referred to retroactive tax regulations.[14] But the policy behind these cases is not appropriately applied to antitrust litigation.

The peculiar nature of our tax system has led the courts to conclude that imposition of a tax retroactively is not necessarily unconstitutional. Unlike the civil liability imposed on antitrust defendants, "[t]axation is neither a panalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of Government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process . . . ." *Welch* v. *Henry,* 305 U.S. 134, 146-47 (1938). Thus, the presumptions that the courts bring to retroactive tax legislation is far different from that arising in other contexts.

Despite this relaxed perspective, there are situations in which retroactive tax legislation has been held a denial of due process. "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation" 305 U.S. at 147.

In the two cases cited by the proponents of retroactivity, the Supreme Court found that the limitations were not exceeded. In Jefferson Electric Manufacturing Co., the Court upheld a tax law that limited the taxpayer's right to a refund when

[13] *See* Senate Committee on the Judiciary, report on the Antitrust Enforcement Act of 1978, S. Rep. No. 95-343, 95th Cong., 2d Sess., Part I at 27 (1978).

[14] *See* office of legal counsel letter at 38-41.

he pursued the refund *after* the effective date of the tax legislation. The statute was *not* made applicable to pending claims. In contrast, S. 300 interferes with rights *pending* on the date of its enactment. In *Anniston Manufacturing Co.* v. *Davis*, 301 U.S. 337 (1937), the taxpayer challenged a tax regulation which provided an administrative remedy in lieu of his judicial cause of action against the collector. The Court denied that there was any unreasonable retroactive effect since the substitute procedure was a fair and adequate remedy. Senate bill 300, by contrast, inflicts a far greater injury to the parties' rights than merely to substitute the type of proceedings available.

But in other circumstances, even retroactive tax laws are intolerable. A recent opinion from the sixth circuit court of appeals suggested several considerations which have generally been relevant to whether retroactive tax legislation is lawful:

"(1) whether or to what extent the taxpayers justifiably relied on settled prior law or policy and whether or to what extent the putatively retroactive regulation alters that policy; (2) the extent, if any, to which the prior law or policy has been implicitly approved by Congress . . . ; (3) whether retroactively would advance or frustrate the interest in equality of treatment among similarly situated taxpayers; and (4) whether according retroactive effect would produce an inordinately harsh result." *Wilson* v. *United States*, No. 77-3101, slip op. at 8 (6th Cir. Dec. 20, 1978).

Thus, despite the somewhat relaxed approach to tax cases, in "harsh cases" or situations of "justifiable reliance" a retrospective tax law may also be improper. As we have already seen, those tests establish that it would be unconstitutional to apply S. 300 retroactively.

2. THE RIGHTS HERE ARE NOT MERELY PROCEDURAL RIGHTS

Proponents of retroactive application of S. 300 have also justified its constitutionality by characterizing the rights affected by the bill as procedural rather than substantive. This semantic device was first utilized in the opinion letter submitted by the Office of Legal Counsel of the Department of Justice, in response to inquiries by House Judiciary Committee regarding the constitutionality of H.R. 11942.[15]

In his testimony before this committee on February 1, 1979, Assistant Attorney General John H. Shenefield relied upon this opinion letter and its comments on "procedural" rights.[16] Both the Office of Legal Counsel's letter and Mr. Shenefield's testimony are fundamentally flawed by treating the rights affected as merely procedural. Even when confined to H.R. 11942, the opinion letter too casually dismissed the constitutional defects posed in retroactive application. The provisions of S. 300, however, are materially different from those of H.R. 11942, to which the Office of Legal Counsel opinion was addressed. Mr. Shenefield noted that differences exist, but he failed to mention that these differences actually intensify the constitutional problems that accompany retroactive application of this type of legislation. The analysis suggested in the Office of Legal Counsel letter is quite unreliable as a guide to the validity of S. 300.

The rights at issue are said to be merely procedural because they merely realign the parties to the litigation. Since the changes are only procedural, it is asserted, they can be retoactively imposed.[17] But, as discussed earlier, the impact of S. 300 would be far more extensive than merely exchanging the parties to an action. It is arguable that last year's House bill, H.R. 11942, was merely reallocating claimants to a fixed amount of liability, since—assuming consistent verdicts—the initial overcharge was the amount subject to claims by direct and indirect purchasers. Under S. 300, however, the defendant would be made liable for subsequent markups and for consequential damages at all levels. It is a preposterous evasion to refer to these major changes in substantive law as "merely procedural."

As the House Judiciary Committee staff explicitly warned in this context, a bill that authorizes consequential damages for indirect purchasers would increase the

---

[15] *See* Office of Legal Counsel letter, *supra* at 39 n. 4, 40.

[16] Testimony of John H. Shenefield, in Antitrust Enforcement Act of 1979, hearings on S. 300 before the Senate Committee on the Judiciary, 96th Cong., 1st Sess., transcript at 36 (Feb. 1, 1979) (hereafter "Antitrust Enforcement Act of 1979 Hearings").

Senator Metzenbaum asked Mr. Shenefield to summarize his reasoning regarding the constitutionality of retroactive application. Mr. Shenefield replied that retroactive application impacts would have an impact only on procedural rights—merely the right to have actions sought by different plaintiffs—not substantive rights. He answered in the affirmative to Senator Metzenbaum's inquiry whether retroactivity was more often permissible when it affects procedural rather than substantive rights. He then relied on a balancing test to vindicate retroactivity here.

[17] Antitrust Enforcement Act of 1979 hearings at 36.

substantive liability of violators and could "not constitutionally be retroactive." [18] Since S. 300 threatens to increase an antitrust defendant's substantive liabilites, retroactive application would not be constitutionally permissible.

From the plaintiff's perspective as well, the consequences of this legislation are undeniably substantive. Direct purchaser plaintiffs who would face "pass on" defenses in pending cases risk losing viable causes of action. Clearly, the damage to the parties is more severe than the label "procedural reallocation" would imply.[19]

E. Even if the rights affected by S. 300 were only procedural, retroactive application would be unconstitutional.

The proponents of S. 300 falsely imply that a legislative change that is merely procedural is necessarily constitutional when retroactively applied. That proposition is wrong, and thus they would not prove their case for retractivity even is S. 300 were a procedural bill.

The proponents rely on *Chase* v. *Donaldson,* 325 U.S. 304 (1945), where the Court allowed retroactive application of a State law that effectively lifted the bar on the statute of limitations in a pending litigation. While the Court in *Chase* stated that this alteration was not a per se violation of due process, it affirmed the law only after concluding that there had been no showing of hardship or oppression by its retroactive application, and that the parties conduct would not have been different had the new rule been known, 325 U.S. at 316. There was an unquestioned liability by the defendant to the plaintiff and the defendant had no vested interest in having enforcement of that claim barred at any particular time.

As discussed above, S. 300 would work oppressive results on both plaintiffs and defendants. And, if the conditions which S. 300 proposes had been foreseen before the pending cases were filed, the parties may very well have altered their conduct—both in business and litigation—to conform with it.

The Court in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), in contrast to the earlier decision in *Chase,* decided that a statute of limitations under attack could not be applied retroactively. The Court had before it a closely related problem: the constitutionality of retroactively applying new judicial decisions that make procedural changes. The issue was not, as the proponents would imply, summarily resolved by attaching a label. Instead, three separate factors were listed as relevant to the consideration of constitutionality.

The Court first examined, whether a new principle of law is established by the judicial decision or whether it is an issue of first impression "whose resolution was not clearly foreshadowed," 404 U.S. at 106. Second, the Court said it had to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation," 404 U.S. at 106–7. (Citations omitted.) And finally, the Court weighed "the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retoactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' " 404 U.S. at 107. (Citations omitted.)

In *Chevron,* the Court decided against retroactivity because the respondent had to "rely on the law as it then was," and could not be expected to foresee that the interpretation he relied on would be overturned. Similarly, parties to pending antitrust actions have been relying on the rules as announced by the Supreme Court more than 10 years ago in *Hanover Shoe* and followed 2 years ago in *Illinois Brick.*

The Court also examined the effect of retroactive application on the pending case: "To abruptly terminate this lawsuit that has proceeded through lengthy and no doubt costly discovery stages for a year would surely be minimal to the beneficent purpose of the Congress," 404 U.S. at 108.

Certainly similar effects would accrue if S. 300 is applied retroactively to pending antitrust cases. For example, "pass on" defenses—if permitted—will inevitably throw direct purchasers either out of court or back to their litigation strategy drawing board.

Finally, the Court concluded that nonretroactive application was necessary to preserve the respondent's day in court. Direct purchasers may similarly be deprived

---

[18] *See* Staff of House Committee on the Judiciary, 95th Cong., 1st Sess. memorandum on antitrust law revisions, Dec. 8, 1977, at 18. In addition, unlike the arguments of the proponents of retroactivity, the House staff memorandum did not lightly dismiss the threat of multiple liability. Instead, it acknowledged that if this is the result, then it is an unconstitutional one, at least when retroactively applied.

[19] *See* Office of Legal Counsel letter, *supra* at 40. *See also* prepared statement of John H. Shenefield in Antitrust Enforcement Act of 1979, Hearings on S. 300 before the Senate Committee on the Judiciary, 96th Cong., 1st Sess. at 13 (Feb. 1, 1979).

of their day in court if, in the midst of pending litigation, a defendant is permitted to assert a "pass on" defense that may wholly nullify the plaintiff's claim.[20]

Even if we apply a simple balancing test, as suggested by Mr. Shenefield,[21] retroactive application of S. 300 cannot be constitutionally justified. The public interest theoretically promoted by S. 300 would be twofold: it would allegedly deter antitrust violations, and would create for indirect purchasers a cause of action. Since by definition any past violations have already occurred, an alleged increase in deterrence for the future provides no basis for retroactivity. Nor is there a compelling justification for subordinating the interests and expectations of plaintiffs and defendants in pending litigation to the hopes of indirect purchasers.[22]

Under any mode of analysis, therefore, there is no way that S. 300 may be fairly or constitutionally applied retroactively.

III. S. 300 CONFUSES THE JUDICIAL AND LEGISLATIVE FUNCTIONS IN VIOLATION OF THE SEPARATION OF POWERS PRINCIPLE

Most retroactivity cases have arisen in a relatively neutral context: Deciding whether a new piece of legislation should have an effect on prior conduct or pending litigation in the absence of any expressed congressional intent. The bill before this committee, however, poses the issue in a constitutionally more vulnerable setting. It manifests an explicit intention to overturn the substantive rules of law applicable to pending cases under specific holdings of the Supreme Court in *Illinois Brick* and *Hanover Shoe.*

The unequivocal intent of the pending bill—to compel the Federal judiciary to disregard the holdings of the Supreme Court in cases already pending before them—raises an additional serious constitutional question under the separation of powers doctrine.

In deciding *Illinois Brick* and *Hanover Shoe,* the Supreme Court was interpreting the Clayton Act in the course of exercising "the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 177 (1803). Congress is, of course, free to change what the law will be in actions based on future conduct. That is the nature of the lawmaking function—to say what the law will be. The effect of the proposed legislation, however, is to replace the Supreme Court's statement of what the law has been and is for pending actions under the 1914 Clayton Act and to substitute the views of a subsequent Congress as to what it feels the law should have been under that statute.[23]

As *Marbury* v. *Madison* settled, however, it is the judicial function to decide, finally and authoritatively, what the law has been and *is* in pending cases. *See also Koshkonong* v. *Burton,* 104 U.S. 668, 678–79 (1882); v. *Blackledge,* 6 U.S. (2 Cranch) 272, 277 (1804). Accordingly, by enacting this proposed legislation, Congress would be encroaching upon the essential function of the judiciary under the doctrine of separation of powers. Even though this constitutional objection was raised by witnesses before this committee last year, neither the Office of Legal Counsel's opinion letter, *supra,* nor Mr. Shenefield, in his testimony before this committee last month, have addressed this additional constitutional flaw.

Over a century ago, the Supreme Court forcefully enunciated and applied the separation of powers doctrine to condemn an act of Congress that attempted to overrule a Supreme Court decision by prescribing a different rule of law to be followed in pending cases. In *United States* v. *Klein,* 80 U.S. (13 Wall.) 128 (1872), plaintiff's decedent had been the owner of property sold by agents of the Federal Government during the Civil War. Plaintiff sued for the proceeds of the sale in the court of claims and recovered under legislation according such a right of action to

---

[20] In *Ramey* v. *Harber,* Nos. 77-1927, 77-1928 and 78-1010, slip op. (4th Cir. Dec. 15, 1978), the court applied the Chevron test to decide that the Supreme Court's decision in *Elrod* v. *Burns,* 427 U.S. 347 (1976) could not be applied retroactively to employees who were denied reappointment under a patronage system 6 months before the *Elrod* decision. (Elrod court had held unlawful discharges of nonpolicy making employees under a patronage system).

[21] Antitrust Enforcement Act of 1979 Hearings, *supra* at 36.

[22] *See Daughter of Miriam Center for the Aged* v. *Matthews,* No. 78-1050, slip op. at — (3d Cir. Dec. 29, 1978); *Nachman* v. *Pension Benefit Guaranty Corp.,* Nos. 77-2146 and 77-2147, slip op. at — (Jan. 23, 1979), in *Nachman,* the Court upheld the law because, *inter alia,* the beneficiaries of the challenged act had reliance interests protected by the law's retroactive application. The same cannot be said for indirect purchasers who, *Illinois Brick,* lost any interests they had previously.

[23] The general principle is firmly established that a subsequent congressional enactment declaring the intent of an earlier one is "not entitled to contol judicial action." *United States* v. *Stafoff,* 260 U.S. 477, 480 (1923) (refusing to give retroactive effect to a later statute interpreting the National Prohibition Act). *See also Mattz* v. *Arnett,* 412 U.S. 481, 505 n.25 (1973); *Federal Housing Administration* v. *Darlington, Inc.,* 358 U.S. 84, 90 (1958).

noncombatant owners upon proof of loyalty, which the Supreme Court had previously held could be proved by a presidential pardon.

While the case was on appeal in the Supreme Court, Congress passed an act crucially altering the rights of people in the rebellious States. The act provided that in all pending cases no pardon would be admissible to show loyalty and that, to the contrary, a recital in a pardon of participation in the Civil War would constitute conclusive proof of disloyalty.

The Court decided it could not properly give force to the legislative directives. The Court asked rhetorically: "Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the Government in cases pending before it?" The Court's answer was an emphatic "no." It held the statute unconstitutional on the ground that, by prescribing a rule of decision for pending cases, "Congress has inadvertently passed the limit which separates the legislative from the judicial power." 80 U.S. at 145–46.[24]

The Court's denunciation of congressional intrusion on judicial power has particular force in relation to S. 300. Like the statute condemned in Klein, this bill would purposefully overrule two prior Supreme Court decisions and prescribe different rules of substantive law to be followed in pending cases. Thus, like the statute in Klein, it would unconstitutionally encroach upon the exclusive authority of the Federal judiciary.

Congressional response to the controversial decisions under the Portal-to-Portal Act is also instructive in this regard. The Fair Labor Standards Act of 1938 guarantees overtime pay for work in excess of 40 hours per week. It also creates liability for unpaid overtime together with an additional, equal amount as liquidated damages. In a series of cases,[25] the Supreme Court held that "work week," which was undefined in the act, included underground travel in mines and similar incidental activities in connection with work. The holdings, which were surprising and contrary to the shared views of employees, unions, and employers instantly created prodigious employer liability: in a 7-month period in 1946–47, actions were filed by employees claiming damages in excess of $5 billion.

Congress acted swiftly. Sections 2(a) and 2 (b) of the Portal-to-Portal Act, passed in 1947, were designed to extinguish the wholly unforeseen liabilities created by the Supreme Court, 29 U.S.C. §§ 252(a) & (b). Despite the exceptional nature of the liability, which it was commonly agreed had never been intended when the Fair Labor Standards Act was passed, Congress had deep reservations about the validity of an attempt to change the rules of decision applicable in pending cases. In light of the substantive doubt about the constitutionality of retroactively destroying vested rights being asserted in pending cases, Congress took the extraordinary step of actually denying to any Federal or State courts the jurisdiction to enforce the claims previously validated by the Supreme Court.[26]

No similar device, however, is available to Congress to safeguard the validity of the retroactive overruling of Illinois Brick and Hanover Shoe. The object of S. 300 is the creation of new claims and classes of claimants (by overruling Illinois Brick) and the establishment of a new partial defense in antitrust cases (by partially repealing Hanover Shoe). The continued assertion of judicial jurisdiction is, therefore, essential. Hence the fundamental vice identified in Klein will inevitably afflict S. 300 as well: The effort to change the rules of substantive law in midstream and to direct the courts to decide pending cases in ways contrary to the mandate of the law as the Supreme Court has declared it to have been and to be.

---

[24] The modern vitality of the holding in *Klein* was emphasized in *Gliddon Co.* v. *Zdanok*, 370 U.S. 530, 568 (1962). The *Klein* principle was also reaffirmed in *Pope* v. *United States*, 323 U.S. 1, 9 (1944), where the Court held that an intervening act should not be interpreted as requiring the courts "to set aside the judgment in a case already decided or as changing the rules of decision for the determination of a pending case."

See also United States v. *Howard*, 440 F. Supp. 1106, 1110 (d. Md. 1977) (Speedy Trial Act unconstitutionally encroaches on the Federal judiciary by telling it how to manage its caseload: "Congress cannot unduly interfere with purely judicial functions . . . In short, the fact that Congress can create the lower courts does not alter the conclusion that it cannot validly establish a timetable for judicial action.")

[25] *Tennessee Coal Iron & Railroad* v. *Muscoda Local*, 321 U.S. 590 (1944); *Jewell Ridge Coal Corp.* v. *Local No. 6167, U.M.W.*, 325 U.S. 161 (1945); *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

[26] Section 2(d), 29 U.S.C. § 252(d). See generally, P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 322, 324 (1973). That ultimate exercise of constitutional power over Federal judicial jurisdiction is explicitly conferred on Congress by Article III of the Constitutional. See Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). Congressional power over State court enforcement of Federal claims springs from the necessary and proper clause and the supremacy clause.

IV. RETROACTIVE APPLICATION OF S. 300 WOULD BE AN UNWISE EXERCISE OF LEGISLATIVE POWER

This analysis of the leading cases dealing with retroactive legislation casts substantial doubt upon the constitutional validity of the proposal to apply S. 300 to pending cases. Apart from these fundamental constitutional objections, there is the broader question of public policy: retroactivity here is an inappropriate exercise of legislative power. In harmony with the traditional aversion to retroactive laws, Congress has wisely chosen to make all other changes in the antitrust laws prospective only. There are no conceivable benefits that could justify the procedural entanglements and judicial waste that retroactivity of S. 300 would cause.

The disruption that would result from retroactive application of the bill, should not be underestimated.[27] As presently drafted, S. 300 would apply to all cases pending on the date of its enactment. It would reach cases in which a verdict has been reached but no final judgment has yet been entered, or cases in which settlements have been negotitated, as well as cases just entering their discovery phase. If a retroactive bill is passed, motions challenging the constitutionality of retroactivity will have to be filed and acted upon. Lawyers for plaintiffs and defendants have already conducted antitrust proceedings and accordance with the principles of Hanover Shoe and Illinois Brick. Decisions relating to the scope of discovery, which generally lasts years in antitrust litigation, would have to be reconsidered. Retroactive application of the "pass on" defense to pending cases would require, for example, the reopening of pleadings and discovery to take account of the newly created defense. The planned course of trials would also have to be altered to account for the claims brought by the newly authorized indirect-purchaser plaintiffs. Verdicts that have been entered in favor of direct-purchasers might have to be reopened either to account for a "pass on" defense or to consider the impact of a suit by indirect purchasers.

The confusing additional considerations that S. 300 would bring to an action have already been demonstrated. In re Anthracite Coal Antitrust Litigation, 79 F.R.D. 707 (M.D. Pa 1978), the Court factored into its decision approving a proposed settlement the impact that passage of last year's bills to overrule Illinois Brick might have on the parties. For example, the court anticipated that, should the retroactive overruling of Illinois Brick and Hanover Shoe pass Congress, the defendants would become subject to a significantly increased risk of liability. The Court also found that, if a retroactive statute were passed, "recovery by [direct purchaser] dealers in this litigation would be very substantially reduced," 79 F.R.D. at 710.

The speculative gain in reallocating antitrust recoveries is simply not worth the chaos that would result from the ill-advised retroactivity provision and the burdens it would place on the courts and parties.

Because retroactive statutes are, by definition, unsettling, Congress, has traditionally shown great reluctance to enact such legislation, just as the courts have been reluctant to construe legislation to apply retroactively. *See,* e.g., *United States* v. *Larionoff,* 431 U.S. 864, 878–82 (1977); *Greene* v. *United States,* 376 U.S. 149, 160 (1964); *Union Pacific R.R.* v. *Laramie Stock Yards Co., supra,* 231 U.S. at 199.

An examination of prior antitrust legislation, demonstrates the unprecedented nature of the proposal to alter substantive rights retroactively. For example, when Congress added section 4A to the Clayton Act authorizing the United States to sue for damages in its proprietary capacity, it gave the new law only prospective effect. Section 4 of the amendatory legislation, ch. 283, 69 Stat. 282 (1955), provided that it was to become effective "6 months after its enactment."

More recently, section 304 of the *parens patriae* title of the Hart-Scott-Rodino Antitrust Improvements Act of 1976—which, like S. 300, expanded the number of plaintiffs who could sue antitrust defendants—rendered those provisions inapplicable "to any injury sustained prior to the date of enactment" of the act. Pub. L. No. 94-435, 90 Stat. 1396.

Indeed, Congress rejected an earlier draft of the legislation, S. 1284, 94th Cong., lst Sess., that would have authorized the retroactive application of the title to actions "pending on the date of enactment" of that bill. This is precisely the language now included in S. 300. The committee should heed the admonitions issued by the 1976 minority report—which ultimately prevailed on this vital issue—that

---

[27] Mr. Shenefield does just this. For example, in his February lst testimony before this committee, he attempted to downplay the additional complexities. The additional problems and cases, he said, could be taken care of "maybe on Saturday morning or Saturday afternoon." Antitrust Enforcement Act of 1979 hearings, at 40–42.

In contrast, as Senator Cochran pointed out, (*id.* at 40), the Supreme Court in Illinois Brick explained concretely why the creation of new defenses and parties would "add whole new dimensions of complexity to treble damage suits and seriously undermine their effectiveness," 431 U.S. at 737.

"such retroactive reach-back for punitive impositions offends elementary constitutional requirements of fairness and due process." S. Rep. No. 94-803 Part II, 94th Cong., 2d Sess. at 187 (1976).

Congress's historic disinclination to amend antitrust legislation retroactively is rooted in considerations of fairness and a sound regard for the disruption that retroactivity causes. This historic course of prudent legislation ought not to be abandoned now.

Accordingly, if S. 300 is to be favorably reported by the committee, the bill should be amended to replace the present retroactivity provision with the following language:

"The amendments made by this act shall apply only to actions based on conduct that occurs after the enactment of his act."

This type of provision would be faithful to constitutional precepts and wise public policy. The retroactivity provision now in S. 300 is not.

Mr. LACOVARA [continuing]. But the focus of my submission to the committee this morning is on the section that would give these changes in substantive law retroactive effect.

At the outset, I think it is important for the committee to recognize that this would be virtually full retroactivity, even though the language that has been included in this year's bill, S. 300, is somewhat different from the language that was included in S. 1874 last year.

The reason for that point is essentially this. The focus of the effective date provision is not on the date when conduct occurs, as it should be in order to have a proper notion of what legislating is all about, establishing rules for the future.

Instead, the focus here is on the date a lawsuit happens to be filed. That applies necessarily to lawsuits that are pending today and that involve conduct that has taken place yesterday or in many cases 4, 8 or 10 years ago.

It seems manifestly obvious that attempting to change the rules of substantive law that would govern those actions, even though it is termed an application of the law to pending lawsuits, would be transforming the rights and liabilities that arose when conduct took place in the past.

So I want to emphasize that the committee should not be misled into thinking that this legislation would be prospective since it only talks about applying to cases pending on the date of enactment or filed thereafter.

In order to have legitimate prospectivety, any legislation the committee recommends, and I earnestly hope that it does not recommend any—should say that the provisions will apply only to conduct taking place after the effective date.

The other preliminary point that I would like to make, Mr. Chairman, is that the rather feeble attempts to justify the constitutionality of retroactive overruling the Illinois Brick and Hanover Shoe cases have come primarily from the Justice Department's Office of Legal Counsel.

I have been frankly disappointed by the quality of the analysis in their opinion letter, and I explain in my written statement why I think their analysis is fundamentally flawed. But perhaps more significantly it is improper at this time for this Congress to rely on that opinion letter; it dealt with a very different piece of legislation. It dealt with the House bill in the last Congress which had provisions in it that have been omitted from the bills that are now identically pending in both the House and the Senate, bills which

have a marked aggravation of the constitutional problems under the due process clause as I see them.

For that reason, I think the committee should dismiss out of hand any attempt to rely on the Justice Department's opinion letter that was submitted last year in support of the House bill.

There are two basic constitutional objections to the retroactive application of S. 300. One arises under the due process clause and it relates both to the interests of plaintiffs and to the interests of defendants.

The other constitutional objection springs from the separation of powers principle, which is an essential part of our constitutional plan.

I discuss in my testimony, Mr. Chairman, the various constitutional formulations that the Supreme Court has used in defending retroactive legislation goes beyond the permissible bounds of the due process clause. And the courts start with the general principle that has been recognized in this country since John Marshall's day, that retroactive laws are suspect, inherently suspect, because they are inherently unfair by attempting to reach back to re-create history.

The basic test today under the due process clause seems to be the one of "manifest injustice" and the Supreme Court has suggested that there are several inquiries to be made in applying that test.

One is the nature of the rights involved. Are they basically private rights or private claims or are they public rights? Here we are talking, of course, about private damage rights. The Court also talks about the effect of the retroactive alterations. Is it simply procedural or is it a substantive interference with the rights or liabilities that the parties had a right to assume would become fixed at the time they acted?

Here, too, the Justice Department's submission as echoed as recently as the February hearings before this committee, rather cavalierly attempt to classify this bill as a procedural bill. They say it is simply reshuffling plaintiffs or reallocating claims.

I think if you look at this, even in the most cursory way, you find that that analysis is terribly misleading, both practically and constitutionally.

What this legislation would do would be to have a direct and substantial substantive impact on the rights and liabilities of the plaintiffs and defendants.

What this legislation would do if applied retroactively would be to dilute or to eliminate vested rights of action that the Supreme Court held 11 years ago, in the Hanover Shoe case, that direct purchasers have under section 4 of the Clayton Act. They have those rights from the time they purchased a product that was illegally overpriced. It is a vested right to treble damages and the Supreme Court said there is no legal defense against that claim on the theory that somehow or other the direct purchaser was able to recoup some of its injury.

This legislation at least tentatively in the discretion of the district court, whatever that means, would allow the court to reduce or to eliminate that vested claim by the direct purchasers. Accordingly, there would be direct substantive impact on defendants.

Let's assume for the moment that a defendant did in fact violate the antitrust laws. As you have heard from Mr. Kirkham and other witnesses, the assumption that an antitrust suit claiming massive damages is necessarily a well-founded one is an assumption that the committee should not indulge, but let's assume that the defendant has in fact violated the law.

At the time he violated the law, certain consequences took place. He became liable for a certain amount, the amount of the overcharge. Under currently prevailing principles, I think it is fair to say that the defendant may also be liable for any consequential damages that that overcharge may have caused to the direct purchaser.

Senate bill 300, however, unlike the House bill of last year, would expand that liability and attempt to do so retroactively by allowing the defendant to be sued not only for that liability for which he was responsible under the law at the time he acted but for new types of liability, not just to new classes of people.

The new types of liability would be liability, as I understand it, for subsequent markups that may have had a multiplier effect on the prices being paid by remote purchasers.

That liability did not exist in the law at the time the defendant acted. To allow the overruling of *Illinois Brick* to permit claimants to assert those demands retroactively is clearly a substantive change in law that enlarges the defendant's liability for past conduct.

In addition, Mr. Shenefield has acknowledged, I believe, that unlike the House bill last year, the defendant would also be liable for consequential damages at those more remote levels. That has not been the law under the statute as the Supreme Court has interpreted it in *Illinois Brick* because under the law as it is today, there is no liability at all to indirect purchasers.

So when you add up, Mr. Chairman, the purported liability that will be imposed upon defendants for the markups, and for consequential damages in claims by indirect purchasers, you can easily see that the quantum of liability that may be imposed upon the defendant will be drastically increased.

Under section 4 of the Clayton Act, all of that liability, of course, would be trebled. It seems to me crystal-clear that that is a substantive violation of the defendant's expectations and that the due process clause of the fifth amendment of the Constitution does not permit the Congress to attempt that.

The other basic constitutional point that I have developed in my testimony is, I think, an equally sound one, that the committee ought to consider quite carefully. I not that none of the witnesses, including the Justice Department, has ever addressed this point, even though it was brought to the attention of the committee in the testimony last year by Professor Handler and by me.

The point is that under the separation of powers principle, the business of the courts is law-deciding. The law-making function is inherently prospective. The question you ask yourself is, what should the law be for the future?

What should the rules be that guide conduct in the future? It is the business of the courts to decide what the rules have been that parties before them must be held to. In this case, the Congress

is being asked to reach back in history and tell the Federal courts adjudicating antitrust claims. Disregard what the Supreme Court has said the law has been. Do not apply to these parties before you the rules of law articulated by the Supreme Court in the exercise of its constitutional responsibilities.

"Instead, apply the new rules that we think are proper for the future and apply them to affect the rights and the liabilities of people who have already acted and, indeed, who are already in court litigating over those rights and liabilities."

That seems to me, Mr. Chairman, grossly inconsistent with the proper allocation of responsibility between the legislative and judicial branches under the Constitution.

I think there is ample Supreme Court precedent to establish that it would be an unconstitutional intrusion upon the judicial function to direct the Federal courts to ignore Supreme Court holdings of what the law has been for the past in cases that are pending before them.

But my final point in the prepared statement that I have submitted is that, as Mr. Kirkham himself mentioned at the end of his testimony, it is undeniable that, while lawyers may differ in predicting the ultimate constitutional outcome on these questions, these are very substantial constitutional questions.

The proponents of this legislation, particularly the proponents of its retroactive application, have been cavalier and I would say irresponsible in attempting to convince this committee to disregard those constitutional objections, just to move ahead, let the courts worry about the Constitution.

The members of this committee, all the Member of Congress, took the same oath to support and defend the Constitution as do the Members of the Judiciary.

It is incumbent upon you to examine the constitutional questions, and I submit that this is no less true in the antitrust field than in any other field. The Congress should give wide berth to serious constitutional questions and avoid going right up to that constitutional line. At the very least, enactment of retroactive legislation of this type will go right up to the constitutional line.

My statement attempts to demonstrate that it will go well beyond it. But for reasons of policy, therefore, the committee should strongley recommend that if there is to be any legislation on this subject, those constitutional objections should be avoided in the very simple and direct way, by adopting the traditional approach that the Congress has taken in law-making, including law-making in the antitrust field.

That is to say, any new rules that the Congress may consider well advised should guide only the conduct in the future, and the past must be left to the law as it is has been.

I earnestly recommend, therefore, that if committee decides to recommend favorable action on this legislation, it should strip our the retroactive feature that now appears in the bill.

Senator COCHRAN. Thank you very much for your statement.

I notice in the written portion of the memorandum or statement that you submitted that you go further into the problems that you see with the discretion being vested in the district court for permitting or barring the pass-on defense to be asserted.

As a matter of fact, you state on page 16 that the bill would make the direct purchasers entitlement to recoup the full amount of overcharge they paid to the defendant totally dependent on the discretion of the court

A few pages over, you say on page 18 that the bill does not guarantee a defendant the right to have a pass-on defense.

I share your concern about that provision of the bill and wonder if there is anything that can be done in your judgment in the way of an amendment or changing of the language in the bill that would clean up that part and make it less bothersome.

Do you have any suggestion like that?

Mr. LACOVARA. Once again I am happy to echo the comments by Mr. Kirkham. There is a question of death by hanging or death by firing squad. If the committee were advised to go forward with this legislation then at an absolute minimum that discretionary element has to be taken out of the legislation in order to avoid the clear problem of duplicative liability.

As I explain in the prepared statement, that build-in reinforcement of the danger of duplicative liability is a further danger to the constitutional validity of this bill.

In the *Illinois Brick* case, the Supreme Court expressly assumed that there would have to be symmetry on the pass-on principle.

If the pass-on basis for a claim, the affirmative use of the pass-on, was going to be permitted, and the Court in *Illinois Brick* said it would not be, the Court necessarily assumed that the defendant would have to have the right to assert a pass-on defense against the direct purchaser.

In what I think, Mr. Chairman, must candidly be recognized as a political effort to neutralize the opposition that came last year from the plaintiffs' bar, the bill attempts to have its cake and eat it too, by saying the defendant loses both ways.

It is a heads the plaintiffs win, tails the defendant loses. The bill holds out to the plaintiffs' bar the prospect that perhaps the direct purchasers claims will not be diluted or barred because of a generous judge will disallow the defendant's assertion of the pass-on defense.

I think that is a very irresponsible method for making law. All it does is underscore the constitutional problems that this bill has in many of its sections. I think there has to be symmetry, and if the committee recommends that the bill go forward, that discretionary uncertainty has to be taken out.

Senator COCHRAN. In respect of the statements you make referring to a staff memorandum prepared for the House of Representatives Committee on the Judiciary, you suggest that the committee ought not to simply overrule *Illinois Brick* without then attending to some change of the *Hanover Shoe* decision.

I am presuming that you are suggesting that the legislation before the committee does not attempt to change in any way the *Hanover Shoe* decision of the Supreme Court.

Mr. LACOVARA. What it does by including that discretionary language that we were just discussing is leave open the prospect that in particular cases and, indeed, perhaps in a large number of cases, individual defendants will be subjected to the affirmative use

of the pass-on without the symmetrical entitlement to the pass-on defense.

That situation is what the House Judiciary Committee staff said would probably be unconstitutional.

Senator COCHRAN. In other words, what the proponents of this legislation are suggesting here in this committee is that we ought to pass on the causes of action, but not the defenses.

Mr. LACOVARA. But not the defense. That is exactly right. Mr. Chairman, I do want to reiterate, so that my views on this are clear on the record, that this discretionary insertion this year is not a principled one. It is, I think, an attempt to soften the political opposition that came last year before this very committee, from the plaintiffs' bar, when they said that the symmetrical overruling of both *Hanover Shoe* and *Illinois Brick* would undermine some plaintifs' cases.

That is quite true as a constitutional matter. I think that is one reason why it cannot be done retroactively, because it would interfere with the plaintiff's rights as well as with the defendant's rights.

But I think it raises other constitutional problems to do what the bill now attempts to do, which is automatically impose on the defendant exposure to the new claims, while saying "maybe you will have a defense to avoid duplicative liability with the direct purchasers and maybe you won't, and we will just let the Court worry about when you will and when you will not."

I think that that is a very nefarious attempt to avoid the real problems with this legislation.

Senator COCHRAN. Given all the well documented arguments you have presented on the retroactivity problem, is it safe to assume that if S. 300 is recommended by the committee, and enacted with the retroactivity provision in it, there will be suits taken right up to the Supreme Court challenging the constitutionality of it, tying up money, funds, claims for another long time into the future?

Mr. LACOVARA. I have not the slightest doubt about that, Mr. Chairman. The deleterious impact of this provision would be, I think, catastrophic. There are hundreds of antitrust cases pending that would be affected by this legislation, if it is passed with retroactive effect. Settlements may have to be reopened in order to take account of the possible new defenses and assertions of new claims. Judgments, verdicts that have been entered but have not yet become final—and often there is a long delay between the entry of even a judgment and its finality—they too might have to be reopened.

But even those hundreds of cases which haven't reached that stage yet, but which have been litigated on the basis of assumptions on what the basis is of the legal claims is, and what the available legal defenses will be; those, too, will have to be restructured. You will find plaintiffs and defendants litigating the validity and application of this legislation for years to come and ultimately 5 years, 10 years from now the Supreme Court will have to step in. My memorandum suggests it will step in to say that Congress overstepped its bounds.

Senator COCHRAN. I think that you highlight some of the real serious problems that this committee is about to get itself into, and

a lot of prospective litigants, those who have cases and claims in the antitrust area. It is fraught with problems, and I think your testimony clearly shows that.

In behalf of the committee, I want to commend you for the quality of the work that you have done, both the memorandum and the statement you have presented. I think it is very helpful to us to have this quality of treatment of some of the questions that are raised by the legislation.

Of course, I am glad to see you personally, and having worked with you some in the House Ethics Committee, and knowing of your distinguished record in the Solicitor General's Office and the Special Prosecutor's Office, and in many other aspects of your very fine career, it is good to have you before the committee.

Thank you very much for being here.

Mr. LACOVARA. It is good to be with you, Senator.

Senator COCHRAN. Our next and final witnesses for the hearings this morning will be Perry Goldberg, an attorney from Chicago, Illinois, Harold Kohn from Philadelphia, and Guido Saveri from San Francisco.

Mr. GOLDBERG. Mr. Chairman, we will also be joined by Mr. James Sloan, of Chicago, who will also be testifying.

Senator COCHRAN. Mr. Sloan? I want to welcome all of you to the committee. I appreciate your patience in waiting through the testimony of others who have come before the committee this morning.

PANEL OF ATTORNEYS

STATEMENT OF PERRY GOLDBERG, CHICAGO, ILL.; HAROLD E. KOHN, PHILADELPHIA, PA.; JAMES SLOAN, CHICAGO, ILL., AND GUIDO SAVERI, SAN FRANCISCO, CALIF.

Mr. GOLDBERG. Mr. Chairman, this will be a joint presentation which is being made basically on behalf of ad hoc committee of plaintiffs' antitrust lawyers opposing this piece of legislation.

I have submitted a prepared statement following pretty much the format of a statement which I submitted last year. Mr. Kohn testified last year and there was some question as to the position that he wanted to take and I think he would be prepared to lead off on our behalf at this point.

Senator COCHRAN. I appreciate, Mr. Goldberg, your description of the ad hoc group. We have a copy of your statement here. We will make that a part of the record.

[The prepared statement of Mr. Goldberg follows:]

PREPARED STATEMENT OF PERRY GOLDBERG

Mr. Chairman, my name is Perry Goldberg. I am a member of the firm of Specks & Goldberg, Ltd., in Chicago, a firm which with its predecessors has been heavily involved as attorneys for plaintiffs in scores of antitrust litigation for the past 10 years. I am appearing here today, as I did last year, on behalf of plaintiffs' antitrust attorneys throughout the Nation who are opposed to S. 300 (and H.R. 2060), the current bills to overrule *Illinois Brick* and *Hanover Shoe*. I hope I can bring to this committee my experience not only as a practicing plaintiffs' antitrust attorney, but also some special experience in the problems of judicial administration to which I believe *Hanover Shoe* and *Illinois Brick* are primarily addressed.

Much of my early career was spent in the massive electrical equipment antitrust litigation. In the early 1960's, I served in an administrative legal capacity to the coordinating committee for multiple litigation. This was a special subcommittee organized by the judicial conference of the United States and appointed by Chief Justice Warren to function as a kind of executive committee for the judges assigned to the electrical equipment antitrust litigation and thereafter to make recommenda-

tions regarding proposals for dealing with future complex multidistrict litigation. In a sense, this judicial conference subcommittee was the predecessor for the current judicial panel on multidistrict litigation. Accordingly, I participated in the drafting of title 28, U.S.C. § 1407, the pretrial coordination or consolidation provisions that are applicable to multidistrict litigation and which would be amended by the pending bills. I, thus, have had experience both as a judicial advisor and as a practicing plaintiffs' attorney with the problems of complex litigation and judicial administration.

As I testified last year, the plaintiffs' attorneys for whom I am speaking are strongly committed to the efficient and effective enforcement of the antitrust laws. Most of us were initially troubled by the decision in *Illinois Brick* and the notion that the courts are unable to remedy violations of the laws by providing redress to the persons actually injured. At the same time, however, we believe that *Hanover Shoe* was correctly decided, and that the proposed legislation will do irreparable harm to effective antitrust enforcement without in fact delivering on its promise of improved compensation. As Harold Kohn testified before the national commission for the review of antitrust laws and procedures, "[D]o not waste your time changing or trying to change *Illinois Brick*. It's simply going to lead, once again, to years of profitless litigation." *

Before elaboration on this point, I want first to voice the concern that many of us in the plaintiffs' bar have that you do not fully appreciate the practical difficulties of antitrust litigation.

Antitrust litigation is today enormously complex even without the pass-on defense. In testifying last year I attached an article I coauthored on the electrical equipment conspiracy cases to demonstrate how difficult that litigation became just in the context of what were essentially direct purchaser actions. I do not believe those cases could have been handled had the pass-on defense been available. Nor do I believe that it would be possible under S. 300 to handle most of the treble damage actions that are pending today. In short, we believe it is correct to observe that much current private enforcement would be torpedoed if the proposed legislation were enacted. I sincerely believe that an already complex enforcement system would simply collapse of its own weight if you complicate it any more. And I should add here in this connection that obviously direct purchasers do sue, and I find the argument that they do not sue is simply not borne out by the experience in scores of cases.

I would challenge you in a different way than some of the antitrust scholars you have heard. I would ask you before you enact any legislation to spend just a few weeks in the field, so to speak, monitoring some of the current antitrust actions. I do not refer here to review of scholarly papers. I mean traveling with me or anyone you choose through a few steps of the discovery process. I would be willing to let such an experience speak for itself. Accordingly, I will only make three brief additional points.

First, on the question of the compensatory aspects of the question, to which I said I would return, let me just make one comment. Perfect compensation is impossible, and the costs of trying to achieve even approximate compensation would undermine the entire enforcement effort. Indirect purchasers, including consumers, are simply not the only ones who may be injured in some economic way by violations that today can be pursued only by direct purchasers. Stockholders, employees and suppliers of both the direct and the indirect purchasers may suffer even more injury than the ultimate consumer. The pending legislation at least recognizes that it would be impossibly burdensome to allow these persons into the lawsuit by expressing an intent not to change the law of standing.

Moreover, the chain-of-distribution requirement would appear to prohibit recovery by numerous classes of potentially injured indirect purchasers, including those who can recover today under the exceptions to *Illinois Brick*. I am referring here to those who pay higher prices as a result of price-fixing of capital goods, energy supplies, or substantially transformed products.

Presumably, these various limitations are designed to eliminate some complexity and thus make the legislation more appealing. To my way of thinking, this limitation only underscores the futility and discriminatory nature of the bill. While Congress can obviously decide to prefer compensation over efficient deterrence, I do not see how it can decide to compensate some injured persons but exclude others perhaps more worthy. *Hanover Shoe* and *Illinois Brick* are, I will admit, somewhat arbitrary in the interests of enforcement and judicial administration. But the pend-

* Hearings to receive testimony on procedures for complex litigation before the national commission for the review of antitrust laws and procedures, testimony of Harold Kohn (July 12, 1978, p. 112).

ing legislation is no less arbitrary and infinitely more complex and obscure. In short, it combines the worst of both worlds and cannot work.

It is possible to try to have it both ways, by leaving *Hanover Shoe* intact, overruling *Illinois Brick*, revising the law of standing and eliminating the chain-of-distribution limitations. This would solve the difficulties with the pass-on defense while permitting all potentially injured persons to press their claims. But it would be cumbersome and it would also raise the problem of duplicative recovery. I am not convinced that double recovery is as much of a problem on the practical level in the Federal courts as it is on the theoretical level. But it should be pointed out that no matter what the Congress does to amend the Clayton Act, the State courts are likely to continue to follow *Hanover Shoe* and *Illinois Brick* in interpreting State antitrust laws, which are patterned after the current Federal law. There is nothing the Congress can do to change State law short of total preemption. Accordingly, if the pending bill passes, you will have intractable problems of double damages arising out of direct purchasers' rights to the entire overchange in state courts, and indirect purchasers' rights to additional recovery in the federal courts.

Second, in the interest of full disclosure, I should point out that my firm's clients have an interest in this legislation. My clients are currently pursuing direct purchaser claims in numerous active litigations, including the folding carton, fine paper, corrugated container, western sugar, chicken, wiring devices, toilet seats and armored car antitrust litigations. These clients are primarily small businesses which may have their potential recovery both reduced and delayed if the defendants raise a *Hanover Shoe* defense, as they most certainly will have to, in the event the pending legislation is enacted. But the fact that our clients may be affected cannot eliminate the questions of constitutionality and basic fairness raised by retroactive legislation.

Perhaps there is concern on the other side about the pending actions that will fail if the legislation is not retroactive. But I would like to suggest that the equities are not equally balanced. *Hanover Shoe* has been solid law for a decade, and there was never any hint that I was aware of that the Congress even considered overruling that case in the *parens patriae* legislation. *Illinois Brick,* though in our view of questionable correctness, can hardly be considered a surprise. It is a logical extension of *Hanover Shoe,* and there have been many indications in the courts and in the *parens patriae* legislation that such a case could be decided in the way it was. Moreover, there are far more direct cases that would be adversely affected by retroactivity than there are indirect claims that have been adversely affected by *Illinois Brick.* In other words, I am trying to say that while I recognize that nothing you do will be considered equally fair by all interested groups, I think that apart from being unwise, it is more unfair to reverse the reasoning of recent and long-standing Supreme Court precedent retroactively than to accept the teaching of the High Court.

Here again, it might be possible to have it both ways by overruling *Illinois Brick* retroactively but making the *Hanover Shoe* provisions prospective only. But this approach would almost certainly expose defendants to duplicative recoveries in Federal court. For example, if any of the direct purchaser cases in which I am involved is settled finally prior to enactment of this legislation, there would be nothing in S. 300 to prohibit duplicative recoveries by indirect purchasers, some of whom have tried already to bring suit. I have to confess I do not have too much sympathy for these defendants, but this is a point you should be aware of.

Finally, let me reiterate what I said last year about the obscurity of this legislation. No member of the plaintiffs' bar that I know understands what the legislation really means. The discretionary *Hanover Shoe* provisions and the chain-of-distribution requirements will take a decade of litigation to define. If I were a defendants' lawyer, I would seriously consider supporting the legislation at least for the near-term confusion it will create. The current system is today a very effective deterrent. I would urge you to leave it alone.

Senator COCHRAN [continuing]. Mr. Kohn, you may proceed.

Mr. KOHN. I guess the only thing more foolhardy than this legislation is having four plaintiffs' lawyers talk at the same time. [Laughter.]

If I could digress for just a moment, I think in fairness to everybody, including ourselves, we ought to say a word or two about what Mr. Kirkham said. It is seldom that we find ourselves on the same side of anything with Mr. Kirkham and I suppose we ought to be grateful for small favors, but after listening to him, I

think some of us were beginning to wonder whether at least in some respects we ought not to reconsider our position.

He mentioned the $1.78, but he forgot to tell you about the million dollar check that his client Safeway is going to get out of the sugar antitrust case pending in the Northern District of California, where he also very happily happened to represent one of the defendants, the U and I Company.

He is also wrong when he talks about Eisen. I was in the Eisen case, so I know.

The Eisen case did not hold fluid recovery unconstitutional. All that the Eisen case said was you couldn't make the defendant pay for the cost of notice before there was an adjudication that the defendant was liable.

And the Supreme Court in the Eisen case sent it back with a class of some 2 million people. I don't advocate classes of 2 million people in all cases, but I think those parts of the record ought to be set straight.

Let me talk about what I did come here to talk about until I listened to Mr. Kirkham.

I testified before the antitrust subcommittee some 6 weeks after Illinois Brick was handed down by the Supreme Court on July 21 of 1977. My testimony is at pages 44 to 53 of the transcript of the hearings, the printed transcript. There is a letter from me at page 269. My pedigree is set forth there in great length.

Mr. Chumbris knows me. I have been entertaining this committee and its antitrust committee for 15 years, and I use the word advisedly. I notice on every page somebody incorporated "laughter" after a half dozen things that I had said, but I am quite serious and I do think we ought to speak to each other quite candidly because this is a very, very important piece of legislation we are considering.

Mr. Boies was questioning Mr. Kirkham at great length as to whether the passage of this legislation would discourage suits. I must say candidly that I don't think it will. I think Mr. Boies is right. It will not discourage suits because nothing is going to discourage these suits. The important thing is what is going to happen at the other end.

I think Mr. Boies is absolutely dead wrong when he says that the Illinois Brick decision which permits only direct purchasers to sue will discourage suits. Neither rule discourages suits. But what you are interested in, I think, is the results of those suits.

Since Illinois Brick, contrary to all they have been telling us, the gentleman sitting here with me, have recovered some $600 million in settlements on behalf of direct purchasers. In the Corrugated case in Texas, we now have some $300 million in settlements. In the Folding Carton case in Chicago, there are 200 million at hand. In the Western Sugar case, in which Mr. Kirkham's firm is representing a defendant, his son James was good enough to contribute some $7 million toward a recovery of some $60 million and there are recoveries similar to it all over the country.

In the fine paper case in the eastern district of Pennsylvania, where there is not even a Government indictment yet, we have some $30 million in settlements, all on behalf of direct purchasers. What we find is the counsel for the direct purchasers are knocking

themselves out to get into the litigation. The problem is not to get enough suits, it is to keep them out so you don't have 50 lawyers in every case.

So there is absolutely no basis for saying that limiting recovery to direct purchasers will inhibit suits in any way.

John Shenefield knows better than that, too, because he and I have been in cases together at cocounsel. His firm, the Hunton Williams firm, in Richmond, and in Washington, has represented public utilities, for example. They were in the electrical equipment cases, as was I. Those are all direct purchasers. Nobody was inhibited because he was a direct purchaser from bringing suit. For example, in the Gas Meters case now we have half dozen major public utilities that started suit against gas manufacturers, within a week after the Government indictment came down. So it is in case after case.

You have, for example, companies today like I.T. &. T., Pillsbury, Ralston, Mr. Kirkham's client: Safeway. You can name a roster of major corporations which are engaged as plaintiffs, direct purchasers in price fixing cases for major suppliers. So there is absolutely nothing to that argument.

Why is this legislation—I am sorry Senator Laxalt isn't here because, like Mr. Kirkham, I seldom agree with the Senator on most matters. On this I think we see eye to eye. When I testified before, the Senator asked whether the Illinois Brick decision would gut enforcement of the antitrust laws, and I said in my opinion it would not.

What I proposed then was that we wait awhile and see what does happen with the enforcement of the law, instead of jumping off half-cocked before we knew what the result was going to be. I say that the experience of the past 21 months vindicated my recommendation and I think vindicated the position that Senator Laxalt took and repeated again today; namely, leave it to the courts and it will work out all right.

Here is what is going to happen if this legislation gets passed. What you are going to have is really a retrogression in the enforcement of the antitrust laws, such as we have not had before. I would say the two most significant improvements, the two most significant aids that we have received in this generation, in the enforcement of the antitrust laws, are first, rule 23, which has permitted class suits and, secondly, believe it or not, Illinois Brick.

Prior to Illinois Brick the defendants always took the position that the plaintiff who was a direct purchaser passed it on, and the plaintiff who was an indirect purchaser never paid it. There you were in this limbo. The litigation was protracted, the major issue was always not the violation because it is easy to prove that. The major issue was always the damages.

At least the plaintiffs at that time had a position where the defendants were uncertain as to what was going to happen. Nobody really knew despite a decision in the ninth circuit or a decision in the third circuit, where I practice. Nobody knew what the ultimate result was going to be. So both sides had something at risk, and it was generally possible to settle the litigation.

When Illinois Brick came down, you had certainty that was administratively and judicially possible to handle without undue

confusion. In other words, the first purchaser collected and you didn't have to get into that. There was no further inquiry as to whether you pass some of it or all along. So that was good. The defendants knew all you had to do was show the overcharge and the first purchaser was going to collect.

Now you have a situation where the uncertainty which existed before, and nobody knew what it was going to be, would be legally certified so to speak, assuming this legislation means what the drafters of it think it means and it doesn't. I will come to that in just a few minutes.

You would have a situation where they would know that they were going to have the right to play the first purchaser and the second purchaser against each other because it so says and that will prevent settlements. It will make trials impossible. I just came back in November from the trial of a case which I understand before I got here was referred to, the plywood case, tried before Judge Pointer of Alabama in New Orleans.

Senator COCHRAN. If you will excuse me, Senator Thurmond will resume the Chair.

Mr. KOHN. In that case we received a jury verdict and a measure of damages which the defendants have estimated is in the amount of $10 billion. That is spelled with a "b," not an "m," $10 billion, which I think is grossly exaggerated, but is certainly substanially in excess of many billions of dollars.

I tell you now that if the problem were as it would be with the passage of this law; namely, the right of indirect purchasers to recover, nobody could ever have recovered the verdict or be talking about the kind of damages we are talking about, because it would have been simply judicially impossible to ascertain the ultimate damages, whereas with the first purchaser getting it, there is no problem whatsoever.

Let me turn briefly and then I will close, to this act, S. 300. When I testified before, I stated that S. 1874 didn't do what everybody who drafted it thought it did and I think over the period of time that judgment has been vindicated and we have a new act. I don't mean to be derogatory about anybody's efforts at draftsmanship, many people for example think that James Joyce's "Ulysses" is a great work of art, although it too is incomprehensible.

Let's take the first section. "Any purchasers or sellers," phrase by phrase, any purchasers or sellers in the chain of manufacture, production or distribution of goods or services shall upon proof of payment—how do you have somebody in the chain of production or distribution of services?

I can see how, for example, in the plumbing case you can pass a bathtub along, but how do you pass architects services along? What does that mean? Does that mean that the services are melded into the product and you have the conglomerate product, that everybody who receives the entire product, everybody who receives something in which the product is used is going to have a right of recovery?

Let's take an architect, and there have been cases brought in which they have charged conspiracy with respect to architects. Bring it more closely to home, conspiracy on the part of lawyers as

42-005 O - 79 - 16

to title searches and the lawyer is overpaid and the builder who buys the land in the first instance is overpaid.

Then he builds a commercial project and sells it to somebody who is going to operate a restaurant. The restaurant proprietor leases it to somebody. These are not fictitious problems because they did arise before and they still will arise in other aspects of price fixing and monopoly and antitrust litigation, regardless of what you do here.

Then he sells the sandwich, for example, to Mr. Kirkham, who is representing the defendant in the antitrust case, the charge has gone all around. So it has been absorbed and so the defendant whom Mr. Kirkham represents, who made the overcharge in the first place, has the right of action and it is now disappeared.

It is a rather absurd situation, but all I am saying is whoever drafted this legislation did not think through that kind of problem.

It continues that he "shall be deemed to be injured." I say to you as a lawyer, that "deemed to be injured" is not going to get around Illinois Brick because the Supreme Court was not concerned, and the basis of that decision, was not whether he was or wasn't injured, they said even though he may be injured and even though he is injured, we are simply not going as a matter of judicial administration to permit them to recover. It doesn't make any difference whether he was injured or not. You have the same thing in other phases of the antitrust laws. For example, somebody who operates a motion picture theater under the old Paramount cases, and I tried a number of those. I go back quite a way, about 25 years. It was held there the same day that I was literally, the same day in 1950, or 1954, that I was recovering a judgment for an operator of a motion picture theater because of a monopoly and a boycott which denied him pictures, the owner of another theater who had a percentage lease was held not to have the right to recover, not because he wasn't injured. He was obviously injured because, had the receipts been greater, he would have received more money in rent. But simply because the court said we are not going to get into that kind of involved inquiry, we hold as a matter of law he can't recover, just the same as employees who are put out of work because a corporation is put out of business by a monopoly can't recover, even though the injury to them may actually be greater than it is to the employer.

So it doesn't accomplish what those who drew it thought they were accomplishing.

I agree, as Senator Laxalt or Senator Cochran, or somebody said, you simply can't draw any legislation that is going to resolve the Illinois Brick problem.

Let's take paragraph B. I agree with everybody that you simply can't have legislation when it says it may in the discretion of the Court permit the defendant to show the defense. I just don't think you will get two lawyers out of 2,000 who will not say that that is unconstitutional.

It is plainly unconstitutional. There is an exception to every rule, I suppose, but really, you just can't get away with that. The Supreme Court is bound to throw it out.

Even worse, as I read B, it doesn't say that the defendant has to pay anything to the indirect purchaser. All it says is that he has to

show the indirect purchaser would have had damage. So you will have this delightful situation which those who want to enforce the antitrust laws more effectively will have accomplished if this legislation should be passed, where the defendant can prove that it has all been passed on, that the man who is suing him has suffered no damage becasue he has passed it on, and no second purchaser has ever sued him.

So that he doesn't pay anything to that second purchaser or if the second purchaser sues him 2 years later, he says yes, I did show in that case that it was passed on, but it wasn't passed on to you. It is passed on to number 2, and number 4, not to number 3.

So I think that nobody in either camp would want something to be enacted which would contain that kind of problem.

Finally, subparagraph C(2), subparagraph (2), I guess it is, C(2), after giving an apparent fluid recovery right in subparagraph C(1), takes it away in C(2) because it says a defendant shall not be required to pay damages except to persons on whose behalf a "valid claim is presented to the court."

If there is fluid recovery you don't need the presentation of a valid claim to the court and, once again, I am not speaking academically or about pie in the sky. Mr. Goldberg and I were in, for example, the so-called tristate or New Jersey-Pennsylvania-Delaware gasoline antitrust case, where we recovered some $30 million, and we distributed that money (we were representing States as well as private claimants), to the States of Pennsylvania, New Jersey and Delaware, and to their municipal subdivisions without the filing of any proofs of claim. We simply divided the money geographically, by population, the chief judge of New Jersey approved it, and the checks went out.

If some little township with two police cars had to file a proof of claim, they wouldn't have got anything. But based on the population, they, like Mr. Kirkham, got a check in the mail and being somewhat less affluent than him, they were glad to get it. We received may letters thanking us for the efficient way in which that was handled.

In the Plywood case that I talked about where we got this multibillion dollar judgment, we are meeting with Judge Pointer in 2 or 3 weeks to endeavor to devise a system where the payment will go out, will be determined assuming the verdict is sustained, based upon the defendant's own records of direct purchases. They have computer records. They have invoice records. We will simply take the percentage of recovery which is ascertainable from their own records, and send the checks out.

I say that is an improvement. That does help enforce the antitrust laws. But this provision C(2) which requires everybody in the United States who bought plywood directly from them to present a claim would be a step backward.

I think I have talked enough. I am sure these gentlemen on my left are hurt by the fact that I have. Unless you have some questions of me, I am sure they will want to proceed.

Senator THURMOND. We are delighted to have you with us. I want to commend you for your able statement. These other gentlemen here with you, who wants to talk next?

Mr. SAVERI. I guess I will follow next. My name is Guido Saveri, an attorney from San Francisco. I have my own practice, Saveri & Saveri, and I have been practicing antitrust law for 25 years.

I met Mr. Kohn in the electrical cases when we worked on those cases 20 years ago. It is where I met Mr. Goldberg. I think one statement should be made that is clear. You can speculate and you can theorize, you can write a lot of nice bills and you can have very simplistic approaches to paragraphs on passing on. But when you get into the courtroom and you look at the practicalities of what happens, it is a completely different ball game.

I would like to get a few matters straight for the record with reference to my friend, Mr. Kirkham. I used to practice in his firm when I first started. Fortunately or unfortunately, I had the distinct privilege of having been the person who filed the Potato Chip case that Senator Kennedy referred to in his prior transcript. There also were some references here. Let me tell you about that case. As Mr. Kohn indicated, Mr. Kirkham's client in that situation did not get $1.87. On behalf of my filing that lawsuit for direct purchaser; namely grocery stores, his client Safeway Stores received a check for $450,000, out of the distribution of that fund.

Likewise, in that case, I will get to the pass-on problem in a minute, which is really a trap as it is proposed in this bill, a very interesting thing developed. I filed a lawsuit on behalf of all grocery stores in three States, alleging a price fix on potato chips; 6 months later the Federal Government indicted the parties and they all pleaded nolle.

In that particular case, five offices represented five major manufacturers of potato chips. When we got down to the actual practicalities of preparing the case for trial, the ugly head of pass-on raised itself. Most of the defendants filed a motion for summary judgment against me on the basis that my grocers had passed on the overcharge to the consumer. One defendant took the other position, joined me and said there was no pass-on.

Furthermore, there was no pass-on defense in that case because the persons to whom they alleged it was passed on was such a large class of 6 milion people in the State of California that it would have been unmanageable to try to prove injury to the tune maybe of $1.50 to $2 to each of those 6 million people.

In that case, a very interesting thing developed. In open court I indicated to the court that if the defendants were willing to stipulate that they would not raise the question of manageability of the consumer class. I would withdraw my motion and dismiss my case as long as they would stipulate that any overcharge or any overcharge that resulted as a result of the price fix would go the consumer.

No one would stipulate. So what they were trying to do was to sandbag me and the court in a sense of arguing that the overcharge was passed on to the consumer and then argue manageability so no one could recover. One can stay here and talk for days on antitrust litigation. I participated in the trial of the first class action that was tried in 1962 in Salt Lake City, in the case of *Nisely* v. *Union Carbide,* which involved vanadium and uranium, a price fix on uranium and vanadium. I tried that with an attorney

by the name of Joe Alioto in San Francisco, whom I practiced law with for 20 years.

As a result of that case, rule 23 was modified to what it is today. Everybody complains about rule 23 and the monster that was created simply because of the result in that case. I think that is exactly what we are going to get if this type of legislation is passed along the lines proposed here. When you really get down to it, what are the basic reasons for the antitrust laws? It is to deter price fixing. How do you deter price fixing? You deter price fixing by making the persons who violated the law pay for the full amount of the injury that they forced to come about.

The only way that you can make the defendants pay for the full amount of damage that they caused is to pay the persons who bought on the first line. In that situation, you would have the greatest recovery possible under the antitrust laws because you do not run into any problems of pass on, levels of distribution, and warfare among the various levels of the attorneys representing the direct purchaser, the middleman, the next person who bought it, and then the consumer.

The only way you are going to deter, as I said, a violation of the antitrust laws is to pay the persons who were directly injured. That would be a great redeeming and deterrent factor. The fact that someone way down the line, possibly a consumer is going to pick up a $1.50 doesn't really mean anything to him. He is more interested in having the violation nipped at the bud, having preventive medicine and making it difficult, through the million dollar fine, and assessing the real damages as a result of a price fix, threefold on the first level.

I have heard a lot of talk about windfall recoveries. It may be in this type of litigation, that somebody will have to get a windfall recovery. But it is better to give someone a windfall recovery and nip a violation of the antitrust laws in the bud, rather than creating different levels of distribution and pass-on theories that will permit a violator of the antitrust laws to get out scott-free, by setting up technical arguments of pass-on.

As Mr. Kohn indicated, in reading this bill, there are a lot of questions that arise. For instance, on the first section, they talk about distribution, the manufacture, production and distribution of goods and services.

You take the Sugar case that we are all involved in. Incidentally, in the Sugar case, I represent all the grocers in that case and against Mr. Kirkham's client will probably end up getting $150,000 out of the case. It is a pretty good deal.

What happens in the situation, for instance, in the Sugar case under this bill, where there is a price fix on sugar and the sugar then is used by a canner when he cans peaches? There is a substantial amount of sugar in that can of peaches.

That canner then sells the can of peaches to the grocery store. The grocery store then sells that can of peaches to the consumer.

Who is entitled to recover for the overcharge on that sugar? Number one, the canner paid directly for the sugar, presumably he included part of the overcharge in the sugar that went into the can of peaches. So technically, the grocer paid something, paid part of that overcharge and I guess presumably, although grocers are

going broke every day and they are working on very low margins of profit, presumably part of that sugar increase was contained in the price that he charged for the can of peaches.

Under that situation, you would have a consumer who would have a lawsuit, a grocer who has a lawsuit, a canner who has a lawsuit and perhaps you might have some middleman or distributor or wholesaler who bought the sugar who would have the lawsuit.

The end result is by having all of these levels of distribution filing lawsuits, you are going to make a complex case 10 times more complex and the end result will be that we will not be getting top dollar for that case because there will be so many unknowns and so many problems as to who passed on what and who is entitled to recovery and what proportion, that the end result will be that in an effort to get some recovery you will not get the maximum amount out of that case that you would have gotten if the direct purchaser has sued.

I join in everything that Mr. Kohn said, particularly section B, when you talk about someone having to present a valid claim. Once again, this raises the ugly head of the pass-on. There is no question about it, consumers like myself don't have records of what they bought over the past 5 or 10 years.

If it became a problem of proving under the rules of evidence in a court of law what my purchases were in potato chips for the last 10 years, I would not be able to do it. Consequently, if, through this so-called fluid recovery, whatever you want to call it, you do pass that right of action on to the consumer and then require him to come in to a court of law and file a valid claim pursuant to rules of evidence, you will never get anyone who will be able to prove any kind of a claim.

In that situation, the defendants will set up the pass-on doctrine, so that the middleman who passes it on will have no recovery. You then get down to the consumer. He will not be able to prove his valid claim and, once again, you will have a situation where there has been a violation of the law with no recovery by anyone.

If that is a deterrent in the antitrust laws, I have never heard of it. I can go on talking about problems that I see, problems in this bill, that will only make complex cases more complex. I don't want to repeat what Mr. Kohn has said and what the professors have said on a technical basis, but when get down to the practical application of the antitrust laws, what goes on in a court of law, if these cases ever do go to trial, then you face a real problem and that problem will be removed, if you do give the recovery to the direct purchaser.

I would like to see Illinois Brick repealed, legislatively. At least with Hanover Shoe we knew what we were doing.

You knew when you could pass it on, you knew when you couldn't, you knew when there was a question of manageability. There was some framework, at least a certain certainty.

So my comments have been made, and you may say "you complained about the bill, you say it is not a good bill, what are your suggestions?" I would prefer not have any bill, to let the law remain as it is, and let us see what would happen perhaps in the next year or year and a half.

Thank you very much.

Mr. GOLDBERG. I am Perry Goldberg. I spoke here last year with Mr. Sloan.

Mr. Kohn spoke here a year and a half ago. At that time he suggested with respect to the predecessor of this current legislative proposal that you go slow about it. A year ago I suggested that you go very, very slow about it. Now, I would suggest respectfully that you go home and forget about it.

The truth of the matter is that too much has been talked about this bill. Too little has been done and the bill ought to be just forgotten at this point in time, enough. We have collected more money in the last year for antitrust enforcement than in the preceding 50 years of the Sherman Act, we will collect more money in the next year than in the preceding 51 years of the Sherman Act.

Senator THURMOND. You expect more money than what?

Mr. GOLDBERG. In the next year than in the preceding 51 years; in the preceding 50 years of antitrust enforcement. What really the net effect of Illinois Brick has been, as much as I hate to give the Supreme Court any credit since I don't agree with them very much, surely not in the Antitrust Act, I don't agree with their decision in Illinois Brick, but nonetheless the effect has been better enforcement in the antitrust laws.

The pragmatics are in the dollars. In the last year over $500 million has been paid into settlement funds which probably equals what has been collected in all the settlements previously in all the antitrust cases with maybe the exception of the electrical equipment cases. That is just a possible exception. Maybe the figure this last year was $700 million, in which case it beats everything, all put together.

My prediction is that the next year, given some good luck and a few reasonable court decisions, it might take a year and a half, we will collect a billion dollars and will equal the preceding 51 years. In effect the net result is that Illinois Brick had engendered antitrust enforcement at a level that is meaningful to the pocketbook of the violator. It is costing them money.

To my left we have Jim Sloan, who has been acting as coordinating secretary for our ad hoc committee, and perhaps he would like to say a couple of words prior to any questions which the Senator or any other member may have.

Mr. SLOAN. Thank you. It is an honor and a privilege to appear before the committee.

I am here in a role that allows me to talk about the three gentlemen on my right. There are a large number of plaintiff's antitrust lawyers who have been concerned about this legislation and concerned about the fact that the plaintiffs bar has not been sufficiently active, enabling the committee at least to have the facts as they say from the field, from the arena and tell you as a practical matter what the implementation of a draft of legislation may be.

Mr. Harold Kohn, from Philadelphia, Mr. Guido Saveri, from San Francisco, Mr. Perry Goldberg from Chicago, are the preeminent antitrust plaintiff's lawyers in the United States. In case after case they have been chosen not only by their peers, the large

number of plaintiff's antitrust lawyers from coast to coast, but also by the courts from New York to San Francisco, from New Orleans to Chicago. They have been chosen both the courts and by their peers to be lead counsel, to be leaders in the major antitrust cases which have been brought by the private plaintiffs bar in the past 20 or 25 years.

Senator THURMOND. The gentleman sitting there with you now?

Mr. SLOAN. That is correct, Senator. Mr. Kohn, Mr. Saveri, and Mr. Goldberg. In addition, they have been engaged, all of them at one time or another, to represent public entities in antitrust actions which have been brought. Mr. Kohn and Mr. Goldberg, were very prominent on behalf of the States in the tetracycline litigation. Mr. Saveri was active and actually went to trial on one of those cases, and received a tremendous recovery.

So on behalf of many, many lawyers, a large number of whom were identified, in the ad hoc committee's report, which we submitted to the Judiciary Committee last year, we want to urge upon the committee to listen carefully to the views of Mr. Kohn, Mr. Saveri, and Mr. Goldberg, because they do speak for a very large segment of the private plaintiffs bar in the United States.

In that vein, Senator and Senators, we ask you to carefully review the matters submitted in the prior Judiciary Committee hearings, as well as the presentations today.

I would like to make a couple of additional comments myself not only in response to Mr. Kirkham's eloquent presentation but also in response to other presentations which have been made here today in a very practical approach.

The argument has been made that direct purchasers will not and do not sue. I think my colleagues have made a rather forceful empirical presentation that they not only do, but they have. I want to emphasize Mr. Kohn's point that in private case after private case, there is no shortage of plaintiffs. There is no shortage of competent plaintiff's counsel filing suits. It is rather the opposite.

There is an inordinately large number of private actions being filed since the Illinois Brick decision.

I think one of the reasons for that is the certainty that now exists in the law and perhaps a reduction in the proportion of risk since the defendants are not allowed to play procedural gains, like the old shell game at the carnival. The bean is under two shells, but one of them is empty. That is what pass-on formerly meant in this litigation. Without that, we have a large number of lawyers who have not put the years in this business, developing it from infancy, as Mr. Kohn, Mr. Saveri, and Mr. Goldberg, have done and who now want to become vigorous private enforcers of the antitrust laws.

Second, in regard and in response to that argument that direct purchasers do not sue, I have checked some of the major antitrust cases. I think that as a matter of fact Mr. Kohn, Mr. Saveri, Mr. Goldberg and myself are in the five largest antitrust cases that are pending in the United States today and in those cases there is, as of today, $561 million in those five cases, and closer to $600 million exclusive of the interest which is earned on all of those funds which are for the most part, over 90 percent of those funds, on

deposit with escrow agents awaiting distribution orders and approval by the courts.

This legislation which is being promoted by people who are not parties to those lawsuits is threatening to delay the distribution of those moneys to the direct purchasers.

Some major companies suing as direct purchasers not previously mentioned were Kraft, Deans, Pillsbury, Borden, ITT Continental, Falstaff, a client of Mr. Saveri's, Land-O-Lakes, and a large number of other companies, including General Mills and Jolly Green Giant. What we really have developing, Senator, is, since the Illinois Brick decision, some equality in the adversary process. My colleagues have perhaps cynically, but I think truthfully said, you have to send a crook to catch a crook.

In that vein, the argument that Mr. Kirkham has advanced that it is a terrible thing when a small company may be as liable as a large company when they are a coconspirator in an illegal scheme, we suggest smacks of a dual standard. In the law enforcement atmosphere of today's society, the crackdown on offenders of the law, we have before this Congress a request that somehow it is unfair, that Corporations are subject to the same general principles of criminal culpability that individuals are.

Certainly, the smallest company is as liable as the largest. They should be because in the conspiracy, as has been the law of the land for time immemorial, a coconspirator in an unlawful scheme is as liable as someone who initiated the scheme and it is only fitting and proper that a company which is culpable should be jointly and severly liable to enforce the antitrust laws.

I think I have one or two brief points. I don't think we should allow to stand unrebutted an unsubstantiated claim that attorneys' fees and class actions are somehow becoming improper or inordinate or that as a result of the lack of passionate and zealous representation of plaintiffs that the motivation for attorneys' fees are somehow not allowing us to enforce the antitrust laws. That is totally and maliciously false. It is a slanderous and libelous approach which I think developed because the plaintiffs were in fact pursuing class actions too vigorously. It was an attempt to undermine the enforcement of the antitrust laws.

I think it is a classic and a forceful truth. Mr. Kohn has always said, that the plaintiffs bar would be quite happy with anything close to the fees the defendants have earned in these cases. The fact is nobody is scaring Mr. Kirkham into paying any settlements. Nobody is scaring these giant corporations and their well-established, large law firms into paying any settlements. In fact, the opposite is quite true. Prior to Illinois Brick, the opportunity to use the plaintiff class against plaintiff class and to hand out a substantial sum of money and say you fellows fight over who gets it, that was undermining the antitrust laws. But the fact was and the fact is that the plaintiffs bar is losing daily capable people to the companies and defendants who are hiring them because the compensation on the plaintiffs side does not and probably never will equal the compensation which is available in defending these large antitrust cases.

I think it should be pointed out in that vein that one of the largest law firms in the United States was going around the coun-

try making these same remarks about coercion by class action plaintiffs' counsel and was defending vigorously the plywood antitrust cases against Mr. Kohn, while making these statements, and people prudently suggested that maybe they ought to reconsider the decision to go to trial in view of the evidence, but they wanted to prove a point that these cases were brought without merit. They are now facing a $1 billion-plus judgment.

I conclude by saying that any action that this committee takes that it would be deeply appreciated by the plaintiffs bar if they would consult with Mr. Kohn, Mr. Saveri, Mr. Goldberg, because of the tremendous impact on the enforcement of the antitrust laws and there is no other place that I know of, or that the plaintiffs bar in general knows of where you can obtain reliable, wise, and practical advice as to the type of legislation to be enacted than from these gentlemen.

I conclude by saying I think that the consumer action should be left to the States under the local antitrust laws to enforce at the local level. Senator, this may be an area where the Federal Government doesn't belong at all. The consumer end of it, they are close to the people, they know the problems; it should be left to them; they are free to enact their own antitrust laws.

In the State of California, Mr. Saveri has a vigorous class action law and they have consumer actions out there that are very effective.

Senator THURMOND. Thank you very much. We wish to thank you for your appearance here. I want to express my appreciation to all of you gentlemen.

We had a very important meeting of the full Judiciary Committee this morning on the Immigration bill at 9:30 a.m. I got away as soon as I could, but I could not be here in the beginning.

I have a number of questions to ask each witness, but I will submit them to the witnesses and they can answer for the record, if that is agreeable.

Mr. Kohn, I have just a couple of questions here for you.

Would you care to comment on the discretion given the trial judge to permit the pass-on defense, or how he would exercise his discretion and how long would it take? Is it a weapon?

Mr. KOHN. I think it is unconstitutional and I think most judges faced with that problem would be in a quandary as to what position they would take. I think what they would say is that the discretion vested in them is unconstitutional and that would be the way that discretion would be exercised. Since that is basic, I think to the whole act, I think the whole act would fall with it. There is no standard that they could apply.

Senator THURMOND. There has been testimony by a State attorney general here and in the House, complaining that the States have been dismissed from numerous cases. We have requested more information from them.

Are you familiar with any of these cases such as the sugar cases and can you comment on them?

Mr. KOHN. I think I am familiar with most of them. I have represented the States in much of this type of litigation and was one of those who in the electrical cases for the first time represented States who did vindicate their position for monetary damages.

The State claims were de minimis really in the Sugar case, for example. It was the claims of the consumers that they were endeavoring to vindicate by representing the consumers. Those were thrown out as Mr. Saveri indicated, because the class was held to be unmanageable. In other words, the judge was not going to undertake to have represented millions of consumers who bought 2 or 3 pounds of sugar and had no records. So far as the States themselves are concerned, there are many items in which the States are frequent purchasers. There are many, as in the case of most other people, where they are indirect purchasers.

It is vastly more in the interest of the States to have the certainty of collection and to recover the much more enormous amounts that they can recover if recovery is confined to direct purchasers and the defendants are not permitted to dissipate the recoveries and to reduce them by claiming some of what the States would otherwise get should go to an indirect purchaser.

The whole level of antitrust recoveries would be substantially reduced so that even though they be participating in more recoveries, the aggregate would be less.

Let me say one other thing. The people who argue that the overcharges passed on are inconsistent unless they admit at the same time that the recovery by the direct purchaser will likewise be passed on because the two are simply opposite sides of the same coin.

So the substantial justice is done, if you permit the first purchaser to recover, because if he has indeed passed on the overcharge, then he must equally indeed under any valid economic theory, pass on the additional amount that he has recovered by way of the overcharge.

So that in the long run, the State, as far as the State claims were concerned, would be just as fairly dealt with.

Perhaps I shouldn't go into this, but since we talked about it, in the Sugar case, the States were given an opportunity to recover a very substantial part of the total recovery in that case far beyond what their own purchasers would have justified. They refused, I think, as part of the same attitude, which is endemic among a relatively small group of assistant attorneys general for the States, who are representing them in these antitrust matters.

We think they are misguided. In an effort to recoup some of the situation, we have voluntarily offered subject to the approval of the class and subject to the approval of the Court, to take a somewhat smaller percentage than they would have gotten before, but a very substantial number of dollars and turn it over to the States.

We are having a settlement conference in the eastern district of Pennsylvania tomorrow, where Judge Cahn is sitting especially along with Judge Boldt, originally as signed in the northern district of California, to see if that can be made. We do not proceed from any antagonism toward the States, believe me. We like to settle matters. We have a great many things to do.

If it were possible to placate the 50 or 100 young men and women who are representing the States, we could do so. But just as you would not indulge a wayward child—I don't mean to make a comparison—in everything that the child wants, if you do this to

placate these people you will be destroying that which they are purporting to vindicate.

I would say that this is one case where you have to be stern, where you have to say you don't get what you want, because if you do, you are going to deprive yourself of something that is infinitely more. It is a very long-winded answer but I think it covers most of the problems which are in the minds of the State representatives who have appeared here.

I don't want to comment one way or another on the political implications. I think Senator Laxalt commented on that earlier in the day and I think he put his finger on it in one sense. But I am talking about the practicalities of the situation, so far as the money the States will get. Without this legislation and under Illinois Brick they will get infinitely more than they will under this legislation.

Senator THURMOND. I have a few questions here for Mr. Goldberg.

Mr. Goldberg, would it suit you to take these questions and answer them and send them in for the record right away? I would appreciate it if you would.

Mr. GOLDBERG. Either way, Senator I will be pleased to answer them.

Senator THURMOND. I might let counsel propound those questions to you now. I have got another appointment, so I have to leave. However, I am anxious to get your opinions.

Mr. GOLDBERG. Either way. If it would be easier to have them in writing, I would be glad to.

Senator THURMOND. Mr. Saveri, I would like for you to comment on any of the questions or answers that are propounded here, too.

Mr. Sloan, if you can also do that. Counsel will propound these questions.

Mr. GOLDBERG. Perhaps if I might, I would give an answer now and perhaps give you a written answer if I think of something better later on and perhaps the gentlemen to my left and right might do the same.

Senator THURMOND. Counsel can propound the questions and you can tell him whether you wish to send in the answer or answer now. I will give you the choice.

Mr. GOLDBERG. Thank you very much.

Senator THURMOND. I want to express my sincere appreciation to you gentlemen. You are some of the most talented lawyers in the country on this subject. Your testimony here is of great help to us. I want to thank you again for being here on this occasion.

Senator Laxalt had to leave. Mr. Regnery, his staff member is here, and if he has a few questions and if you would be kind enough to answer those now as soon as the counsel for the subcommittee propounds his questions. Thank you very much.

Mr. CHUMBRIS. Mr. Goldberg, you testified last year that nobody understood what last year's bills meant and that litigation to interpret the bills would set back antitrust enforcement for years. Do you feel the same about S. 300, this year's bill?

Mr. GOLDBERG. Sir, I can only say that I have tried to read this bill again and I don't think I am the person who can't read, but I think Mr. Kohn and Mr. Saveri pointed out that the bill doesn't

read. I think the same criticism once again applies. The draftsmanship with all due respect leaves open more questions than it solves and, once again, we have a bill which I can honestly say if I were a defense lawyer I would be delighted with 10 years for defense is sure, 15 is probable, and perhaps a lifetime is possible.

Mr. CHUMBRIS. Can you compare in terms of rough dollars—this goes to all four of you—and you also, Mr. Kohn, the amount of pending indirect claims with direct claims that would be jeopardized by this bill?

Mr. GOLDBERG. Sir, I don't think we could ever do that. All we can tell you is that the direct claims now are in the billions. In fact, in the many billions. Mr. Kohn in one case has direct claims in which he has a judgment which may be in the billions on. In the cases, some other cases, we have equal claims, I would say, in the billions. How much they will ultimately be, no one can tell. But the indirect claims there would be probably the same if they were allowed. There is no way to judge it.

Mr. REGNERY. In that regard there was a $561 million in settlements which have been put in the bank. I wonder if you have any idea how many of those judgments or settlements would be in jeopardy if this bill were passed?

Mr. GOLDBERG. It depends on how imaginative defense lawyers are and we can presume they will be very imaginative. By their terms certain of these settlements are firm but on the other hand perhaps some of them, and I guess somebody always can do it, can say there has been a mistake of law.

Mr. KOHN. The pendency of the bill, the passage of the bill would be a substantial complicating factor. I don't think anyone can put it in dollar terms. But I think the very existence of this bill has impeded settlements. There would have been substantially more, and the passage of the bill I think would cause confusion in situations where there are settlements as to which the defendants are quite reconciled and willing to have the money distributed if they are assured that this bill is no longer viable.

Mr. SLOAN. Could I supplement? I believe I used the figure of $561 million. That only is in five cases that are pending in the United States. Mr. Kohn's figures earlier were higher. But in those five cases, the figure is without interest earned: $561 million-plus.

I think that the figure in terms of actual moneys and settlements and recoveries since the Illinois Brick decision is for higher.

Mr. CHUMBRIS. Mr. Kohn, I happened to be in the hearing room at the time the Antitrust Commission was holding a session, I believe, in August. You came in and testified. Would you like to comment on the comment that you made to the Commission that day about the impact of the Illinois Brick and what it was doing to cases that were pending?

Mr. KOHN. Yes. I do have the National Commission report here. I don't think it covers that particular aspect of it. I think most of what—if I can digress, most of what that Commission proposed and most of what you propose in S. 390 are very valuable improvements which ought to be made. I am wholeheartedly in favor of those as I was, for example, I was virtually the only plaintiffs' lawyer who testified in favor of the parens patriae legislation. Illinois Brick is going to be an unmitigated disaster, not Illinois Brick, this S. 300.

And I think that anybody who supports that is simply going to move back the enforcement of the antitrust laws to where it was back in literally the 1930's. I think it is very dangerous. I think any tampering, any tampering with the antitrust laws ought to be most cautiously proceeded with. It is sort of like the Constitution. It has worked pretty well with the uncertainty, with the vagueness, and so on, that is in the basic legislation. I think any change ought to be very seriously thought out. It should be absolutely essential. It should be clear as crystal.

Another thing you always get, you always get compromise legislation.

So when somebody goes along with something that looks like it is going to help the antitrust laws, he always puts in a sleeper, like the business at the end like the necessity of filing valid claims, whatever that may mean.

So that is sort of a longhanded way, what I said, in passing in shorthand, the National Commission hearings that you referred to.

Mr. CHUMBRIS. Mike Cooper, counsel to Senator Metzenbaum, thanks you through me for the comment that you made about this bill, S. 390.

Mr. KOHN. This is the sort of chain reaction. I suppose somebody should be grateful, at least on our side for what I have passed on in the National Commission hearings, too. Thanks ever so much. You are very kind. I may say that Mr. Sloan is unduly kind to all of us. I have to dissent from some of it.

Mr. CHUMBRIS. One other question for Mr. Goldberg. We have been told that you represent some plaintiffs in sugar cases. If so, could you describe briefly what claims the various States have in terms of what may have been dismissed, settled or still be pending?

Mr. GOLDBERG. I don't represent any States in those cases but so far as I know, there has been no dismissal in those cases to date, though there perhaps should have been under the law, but the cases remain pending. Mr. Saveri is certainly more familiar than I am with that aspect of the litigation. Is that right?

Mr. SAVERI. Yes. The State cases are pending and in fact they are pursuing the cases and intend to try them if they are not settled. We have meetings in Philadelphia tommorrow with the hope of disposing of all of the cases. But the State cases are still on the books and are proceeding along. The only cases that have been settled are the private cases.

Mr. CHUMBRIS. All five of you can answer this last question that I have, including you, Mr. Kirkham, assignment and private parties. Many States are now routinely taking assignments in procurement processes. Are you aware of the use of assignments by private indirect purchasers? What are the problems? If the private parties are not trying to take assignments, can we construe that as a lack of interest in policing violations up the line?

Mr. GOLDBERG. Yes.

Mr. SAVERI. Yes. I would like to comment on that, if I may. I had that in my notes. I wanted to mention this. Imagination and ingenuity can accomplish a lot of things which don't have to be accomplished by a new bill. One thing good about the antitrust laws, the Sherman Act, at least section 1 and 2, it is short, simple and to the point. It is like a constitution. It is an organic instrument that

grows and lives as it is interpreted by the Supreme Court. Once you start toying with that basic structure, as Mr. Kohn indicated, and try to legislate specifically on every point as to violation, you get into a morass of problems.

I think the best example is the Robinson-Patman Act. I worked with that statute for years. I have had lawsuits on it. To this day, I don't know who understands that act. That is what I am afraid of might happen in this situation with the Illinois Brick legislation. There are many ways that a State can protect itself. It can take an assignment from the person from whom it buys the product. It can be a condition of any contract with the State, that if there is any recovery from an overcharge, that recovery will be given to the State. Or it can be an assignment of any potential cause of action that might arise because of a price fix.

In that situation, the State would step into the shoes of the assignor, and as the assignee would have a right to sue. For instance, when we had the problem of fraudulent concealment—Mr. Kirkham mentioned the problem of fraudulent concealment—the fraudulent concealment problem is very, very important to the enforcement of the antitrust laws.

There is a 4-year statute of limitation. We litigated that issue in every circuit in the United States in the electrical cases and we won every one because the defendants tried to say a conspiracy is always concealed, consequently, you have an unlimited statute of limitation.

In municipalities that I represented in the electrical cases we developed something. I think we originated it. We asked every person who sold a product to us to state under oath that the price that was quoted to us was done independently and not through any collusion because if he did sign that statement, and it later turned out that there was a price fix, that is an affirmative act of fraudulent concealment.

So there is through the use of imagination another mechanism where you can get a lot of this protection that the States are complaining about.

With reference to the assignments, that is something that I have thought about. I suggested it many times. What is being done with it, I really don't know, because presently I don't represent any States. Perhaps Mr. Kirkham can shed some light on that.

Mr. KIRKHAM. I think as a practical matter the States can handle it. They have procurement forms. They have just put in section 26 or paragraph 26. They have to put that in their procurement forms and there would be no problem. As far as in the private sector, I don't think it is too practical to think of having everybody comply with the form in the contract that there is going to be assignment. I think notwithstanding the horrendous figures that have been stated by these very prominent gentlemen here that when you think of the total business that is done in the United States, that there is more legal business being done today than there is illegal business by a long ways. So I don't see that as something that would be a common thing in the private sector. But I think as far as the States are concerned, it could be just routine in their purchase contracts.

Mr. CHUMBRIS. Have you gentlemen had an opportunity to read the record on the first day of the hearings on February the first, when Senator Hatch got into a colloquy with the Governor of the State of Arizona, and in which Senator Hatch asked why aren't the States taking assignments?

Mr. GOLDBERG. No, I haven't.

Mr. CHUMBRIS. I would like to perhaps ask you gentlemen, since we are discussing assignments, if we can get that portion of the record submitted to you, maybe you can comment because the Attorneys General who responded after Senator Hatch had his colloquy with the Governor to the idea that they had too many inhibitions in trying to make use, too many difficulties in trying to make use of the assignment procedure, we would like to get your reaction on that.

Mr. GOLDBERG. Perhaps that maight also point out the fact that they have no real interest in obtaining real restitution of the affair.

Mr. CHUMBRIS. That is the reason I am asking the question, because Senator Hatch was trying to get from you as to why they aren't moving in that direction when they could be getting these assignments.

Mr. GOLDBERG. I have represented a few municipalities on a consulting basis and we have put in the form of contract that assignment provision. We also put in the form that Mr. Saveri discussed requiring each bidder to say that he is not colluding basically on the price that he is submitting to the municipality and as a preventive measure I think it works.

Mr. CHUMBRIS. If each of you will leave your card, we have your addresses, with our clerk, our secretary here, so that we will Xerox that part of Senator Hatch's colloquy with Governor, and ask you to respond on that point. The record needs some additional data on that particular point.

I will turn it over to Al Regnery, Senator Laxalt's chief counsel, on the administrative practices and procedures on the minority side. He has several questions.

Mr. REGNERY. I think I have only one. Mr. Kohn, you mentioned that in section A of the bill, the draftsmanship is really inadequate to accomplish what the drafters thought they were accomplishing, and specifically referring to the language that the purchaser or seller were deemed to be injured, that he would have a cause of action. If that in fact is true, and if this language were retained, what is everybody so upset about?

Mr. KOHN. I think it would lead to what no lawyer who really has any pride in his profession would want and that is endless litigation as to whether it does mean something or it doesn't mean something, years of prolonged fights with great expense on both sides. For example, one of the reasons that I think that the more professionally minded of the defense bar are opposed to this legislation, and favor Illinois Brick, is the horror they have of the litigation.

That is one illustration of it. I don't think you pass legislation with the Machiavellian thought in the back of your mind that it will be meaningless.

Mr. REGNERY. One other question for Mr. Goldberg. I think you are putting together an ad hoc committee of plaintiffs' lawyers to oppose the bill and I wonder if you have found plaintiffs' lawyers who support it.

Mr. GOLDBERG. We have found no one who really supports the bill, no one, zero. In fact, the only people that could be conceived of having supported this bill are people who wrote a minority report for the ABA but even those people aren't here and haven't spoken out in favor of this bill.

Mr. REGNERY. Thank you.

Mr. KOHN. The only real support comes from the gentleman I referred to, the assistant attorneys general in the Antitrust Division of the various States. Without exception, every other lawyer, plaintiffs and defendants—it is the one thing I have seen the entire bar united on—is opposed to this legislation.

Mr. CHUMBRIS. Are you referring to the entire U.S.?

Mr. KOHN. Yes.

Mr. CHUMBRIS. Not just to Mr. Goldberg and Mr. Sloan's committee that he submitted 33 names.

Mr. GOLDBERG. That is a lot. There aren't that many cases. There aren't that many plaintiffs antitrust cases and I think the people we submitted there are among 40 who are regular or 50 or whatever the right number is who regularly practice in the field.

Mr. SAVERI. I think it might be fair to say that, if you want to say Mr. Kohn is maybe the dean of the group, or however you want to call it——

Mr. KOHN. I am just the oldest.

Mr. SAVERI. I have never seen Mr. Kohn give up anything that he felt he was entitled to and he is a vigorous enforcer. I feel, and I say this very, very objectively, when you get people, myself, Mr. Goldberg, Mr. Kirkham, who is on the other side of practically every case that I file, who all come together on this bill, I think there is something in saying that there may be some problem with this proposed legislation.

Mr. KIRKHAM. If I can add just one comment to that, I don't think the defense bar in a way have the same self interest, if you can call it self interest, reason that the plaintiffs' bar have. We are hurting ourselves and the defenses that we can put in in these cases. But we are so offended as lawyers who have spent a lifetime in the practice of the antitrust laws and believe in them and believe in their enforcement. And almost without exception, we are opposed to this legislation which could be a source of vast income to us.

Mr. CHUMBRIS. You mentioned Mr. Kohn. I have been on this subcommittee since January 1957. I don't know whether he testified before 1957, but the subcommittee didn't begin until I think October of 1954, but he has been here as much as any expert in antitrust throughout our 22-23 year history. I think this is the first time that I recall when Mr. Kohn came in and said something against a bill. He has usually been in favor of the legislation of either Senator Kefauver or Senator Hart and of Senator Kennedy, at least he was in favor——

Mr. KOHN. And everything that Senator Metzenbaum is proposing other than this.

Mr. CHUMBRIS. Right. So I guess if anyone wants to look at the record, they would not have to look at it closely to see that here is a gentleman who has appeared for almost 20 years before this committee, always one of the leaders of the causes.

Joe Alioto was another person who came in a few times, and a few others. This is the first time that he comes in and opposes the principles of this bill.

We stand adjourned until Monday, the 19th, at 9:30 a.m., in room 1318 in this building.

Thank you very much, gentlemen; also the people in the audience who stuck with us on this very important subject.

[Whereupon, at 12:45 p.m., the committee recessed, to reconvene at 9:30 a.m., Monday, March 19, 1979.]

ANTITRUST ENFORCEMENT ACT OF 1979, S. 300

MONDAY, MARCH 19, 1979

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 9:30 a.m., pursuant to call, in room 1318, Dirksen Senate Office Building, Hon. Strom Thurmond presiding.

Present: Senators Thurmond, Laxalt, and Hatch.

Also present: David Boies, chief counsel and staff director, Joel Perwin, Terry Lytle, and Mike Cooper, counsel.

Staff present for the minority: Peter Chumbris, minority consultant; Al Regnery, counsel for Senator Laxalt; Joel Mandelman, counsel for Senator Simpson, and Tom Perry, counsel for Senator Hatch.

Senator THURMOND. The committee will come to order.

OPENING STATEMENT OF SENATOR THURMOND

Today we are entering into the 4th day of hearings on S. 300, the so-called *Illinois Brick* bill—which is designed to overturn the Supreme Court decision referred to as the *Illinois Brick* decision and the 1968 *Hanover Shoe* decision. We have excellent witnesses here today whose testimony, coupled with the fine presentations of the previous witnesses, should create an outstanding record against S. 300.

I feel it is particularly noteworthy to point out that on last Wednesday, March 14, among our outstanding expert witnesses for that day, we were privileged to hear from four of the great antitrust plaintiffs' lawyers of this country. These four plaintiffs' lawyers testified against the bill on behalf of the predominant number of antitrust plaintiffs' bar, most of whose names are listed in the 1978 Minority report.

What makes their testimony so significant is the fact that plaintiffs' antitrust lawyers for the past 20 years have supported amendments to the antitrust laws in their appearances before this committee.

These four excellent plaintiffs lawyers, however, told this committee that the *Illinois Brick* bill is a very bad bill and should be defeated in the best interests of all persons and groups, because the *Illinois Brick* and *Hanover Shoe* decisions are well reasoned.

The *Illinois Brick* and *Hanover Shoes* decisions strike a good balance between deterrence of violations of the antitrust laws and compensation to the purchasers. I urge all parties interested in this legislation, especially the proponents of S. 300, to study closely the testimony of Harold Kohn, Guido Saveri, Perry Goldberg, and

James Sloan, most of whom have supported the bills of the chairmen of the Antitrust Subcommittee over the past 20 years.

The other witnesses on March 9 and 14 are equally outstanding antitrust lawyers and economists, some of whom serve on special committees of the American Bar Association pertaining to issues created by the *Illinois Brick* bill.

We look forward to hearing today's witnesses who are equal in stature with the previous witnesses and who have significant testimony to present to us.

We are very pleased to have with us this morning the able and distinquished Senator from Wisconsin and we would be glad to hear you at this time.

STATEMENT OF SENATOR GAYLORD NELSON

Senator NELSON. Mr. Chairman, I am simply here to submit some testimony on behalf of constituents unable to testify in their own behalf. I will read two pages of their statement and ask that the balance be submitted in the record.

This is the testimony of a manufacturer in the State of Wisconsin:

Many attorneys who have testified before this committee have referred to the detrimental effects of clientless consumer class action suits which would benefit mainly the plaintiff's lawyers, and which exposes business to extortive or blackmail settlements rather than having to face the catastrophic results of litigating complex suits. These statements take on a new and more vivid meaning when viewed firsthand.

In order to better understand the real effect of the current antitrust situation on the small businessmen and his business decisions a firsthand report of an actual, current experience is hereby offered. It is not possible to give exact names and figures due to a court order in pending litigation, however, the following facts regarding "X Corp." are true and representative of what has actually happened to one Wisconsin family-owned small manufacturer.

It should be pointed out that this same occurrence has been repeated by many other small businesses in the same and other industries, in many other States.

X Corp. has annual sales of $125 million in an industry with total sales of $6 billion annually. There are more than 1,000 companies in this particular industry, with the largest having approximately 6 percent of the total industry sales, and X Corp. having 1.65 percent of these sales.

While other much larger corporations in this industry have diversified into other activities—accounting for their much greater net worth—X Corp. has grown almost entirely in this single business area and currently has a total net worth of approximately $70 million.

X Corp. employs a total of 1,780 persons in the States of Arkansas, Georgia, Ohio, Michigan, Wisconsin, Connecticut, Texas, Illinois and Oklahoma.

More than 2 years ago, X Corp. and 35 others in the same industry received a subpena from a Federal grand jury investigating antitrust price fixing conspiracy allegations.

X Corp. responded by furnishing all requested information and witnesses to the Justice Department officials conducting the investigation, with no serious concern, for X Corp. has had a long-standing policy of compliance with the antitrust laws and is in complete agreement with the premise that proper enforcement of these laws serves to protect our free enterprise system

At the conclusion of the Justice Department investigation, some of the corporations and individual employees being investigated were indicted for felony or misdemeanor violations of the antitrust laws.

Eight corporate felony indictments, five corporate misdemeanor indictments, seventeen individual misdemeanor indictments, nine individual felony indictments—X Corp. was not indicted, and no employees of X Corp. were indicted as coconspirators.

This was fully within the expectations of the family managers of X Corp., for they knew X Corp. was not guilty of any antitrust violations.

Commencing less than 1 year following the start of the Justice Department investigation—and prior to any indictments being issued—X Corp. was named as a codefendant in class action civil suits which now number more than 25 cases. X Corp., with other unindicted defendants, requested that the actions not be certified as class actions.

This was not done and the court certified a single class of nationwide purchasers of the industry's products. X Corp. management didn't feel overly concerned by these occurrences, for having been found not to be involved in the criminal case being prosecuted by the Justice Department, and finding none of its past customers named as a complaining plaintiff in the treble damage class action suits, X Corp. concluded that its only concern was to prepare to bear the expense of lengthy litigation to prove its innocence in the civil class actions. Developments proved this to be a very erroneous conclusion.

Mr. Chairman, I ask that the balance of this statement in behalf of this company be printed in whole in the record.

Senator THURMOND. Without objection, so ordered.

[The statement of X Corporation follows:]

PREPARED STATEMENT OF X CORP.

Many attorneys who have testified before this committee have referred to the detrimental effects of clientless consumer class action suits which would benefit mainly the plaintiff's lawyers, and which exposes business to extortive or blackmail settlements rather than having to face the catastrophic results of litigating complex suits. These statements take on a new and more vivid meaning when viewed first hand.

In order to better understand the real effect of the current antitrust situation on the small businessman and his business decisions, a first hand report of an actual, current experience is hereby offered. It is not possible to give exact names and figures due to a court order in pending litigation, however, the following facts regarding "X Corp." are true and representative of what has actually happened to one Wisconsin family-owned small manufacturer. It should be pointed out that this same occurrence has been repeated by many other small businesses in the same and other industries, in many other States.

X Corp. has annual sales of $125 million in an industry with total sales of $6 billion annually. There are more than 1,000 companies in this particular industry, with the largest having approximately 6 percent of the total industry sales, and X Corp. having 1.65 percent of these sales. While other much larger corporations in this industry have diversified into other related activities—accounting for their much greater net worth—X Corp. has grown almost entirely in this single business area and currently has a total net worth of approximately $70 million. X Corp. employs a total of 1,780 persons in the States of Arkansas, Georgia, Ohio, Michigan, Wisconsin, Connecticut, Texas, Illinois and Oklahoma.

More than 2 years ago, X Corp. and 35 others in the same industry received a subpoena from a Federal grand jury investigating antitrust price fixing conspiracy allegations. X Corp. responded by furnishing all requested information and witnesses to the Justice Department officials conducting the investigation, with no serious concern, for X Corp. has had a long-standing policy of compliance with the antitrust laws and is in complete agreement with the premise that proper enforcement of these laws serves to protect our free enterprise system. At the conclusion of the Justice Department investigation, some of the corporations and individual employees being investigated were indicted for felony or misdemeanor violations of the antitrust laws.

Eight corporate felony indictments, five corporate misdemeanor indictments, seventeen individual misdemeanor indictments, nine individual felony indictments.

X Corp. was not indicted, and no employees of X Corp. were indicted as coconspirators. This was fully within the expectations of the family-managers of X Corp., for they knew X Corp. was not guilty of any antitrust violations.

Commencing less than 1 year following the start of the Justice Department investigation—and prior to any indictments being issued—X Corp. was named as a codefendant in class action civil suits which now number more than 25 cases. X Corp., with other unindicted defendants, requested that the actions not be certified as class actions. This was not done and the Court certified a single class of nationwide purchasers of the industry's products. X Corp. management didn't feel overly

concerned by these occurrences, for having been found not to be involved in the criminal case being prosecuted by the Justice Department, and finding none of its past customers named as a complaining plaintiff in the treble damage class action suits, X Corp. concluded that its only concern was to prepare to bear the expense of lengthy litigation to prove its innocence in the civil class actions. Developments proved this to be a very erroneous conclusion.

Shortly after the filing of the many civil class actions, and prior to the commencement of the criminal trial, some of the defendants settled the civil actions with the plaintiffs by making payments to the plaintiffs' attorneys. This settling trend quickly began to "snowball." At this time, X Corp. conducted a detailed analysis of the situation and found as follows:

1. Approximately 80 percent of the defendants had entered into settlement agreements with the class plaintiffs, thereby increasing the potential liability of the nonsettling defendants;

2. The amount contributed by the settling defendants at that time totaled over $150 million, with the expectation of $300 million, or more, thus creating a "war chest" from which plaintiff's counsel could anticipate collecting substantial attorneys' fees;

3. Settlements were being arrived at by a formula decided upon solely by the plaintiffs' lawyers, having as its base, the defendant's percentage share of the market, times a required dollar figure. X Corp. found that the dollar figure which had been offered to the first settling defendant, $500,000 per percentage point, had been steadily rising for each succeeding settling defendant, until the amount which was requested from X Corp. for settlement was $3,250,000 per percentage point. Plaintiffs' attorneys settlement terms were clear and easily understood. The stated amount was required to settle at that moment—it would go higher later, and it was offered "take it or leave it."

4. Settlements in civil class action suits are encouraged by the courts. Very few such cases have ever gone to a jury decision. X Corp. now realized that it faced a monumental decision * * * pay the $5 million plus settlement, or face the possibility that it may ultimately be the only remaining defendant which, under the law, could be jointly and severally liable for the entire amount of damages which may be allowed by a jury for the alleged price fixing conspiracy.

An estimate of the potential damages which might be decided by a court was then necessary in order that a proper assessment of the situation was possible. Using a time period of 10 years, a damage figure of 5 percent of the total industry annual sales, subtracting settlements already made, and multiplying the results by 2½—because the law provided for treble damages in such cases and taking tax consequences into account—X Corp. concluded that it must stand ready to bear the burden of a potential legal liability of up to $5 billion if it followed its original decision to defend its innocence of any civil antitrust liability. The choices available to X Corp. became clear, and the extortion aspect of antitrust civil class action suits was indeed now understood. X Corp. was faced with the following choices:

1. Settle the pending class action suits by paying more than $5 million—and still face the liability of defending the individual antitrust civil damage suits which might be brought by X Corp. customers who do not wish to participate as members of the present class—or,

2. Stand ready to continue to defend the class action suits and face the possibility of a potential liability of over $5 billion. This liability would have to be reported to X Corp.'s mortgage holders, and other creditors, lenders, and potential lenders, and under this threat, no banker or creditor would continue their credit. X Corp.'s borrowing power would be voided during the time the class actions were being decided.

With this threat of insolvency hanging over their corporate heads, the owner-managers of X Corp. reluctantly concluded a settlement agreement with the plaintiffs in the class actions. [The calculations and pro forma balance sheets used by X Corp. in arriving at this decision are attached.] Loss of borrowing power is a killer factor for a small privately-owned corporation involved in a capital-intensive manufacturing industry. Attorneys who are handling class action suits of this nature are well aware of the financial necessities of the defendant parties in such actions, and they readily exercise the power given them by this situation to exact tribute by way of settlement, under the threat that failure to settle will result in a trial which may break any company. It has been said that settlements ignore the due process aspect of our system of justice—this would certainly seem to illustrate that point.

The above cited situation is true, and has been repeated many times in the settlement process of the class actions now pending in the referenced industry. In addition, this coercive settlement process has also been used similarly by plaintiff

counsel to extort settlements from defendants in the folding carton, sugar, corrugated container, and consumer paper bag industries to cite but a few. These defendants are located in many States in addition to X Corp.'s home State. Many of these actions are now pending, and it is, therefore, not proper or possible for parties so effected to come before this committee to tell their story, but names and corporations are available if the committee desires them.

This committee is presently considering a bill, S. 300, which will drastically expand the scope of class action antitrust suits many times greater than the present. The retroactive feature of S. 300 will expose the above corporations to a multitude of additional class action suits which will, no doubt, result in many more extortive settlements rather than bearing the burden of trial or bankruptcy. Senate bill 300 will, therefore, multiply manyfold the current antitrust problems of U.S. small business.

What solution to this problem? No easy answer is available. First of all, to extend legal liability beyond the first purchaser seems legislatively unsound. An amendment to the law to eliminate the joint and several liability provision among defendants in such actions might help solve some of the problems. Another solution might involve provisions which would allow the prevailing party to recover its attorney's fees and costs from the losing party. Exact provisions here are not possible, but of course should come from skilled antitrust lawmakers and counsel. One thing is certain though, a change to eliminate the present extortive system is desperately needed, and S. 300 does not provide the needed change.

One final point should be made—X Corp. has grown and prospered in its industry for the past 45 years by maintaining a reputation for quality products and high business integrity. Many of its customers have been with the company for all of these 45 years. Settlements of the size X Corp. has had to make in these class actions will inevitably be construed by its customers as an admission of price-fixing guilt. This will result in a lack of confidence and reduced volume, increased costs—due to less volume—and reduced employment—all added to the penalty created by the above referenced monetary damages extracted.

If the financial soundness of the 23 unindicted companies can thus be impaired or destroyed by class action attorneys, the economic integrity of most of the industrial base of our country can also be similarly impaired and destroyed.

FOUR YEAR STATUTE OF LIMITATION IF CONCEALMENT IS NOT PROVEN [1]

	Percent [2]		
	1	5	10
Class liability	$610,198,865	$3,050,994,325	$6,101,988,650
X corporation liability if class defended	10,068,283	50,341,408	100,682,813
Settlement to date—80 percent of class	300,000,000	300,000,000	300,000,000
Residual liability for class if X corporation is only defendant	310,198,865	2,750,944,325	5,801,988,650
X corporation liability if 20 percent remaining defend	25,436,307	225,577,435	475,763,069

[1] Sales (1974–75)—$24,407,954,600.

[2] Percentage of total industry sales for period shown.

Sample calculation to determine after tax damages

Sales	$24,407,954,600
10 percent damages deductible=0.005	122,039,773
10 percent not deductible	244,079,546
10 percent not deductible	244,079,546
Total	610,198,865

BASED ON 1969 UNITED STATES V. CONTAINER CORP. NOTICE PERIOD [1]

	Percent [2]		
	1	5	10
Class liability	$1,078,321,633	$5,391,608,163	$10,783,216,325
X corporation liability if class defended	17,792,308	88,961,535	177,923,070
Settlement to date—80 percent of class	300,000,000	300,000,000	300,000,000
Residual liability for class if X corporation is only defendant	D778,321,633	E5,091,608,163	F10,483,216,325
X corporation liability if 20 percent remaining defend	A63,822,374	B417,511,869	C859,623,739

[1] Sales (1969–77)—$43,132,865,300.
[2] Percentage of total industry sales for period shown.
Note.—A–F See attached balance sheet.

Sample calculation to determine after tax damages

Sales	$43,132,865,300
5 percent damages deductible=0.0005	215,664,327
5 percent not deductible	431,328,653
5 percent not deductible	431,328,653
Total	1,078,321,633

PERIOD FOR WHICH PLAINTIFFS REQUESTED DOCUMENTS [1]

	Percent [2]		
	1	5	10
Class liability	$1,590,224,428	$7,951,122,138	$15,902,244,275
X corporation liability if class defended	26,238,703	131,193,515	262,387,030
Settlement to date—80 percent of class	300,000,000	300,000,000	300,000,000
Residual liability for class if X corporation is only defendant	1,290,224,428	7,651,122,138	15,602,244,275
X corporation liability if 20 percent remaining defend	105,798,403	627,392,015	1,279,384,031

[1] Sales (1960–77)—$63,608,977,100.
[2] Percentage of total industry sales for period shown.

Sample calculation to determine after tax damages

Sales	$63,608,977,100
1 percent damages deductible=.005	318,044,886
1 percent not deductible	636,089,771
1 percent not deductible	636,089,771
Total	$1,590,224,428

X CORPORATION
CONSOLIDATED BALANCE SHEET

	A	B	C	D	E	F
Current assets:						
Cash and short-term investments	$7,843,000	$7,843,000	$7,843,000	$7,843,000	$7,843,000	$7,843,000
Notes and accounts receivable (net)	12,186,000	12,186,000	12,186,000	12,186,000	12,186,000	12,186,000
Inventories	10,967,000	10,967,000	10,967,000	10,967,000	10,967,000	10,967,000
Prepaid expenses	1,155,000	1,155,000	1,155,000	1,155,000	1,155,000	1,155,000
Total current assets	32,151,000	32,151,000	32,151,000	32,151,000	32,151,000	32,151,000
Property, plant and equipment	149,495,000	149,495,000	149,495,000	149,495,000	149,495,000	149,495,000
Less accumulated depreciation & amortization	−47,121,000	−47,121,000	−47,121,000	−47,121,000	−47,121,000	−47,121,000
Property, plant and equipment (net)	102,374,000	102,374,000	102,374,000	102,374,000	102,374,000	102,374,000
Investment and other assets	10,190,000	10,190,000	10,190,000	10,190,000	10,190,000	10,190,000
Total	144,715,000	144,715,000	144,715,000	144,715,000	144,715,000	144,715,000
Liabilities:						
Current liabilities	13,112,000	13,112,000	13,112,000	13,112,000	13,112,000	13,112,000
Long term debt	35,941,000	35,941,000	35,941,000	35,941,000	35,941,000	35,941,000
Deferred income taxes and miscellaneous items	13,351,000	13,351,000	13,351,000	13,351,000	13,351,000	13,351,000
Class action damages	63,822,000	417,512,000	859,624,000	778,322,000	5,091,608,000	10,483,216,000
Shareholders' equity (deficit)	18,489,000	−355,201,000	−777,313,000	−696,011,000	−5,009,297,000	−10,400,905,000
Total	144,715,000	144,715,000	144,715,000	144,715,000	144,715,000	144,715,000
Creditors recovery	(1)	(2)	(3)	(4)	(5)	(6)

[1] $1 per $1
[2] 31 cents per $1.
[3] 15 cents per $1.
[4] 17 cents per $1.
[5] 2 cents per $1.
[6] 1 cent per $1.

Senator THURMOND. We are glad to have you with us, Senator, and thank you for your appearance.

Our next witness is associate dean of the University of South Carolina Law School, General Sneeden. We are very glad to have you with us and come around at this time and testify.

[Prepared statement of Mr. Emory Sneeden follows:]

PREPARED STATEMENT OF EMORY SNEEDEN

My name is Emory Sneeden, I am associate dean and lecturer in law, antitrust, at the School of Law, University of South Carolina.

I appear this morning to testify concerning S. 300, which would amend the antitrust laws to overrule the decision of the Supreme Court in *Illinois Brick*.[1] In addition it would permit trial judges, as a discretionary matter, to overrule *Hanover Shoe*.[2]

The committee is faced with the complex problem of attempting to strike a balance between deterring potential antitrust violators and compensating those injured by antitrust violations. As was the case in the 95th Congress with several drafts and a reported bill, I do not believe S. 300 will improve the antitrust laws.

A number of witnesses testified on the merits of S. 300 and the predecessor bill S. 1874, in the 95th Congress. Witnesses have covered a host of issues, favoring or opposing the bills. In my statement, I limit the views I leave with you to six points. In doing so, it is my purpose to avoid insofar as is possible discussing issues, which have been covered in depth before the committee on previous occasions.

1. To place the issues to be decided by the committee in the proper perspective, it may be helpful to go much further back than *Illinois Brick*. While one or two witnesses have mentioned that Justice Byron White, author of the majority opinion in *Illinois Brick*, is a strong proponent of the antitrust laws, they were passing references. Justice White was nominated to the U.S. Supreme Court by President Kennedy and took his seat on the Court in April 1962. I have not collected his dissents or concurring opinions, but citations to his majority opinions are attached to my statement. Three citations, *Ramsey* v. *United Mine Workers of America, United Mine Workers of America* v. *Pennington* and *Local Union No. 189, Amalgamated Meat Cutters* and *Butcher Workmen of North America, AFL–CIO* v. *Jewell Tea Co.*, are decisions by Justice White addressing the labor law exemption to the antitrust laws. Justice White was the author of 13 other majority opinions. A common thread runs through the opinions. Justice White is a vigorous proponent of the antitrust laws. He certainly understands the impact of *Illinois Brick* and one who peruses his opinions in antitrust would have great difficulty labeling him as an insensitive jurist. I do not mean to suggest to this committee, which possesses the legislative authority, that *Illinois Brick* is sacrosanct. However, I do suggest that, because of his philosophy and understanding of the antitrust laws, there is a clear signal that any legislation to overturn *Illinois Brick* and *Hanover Shoe* must address very difficult problems for which there may be no better legislative solution.

2. The current bill before the committee, S. 300, permits the trial judge, as a discretionary matter, to overrule *Hanover Shoe*. Assume under this provision that in a case before him, the judge decides that *Hanover Shoe* need not be overruled. Other provisions in S. 300 overrule *Illinois Brick*. At this juncture it becomes important to look back at the *Illinois Brick* decision. The following language is pertinent:

> We granted certiorari . . . to resolve a conflict among the courts of appeal on the question whether the offensive use of pass-on authorized below is consistent with *Hanover Shoe's* restrictions on the defensive use of pass-on. We hold that it is not, and we reverse. We reach this result in two steps. First, we conclude that whatever rule is to be adopted regarding pass-on in antitrust damage actions, it must apply equally to plaintiffs and defendants . . ." [3]

This was one of two basic reasons given by the Court for deciding *Illinois Brick* as it did. The point is, a bill which permits *Hanover Shoe* to stand, while overruling *Illinois Brick* faces a serious due process problem.

3. In those cases in which the trial judge exercises his discretion to overrule *Hanover Shoe* and permit the use of pass-on defensively, it will result in litigation with all of the complexity described by a number of witnesses. Without commenting

---

[1] *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977).
[2] *Hanover Shoe, Inc.* v. *U.S. Machinery Corp.* 392 U.S. 481 (1968).
[3] 431 U.S. 720, at 728.

further, the prepared statements and testimony of Peter D. Standish, 1978 hearings on S. 1874, Judge Charles Joiner, 1977 hearings on S. 1874, Perry Goldberg, 1978 hearings on S. 1874 and Dorsey D. Ellis, Jr., 1978 hearing on S. 1874, are representative of the problems, which can be expected. The bottom line, I believe, will favor the giant antitrust defendants.

4. The discretionary provision in S. 300, which allows a trial judge to overrule *Hanover Shoe* on a case by case basis, will add uncertainty to the antitrust laws. Some years will pass before the impact can be measured. Certainly for some time to come until the application of the discretionary provision by the Federal judiciary develops, it probably would have a chilling effect on those who could sue. Direct purchasers will have to weigh the risks of contesting the pass-on defense and sharing a fractionalized recovery with the indirect purchasers. Indirect purchasers, before bringing suit, would be in much the same position. I do not know what effect the discretionary provision will have on the incentive of direct and indirect purchasers to sue antitrust violators. However, I am sure that I do not stand alone in believing that it will weaken, rather than strengthen their incentive to sue.

5. An attempt has been made in this bill to limit potential plaintiffs to the chain of distribution and eliminate those whose injuries are very remote. The language now refers to "purchaser" or "seller" in the "chain of manufacture, production or distribution of goods or services." I must admit that I do not know what effect that language will have in future cases. However, the language in S. 300, which limits potential plaintiffs to the distribution chain, falls short in addressing the issue of tracing damages. A careful reading of *Illinois Brick* reveals that the opinion addresses the difficulties of tracing damages within the context of the distribution chain. Thus the language change in the Senate bill in the 95th Congress to limit potential plaintiffs to the distribution chain is probably cosmetic insofar as being of any assistance to the Court.

6. Addressing the issue of duplicative recoveries, it should be mentioned that the statue of limitations does not provide complete protection against duplicative recoveries. The major problem presented relates indirectly back to the difficulty of tracing damages; a problem of concern to the Court in deciding *Illinois Brick.* Ordinarily an action for damages under section 4 of the Clayton Act accrues upon: a. an antitrust violation b. injury to the potential plaintiff. However, should the plaintiff's damages be too speculative to support a damage award, probably the view of the present state of the law with most support is that the statuate of limitations is tolled until such time when damages become definite enough to be proved. At least one prior witness has mentioned the possibility of abuse of the fraudulent concealment defense. Such a defense could go behind the statute for many years.

ANTITRUST MAJORITY OPINIONS OF ASSOCIATE JUSTICE BYRON R. WHITE

1. *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977).
2. *U.S.* v. *Glaxo Group Ltd.,* 410 U.S. 52 (1973).
3. *U.S.* v. *Falstaff Brewing Corp.,* 410 U.S. 526 (1973).
4. *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973).
5. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971).
6. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321 (1971).
7. *Ramsey* v. *United Mine Workers of America,* 401 U.S. 302 (1971).
8. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100 (1969).
9. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968).
10. *U.S.* v. *Third Nat. Bank in Nashville,* 390 U.S. 171 (1968).
11. *Albrecht* v. *Herald Co.,* 390 U.S. 145 (1968).
12. *Utah Pie Co.* v. *Continental Baking Co.,* 386 U.S. 685 (1967).
13. *Leh* v. *General Petroleum Corp.,* 382 U.S. 54 (1965).
14. *United Mine Workers of America* v. *Pennington,* 381 U.S. 657 (1965).
15. *Local Union No. 189, Amalagamated Meat Cutters and Butcher Workmen of North America, AFL-CIO* v. *Jewel Tea* Co., 381 U.S. 676 (1965).
16. *U.S.* v. *Continental Can Co.,* 378 U.S. 441 (1964).
17. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962).

STATEMENT OF EMORY SNEEDEN, ASSOCIATE DEAN, UNIVERSITY OF SOUTH CAROLINA LAW SCHOOL

Mr. SNEEDEN. Mr. Chairman, I appear this morning to testify on S. 300, which would amend the antitrust laws to overrule the

Supreme Court decision in *Illinois Brick* and in addition, the bill would permit trial judges as a discretionary matter to overrule the *Hanover Shoe* case.

The committee, as was the case in the 95th Congress, is faced with the complex problem of attempting to strike a balance between deterring potential antitrust violators and compensating those who have been injured by antitrust violations.

As was the case in the 95th Congress with several drafts and a reported bill, I do not believe that S. 300 will improve the antitrust laws.

A number of witnesses have testified on the merits of this bill and its predecessor S. 1874. Witnesses have covered a host of issues, either favoring or opposing the bills. In my statement, while I have views on some of the issues that have been covered previously, I will attempt to limit my views to five points.

In doing so, it is my purpose to avoid, insofar as possible, going over issues which have been covered in-depth previously with the committee.

1. To place the issues to be decided by the committee in proper perspective, it may be helpful to go much further back than *Illinois Brick.* While one or two of the witnesses have previously mentioned that Justice Byron White, the author of the majority opinion in *Illinois Brick,* is a strong proponent of the antitrust laws, the references previously were passing references.

Justice White was nominated for the Supreme Court by President Kennedy and took his seat on the Court in 1962. While I have not collected his dissents or his concurring opinions, citations to his majority opinions ranging from 1962 or 1963 are attached to my statement.

Three of the citations concern the labor law exemption, the *Ramsey* case, *Pennington* and the *Jewel Tea* case, in which Justice White addresses the labor law exemption to the antitrust laws.

Justice White was the author of 13 other majority opinions, 14, if you count the 2 *Zenith* cases.

A common thread runs through these opinions. Justice White is a vigorous proponent of the antitrust laws. I think he certainly understands—maybe it is presumptuous on my part—but I think he certainly understands the impact of *Illinois Brick* and one who peruses his opinions in antitrust would have great difficulty labeling him as insensitive jurist.

I do not mean to suggest to this committee, which certainly possesses the legislative authority, that *Illinois Brick* is sacrosanct. However, I do suggest that because of his philosophy and understanding of the antitrust laws, there is a clear signal that any legislation to overturn *Illinois Brick* may not provide a better solution.

2. The current bill before the committee, S. 300, permits trial judges as a discretionary matter to overrule *Hanover Shoe.* Assume with this provision that in the case before him, the judge decides that *Hanover Shoe* need not be overruled. Other provisions in S. 300 do overrule *Illinois Brick.* At this juncture, it becomes important to look back at the *Illinois Brick* decision and the language therein. The following language is pertinent.

I will leave out some of this, but one of the two basic reasons why the court reached the result that it did was in a two step process. The first, "we conclude whatever rule is to be adopted regarding pass-on in antitrust damage actions, it must apply equally to the plaintiffs and defendants. . ."

This was one of the two basic reasons given by the Court for deciding *Illinois Brick* as it did. The point is, a bill which permits *Hanover Shoe* to stand, while overruling *Illinois Brick* faces serious constitutional problems.

3. In the cases in which the trial judge exercises his discretion to overrule *Hanover Shoe* and permit the use of pass-on defensively, it will result in litigation with all of the complexity described by a number of witnesses. Without commenting further, the prepared statements and testimony of Peter D. Standish, 1978 hearings on S. 1874, Judge Charles Joiner, 1977 hearings on S. 1874, Perry Goldberg, 1978 hearings on S. 1874, Dorsey D. Ellis, Jr., hearings on S. 1874, and others, are representative of the problems, which can be expected.

The bottom line, I believe, will favor the giant antitrust defendants.

4. The discretionary provision in S. 300 which allows the trial judge to overrule *Hanover Shoe* on a case-by-case basis will introduce a sort of guessing game. It will add some uncertainty to the antitrust laws.

Some years will pass before the impact can be measured. Certainly, for some time to come until the application of the discretionary provision is developed by the Federal judiciary, it will probably have a chilling effect on those who could sue.

Direct purchasers will have to weigh the risks of contesting the pass-on defense and sharing a fractionalized recovery with indirect purchasers. Indirect purchasers, before bringing suit, would be in much the same position. I do not know what effect the discretionary provision will have on the incentive of direct and indirect purchasers to sue antitrust violators. However, I am sure that I do not stand alone in believing that it will weaken, rather than strengthen their incentive to sue.

5. An attempt has been made in this bill to limit potential plaintiffs to the chain of distribution and eliminate those whose injuries are very remote.

Also, a class action provision to try to simplify tracing damages has been placed into the bill.

The language now refers to "purchaser" or "seller" in the "chain of manufacture, production, or distribution of goods or services." I must admit I don't know what effect the language will have in future cases. However, the language in S. 300 which limits potential plaintiffs to the distribution chain falls short of addressing the issue of tracing damages.

A careful reading of the *Illinois Brick* opinion reveals that the opinion addresses the difficulties of tracing damages, mentions class actions, all within the context of the distribution chain. This language change in the Senate bill in the 95th Congress to limit potential plaintiffs to the distribution chain is probably cosmetic insofar as being of any assistance to the court.

Mr. Chairman, that concludes my statement.

Senator THURMOND. Thank you very much, Dean Sneeden. We appreciate very much your being here and wish to thank you for a magnificient statement that you have presented to the committee. I assure you it will be very helpful to the Members in their consideration of this important matter.

We have a few questions here we would like to ask you. Would you comment on what effect the *Illinois Brick* decision will have on the future *parens patriae* actions by the State attorney general in behalf of the consumers?

Mr. SNEEDEN. Senator, I don't believe anybody could answer that with any degree of certainty. However, there are two footnotes in the *Illinois Brick* opinion, if my memory serves me right. One is No. 14 and the other footnote is the last footnote of the opinion. I think where the mistake probably was made by those who were insistent that the *Illinois Brick* decision affected the *parens patriae* action were those who went off on the legislative history track.

The legislative history of the *parens patriae* section 4(c) of the Clayton Act was made in 1976. The legislative history of the section 4 of the Clayton Act was made in the previous Congresses. Actually, that part of the Clayton Act was derived from the Sherman Act.

Some have tried to make the point that the legislative history made in 1976 when 4c was passed affected section 4, passed in an earlier Congress. I don't believe that to be the case nor do I believe one can transpose the legislative history of section 4 to 4c and say it precludes recovery under 4c. We will have to see a decision by the Supreme Court before anybody will know for sure whether the *parens patriae* remedy has been affected. However, I think the *parens patriae* remedy has not been affected by the *Illinois Brick* decision.

Senator THURMOND. Assuming the *Illinois Brick* decision is reversed by legislation, do you see any way for the States to save the propriety actions?

Mr. SNEEDEN. Senator, the real hope I see there is in the States' procurement process. There is nothing to prevent assignment of antitrust actions to one of the indirect purchasers at the time of contract. I think from what I have heard, this is already being done. Of course, the State has considerable clout in making a contract, because usually the contracts are for a good sum of money.

Under these circumstances with a boiler plate assignment clause in their contracts, I think the States will be able to salvage many of their cases in this manner.

Senator THURMOND. Thank you.

Suppose we decide to completely reverse the *Hanover Shoe.* What problems do you foresee with that approach?

Mr. SNEEDEN. Senator, I think if you decide to completely reverse *Hanover Shoe,* that the end result would be to favor the big antitrust defendant. I think it would reduce the incentive of the direct purchaser to sue because he is not looking at a treble damage recovery. He is looking at a fractionalized recovery. I think it would further reduce his incentive to sue because he is not only going to have a fractionalized recovery, but he is going to have this issue of pass on probably from every plaintiff in the chain of

distribution. In addition, the defendant will certainly raise the pass on defense.

In the end, I think probably the worst thing that could be done would be to completely reverse *Hanover Shoe.*

Senator THURMOND. What other approaches may be used to balance the deterrence and compensation of consumers in antitrust actions?

Mr. SNEEDEN. Senator, I have thought about that considerably over the past, I would say, almost 3 years; since 1977, almost 2 years. I have not found an approach I favor. I don't like the result particularly of *Illinois Brick,* but I have not found one that is better. I have thought of an approach and I haven't reduced it completely to writing.

I have tinkered around with some language, but the concept that I did toy with, that may work, would be one where you would continue to permit the direct purchaser to sue and recover treble damages.

At this point in time, based on, I believe, the prior testimony of Mr. Beverly Moore—and I agree with him on this point—I would take the antitrust defendant out of the case, period, put a clause in saving him harmless from further actions. I would fence off single plus one-half damages to the direct purchaser. I would do this in the name of incentive to sue.

The other one and one-half damages I would put in a pot in the custody of the court. I would leave this available for the indirect purchasers for a period of—and there is no magic—possibly 2 years. To ensure that the violator did not receive damages recovered back, I would have a reversion clause to ensure the remainder, if any, would revert back to the person who brought the suit, namely the direct purchaser.

Again, if you ask me the question whether I favor the present situation or the proposed, I would probably have to say based on what I believe and have heard—a billion dollars is expected to be recovered by the plaintiffs' bar next year, I probably would have to say that I favor leaving *Hanover Shoe* and *Illinois Brick* stand.

Senator THURMOND. Dean Sneeden, with respect to tracing damages, do you have suggestions for changing the language of S. 300 to help clarify this difficult problem of damage identity?

Mr. SNEEDEN. Yes. I believe the proposal I outlined to you, Senator, would avoid some problems. It would, one, permit the direct purchasers to sue, letting them recover treble damages, saving harmless the defendant thereafter. He is out of the case; fence off and give the direct purchaser single damages plus a half in the name of incentive and then put the pot up and, as I believe Mr. Moore said before, with an administrative mechanism, let the indirect purchasers go off in a room and decide who splits it up from thereon.

Senator THURMOND. Dean Sneeden, do you think that the tendency of S. 300 has discouraged any direct suit for fear of losing part or all of the potential recovery because of either defensive or offensive pass-on?

Mr. SNEEDEN. Senator, I am not sure it has. I suspect some of them are being moved on awful slowly until the direct purchaser

can see exactly what is going to happen with this bill. On balance, it probably has deterred some from bringing suit at all.

Senator THURMOND. Dean Sneeden, both Professor Posner's and Francis Kirkam's testimony suggest that fragmentation of cause of action among multiple plaintiffs, operates to discourage all suits in comparison with the encouragement of direct suits, under current law. This is apparently true even in the absence of the pass-on defense which will discourage direct suits even more.

If this is so, how come there were multiple indirect suits in a few cases such as sugar and plywood and is this a reflection of clientless and unsupervised attorneys representing ignorant indirect purchasers primarily to obtain a fee?

Mr. SNEEDEN. It may well be, Senator. I really do not know. It may well be.

Mr. PERWIN. Thank you, Mr. Chairman.

Dean Sneeden, could you tell us by what reasoning you conclude that the *parens patriae* remedy is probably unaffected by the *Illinois Brick* decisions?

Mr. SNEEDEN. Yes. Footnotes 14 and 31.

Mr. PERWIN. By what reasoning do you reach that conclusion?

Mr. SNEEDEN. I don't believe when you are talking about traditional suits, I suppose the best way to frame it is apples and oranges, comparing 4c to section 4, you are talking about a new remedy that Congress introduced in 1976 when they introduced and codified 4(c). I don't know, and you don't, nobody else does until the Supreme Court decides, but it seems to me that the signals in those two footnotes were pointing to the direction of that particular remedy which is the price fixing remedy, which would still be available for the consumer. I would want to make the point clear that I am giving you what I think, not what will happen.

Mr. PERWIN. I am trying to get at the reasoning by which you come to that conclusion. It is true, is it not, that the *parens patriae* remedy is merely a procedural device to subrogate to the States the underlying substantive rights of the consumers in those States? That is correct, isn't it?

Mr. SNEEDEN. Yes.

Mr. PERWIN. If we assume by hypothesis cases in which the consumers of a State indirect purchasers of an item and the State is merely subrogated by a procedural device to the underlying rights of those consumers, and that *Illinois Brick* precludes those consumers from bringing suit, by what reasoning could the State suddenly gain the ability to bring a suit which the consumers could not bring themselves?

Mr. SNEEDEN. Again, I get back to the same answer I gave you before. You were talking about the traditional 4 and then 4(c). Your reasoning may well be right. But I believe in the last footnote in the case of the Supreme Court it mentioned the term "innovative ways." They could have well said, tipped their hand right at that particular point in time and signal that they wouldn't entertain a suit like that. The Court did not. You know, as I said, I am not any more certain than you are.

Mr. PERWIN. Let me ask one other question on this subject. Are you aware of any State in which the State attorney general has

read the case that way, and pursued a pre-existing policy of active litigation under the *parens patriae* procedure?

Mr. SNEEDEN. The only thing, the only instance I am aware of, is where it seems to me possibly a question was asked by Senator Laxalt in the 95th Congress about the number of *parens patriae* cases that were then coming on the track before the courts. That is the last count I have had of it.

Mr. PERWIN. Thank you very much.

Senator THURMOND. Dean Sneeden, we want to express our appreciation to you for coming here. I know you went to a lot of trouble to leave your work at the law school to be here and we are very grateful to you. Again, thank you for your splendid testimony.

Our next witness is Mr. Alvin Stein from New York. Mr. Stein, would you come around and testify? I will ask Senator Laxalt to take the chair at this time. I have two other committee meetings, but I will come back. Thank you very much, Senator.

STATEMENT OF ALVIN M. STEIN, ATTORNEY

Senator LAXALT. Will you proceed, Mr. Stein?

[Prepared statement of Alvin M. Stein, Esq. follows:]

PREPARED STATEMENT OF ALVIN M. STEIN

I am a member of the firm of Parker Chapin Flattau & Klimpl, attorneys at law, 530 Fifth Avenue, New York, N.Y. I am the senior member of the firm's litigation department, and I have been engaged in the practice of law as a litigator for more than 30 years. I have tried cases and argued appeals primarily in the courts of the State of New York and the Federal courts in that State. I have, however, also practiced, by leave of court, in various other State and Federal judicial and administrative tribunals. My practice has included antitrust matters, and most recently I served as the attorney in charge and trial counsel for Berkey Photo, Inc. in its antitrust action against Eastman Kodak Co. in the U.S. District Court for the Southern District of New York, index No. 73 Civ. 424 (MEF). It is with this background and experience as a trial lawyer, who has handled antitrust matters, that I make this statement with respect to the Antitrust Enforcement Act of 1979, also known as the *Illinois Brick* bill and what I perceive to be its effect on private antitrust enforcement in general and the *Berkey Photo, Inc.* v *Eastman Kodak Co.* litigation in particular.

As I more particularly hereafter demonstrate, the bill, which by its terms (section 4) applies retroactively to "pending cases" would, contrary, I am sure to its intendment, permit judgements against price fixers or monopolists, which have not yet been finally tested on appeal, to be placed in jeopardy. It is to avoid this highly undesirable result that I propose an amendment to section 4 of the bill, which would otherwise leave the proposed legislation unchanged. Before discussing the amendment and its vital significance, I would like to provide certain essential background information.

In January, 1973, Berkey Photo, Inc. commenced its action against Eastman Kodak Co. charging that the defendant, among other things, monopolized the amateur conventional film market in violation of section 2 of the Sherman Act. Following more than 5 years of complex and intense litigation and a 7-month jury trail, on July 3, 1978, a judgment was entered in favor of Berkey Photo, Inc., which included an award of $34,500,000[1] for overcharges resulting from defendant's illegal monopolization of the amateur conventional film market.[2] The film involved was purchased

[1] The defendant has appealed from this and all other portions of the judgment providing for damage to plaintiff or equitable relief.

[2] In addition, the jury rendered an award, which trebled, would have totalled $26,409,000 for overcharges resulting from defendant's illegal monopolization of the color print photographic paper market. This award, however, was set aside by the trial judge, Hon. Marvin E. Frankel, on defendant's motion for judgment notwithstanding the verdict, and is the subject of appeals pending before the United States Circuit Court of Appeals for the Second Circuit. Much of what is here said with regard to the film overcharge award would apply to the photographic color

Footnotes continued on next page

by Berkey directly from Kodak, resold primarily to retailers, and ultimately found its way, in its original packaging, into the hands of consumers. This lengthy and costly action, which so taxed the resources of my client—truly a modest business when measured against the defendant—is one of the very few instances where a private monopoly case was successfully tried before a jury. It had been widely referred to as a landmark case which would tend to encourage more vigorous private enforcement of the antitrust laws.

Most regretfully, however, the Antitrust Enforcement Act of 1979 would—I am sure, unintentionally permit Kodak, a proven monopolist and a repeated violator of the antitrust laws, to seek to undo, either totally or in large measure, the obligation to respond in damages for the illegal film overcharges involved. Such a result would not only be unfair and of questionable constitutional validity,[3] but would make a mockery of private antitrust enforcement, and encourage the belief that big business antitrust violators, are, for all practical purposes, immune from effective antitrust enforcement, particularly under section 2 of the Sherman Act.

Accordingly, it is urged that at the very least, the bill under consideration be amended to make clear that the proposed legislation, if enacted, would not permit such an unconscionable result. I, therefore, respectfully submit herewith, a proposed amendment to the Antitrust Enforcement Act of 1979 which, without otherwise affecting the purposes of the bill, would preserve judgments secured by direct purchasers or sellers after trial, and insulate defendants against whom such judgments have been obtained, from suits from indirect purchasers or sellers, to the extent such judgments are not reversed or set aside. Manifestly, since the bill obviously is not intended to protect wrongdoers or those who fix prices or monopolize in violation of the antitrust laws, the language of the legislation should expressly preclude such persons from retroactively attacking such judgments obtained after trial.[4]

Furthermore, however, I am compelled to conclude and observe that the proposed amendments to the Clayton Act—apart from the retroactive feature of section 4, which is the subject matter of my proposed amendment—would: (i) drastically discourage and inhibit private enforcement of the antitrust laws; and (ii) impose vast additional and overwhelming burdens on the courts in terms of pretrial discovery and administration, and at trail.

Antitrust litigation is extraordinarily burdensome and expensive. Illustratively, in the *Berkey-Kodak* case, I and the lawyers associated with me expended over 60,000 hours in the prosecution of the lawsuit. Millions of dollars were necessarily spent on support services, facilities and personnel. I have good reason to believe that this was modest in terms of such litigation generally, and the efforts customarily applied by defendants involved in antitrust litigation. A particular onerous aspect of such litigation from the plaintiff's point of view is proving damages. Any act, therefore, which materially enhances this burden or otherwise renders proof of damages uncertain would tend to vitally inhibit private antitrust enforcement.

The instant bill would indubitably have this effect, and in many situations would make it impossible for plaintiffs to prove damages. As the Supreme Court recognized in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), consistent with earlier judicial analyses of the matter,[5] a wide range of factors influence a company's pricing policies, so that the burden of proving the amount of pass-on by even a single purchaser from a single seller with regard to a particular price or price change would be extremely difficult. In the real world of litigation, an ultimate purchaser would have this burden multiplied by each intermediate person or firm in the chain of distribution. Also, since, not infrequently, products are distributed through alternative lines of distribution, the ultimate purchaser might have difficulty identifying the particular chain of distribution from which his particular purchases were derived, and all such alternatives might have to be considered since these lines of distribution to the ultimate purchaser may change from time to time.

Footnotes continued from last page

print paper award, if reinstated on appeal, except that the latter product was used in Berkey's photofinishing business and, therefore, ultimately came to consumers in a modified form from the condition at the time of purchase from Kodak.

[3] *Cf.,* Statement of Prof. Philip A. Lacovara on the constitutionality of S. 1874, Antitrust Enforcement Act of 1978, Senate Rept. 95-934, Part 2, 95th Congress, 2d Session, pp. 83-91.

[4] Since it is intended that the pass-on defense not be used when the overcharge was exacted from persons barred from recovery by the applicable statute of limitations (see Statement from the office of Senator Edward M. Kennedy, January 3, 1979, p. 4), the bill should explicitly so state.

[5] See, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968); *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.,* 245 U.S. 531 (1918); *Chattanooga Foundry and Pipe Works* v. *City of Atlanta, 203 U.S. 390 (1906); Straus* v. *Victor Talking Machine Co.,* 297 F. 791 (2d Cir. 1924); and *Ohio Valley Electric Corp.* v. *General Electric Co.,* 244 F. Supp. 914 (S.D.N.Y. 1965).

Furthermore, even assuming that theoretically the data sufficient to prove pass-on were available, one cannot overlook the harsh reality that the ultimate purchaser would have to obtain this information from hostile third parties who, I can tell you from experience, would be unwilling to make their confidential business records available to others. The cost of developing such an enormous body of evidence and subjecting it to necessary analysis would be absolutely prohibitive, and it may very well be that judicial procedures do not provide the means of compelling the kind of discovery that would be involved. The foregoing does not even give consideration to the difficulty involved in proving such collateral but relevant issues as to effect a change in the company's price will have on its total sales. As the Supreme Court cautioned in *Illinois Brick*, these matters must be considered "in the real economic world [and I would add, in the realities of litigation] rather than an economist's hypothetical model."

Additionally, it is possible that in the light of applicable law and rules of civil procedure, a plaintiff in a pass-on situation might be required to join all potential or intermediate claimants. This would, of course, impose an almost insuperable burden of identifying and joining such a potentially large and ill-defined group of persons or entities and may in fact be impossible because of jurisdictional limitations.

Our experience with overburdened court dockets and the resulting delay in the administration of justice can only reinforce the deep concern we all must have that proceedings such as I have just alluded to, and which would unavoidably be a consequence of this legislation, will only add to an already alarming situation.

Thus, it may be seen that what is now difficult in terms of private antitrust enforcement, under the proposed amendments would become almost, if not in fact, impossible. A prospective plaintiff could not reasonably anticipate the outcome of such litigation particularly in terms of the amount of potential recovery, and under this bill as drawn, the plaintiff would be subject to the further uncertainty as to whether he or his class of purchasers are too remote to maintain the action. In this respect the consumer, as the ultimate purchaser in the chain of distribution, would be most adversely affected.

In conclusion, I firmly believe that very few serious litigants, looking to pursue an antitrust claim to its ultimate potential conclusion—as distinguished from a plaintiff "sharp-shooting" for a quick settlement—would undertake litigation in the face of these uncertainties and burdens, and even if he were foolhardy enough to undertake the task, I do not see how he could prevail in the light of the burdens of proving loss which the bill imposes.[6]

PROPOSED AMENDMENT TO S. 300, THE ANTITRUST ENFORCEMENT ACT OF 1979, ALSO KNOWN AS THE *ILLINOIS BRICK* BILL

It is proposed that section 4 of the bill be amended to read as follows:

Section 4(a). Except as provided in subsection (b), the amendments made by this act shall apply to any action under sections 4, 4A or 4C of the Clayton Act which is pending on the date of enactment of this act or which is commenced on or after such date of enactment.

Section 4(b). The amendments made by this act shall not apply to any action commenced under sections 4, 4A or 4C of the Clayton Act where, prior to the date of enactment of this act, a judgment has been entered in favor of a first or direct purchaser or seller after trial, whether or not the appellate process has been exhausted. Any such judgment, to the extent not finally reversed or set aside on appeal, shall be a bar to recovery by any subsequent or indirect purchaser or seller for any overcharge or underpayment reflected in the judgment.

Mr. STEIN. My name is Alvin M. Stein. I am a member of the firm of Parker, Chapin, Flattau & Klimpl, attorneys in New York City. I have practiced law for approximately 30 years, primarily in the field of litigation. I practiced primarily in the State and Federal courts in New York, at the trial and appellate level. I have also tried cases and appeared as legal counsel in other State and Federal courts and administrative tribunals. My firm was lead counsel, and I was trial counsel, in the case of *Berkey* v. *Kodak*.

---

[6] Section 4I(c)(1) is no real solace since it does not avoid the necessity of proving the totality of damages sustained by the class, which would at least involve all of the problems of proof above discussed.

I have had other experience in antitrust litigation, both on the plaintiff and defendant side.

I make this statement to express what I perceive to be the effect of this proposed legislation on private antitrust enforcement generally and on the *Berkey-Kodak* case in particular. The *Berkey-Kodak* case began in January of 1973. Among other things it charged *Kodak* with violating section 2 of the Sherman Act by monopolizing the amateur conventional film market and charging overpricing in that market. After years of proceedings and 7 months of trial, on July 3, 1978, a judgment was entered in favor of *Berkey,* which included, as trebled, a $34 million award for film overcharges.

This action which resulted in total judgment of some $87 million was one of the very few monopolization cases tried successfully by a private plaintiff before a jury and it is regarded as a landmark case and one which would tend to encourage further private enforcement.

However, the retroactive provisions contained in section 4 of this legislation, I would think unintentionally appear to permit the defendant in that case, a proven violator of the antitrust laws, to seek to set aside some $34 million of that judgment or some substantial part of that judgment.

I submit that no one who favors antitrust enforcement could look favorably upon such a result.

I think that the bill if enacted in this way makes a mockery of private antitrust enforcement. It would lead people to believe that "big pocket" defendants are, as a practical matter, immune to private antitrust remedies.

We have proposed an amendment to the bill which I have annexed to the statement I submitted to the committee which would deal with this unfair, and I think unconstitutional, retroactive provision of the bill. It would leave the bill in all other respects unchanged.

I now would like to turn to what I perceive to be the effects of this bill generally in the field of private antitrust enforcement. It seems to me that the bill would drastically discourage and inhibit meaningful private enforcement of the antitrust laws, and would impose vast additional and overwhelming burdens on the courts in terms of pretrial discovery and administration of antitrust litigation and certainly at the trial stage.

Antitrust litigation is extraordinarily burdensome and expensive. In the *Berkey-Kodak* case, it is a matter of record. The plaintiff counsel expended, necessarily, over 60,000 hours of lawyers' time prosecuting the case and millions of dollars of out of pocket disbursements.

A particular burdensome part of antitrust litigation is the plaintiff's efforts and attempts to prove damages. Any act which materially enhances these burdens it seems to me discourages and inhibits private antitrust enforcement and the instant bill does that. It seems to me that what has formerly been difficult is now made impossible.

As the court pointed out in the *Illinois Brick* case there are a wide range of factors which influence price movements, any particular price movement. Accordingly it is a difficult matter to identify

and prove the material facts in a relationship involving a single buyer and a single seller and a single price movement, or price change.

In the real world of litigation, however, that problem is multiplied because you usually have a series of buyers, and a series of sellers so that that proof must be put forth at each level of distribution. Additionally, in the real world, buyers frequently tend to obtain their products through alternate lines of distribution so that that, too, adds to a multiplication of the kind of proof necessary under this bill to prove damages, and to prevail in a claim for damages.

Moreover, all of this information would have to be obtained from largely hostile third party witnesses. In other words, in a suit by a purchaser or a class of purchasers, that information would have to be derived from people in the chain of distribution who would have no interest in the outcome and who would be hostile to anyone discovering and making public or disclosing their profit and profit information.

The cost of developing this kind of information to a private litigant is absolutely prohibitive. It just can't be done. And it may very well be that there is no procedure for discovery to obtain the evidence which under this bill would be necessary for recovery.

You have got to look upon this problem in the real world as *Illinois Brick* said, and I would add in the real world of litigation, rather than according to some economist's hypothetical model.

Moreover, our experience with the overburdened court dockets causes us, or me at least, to further question whether or not we are adding to that burden by this kind of legislation.

Moreover, this bill makes it very, very difficult for a plaintiff, a prospective plaintiff, to anticipate what the recovery is likely to be. It may very well be, moreover, under this bill, as I understand as it is being construed by its proponents, that somewhere along the line, the purchaser ultimately down the line of distribution, may find himself declared to be too remote to prosecute the action, and after having gone through all the preparation for litigation and trial, may ultimately be told he is too far down the line to prevail.

Interestingly, the plaintiff who most suffers from such a determination is the one who the proponents of this bill claims they seek to protect, namely the consumer. Under this bill, it is quite possible that the consumer may be declared to be too remote to recover, so that you are leaving recovery then to someone, somewhere in the middle of this chain, someone who is denied the full measure of recovery.

I think that one can readily say that under this statute those who can prove damages can't sue and those who can sue can't prove damages as a practical matter. I regard this bill as an important impediment to private antitrust enforcement.

I firmly believe that few serious litigants—and I am not distinguishing those from people who are sharpshooting for a quick settlement—but I firmly believe that serious plaintiffs will be discouraged from bringing litigation, antitrust litigation, under this statute. I also believe that anyone who is foolhardy enough to take on that risk is likely to be denied recovery.

Thank you.

Senator LAXALT. Thank you, Mr. Stein.

Counsel?

Mr. BOIES. You say you favor an amendment to S. 300 that would make the bill not applicable to situations where a judgment had already been rendered after trial on behalf of a first or direct purchaser.

If we were to adopt that amendment, from the standpoint of fairness shouldn't we apply that rule to any case where there has been a judgment act after trial, and not merely limit it to cases where the plaintiff won?

Mr. STEIN. Yes. I don't think you ought to start the ball game over after one side has prevailed. It is unfair and unconstitutional.

Mr. BOIES. So what you are saying is while your language won't do this, the principle is that any time there has been a final judgment after trial, whether it is for the plaintiff or for the defendant, that judgment ought not to be disturbed?

Mr. STEIN. Yes.

Mr. BOIES. Would that apply to settlement as well?

Mr. STEIN. Not under my amendment.

Mr. BOIES. No. I understand it wouldn't under your amendment. Indeed, your amendment wouldn't even apply where the defendant won after trial. But I am talking about principles. If we are going to make the act inapplicable to situations where there has been a final judgment after trail, what about the situation where there has been a judgment after a settlement?

Mr. STEIN. I would be inclined to think it ought to apply there as well, because there ought to be a measure of certainty to litigation.

Mr. BOIES. So what you would recommend is that any time there has been a judgment, whether after trial or as a result of settlement that should not be disturbed and the law if it is passed at all should not apply. Is that correct?

Mr. STEIN. Yes.

Mr. BOIES. Just at the end of your statement you indicated that you believe that this bill if passed would be a serious impediment to private antitrust enforcement. You are aware, are you not, that there are circuits in the country, particularly the ninth circuit, where a rule that permitted pass-on defenses and allowed indirect purchasers to sue had been in effect for several years prior to the *Illinois Brick* decision?

Mr. STEIN. I am aware of that, but I also am not aware of cases where indirect purchasers undertook the burden and succeeded in proving liability and damages.

Mr. BOIES. You are aware of the asphalt cases, I assume.

Mr. STEIN. Yes.

Mr. BOIES. That was a case in which indirect purchasers received $31 million in a settlement following an appellate court decision in their favor.

Mr. STEIN. Yes. I question whether those plaintiffs, although I must admit I am not altogether familiar with the facts of that case, I question whether those plaintiffs could have proved damages.

Mr. BOIES. The defendants were at least sufficiently convinced that the plaintiffs could prove damages to pay out $31 million of their money.

Mr. STEIN. I don't know how that compares with the potential for recovery that really existed in that case.

Mr. BOIES. As I understand your point, though, it was not whether or not indirect purchasers would sue and recover, but that you believe that somehow direct purchasers would be inhibited from suing if we had a rule such as the one that we would propose in this bill, and such as the one that was in effect in the ninth circuit prior to the *Illinois Brick* decision.

Mr. STEIN. Sure, because a direct purchaser who is not going to be able to recover in the action, really has no motive for bringing the lawsuit. Why would he incur the expense, trouble, bother of litigating if he can't recover?

Mr. BOIES. Are you aware of whether or not during the period of time that this rule was in effect in the ninth circuit there was any lack of direct purchaser lawsuits, whether there was any serious impediment to private antitrust enforcement and that sort of thing?

Mr. STEIN. Frankly, there hasn't been all that much successful private antitrust enforcement, certainly in the monopolies area, to begin with. So that I don't think that there is a pattern of successful litigation in the ninth circuit.

Mr. BOIES. Are you suggesting that somehow the ninth circuit is more hostile to these suits than the other circuits or was that a general comment you make?

Mr. STEIN. I don't think that there is anything that suggests hostility.

Mr. BOIES. So you are saying there is no difference between the ninth circuit and the other circuits in this respect. Is that correct?

Mr. STEIN. I am suggesting that there is no difference in any circuit, or any court, to the pragmatic problems one would have of proving damages somewhere down the chain of distribution. I don't know whether in the ninth circuit or any other circuit that burden of proof has been successfully met all that often.

Mr. BOIES. The point that I was making is that, as I understand it, your argument is that a rule such as the one that is proposed in S. 300, and such as was in effect in the ninth circuit for about 5 years before the Supreme Court's *Illinois Brick* decision, would be a serious impediment to private antitrust enforcement. Correct?

Mr. STEIN. Yes.

Mr. BOIES. What I am suggesting to you is that the statistics that were presented to us last week indicated that in the ninth circuit, that circuit was just as active, indeed somewhat more so, from the standpoint of private antitrust enforcement, by direct purchasers as well as indirect purchasers as were the other circuits.

Mr. STEIN. I don't know what statistics you referred to. All I can tell you is that I have not been able to find cases in the ninth circuit or elsewhere where private plaintiffs down the chain, indirect purchasers, have been successful in proving liability and damages, and while the ninth circuit may have been hospitable to that kind of litigation, I don't know of any that were successfully prosecuted. But I don't think it can be done. There may have been actions brought and there may have been settlements. But that doesn't answer the question, because I would suspect that settle-

ments frequently result in the plaintiff realizing much less than the amount of the overpricing enjoyed by the defendant.

Mr. BOIES. It is the case, is it not, that the vast majority of all private antitrust lawsuits are settled whether by direct purchasers or indirect purchasers or by competitors?

Mr. STEIN. A great many are settled.

Mr. BOIES. A vast majority?

Mr. STEIN. I think a vast majority of antitrust litigation is settled, yes.

Mr. BOIES. Thank you.

Senator LAXALT. Thank you, counsel.

Mr. Stein, you mentioned questions in connection with the constitutionality of the proposed legislation. Do you have any objections other than the retroactive features in terms of remoteness of recovery? We have had a lot of testimony here to the effect that in the indirect actions very often you have recoveries when you distribute an amount of just several cents.

In fact, we had testimony last week to the effect that one of the lawyers indicated that in a telephone case I think he got a check of $1.27, in an action he didn't know about, didn't participate in and eventually ended up de minimis type recovery which is one of the problems I have here.

If you are permitting the indirect class action type recovery, you end up with all of the problems you have in this kind of litigation with no real benefit to the person who is purportedly damaged.

Mr. STEIN. I think it goes even deeper than that. It points out the fundamental problem with this, that if you distribute the possibility of recovery so widely so that no one has any real stake in prosecuting the action, you simply are not going to get vigorous enforcement. No one who is likely to recover $1.30 is going to spend 60,000 lawyer hours to prosecute the case. Someone to do that, to put real teeth into private antitrust enforcement, has to have a big stake in the outcome.

Senator LAXALT. How about the lawyers?

Mr. STEIN. I question really whether a lawyer, even a plaintiff stockholder's lawyer, and I am not that, or a plaintiff's class action lawyer, could himself take on the risk, the burden of this kind of litigation, even though he foresees down the road a carrot that impels him to bring class action. I think that the burdens of antitrust litigation are so enormous that even class action plaintiffs lawyers can't do it.

I think a good illustration of that was in the Grinnell litigation. In the Grinnell litigation, after a Government action there were some 50-odd private actions instituted and then one class action. In the class action the recovery represented 1 percent of the charges. In the private action, the recovery approached somewhere around 12 or 15 percent indicating what I mentioned before, in answer to some of the other questions—yes, you may get settlements, but they are really settlements that are not going to burn the defendant the way that they ought to be burned.

Senator LAXALT. Isn't that where most of the action is, in settlements?

Mr. STEIN. Yes.

Senator LAXALT. Where a lot of these law firms around the country bring suits not for the purpose of eventually prosecuting them but of squeezing your defendant into a settlement?

Mr. STEIN. There has been a lot of that, but more recently also you had some very meaningful private actions brought by a single plaintiff.

Senator LAXALT. Direct action?

Mr. STEIN. Yes, or some of them involved questions other than overcharges, but they were antitrust actions.

Senator LAXALT. The thing that strikes me, and that is coming through in this testimony, is that if you justify this kind of legislation on the basis of accomplishing some social good, you have indicated here as a practical matter, it is almost impossible for an indirect purchaser through class action or otherwise, just from the standpoint of dollars alone, to prosecute that type of action effectively, and in those cases apparently where these actions are brought, they result in de minimis recovery by the persons within the class. So where is the social good that is accomplished?

Mr. STEIN. I think if the social good you are seeking to accomplish is vigorous antitrust enforcement——

Senator LAXALT. I would think so, from the standpoint of punishing the violator. Is that what we are talking about? Do you think that is effective?

Mr. STEIN. I think that is a social good you ought to be seeking.

Senator LAXALT. That is part of it, plus the fact we are attempting to compensate these people, preserve their actions, so they have some meaningful recovery. But I don't see that as being part of this picture as a practical matter at all.

Mr. STEIN. I think it works against that. That is the point I am making, that I think if that is the social goal you are seeking to attain, this bill tends to defeat that effort because it tends to defeat, as I said, vigorous private antitrust enforcement, seeking to hold defendants for the full amount of their overcharge.

Senator LAXALT. Senator Hatch?

Senator HATCH. The end result would be that it would defeat it.

Let me ask you this: Does the opinion letter of the Department of Justice's Office of Legal Counsel on retroactive deal with the situation where the defendant has settled with direct purchasers in the last 3 or 4 years, but the indirect purchasers still have time under the statute of limitations to sue for the entire overcharge under S. 300? Would you comment on that?

Mr. STEIN. I certainly think in fairness to the defendant, the defendant ought not to be made answerable twice for the same overcharge.

Senator HATCH. But there is something either in this bill or in prior law that would prevent the indirect purchaser from suing should this bill be enacted.

Mr. STEIN. Certainly there should be.

Senator HATCH. As you talk about the chain of distribution, what would be the maximum number of indirect purchasers that might be affected in a chain of distribution approximately?

Mr. STEIN. I think that is awfully hard to say, but I would think it is not uncommon for there to be at least three or four levels of distribution. The manufacturer to a national distributor, regional

distributors, then retailers, I think that is quite common. And that assumes, of course, that the product hasn't been changed in its composition, it hasn't been repackaged. It hasn't been incorporated into other products.

Senator LAXALT. It presupposes a product that hasn't been in the process and had its form changed. Then you get into even more problems.

Senator HATCH. I can suppose where you might have as many as 20 little companies in the chain of distribution. How would the pass-on defense work with hard—here we have this new bill, a discretionary pass-on defense with the power in the judge. How would that work, from, say, the first direct purchaser right on down through all the indirect purchasers?

Mr. STEIN. As I see it, what you would have to, I suppose, is if you were a plaintiff in the action, and you are somewhere ultimately down the chain, you would have to discover before trial the business books and records and experience of every single person in that chain.

Senator HATCH. That means everybody in front of you?

Mr. STEIN. That is right.

Senator HATCH. That would mean every small business in front of you would have to hire attorneys and accountants to come in and prove that they have a right of defense on it.

Mr. STEIN. From the plaintiffs' point of view, he would have to go out and subpena the records of all of these people if it can be done under the present discovery rules. Then you would have to analyze all of these business books and records to determine how much of that profit was retained and how much of that profit was passed on.

Senator HATCH. So you have an inordinate problem. You not only have the plaintiff with the obligation to go through every one of them to see if they have a pass-on defense, but you have every one of these little companies in the chain of distribution that have to come out and basically prove that they do have a pass-on.

Mr. STEIN. That is right, either that or try to keep secret their most vital business secrets.

Senator LAXALT. Did you have a pass-on problem with your litigation, Mr. Stein?

Mr. STEIN. It was asserted but based upon the existing state of the law, it was rejected by the Court but it was asserted.

Senator HATCH. I don't see anything in the present state of the law that would stop total discovery of everybody in the forward part of the chain of distribution.

Mr. STEIN. I don't know how you can——

Senator HATCH. Other than the Court's own discretion to limit discovery.

Mr. STEIN. I don't think that the rules presently contemplate the parties' ability to simply subpena books and records of a third party. I think you may have to do that by way of a deposition demand with a document production request or subpena.

Senator HATCH. Of course if this bill passes, that becomes a necessity.

Mr. STEIN. That is right.

Senator HATCH. The Court in its discretion will basically have to allow an indiscriminate wide-open discovery process with regard to every forward person in the chain of distribution.

Mr. STEIN. What happens if some one person in that chain has gone out of business or their records are not available; the chain is broken and I don't know what that does to the problem of proof.

I can tell you that we have attempted in much more narrowly defined situation to subpena, survey evidence of this kind, discover survey evidence of this kind, it is very, very difficult, almost impossible.

Senator HATCH. So what you are saying is if we pass this bill, it looks as though we will make antitrust actions more of a quagmire than they are now and that this will slow down the process, allow guilty antitrust violators to walk away or at least be able to defer payment, cause all kinds of clouding of the discovery process and in the process, probably result in less justice and less antitrust enforcement?

Mr. STEIN. I would agree with that. The only reservation I have is that it doesn't strongly enough point out the impossibility of the situation.

Senator HATCH. I think that is right. Many States are now routinely taking assignments in the procurement process. Are you aware of the assignments of private indirect purchasers, and what are the problems involved in that, and if private parties are not trying to take assignments, can we construe that as a lack of interest in policing violations up to the present time or up until now?

Mr. STEIN. I would like to beg off that question simply because I am not that familiar with that practice.

Senator HATCH. Do you see anything to change that question somewhat and to bring it into an area where perhaps you are familiar? Do you see anything to stop the States, for instance, from taking assignments in order to protect their proprietary rights to bring suit?

Mr. STEIN. No.

Senator HATCH. As a matter of fact, there is nothing in the law to prevent them from doing it?

Mr. STEIN. I don't see any.

Senator HATCH. In other words, the States don't need this bill to enforce their both *parens patriae* and proprietary rights?

Mr. STEIN. I don't think so. I will answer that a little differently. I think the real answer is that this bill doesn't give the States very much. A State's attorney general down the line is simply not going to be able to prove his claim whether he has a cause of action or not.

Senator HATCH. In fact, this type clouds his ability to prove his claim?

Mr. STEIN. No. I think that the inability is there, it was there before *Illinois Brick,* it remains there after *Illinois Brick.* It is the problem of proof that we have just been talking about.

Senator LAXALT. If the Senator will yield, when you are talking about a case in which counsel has participated involving direct purchasers, 5 years in preparation, 7 months in trial, you get some idea about the kind of workload and complexity that you are faced

with if you inject indirect purchasers suits and all the attendant problems of proof that are involved there, not only on the discovery side, but the trial side.

Mr. STEIN. That is precisely the point I am trying to make.

Senator LAXALT. It is mind-boggling when you think about it if all of these other issues can be injected.

Mr. STEIN. I would suggest if anyone comes in here and tells you that is not a serious problem, you ask them how many times they have tried and succeeded in doing it.

Senator HATCH. You made a comment, if this bill is passed, it mandates settlements in order to just get out of the process.

Mr. STEIN. That is right.

Senator HATCH. Senator Laxalt, I think very correctly, brought out that if this bill passes, it will lead to more indiscriminate legal extortion—I was going to say abortions——

Senator LAXALT. You might have been right the first time. [Laughter.]

Senator HATCH. But legal extortion in our society—and we have a proliferation of it now—this would even augment that. Wouldn't you agree?

Mr. STEIN. I perhaps don't have the same dim view of the plaintiffs' bar.

Senator HATCH. I don't, either. Let me interrupt you on that. I believe the plaintiffs' antitrust bar and the experts in the field, are very tough attorneys. You have to be to be a successful antitrust lawyer throughout the years. On the other hand, I see a great number of cases where people are getting into the antitrust area for no other reason, and they realize they can force quick settlements, and make quick money out of the antitrust litigation because it is cheaper to settle an antitrust case for the defense costs than it is to go through all of the process of defending it.

Mr. STEIN. I think that is a concern. But I must tell you that my personal concern about this bill is less the fact that the plaintiffs' lawyers are likely to abuse the bill than that it takes the teeth out of private antitrust enforcement.

Senator HATCH. I agree with that, too. I am trying to bring out that Senator Laxalt is, I think, correct in stating this does lead to indiscriminate, wide-open legal extortion in our society against business. That is the other side of the coin. I think a number of the plaintiffs' lawyers have admitted that that is probably true, given the explosion of lawyers in our society and the growth of litigation in our society, particularly in this area.

Footnote 16 of the *Illinois Brick* opinion indicates that indirect purchasers can sue in circumstances where market forces have been superseded. In other words, indirect purchasers would not have much difficulty showing how the pass-on overcharges injured them in these circumstances. Why isn't this exception sufficient?

Why do we encourage all conceivable indirect suits where tracing the overcharges is virtually impossible to prove?

Mr. STEIN. That footnote, of course, I think, expresses the realities of the situation, where you don't have this impossible burden, it is contemplated that someone other than the direct purchaser can sue. But I think it simply gives recognition to the problems we

have been speaking of before about proving damages in indirect purchaser situations where that circumstance doesn't exist.

Senator HATCH. I will just ask one other question. Professor Arreda of the Harvard Law School last year testified before the House that the Supreme Court decided *Illinois Brick* is dead because of the difficulties of facing damages and the problems of duplicative recoveries. He said further that the first purchaser solution that the Court adopted may be "too simple" but he concluded as follows:

> A responsible legislative process would focus on the two problems the Court identified and find ways to solve them. The proposed legislation seems to deny the existence of those problems or to sweep them under the rug by telling courts to try harder to solve them on their own.

The new bill appears to try to solve the problem of duplicative recoveries and use of the pass-on expense by putting them in the discretion of the trial court. Isn't that throwing the problem right back at the courts without providing any solution or any guidance?

Mr. STEIN. I think that is absolutely true. The bill does not provide a solution to the problem of proof that I have discussed. It just absolutely doesn't. It then introduces other areas of uncertainty.

Senator HATCH. As a plaintiff's lawyer—one last point—with regard to this subject, by giving the pass-on, by giving the Court, the individual court, discretion, with regard to whether or not to allow the pass-on defense, are not we also giving to the Court inordinant title to club one side or the other in the submission?

Mr. STEIN. I think it represents a threat of some kind, yes. But also it introduces a kind of uncertainty that would tend to discourage litigation. The point I mentioned before, the plaintiff could spend an awful lot of time, an awful lot of effort, an awful lot of money, only to find that this discretionary exercise of authority would put him out of court.

Anticipating the existence of that possibility, it seems to me would tend to discourage people from litigating or litigating vigorously.

Senator HATCH. I can see in a pretrial proceeding, the court, if he wants to get the defendant, telling them that he is not going to let them use the pass-on defense, and using it as a club over the defendant, or if he wants to get the plaintiff saying he is going to let the defendant use the pass-on defense, and give a very good set of instructions, charge to the jury that the pass-on defense probably applies here.

Mr. STEIN. I agree.

Senator HATCH. So it really is an inordinate opportunity to abuse discretion as provided by this particular bill.

Mr. STEIN. Yes.

Senator HATCH. Thank you, Mr. Chairman.

Senator LAXALT. Thank you.

Does counsel have any further questions?

I would like the record to indicate, Mr. Stein, first of all—we thank you for appearing here and we will make certain that your remarks and answers to the questions are made available to the other members of the committee.

Senator Thurmond, who wanted very much to be present during your testimony, indicated that he may have some written questions to submit to you later, if that is all right.

Thank you, sir.

Senator HATCH. Why don't we call the next panel of attorneys to testify, Samuel W. Murphy, Jr., attorney, Donovan, Leisure, Newton & Irvire, out of New York, N.Y.; Boyden C. Gray, attorney for Wilmer, Cutler & Pickering, Washington, D.C.; and Robert E. Liedquist, attorney, Squire, Sanders & Dempsey, in Washington, D.C.

If you gentlemen are here we would like for you to come forward and testify at this time.

PANEL OF LAWYERS:

STATEMENT OF SAMUEL W. MURPHY, JR.; BOYDEN C. GRAY, AND ROBERT E. LIEDQUIST

Senator HATCH. We are delighted to welcome you to our committee and listen to your testimony. We look forward to hearing what you have to say.

[The prepared statements of Messrs. Murphy, Gray, and Liedquist follow:]

PREPARED STATEMENT BY SAMUEL W. MURPHY, JR.

I appreciate the opportunity to address again the questions raised by the proposed legislation, S. 300, which would overturn the Supreme Court's 1977 decision in the *Illinois Brick* case.

I am a partner in the law firm of Donovan Leisure Newton & Irvine. As I stated in my previous testimony to this committee in 1977, concerning S. 1874, both my firm and I have been active in antitrust litigation for some time. Since 1969, I have been chief trial counsel for American Cyanamid Co. in the antibiotics antitrust litigation, about which the committee has heard much since hearings on *Illinois Brick* began in 1977. My statements today are made both on behalf of Cyanamid and to express my own views as a trial lawyer who has experienced the problems of trying, and pretrying complex antitrust cases.

The concerns expressed by me and others during the 1977 hearings bear a brief repeating. Without question, antitrust litigation must be administered to achieve the dual aims of deterrence and compensation. But the proposed legislation would not achieve the desired result. Instead, this bill would, I believe, place on the Federal courts burdens so unmanageable as to interfere with the fair and effective disposition of antitrust cases.

A point which needs particular reemphasis is that direct purchasers will sue their suppliers for treble damages, and their suits constitute an effective deterrent against antitrust violations. In his recent statement to this committee, Assistant Attorney General Shenefield argued to the contrary, and as support for his position, reported that only 10 percent of the class of pharmacists in the antibiotics antitrust litigation filed claims to participate in a settlement. Prepared testimony of John H. Shenefield ("Shenefield statement"), February 1, 1979, p. 4. You should bear in mind, however, that almost all members of the direct purchaser class of hospitals did file claims, that city, county and State direct purchasers were active litigants, that the United States sued as a direct purchaser as well as in the capacity of a reimburser of others, that one factor discouraging pharmacy claims was a requirement that pharmacies had to submit detailed claim forms, and that only a relatively small number of consumers ever filed claims. Moreover, it was the direct purchasers—wholesalers and retail pharmacists—that brought the first significant suits in that litigation, and they did so in class actions.

One need not confine himself to the antibiotics litigation to determine the substantial portion of antitrust damage actions brought by direct purchasers. A cursory review of the recently filed cases indicated that almost 100 complaints were filed by direct purchasers in the second half of 1978 alone. It is thus quite apparent that

direct purchasers do not hesitate to sue their suppliers for overcharges. The *Illinois Brick* rule in fact now gives direct purchasers even more incentive to sue. The costs and length of a trial of direct purchaser claims will be less than they would be if indirect purchasers were also in court, and at the end of a trial the direct purchasers can count on recovering the entire damage award.

There are some specific points which I now want to make about the proposed legislation, addressing both old problems which the current bill fails to solve and recent developments in the law which, I believe, this committee ought to consider carefully before it takes any action.

I. The new version of the *Illinois Brick* bill does not overcome objections to the earlier retroactivity provision.

The original Senate version of the legislation to reverse *Illinois Brick*, S. 1874, provided that the bill would apply to all antitrust cases which were pending as of the date of the Supreme Court's ruling. That retroactiviy provision was strongly criticized by witnesses before this committee in 1977. When the Supreme Court decided *Illinois Brick*, it was not making new law or reversing old law—it was applying the teachings of *Hanover Shoe* to a new fact situation. Consequently to reverse that decision retroactively by legislative action would change the rules in the middle of litigation. *See* "Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 95th Congress, 1st session, on S. 1874," July 21, 22, and September 9, 1977 ("Senate hearings"), pp. 173, 179. And as another witness pointed out, the general pattern in antitrust legislation has been to give only future application to new laws. Congress had rejected a retroactivity provision in the *parens patriae* legislation passed just the year before. Testimony of Michael Blechman, Esq., Senate hearings, p. 62.

A gesture toward meeting those objections to retroactivity is made in S. 300, since it would not make the proposed legislative reversal of *Illinois Brick* retroactive to the date of the Court's decision. But although S. 300 recognizes the objections, it does not meet them. The legislation would apply not only to cases filed on or after the date of enactment, but also to cases pending on the date of enactment. Parties who began their litigation under the premise that indirect purchasers could not recover—whether that premise was based on the reasoning of *Hanover Shoe* or squarely on *Illinois Brick* itself—would still find the rules changed in the middle of proceedings and the cases expanded far beyond their original scope.

The increased burden to which this law would expose companies which are now defending suits or are in the process of settling them amounts to far more than simply a greater cost of litigation. Proponents of the bill may claim that they do not intend to expose defendants to multiple recoveries; nevertheless, that remains a real danger, since litigation has proceeded, and decisions by courts and by parties have been made, for more than 10 years with the *Hanover Shoe* case and almost 2 years with *Illinois Brick* on the books. Add to this that a principal motivation for retroactive reversal of *Illinois Brick* appears to be a small number of cases in which the Federal Government is a plaintiff (Shenefield statement, p. 13), and I suggest that, were S. 300 enacted as currently drafted, a manifest injustice would be worked upon companies now defending antitrust suits or prosecuting them as direct purchasers.

II. This legislation would seriously hamper efforts to reduce the enormous burdens which antitrust litigation places on our courts.

We all share a concern over the problems posed for our courts and litigants by big antitrust cases. The report of the National Commission for the Review of Antitrust Laws and Procedures (the "NCRALP report"), which was presented to the President in late January, contains a number of recommendations to expedite antitrust litigation and make it more manageable. Some of those proposals have already been included in legislation reported out of this committee in S. 390.

This committee should carefully consider what the effect would be on our courts were it to reverse *Illinois Brick*. Recalling the important role that considerations of judicial economy and management of the big case played in shaping the *Illinois Brick* decision, I submit that the reversal of that decision would substantially undermine what this committee has set out to accomplish in S. 390 and would make impossible achievement of many of the recommendations of the National Commission (such as, for example, the 24-month time limit on pretrial proceedings).

Recent proceedings in the antibiotics antitrust litigation well illustrate the enormity of the burdens imposed by attempts to trace alleged overcharges past direct purchasers. (For a general history of that litigation, see statement of Samuel W. Murphy, Jr., Senate hearings, pp. 183–186.) My client and other pharmaceutical companies are litigating claims made by the Federal Government for "overcharges" allegedly imposed on first purchasers (hospitals, wholesalers and retailers) and then

supposedly passed along through various intermediate steps eventually to the United States as a reimburser and insurer under various public assistance programs. Armed with the *Illinois Brick* decision, we moved in December, 1977 for dismissal of those claims. Even on the seemingly narrow issue of whether Government reimbursement formulae constituted "pre-existing cost-plus contracts," the one exception permitted in *Ilinois Brick* to the "first-purchaser only" rule, the Government was able to muster up a host of new discovery demands, and through more than 300 pages of memos and exhibits attempted to explain how each of the Federal programs operated. It is difficult to conceive of the record that would have been generated had it not been for the *Illinois Brick* decision.

The lesson of that experience is clear to me. Even with only one plaintiff in court attempting to trace alleged overcharges, the amount of time, paper and effort consumed was tremendous; consider how much more preoccupying and burdensome the process would have been had all of the intermediaries, such as States, hospitals, wholesalers, retailers and individual consumers, been in the court, each claiming that its supplier had passed on overcharges but that it, in turn, did not pass on the higher costs.

The National Commission for the Review of Antitrust Laws and Procedures has strongly advocated the use of summary judgment procedures to narrow the issues in the big case. NCRALP report, p. 65 et seq. That is precisely what occurred in the *Illinois Brick* case itself, where the claims of the indirect purchasers were disposed of by summary judgment. Were S. 300 to become law, of course, that expeditious treatment of antitrust claims could not have taken place.

I would like here to point out what I perceive to be a specific defect in S. 300, one wholly apart from my fundamental concerns about it. S. 300, as currently drafted, would discourage a court from disposing of the "passing on" issue on motion before a trial in situations where not all parties in a distribution chain were before the Court. Section (b) gives a court discretion to permit the "passing-on" defense to avoid duplicative recoveries. With all of the uncertainties inherent in tracing an overcharge to the level in the distribution chain to the point where it was no longer passed on, I wonder how many courts are going to dismiss claims where, because the "injured party" is not in its court, the possibility of unrecovered damages exists. The opportunity to expedite litigation by pretrial motions would be lost. I urge this committee to delete the discretionary language from section (b) so that it would be clear that pretrial motions based on the "passing-on" defense should be treated strictly on their merits.

III. The legislation would reintroduce great uncertainty into antitrust damage litigation, and therefore create enormous pressures for parties to compromise meritorious claims and defenses, and for other parties to bring unmeritorious lawsuits.

The inherent factual complexity of "passing-on" issues is such that it is impossible for any party to predict with any degree of certainty which level in a distribution system will be found at trial to be the correct plaintiff. As a result, before the certainty *Illinois Brick* added to the law, settlements were achieved, after extensive pretrial proceedings, which had little to do with the relative merits of a particular case. While this committee may feel that it would be unfair to deny indirect purchasers the opportunity to recover, the answer to that possible inequity should not be, in my view, the creation of a situation whereby merit would have little to do with the recoveries achieved.

Nor do the proponents of the legislation make sufficient allowance for the fact that the fundamental issue of whether the antitrust laws were violated is far from clearcut in most antitrust cases. Both the Government and private plaintiffs often fail to prove their allegations, as a glance at reported antitrust decisions would show. Yet increasing the numbers of potential claimants, as S. 300 would do, would dramatically increase the costs and risks of litigation beyond what many businesses could bear, with the result being settlements even where the probabilities of a plaintiff's success are less than solid. When a company is sued by, among others, a consumer class and a first purchaser class, the combination of an unknown but potentially enormous number of claimants and a court's denial of summary judgment on a "passing-on" defense could inject such uncertainty into the picture that settlement might literally be forced. Neither of the goals of compensation and deterrence would be served by forced settlements in such cases, particularly where liability was, at best, unclear. Before any legislation is passed which reverses *Illinois Brick*, it would be well to remember that our legal system presumes that a defendant has not violated the law unless a plaintiff proves otherwise. To encourage suits which force settlements is to disregard that fundamental presumption.

IV. Legislative action on *Illinois Brick* should await the Supreme Court's decision in *Reiter* v. *Sonotone Corp.*, which may have a significant impact on who may sue under the antitrust laws.

The Supreme Court on January 8, 1979 agreed to review the recent decision of the eighth circuit in *Reiter* v. *Sonotone Corp.*, 579 F.2d 1077 (1978). 47 U.S.L.W. 3463. The court of appeals held in *Reiter* that a consumer who purchases an item for personal use has no standing to sue for treble damages under section 4 of the Clayton Act, since requisite injury to "business or property" could not be shown. If Congress were to pass legislation which simply reversed *Illinois Brick*, and the Supreme Court were then to uphold the decision of the eighth circuit, the legislation would lose much of its purpose and effect. It is very clear that considerable support for the *Illinois Brick* bill comes from those that wish to encourage consumer suits. Given that the Supreme Court will soon decide whether consumers—direct purchasers or not—have any standing to sue, it would seem premature to proceed further with S. 300.

The Justice Department reportedly has already drafted legislation to submit to Congress were the Supreme Court to decide that consumers have no standing to sue. Debate on such legislation would surely reach some rather basic antitrust issues, such as whether, on the one hand, the damage remedies of the antitrust laws were designed to enhance competition or, as the eighth circuit concluded in *Reiter*, to prevent restraints of trade significantly affecting business.

Such issues are at the heart of the current debate over *Illinios Brick* as well. While at times obscured by discussions of judicial economy, the underlying import of limiting recovery to direct purchasers, as the Supreme Court has done, is that such a rule encourages suits by parties who are in the best position, when considerations of fairness and manageability of litigation are properly balanced, to maintain competition among their supplier. If the Supreme Court were to affirm *Reiter*, then Congress would achieve a more coherent resolution of the overall package of issues by considering them at one time.

PREPARED STATEMENT OF BOYDEN C. GRAY

Mr. Chairman and members of the committee, my name is Boyden Gray. I am an attorney and member of the firm of Wilmer, Cutler and Pickering. I am appearing today on behalf of the Business Roundtable. The Roundtable is an organization of approximately 190 leading business corporations. Its basic purpose is to provide a forum in which the business leadership of the Nation can exchange ideas and develop policy recommendations on major business, economic and social issues. We very much appreciate the opportunity to testify on S. 300 and I will try to be brief in summarizing the attached memorandum.

I would like to develop just one basic point that the pending bill will frustrate rather than advance its dual purpose of improving private enforcement and compensation. As for enforcement, the bill is based on an assumption which might have been plausible nearly 2 years ago when *Illinois Brick* was decided but which is now plainly contradicted by the facts. Contrary to the legislation's basic premise that direct purchasers do not sue their suppliers, the fact show that direct purchasers do sue, much more vigoruously than indirect purchasers. As for compensation, the bill will not provide any more equity than the current system of enforcement. Instead, the bill is likely only to undermine it by creating a litigation free-for-all that will shift enforcement to consumer class actions where lawyers are the only real beneficiaries. Our current system may not be perfect, but is far better than the one proposed here.

Perhaps the best evidence of direct purchaser enforcement activity is the study prepared a year ago for the Senate by Francis Kirkham. This study examines cases pending in two important antitrust districts where indirect suits were clearly permitted. The study shows that the overwhelming majority of cases were brought by direct purchasers, with indirect purchasers bringing suits in only a few instances and initiating the litigation in almost none. Another way of testing direct purchaser's willingness to sue is to examine whether direct purchasers have brought suit following Government price fixing indictments. We surveyed a 33-month period beginning in 1966 and ending 6 months ago (it is too early to tell for any more recent indictments). This survey showed that of the 16 Government indictments against companies in the top Fortune 1,000 all but one have already been followed by direct purchaser damage suits despite the tolling of the statute of limitations.

Obviously, as both this survey and Justice White's opinion in *Illinois Brick* concede, direct purchasers may not bring suit in every single case. But there is no

42-005 O - 79 - 19

pattern of lax enforcement by direct purchasers. The few cited examples, such as the *Liquid Asphalt* cases and the one in our survey, mostly involve governmental construction or purchase activities where assignments are now being used to ensure that the State retains the right to sue.

It is thus difficult to see how overruling *Illinois Brick* and *Hanover Shoe* could improve enforcement since *Illinois Brick* has had such minimal adverse impact: If indirect purchasers were relatively inactive under *Liquid Asphalt,* it is hard to see how they could be anything but less active when faced by S. 300's pass-on defense. But it is very easy to see, by contrast, what the pending bill will do to harm the currently effective system of private enforcement.

There is little I can add to the testimony of others far more experienced than I that allowing proof of pass-on will have a very harmful impact on the current system, which is based, after all, on *Hanover Shoe's* elimination of the defense nearly 10 years ago. As both plaintiffs' and defendants' lawyers have repeatedly pointed out, permitting use of both defensive and offensive pass-on will jeopardize most of the pending cases and discourage all future direct purchaser enforcement. The stakes are large, as illustrated by the pending $500 million direct purchaser settlements in just two cases (folding carton and corrugated box). Assuming that the settlements are not finally approved when any legislation is enacted, the defendants can be expected immediately to raise the pass-on defense because of the possibility of indirect suits now barred by *Illinois Brick.* On the other hand, if the settlements are final when any bill is enacted, the defendants will almost inevitably face duplicative liability because the indirect purchasers will in no way be barred by the bill or settlements from asserting that a part or all of the $500 million previously settled was, in fact, passed on. There are countless other examples. As the attached memorandum indicates, a survey of just eight recently-filed direct purchaser cases shows that more than $1.7 billion is at stake. The bill will throw these cases into turmoil, causing some to be dropped and subjecting defendants to multiple liability in others. The committee could limit the adverse impact of the legislation on current litigation by making it prospective only. But that would only postpone the agony.

It is possible to argue that the trail court could properly exercise its discretion to manipulate the pass-on defense to prevent both the harm to direct suits as well as the potential for duplicative liability. But as the Department of Justice noted in its testimony, "a court may deny a defendant the right to argue a pass-on defense only where subsequent suits by those to whom the damages were arguably passed are not a realistic possibility." While necessary to minimize the risk of duplicative recovery, such a construction of the pass-on defense will mean that it will almost always be available. Although indirect purchasers have not often sued in the past, they have sued just enough to make it very difficult for a trail judge to rule at the outset of a case that such indirect suits are not a realistic possibility. The classwide proof provisions in the bill, of course, are designed to encourage indirect suits.

But even if a trial court is inclined to deny the defense, he must allow the defendant to develop a sufficient record to enable him to exercise his discretion properly. This could mean endless discovery of everyone in the chain, including those indirect businesses who have no interest in suing. Thus, even in cases where the defense is denied, the discovery and motions required to resolve the issue could encumber a case for years and be so costly as to deter first purchasers from suing. Indeed, because the pass-on defense is available against all but the final indirect purchasers, it will deter them as well. Given this possibility prior to every case, only the most remote of the possible plaintiffs are likely to initiate suit.

On the other hand, a greater readiness to deny the defense will only increase the risk of multiple liability. It is simply no answer to this problem to say that multiple liability has never occurred in the past. Duplicative indirect recoveries almost certainly would have occurred if not prohibited in *Illinois Brick* itself, where the direct purchasers had already obtained a recovery. And it is similarly no answer to say that the "short" 4-year statute of limitations will minimize the difficulties. The statute of limitations runs, in fact, very slowly, in part because it need not start until injury is ascertainable—i.e., sometimes long after the violation—and in part because it stops altogether during the pendency of a Government case or the filing of a class action.

Raising these problems is justified on the alternative ground that it is unfair to give direct purchasers the windfall of the entire recovery to the exclusion of others who may be injured. But two-thirds of treble damages are intended as a windfall to encourage suit. In any event, the current system does allow indirect recovery where there is a cost-plus contract or control relationship between two levels in the chain of distribution. If these limitations are arbitrary, the bill is no less so, and its

complexity may, in fact make indirect recovery harder in some circumstances than it is today.

The bill does not, for example, change the existing rules of standing which bar suit by suppliers of first purchasers despite the fact that these admittedly collateral parties may suffer clearer injury than indirect purchasers three or more steps removed in the chain of distribution. Moreover, the "chain-of-distribution" requirement contains its own limitations for those who are not collateral to but appear on the surface to be directly descended from the violation. Although far from clear, the discussion of this requirement in last year's House report means at least that the bill does not apply, for example, to capital goods, or overhead items such as office and energy supplies, or even to items that ultimately find their way to consumers if they undergo sufficient transformation. Because of the complexity of the thousands of distribution systems in our economy, however, the report leaves ultimate application of the "chain-of-distribution" requirement to the courts to figure out on a case-by-case determination.

Finally, many indirect businesses who do qualify for the "chain," whatever it is, will never be assured of recovery, even if they can recover today under an *Illinois Brick* exception. This is because the pass-on defense applies to all who resell, including the retail bakers whose testimony for the legislation conceded that they cannot determine how much they pass-on to consumers. Instead, many of these small businesses will have to open their books for discovery no matter how much they may want to avoid the mess of litigation. And if they are ruled out of the "chain," their immediate sellers will by definition receive as much of a windfall as direct purchasers allegedly do today. Consumers and other "final" purchasers who are spared the defense may thus be the most likely plaintiffs. But consumer class actions, which will still have to prove offensive pass-on, rarely provide actual compensation to consumers. By shifting enforcement to consumer class actions, the bill will provide inadequate deterrence in some cases and overkill in others, inhibiting pro-competitive activity and benefitting only lawyers.

The complexity of the bill, in short, obscures what the antitrust laws are about—to deter and to compensate in connection with provable violations. While not perfect, the current system achieves those two goals fairly well. For violations high in the chain-of-distribution, the House committee found less than 4 years ago that private antitrust enforcement was relatively effective. Direct purchasers sue when they should in the overwhelming majority of instances, and indirect purchasers can recover in crystal clear pass-on situations. The resulting deterrence has lead to a situation where the outgoing president of the National Association of Attorneys General has said that most price-fixing is local in nature and where most Government price-fixing indictments do not involve companies in the top Fortune 1,000. The record of enforcement against local violations by either direct or indirect purchasers may not be as good, and this is in part why *parens patriae* was enacted. The courts could conceivably rule some day that *Illinois Brick* prohibits indirect *parens* remedies. But there is too much scholarly opinion to the contrary to base legislation on that possibility, especially legislation that encourages private consumer class actions in rejection of the *parens* determination that the State Attorney General is the consumers' best representative.

In closing, it is important to explain why the business community supports the strong antitrust enforcement provided by the current system—a position that may seem curious to some. First, every business that sells goods also buys supplies; national companies do not want to pay artificially high prices any more than their customers do, and they may sue as direct purchasers themselves. Second, whether as plaintiff or defendant, the business community wants issues tested on the merits, not obscured by peripheral problems involving class actions, pass-on and standing which benefit lawyers more than anyone else. Finally, I cannot emphasize how impatient clients are today about the costs of litigation and the size of legal fees even under the current system. These costs are essentially nonproductive, and they will be greatly inflated by the complexities of the new bill which could take years of additional litigation to define and implement.

PREPARED STATEMENT OF ROBERT E. LIEDQUIST

I am pleased to present to this committee the views of the National Association of Manufacturers (NAM) concerning S. 300, the Antitrust Enforcement Act of 1979. The NAM is a voluntary organization of over 12,000 business firms of all sizes with members from every State in the Nation. The NAM and its sister organization, the National Industrial Council, which has over 155,000 members, together provide

about 75 percent of the industrial output of this country. For my part, much of my professional career as a lawyer was spent as an antitrust prosecutor with the Federal Trade Commission, where I served as staff attorney, assistant director for litigation (simultaneously chief trial counsel for the *Exxon* and *Cereal* cases), deputy director and, finally, acting director of the Bureau of Competition. Since 1976, I have been in private practice engaged in handling antitrust matters.

Senate bill 300 would have the effect of both striking down the Supreme Court's holding in *Illinois Brick Co.* v. *Illinois* [1] and, in vague circumstances, permitting the courts to disregard the prior holding in *Hanover Shoe, Inc.* v. *United Shoe Machinery.*[2] In these respects, the bill embodies the basic provisions of legislation that failed to be enacted in the 95th Congress. At that time NAM strongly registered its view that the proposed *Illinois Brick* legislation was an expedient patchwork of bad law and unsound public policy. The present bill only reinforces our belief that a wholesale restructuring of antitrust enforcement policy around these lines is imprudent and unnecessary.

This committee has already heard from, and will hear from still other, respected witnesses with a great variety of perspectives on this subject. This statement does not attempt to detail all of NAM's objections to S. 300, but instead focuses on several key deficiencies in the proposed bill.

The discussion which follows is grounded upon a simple but important proposition: The debate over *Illinois Brick* must proceed upon recognition that while the legislative ideal is to provide a maximum of justice for all persons affected by the laws, no field of human activity, let alone the esoteric legal process encompassed by the antitrust laws, can be expected to yield that result. Rather, with due regard for the ideal as well as the possible, the task before us should be articulated as: How best can we strike the balance among the relevant and often competing policy variable of private enforcement, compensation, deterrence, efficiency and fairness. I submit that the proponents of S. 300 fail to appreciate either the need for balance or that the act of balancing itself means that none of these variables deserves to be given priority at the expense of the others. In turn, this failing explains the naive simplicity with which the bill's proponents characterize the *Illinois Brick* bar to indirect purchaser suits as a self-evident injustice to consumer plaintiffs and one that, regardless of the consequences, must be overturned.

The cardinal error in casting *Illinois Brick* in narrow terms as an inflexible generalized rule is that it misinterprets in a fundamental way the Supreme Court's opinion. In my opinion *Illinois Brick* was no more—and no less—than a proper exercise by the Court of its responsibility to supervise the operation of the Federal judiciary. It was a bold assessment, for which there is ample precedent,[3] of the unhappy results which occur when Congress creates broad substantive rights and remedies and leaves to the courts the unmanageable task of sorting out a maze of conflicting policies in concrete cases. What is remarkable about *Illinois Brick* is that in a discrete, adversarial context—without the aid of committee staffs, expert witnesses, empirical studies and leisurely deliberation—the Court was able to present a comprehensive analysis of the relevant policy variables and the huge practical difficulties that our judges confront in complex, multiparty actions generally and antitrust consumer class actions in particular.

The Court's principal purpose in *Illinois Brick* was to deliver a message to Congress,[4] and that message—which S. 300 would ignore—was this: Passing on theories, if they are to be available at all, must treat plaintiffs and defendants equally, and a symmetrical rule which precludes passing on and relies primarily upon direct purchasers to uphold the scheme of private antitrust enforcement, better maximizes the relevant policy variables than the opposite rule. Moreover, absent a complete legislative restructuring of our judicial machinery, class action devices and complex litigation procedures, direct purchasers are more interested, more efficient, and more effective antitrust plaintiffs than indirect purchasers.

Note that the *Illinois Brick* majority, by refusing to ground its decision on "standing" principles, never stated or implied that consumers as a class have no recognizable interest in overcharge damage awards or cannot, suing alone, ever be

---

[1] 432 U.S. 720 (1977).

[2] 392 U.S. 481 (1968).

[3] *See Stone* v. *Powell,* 420 U.S. 465 (1976); *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974). Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Counsel, Inc.,* 435 U.S. 519 (1978).

[4] There are several references in the majority's opinion which suggest that the *Illinois Brick* Court anticipated Congressional scrutiny of its decision. *See* 431 U.S. at 736 (". . . Congress is free to change this Court's interpretation of its legislation."); *id.* at 733 n. 14. ("Should Congress disagree with this result, it may, of course, amend the section to change it.").

efficient plaintiffs. Rather, as the majority correctly perceived,[5] a symmetrical rule allowing passing on would transform virtually every treble-damage overcharge action into massive multiparty litigations in which potential plaintiffs at every level in the distribution chain would be joined.

In such cases, the incremental social benefit of allowing indirect purchasers with small antitrust claims to sue as a class and recover miniscule portions of the damage fund[6] would be far outweighed by the costs and burdens to the courts, other plaintiffs (as well as nonplaintiff middlemen), and not least of all, defendants. Senate bill 300, which elevates the policy of compensating consumers to a position of primacy by providing procedures to facilitate their recovery, would actually foster increased complexity and protraction yet do nothing to improve the ability of the courts to adjudicate the merits of antitrust cases. Faced with these prospects, many antitrust defendants will be unable to withstand the enormous extrajudicial pressure to settle even nonmeritorious suits, and for those defendants able or required to defend through trial, the average costs will be out of proportion to anything we have ever witnessed. I do not believe that the marginal value of allowing indirect purchasers to sue can be held to justify these consequences.

That section of S. 300 which would modify the rule established in *Hanover Shoe* offers a poignant example of the new levels of complexity and confusion that would result from enactment of this legislation. Senate bill 300 would confer upon courts in overcharge actions near absolute discretion to grant or deny the passing on defense. One commentator has summarized some of the threshold issues the courts will face in deciding whether to allow the defense:

[W]ith respect to the fairness policy, a court would have to determine in advance to what extent (if any) an illegal overcharge had been passed on to consumers in order to decide if consumers were in fact the ones who needed compensation. This, however, is precisely the determination which the *Hanover* court found judicially burdensome. Similarly, courts cannot determine in advance how likely it is that anyone but consumers will sue the antitrust violator (enforcement and multiple liability policy), or how great the burden of tracing a particular illegal overcharge will be (efficiency policy). Thus, even if a court makes a conscientious effort to balance all of these policy considerations, the difficulties may well prove insurmountable.[7]

It should not be difficult to see that entirely new waves of costly, time-consuming discovery and minidamage hearings will be necessary prior to the introduction of proof on the amount and apportionment of damages. Even if one assumes for the sake of argument that the judicial burden of tracing an overcharge for this purpose is found not to be unmanageable in a particular case, is it possible to identify in advance the factors that should guide a judge's exercise of his discretion to allow or refuse a passing-on defense? Senate bill 300 fails to address this matter.

Economic theory recognizes that in the real business world there are very few, if any, market situations in which the full overcharge will be passed on to indirect purchasers.[8] This suggests that in virtually every case where both direct and indirect purchasers are represented in an action, the courts may be forced to allow the passing-on defense. In addition, this insight casts considerable doubt upon the viability of the so-called "pure middleman" (who resells goods without altering them) and "fixed percentage markup" (contractors) as model instances in which the passing-on defense should be refused. Nor is there any significant virtue in terms of logic, simplicity of application or explanatory power in attempting to identify general situations where only a "small" amount of the overcharge is "normally" passed-on and, consequently, the defense should be refused.

The *Illinois Brick* majority was not unmindful of the difficulty, if not futility, of attempting to construct general guidelines in this area:

We reject these attempts to carve out exceptions to the *Hanover Shoe* rule for particular types of markets . . . . [T]he process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility

---

[5] 431 U.S. at 737.

[6] The consumer's right to recover may in fact largely be a hollow and empty one. *See* authorities cited in Developments in the Law—Class Actions, 98 Harv. L. Rev. 1318, 1636 and n. 68 (1976) (consumer class actions have largely failed to compensate injured individuals with small claims).

[7] Note, the effect of *Hanover Shoe* on the offensive use of the passing-on doctrine, 46 S.Cal. L. Rev. 98, 115 (1972) (footnote omitted).

[8] Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornell L. Rev. 309, 312 & n. 14 (1978); *see Illinois Brick* v. *Illinois*, 431 U.S. at 742 ("Overcharged direct purchasers often sell in imperfectly competitive markets. They often compete with other sellers that have not been subject to the overcharge; and their pricing policies often cannot be explained solely by the convenient assumption of profit maximization.") (footnote omitted).

to proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in particular class cases would inject the same "massive evidence and complicated theories" into treble-damage proceedings, albeit at a somewhat higher level of generality.[9]

Solutions to the problems involved in the passing on defense became even more elusive in cases where only direct purchasers have sued. The Justice Department's representative, who appeared before this committee on behalf of the Administration to express its support for S. 300, testified that:

Since the bill, as we interpret it, contemplates that a court may deny a defendant the right to argue a pass-on defense *only where subsequent suits by those to whom the damages were arguably passed are not a realistic possibility,* it ensures fairness to the defendant while also appropriately helping to ensure that the fruits of an antitrust violation will not remain with the violator.[10]

But how, one may properly ask, is a court to decide that subsequent suits by indirect purchasers are "not a realistic possibility"? The Justice Department offers no guidance whatsoever other than the suggestion, based solely on impressionistic evidence, that it is unrealistic to assume more than a "few would-be plaintiffs will be willing or able to wait for a previous case to be completed before filing suits."

Although the variety of possible fact situations is infinite, one example will suffice to reveal the cold comfort antitrust courts and litigants will derive from that suggestion. Take the not uncommon situation where a direct purchaser suit is the vehicle by which indirect purchasers first gain knowledge of a possible price-fixing conspiracy; on the date of filing the 4-year statute of limitations begins to run for them. The defendant, in order to assess the extent of his potential liability, moves immediately for a ruling on the availability of the pass-on defense. Whereupon the trial court judge, perhaps influenced by the Justice Department's argument that the possibility of subsequent suits is really no problem at all, denies the pass-on defense. In effect, such a ruling means that the defendant by law is liable to the direct purchaser for the total overcharge. Since no indirect purchasers have yet surfaced, the defendant, faced with substantial potential liability, settles with the direct purchaser, for less than the full extent of the overcharge but possibly for more than the direct purchaser's actual injury. Is the defendant now liable for the full amount of the injury sustained by the indirect purchasers, which may involve some duplicative recovery? Does the settlement with the direct purchaser, on the basis of the court's ruling that the defendant was liable to it for the full extent of the overcharge, constitute a full or partial bar to recovery by indirect purchasers? Given the generally high calibre and ingenuity of antitrust lawyers, issues at least as thorny and complicated as these are likely to clutter the courts for years to come.

Most of the issues discussed above, of course, involve only the problems that will surface if a court denies the pass-on defense. The harmful effects upon private antitrust enforcement which will result from allowing the passing on defense have already been ably catalogued by numerous witnesses and do not need to be repeated here. Federal District Judge Charles W. Joiner perhaps best summed up the advantages of the current symmetrical rule precluding passing on when he told this committee:

The thrust of what I am saying is that *Illinois Brick* and *Hanover* had provided rules that (1) encourage direct purchasers to help enforce the antitrust laws, (2) help the courts to do their job by making the issues and proofs simple, and (3) recognize that the enforcement policy should be kept as inexpensive and efficient as possible. I would urge that you allow the rules that have been finally defined in these two cases to settle in and to determine how they work before you embark upon a drastic program of revision as suggested by the proposed legislation.[11]

Another major defect in S. 300 lies in its underlying premise—for which there is scant empirical support—that the bar to indirect purchaser suits will seriously diminish the effectiveness of antitrust enforcement in terms of its deterrence and compensatory values. In the first place, I believe that the weight of credible evidence demonstrates that direct purchasers, whose suits constitute the overwhelming majority of private antitrust enforcement actions, are effective and efficient plain-

---

[9] 431 U.S. at 744–45 (footnote omitted).

[10] Testimony of Hon. John H. Shenefield, Assistant Attorney General, Antitrust Division, Feb. 1, 1979, at 7 (emphasis added). In effect, this formulation concedes that a judge has little or no discretion to refuse the defense when direct and indirect purchasers are joined in the same action.

[11] S. Rep. No. 988, 95th Cong. 2d sess. 12–13 (1978).

tiffs.[12] Second, assuming that the foreclosure of some number of meritorious suits by indirect consumer purchasers cannot be reconciled by reference to the integrity of the overall scheme of antitrust enforcement, the goal of compensating consumer purchasers can adequately be met by *parens patriae* suits.

I hope it is not premature to say that the anguished cries heard following *Illinois Brick* that the Supreme Court had inadvertently emasculated the Parens Patriae Act have been put to rest.[13] That being the case, it is surprising that the proponents of S. 300 seem to have so little faith in the value of *parens patriae* as a consumer recovery device which, just a few years ago, was heralded as the most important antitrust legislation in decades.[14] Having once made the Parens Patriae Act a cornerstone of their defense of *Illinois Brick* legislation, they would now overlook the implications contained in that position for S. 300.

The truth is that the actual and potential contributions of *parens patriae* to our antitrust enforcement scheme are substantial. First, by its own terms, the Parens Patriae Act is a particularly effective enforcement tool against price-fixing which harms consumers; the statute reserves the procedures of class-wide calculation of treble damages and fluid distribution to that category of violation.[15] Second, State attorneys general are uniquely situated to detect and to enforce the rights of their citizen-consumers adversely affected by price-fixing because most of these conspiracies are local in nature.[16] Third, *parens patriae* has the advantage of administrative screening absent in rule 23 class actions; State antitrust officials are more disciplined, better financed and less oriented to personal gain in their enforcement practices than private class action attorneys. Finally, the enormous growth and development of State antitrust programs in the last several years, aided by Congress' grant of "seed" funds, promises to make *parens patriae* suits a major bulwark of antitrust enforcement.

Senate bill 300 may also have the little-noticed effect of actually discouraging Government enforcement of the antitrust laws. My experience with the FTC Bureau of Competition's Evaluation Committee, which selects antitrust enforcement targets,[17] is that in practice the existence of a private suit almost invariably deters the Commission from filing a parallel suit. This policy was defended on the ground that there are no need to duplicate the efforts of private plaintiffs who could do the job just as well as Government authorities. Yet, the expected advantages of this policy were frequently not realized in practice: because of their inherent complexity, some of these private suits, especially consumer class actions, became procedural quagmires; others suffered similar fates because of poor performance by the plaintiffs' lawyers; and still others were compromised and settled on terms which, not subject to the supervision of the courts or the Federal antitrust authorities, benefitted the lawyers more than the individual plaintiffs. In most of these cases, I believe that Government suits would have been more effective and efficient, and provided greater protection for the members of the public. Senate bill 300, by encouraging indirect purchaser suits with all their attendant shortcomings, would only aggravate this de facto impediment to Government enforcement.

In conclusion, NAM believes that overruling the pragmatic determinations reached by the Supreme Court in *Illinois Brick* and *Hanover Shoe* will seriously jeopardize the functioning of the antitrust laws without conferring a corresponding benefit upon consumers. It could also expose businessmen to unfounded and tremendous increases in damage awards. There are, of course, significant defects in the proposed legislation not treated here—such as its applicability to all "pending" litigation and its potential "spillover effect" on nonprice-fixing causes of action—

---

[12] Fair and Effective Enforcement of the Antitrust Laws: Hearings on S. 1874 before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 95th Cong., 2d sess. (part 2) at 20, 305, 361-78 (1978) (prepared statements of M. Handler, M. Blechman and F. Kirkham).

[13] *See* S. Rep. No. 866 (Part 2), 95th Cong., 2d Sess. 71-74 (1978); Sher, *Emerging Issues Under the Antitrust Improvements Act of 1976,* 77 Colum. L. Rev. 679, 726-77 (1977); *The Supreme Court, 1976 Term,* 91 Harv. L. Rev. 70, 230-31 (1977).

[14] BNA ATRR A-17 (Sept. 21, 1976) (statement of Bernard Nash, Senior Counsel, Senate Judiciary Antitrust and Monopoly Subcommittee).

[15] 15 U.S.C.A. § 15d (West Supp. 1977).

[16] Daily executive report, BNA, No. 247 (December 22, 1978) (statement of Chauncy Browning, attorney general of West Virginia). Where consumers as a class are direct purchasers from price-fixers, of course, *Illinois Brick* never had even an arguable negative effect upon *parens patriae* suits.

[17] During the last few years of my tenure with the Federal Trade Commission, I served as a member and later chairman of the evaluation committee.

which other parties will expose in great detail. For all these reasons, NAM urges that Congress decline to enact S. 300.

Mr. MURPHY. I am Sam Murphy, Senator. I have filed a written statement. I would ask leave to have it made a part of the record. I won't repeat what is in there.

I would like to embrace just about everything Mr. Stein had to say. He and I generally work the other side of the street.

Senator HATCH. That is what is interesting about this bill, both plaintiffs and defense attorneys come in almost coaligned to fight against this bill.

Mr. MURPHY. I think the reason for that, Senator, is that everybody as I understand it, even those who support this legislation, agrees that it will complicate an already complicated field. The only dispute seems to be over how substantial the complication will be and what its consequences might be.

Senator HATCH. I think everybody who is coming in and testifying has also tried an antitrust case, which is perhaps a little bit different from us in the Senate.

Mr. MURPHY. As I understand it, every practicing lawyer, practically without exception, who has appeared before the committee, or last year before the subcommittee, has opposed the legislation. I think the reason for that is clear. The great need in this field today is to simplify and make more efficient the process of antitrust litigation. If that can be done. it will maintain these laws as effective. And if that can be done, it will be the best service that the courts and the Congress can render to consumers.

This bill is contrary to that objective. A question was asked of Mr. Stein generally suggesting wouldn't this legislation toss the problem back at the courts? It would toss the problem back to the courts, but it would take away from the courts a means to deal with the problem; that is, the problem of complication and delay.

I think the courts ought to be left to work the problem out on their own. I believe if that is done, a law will evolve beyond where it is now. Senator Hatch pointed to the footnote in the *Illinois Brick* decision, suggesting that the Supreme Court might have reached an opposite result if the market forces in between the antitrust violator and the plaintiff in that case had not been operating freely. I think that when a case comes along to which that footnote will apply we may find that the courts will attempt a different accommodation of these problems and there is a case right now which has just reached the Supreme Court. If I were in the position of Congress, I would want to see how that case comes out. That is a case called Reader against Sonotone in which the plaintiffs were purchasers of hearing aids, indirect purchasers. Their claim was dismissed by the trial court and by the eighth circuit, not on the ground that they were indirect purchasers, but on the ground that as consumers they could not show injury to business and property as the Clayton Act requires. If the Supreme Court were to reverse that decision, and hold that consumers can sue, then it seems to me inevitable that the courts are going to work out ways, in which, in the proper case, without unduly burdening the judicial thrust as those rights can be vindicated. Indeed,

the Justice Department, despite its position supporting this bill, takes the position in the amicus brief they filed in that case that the *Illinois Brick* decision will not prevent those plaintiffs from prevailing if they are allowed to stay in court.

If on the other hand the Supreme Court were to affirm that case, and hold that consumers don't have any right of action at all under the antitrust laws, then Congress is presented with an issue which is far greater and swallows up the one addressed by this bill. So for those reasons, and for the reasons that everybody else has expressed, I think this is just very bad legislation, although I would have to say that on the defense side, lawyers have mixed feelings about this bill, because if it were passed, it would give the defendants who are always accused of delaying tactics a very effective weapon for that purpose.

Senator HATCH. It would give you almost the total right to delay?

Mr. MURPHY. Yes.

Senator HATCH. In fact, indefinitely. So the so-called bill to protect the consumers and the indirect purchasers really doesn't do that at all?

Mr. MURPHY. I agree, Senator. I would like to comment just very briefly on two specific provisions in the bill and I am going on too long, I know.

One is the retroactive provision, section 4. Mr. Stein and Mr. Boies in his questions to him brought out most of the considerations that apply there. That just seems to me totally unwarranted. It is out of character for antitrust legislation to have that sort of retroactive effect. I would be very concerned about the effect such a provision would have on litigation which while "pending" on the date of enactment of such legislation, if that were to occur, have nevertheless effectively been disposed of. For example, I believe without being able to quote the facts and figures, there are probably a fair number of class actions pending across the country in which settlements have been agreed to but have not yet been final, either because they haven't been reviewed by the trial court or because they have and are on appeal.

I offer that as a reason in addition to those mentioned by Mr. Stein of which such a provision is unwise.

The second provision that specifically concerns me is the language in 4(i) Arabic B allowing the defense of passing-on, only if it satisfies two conditions. One is in the discretion of the court and the other is to avoid duplicative liability.

As to the discretionary provision, I agree with the point that Senator Hatch brought out about the weapon, if a judge is inclined to use it. But additionally, such a provision is going to exacerbate the complications. If there is a case in which there is a clear passing-on defense or a passing-on defense which has been asserted and is clearly unwarranted, a court should be able to dispose of that before trial. And my guess is that when a district judge saw language telling him that that was a discretionary matter, he would be reluctant to resolve the matter until it had been fully tried. That is just not a good thing to encourage.

On the point of in order to avoid duplicative liability, it has been suggested by Shenefield, and perhaps by others, that in most cases a defendant doesn't run a substantial risk of duplicative liability,

and he has pointed to the 4-year statute of limitations to support that provision. I think any practicing defense lawyer in this field will tell you the 4-year statute of limitations isn't worth very much. Most of these cases are brought after Government actions or during Government actions and as you know, the bringing of a Government action suspends the running of the time period. I just cite one small example. In the antibiotic litigation in which I am involved, the first private actions were filed in 1968 and disposed of by settlement in 1970. The last private actions weren't filed until 1974.

In other words, those cases ran over a 6-year period of time which I think is not atypical in this kind of litigation so that a defendant dealing with early cases filed by direct purchasers has as his protection against suits by indirect purchasers only the passing-on defense; that is, assuming this legislation should become law.

And, therefore, I would urge that if this bill is enacted, and I hope it will not be, that it would merit the passing-on concept to be used defensively just as unconditionally and just as effectively as it would be allowed offensively.

Thank you, sir.

Senator HATCH. Thank you.

Mr. GRAY. My name is Boyden Gray. I am with Wilmer, Cutler & Pickering. I, too, have a statement which I assume will be put in the record.

Senator HATCH. Without objection, it will be put in the record.

Mr. GRAY. There are two points I would like to cover briefly, one on the question of deterrence, which is the prime stated premise for the legislation, and the other on the question of equity or compensation. Reference has been made this morning on the question of deterrence to the study that Francis Kirkam prepared last year. I was not here to hear his testimony on last Wednesday, I believe. But I think that it pretty well, to my way of thinking, undermines the basic premise for the legislation which is that direct purchasers don't sue.

I think the study showed that to eliminate the sugar litigation where the direct purchasers were suing but they were also joined by indirect suits, all of the cases in the northern district of California as of about a year ago were direct purchaser actions. The same pattern showed in Arizona.

Senator HATCH. I am sorry to interrupt you. But you seem to be saying that except for the certain isolated instances the vast bulk of all cases would be brought by purchasers under antitrust conditions?

Mr. GRAY. That is correct.

Senator HATCH. I think it was estimated 75 percent of them last year, but you are indicating a lot more than that?

Mr. GRAY. It is difficult to know exactly how to look at it. If you look at it in terms of indirect purchaser initiated actions, that is cases that would not have been brought but for indirect purchasers, I think in the northern district of California, which is one of the three top antitrust districts, it is 100 percent direct purchasers.

Senator HATCH. That is my impression, that outside of the proliferation of plaintiffs of indirect purchasers in some isolated cases

that it is almost 100 percent. The caseload is almost 100 percent direct purchaser?

Mr. GRAY. That is correct.

The studies that are in the record indicate that there have been some examples, there have been some, it cannot be denied, of indirect purchaser initiated lawsuits. I believe, however, there have been very, very few of them, and where they have happened they have been brought by States who can do the same thing through the assignment process which has been discussed.

Senator HATCH. I hate to interrupt you at this point, but while we are on this point, and counsel, I would be happy to have you interrupt as well, the testimony has indicated in the past that if this bill is enacted then basically it would do away with these direct purchaser antitrust enforcement complaints which have been our primary sources of correcting antitrust violations across this country and replace them with indirect purchaser suits which, according to Mr. Stein and others, really will be almost impossible to bring, almost impossible to prove, and almost impossible to enforce. Would you agree with that?

Mr. GRAY. I agree with that completely.

Senator HATCH. So what we might be doing here, what you seem to be saying is, as well as Mr. Stein and other top litigation attorneys in this field, is causing many, many antitrust violators to go scotfree without any real problems of litigation through the coming years.

Mr. GRAY. I am not sure that will always be the answer. We are talking about a little speculation, and I think in some cases that will be the case. I think in others you might have a situation where there is overkill. I think it would be totally irrational, totally random which way particular litigation would turn out. Probably in most cases you would have sort of stalemate. In some cases though I think there would be absolute overkill and the defendants would be forced to settle without any prayer of ever looking at the merits.

Senator HATCH. Whether or not they were right or wrong?

Mr. GRAY. That is right. I think that is in a sense unfair too because the defendants I believe have the right to assert their innocence or defend themselves if it involves consumer product where, for example, there could be bad publicity, and I think this bill would deprive them of this right.

Another thing that I wanted to bring to the committee's attention is a study that we did on the question again of the direct purchaser willingness to sue. Another way of looking at it is to see what direct purchasers do after Government indictments have been brought down. We took a look at a period roughly a year and a half before *Illinois Brick* and a year and a half after. There are roughly 46 Government price fixing indictments. We only did a study of price fixing because that was the simplest, it is not simple, but it is the simplest place to go look and examine what this legislation might do. We found that of those 46, 16 indictments involved companies in the top Fortune 1,000. Of those 16 indictments, 15 have already been followed by scores of direct purchaser cases even though as Mr. Murphy pointed out the statute of limitations has not begun to run on many of them.

We then thought that maybe that is too narrow a look, and that perhaps we ought to see below the top Fortune 1,000, so we took a look at those indictments involving companies which were not that big, but nevertheless had national—where the alleged conspiracy—had national impact and we found a similar pattern. Four out of the six have been followed by direct purchaser suits again even though the statute of limitations has not run. That is 19 out of 22, very, very early really in the litigation cycle. I think that the combination of all of these studies, completely demolishes the notion that we need this legislation in order to improve the deterrent factor of the antitrust laws.

On the question of compensation, I really don't know that I can add much to what has been said before, except to say that in terms of the exceptions to *Illinois Brick,* which have been discussed already, and in terms of what States particularly can do to obtain assignments, that these offer a far more rational way of achieving compensation than this legislation. The State is in a much better position in suing as the direct purchaser through an assignment than it is under this legislation where it would have to prove pass-on through discovery of everyone in the chain and deal with the impossible problems that the bill creates.

Without going on any further, I would like to say that the "chain of distribution" language in the legislation, I think, is no more fair than the current system.

I believe that a lot of would-be plaintiffs who have testified before this committee would find that if the legislation went through that they wouldn't really have a case even apart from the problems of proof that Mr. Stein and Mr. Murphy have referred to.

Senator HATCH. Could I interrupt? Senator Stimpson's counsel on the Subcommittee on Jurisprudence, would like to ask one question.

Mr. MANDELMAN. Getting onto the question of passing-on, do you see any difficulty in the court saying to an indirect purchaser who has had the claim assigned to him that you cannot do by indirection what *Illinois Brick* says you can't do directly since it seems to me you are going to have a lot of the same problems in the reverse. The defendant will be arguing that the direct purchaser will absorb all of the overcharges? Isn't this going to create the same kind of problem?

Mr. GRAY. I don't know actually that there has been a precise court ruling on the exact question that you have posed. There are court rulings approving assignments absent this legislation, and, of course, in advance of *Illinois Brick.* There are Federal court rulings saying the assignments are valid as a matter of Federal law. Whether your exact question was passed on, I don't know. I can't imagine the courts have difficulty with it. In fact, using assignments is already being done in pending litigation and hasn't been challenged to my knowledge. That doesn't mean that someone won't challenge an assignment if he thinks there is something improper in the way it was handled. But to my knowledge, it has been done even in the current cases. I don't see any problem with it. I would be surprised if there were. I would think a court would favor it, and I would think the court would welcome it even if this legislation were to pass.

I don't really want to take any more time except to say that I do agree with Mr. Murphy that some people in the defendants' bar are a little ambivalent about this bill, which raises the question, why does the business community or some portion of the business community support the current situation which is a highly effective deterrent and oppose the pending bill which could undermine this deterrence. I would just like to close by answering this with three points. All big companies and small companies, everyone that sells, also buys. No company wants to pay a higher artificial price any more than its customers do, and many big companies are plaintiffs in these cases as well as being defendants.

The second point I would like to make is whether as plaintiff or defendant—this is the point I believe that Mr. Stein was making—companies want to see these cases litigated on the merits and not distracted by peripheral issues involving pass-on, standing, and manageability, which obscure the merits of the case and which, in fact, keep you from either proving a violation or proving that you were not in violation.

Finally, I think it is important to keep in mind that every company with which I have had any dealings is so impatient it cannot be overemphasized with the high cost of litigation and legal fees under our current system. It is bad enough now, and I am talking about legal fees on the defendants' side as well as on the plaintiff's side. It is bad enough now, but these costs will shoot up under this bill. They are essentially nonproductive. I don't think they advance the cause of enforcement or justice at all.

Senator HATCH. Mr. Regnery, counsel for Senator Laxalt would like to ask one question.

Mr. REGNERY. I believe you have been working on a study at Senator Laxalt's request on the State cases. Would you outline very briefly what that study is supposed to be showing?

Mr. GRAY. We are trying to determine basically the scope of the State cases, mostly proprietary, to determine what is the potential impact of *Illinois Brick* on those cases. We are about a week or 10 days from completing it. It has been difficult to do because in many cases, the States have not alleged damages, or they have not alleged whether they are purchasing indirect or direct, or they have not alleged sales volume from which one can infer potential liability. I think one of the problems is that all these peripheral issues involving pass-on, standing, and everything else have kept some of these cases from ever getting far enough along in discovery to find out just what is at stake. So we are still not completed yet. But I think what we are finding is that the indirect claims that are jeopardized or have already been dismissed pursuant to *Illinois Brick* have a much lower dollar value than I think has been advertised previously.

Certainly, it doesn't begin to compare with the dollar value of the direct claims now pending that would be thrown into absolute turmoil by the legislation. Truly it is a fraction. But we are not yet finished with it. I think I cannot give you any precise figures.

Another thing of course that has come out of this is that we have found a lot of States are taking assignments. That has been an interesting byproduct of the survey.

Mr. REGNERY. You say it will be done within a couple of weeks?

Mr. GRAY. Yes.

Mr. REGNERY. Could I ask on Senator Laxalt's behalf it be included in the record?

Senator HATCH. Without objection, that will be orderd.

[See appendix for additional material submitted by Mr. Gray.]

Senator HATCH. Mr. Liedquist?

Mr. LIEDQUIST. Thank you. My name is Bob Liedquist, with the law firm of Squires, Sanders & Dempsey. And I am here representing the National Association of Manufacturers. I have a written statement I would like with your permission to have made part of the record.

Senator HATCH. Without objection, it will be made a part of the record.

Mr. LIEDQUIST. I would like to talk about the two issues of compensation and deterrence.

There has been a lot of rhetoric, guessing, and estimates about what has been taken from the consumer, State governments and Federal government by the Supreme Court's decision in *Illinois Brick*. The estimates range, according to the record, from $100 million from the Federal Government to maybe $400 million from the State governments to billions of dollars from the consumer. Let us assume that these figures are only somewhat inflated, and take them at their face value.

What we are really talking about is the possible loss to the American consumer on an individual basis of from $8 to $20. I think that is rather high. But let us stay with that figure.

Let us assume that every plaintiff who brings an action under S. 300 is successful. Let us also assume that legal costs will remain as high as they are, and that the tax laws will remain as they are and that, hopefully, American businessmen will remain interested in seeking profits for American shareholders.

If we take these assumptions, we should arrive at the following results after passage of S. 300. Consumers who bother to go through the intricate paperwork involved will be compensated at the rate of, say, $8 to $20 apiece. The cost of running the judiciary will increase. These costs will be borne by the taxpayer.

Lawyers and economic consultants will enjoy a "gold rush." In fact, the bill is really a "lawyer's relief act." Their fees will be deducted from corporate taxes. The treble damage awards will be deducted from corporate taxes. The legal fees and treble damage settlement costs may be passed on to the consumer in two ways, higher prices and or lower corporate taxes. But most importantly, the courts will be so clogged up, in my opinion that eventually a strong public reaction against antitrust may develop.

Instead of being viewed as a "fundamental economic policy," antitrust may become a matter requiring congressional concern equivalent to that presently focused on deregulation.

On the issue of deterrence, I noticed that Barry Bosworth, staff director of the Council on Wage and Price Stability, conceded that the whole purpose of the bill "has almost nothing to do with recovery of damages." He said it is the disincentive that is important.

I found from my experience as a Government prosecutor (I was with the Federal Trade Commission for 14 years, and I, at one time

was antitrust counsel to the U.S. Atomic Energy Commission), that at least in the private sector the deterrence came from direct purchaser suits. Many times when we sat down evaluating targets, if we found there was a direct purchaser suit, we would not move or start an inquiry.

If there was also a suit brought by indirect purchasers, we would not start an inquiry. But I think we generally found that the direct purchaser suits were more successful and brought more deterrence. I think with passage of S. 300 you are going to lose that deterrence. I think people are going to be extremely reluctant to bring direct purchaser suits.

The real deterrence that exists right now, and it is something that hasn't really been mentioned much in these hearings, is the recently enacted Hart-Scott-Rodino law. People that fix prices are now branded as felons. They go to jail and the sentences are getting stronger and stronger with each passing month. Assistant Attorney General Shenefield when he was before this committee talked about some conferences he had attended as a corporate counsel before he assumed his present position.

Since he became Assistant Attorney General the concerns expressed by businessmen have changed somewhat. I have been present in recent years, especially since passage of Hart-Scott-Rodino, at business meetings, and there is a tremendous deterrence flowing from the fact that price-fixing is now a felony. Corporate executives are well aware of the fact that once they are branded as a felon, it is all over for them. The fact is that they are individually indicted and are sentenced to jail. The corporation can handle money situations easily in some respects.

But it is also well known to corporate executives that the Antitrust Division's policy is to try to bring the price fixing indictment up to the highest level. So as a result of this policy I think there has been a tremendous effort since passage of Hart-Scott-Rodino, by American business to do antitrust audits and to prevent price fixing.

In conclusion, we believe that the ruling in *Illinois Brick* was a pragmatic one and that it should stand.

Thank you very much.

Senator HATCH. I have to leave, so I will have to turn this over to counsel. I will ask a few questions before I do.

Let me start with you. Would your study of Government indictments and private cases show the same, less or more private enforcement in connection with the local price fixing schemes and if it is less, do you have an explanation for that?

Mr. GRAY. I think I said we looked at 46 indictments. Most or a slight majority, I believe, involved essentially local conspiracies. The alleged conspiracy of portable toilet sales in south Florida is one of the examples. That is the kind of local conspiracy that has been charged. We found, and I haven't got the figures with me, but the track record of suits by direct or indirect purchasers in those cases has been no where near the same as when you have involvement of big national companies and especially ones in the Fortune 1,000.

So I think for local conspiracy, private enforcement is not as good. In terms of what the explanation is, I don't know, except that

I suspect for plaintiffs' lawyers, the fee isn't as lucrative, for the client itself, for the company itself, the recovery isn't as lucrative, and for the State attorney general, perhaps, the headlines are not as lucrative. But for whatever reason and I don't really know what the answer is, the private enforcement effort for those kind of cases does not appear to be as good as it is for indictments against large companies.

Senator HATCH. The Arizona State officials testified that the antitrust laws are inadequate because they can't reach out of State defendants. Do any of you three have comments about that because they seem to be the major advocates for this type of legislation and this seems to be one of their major complaints.

Mr. MURPHY. I wouldn't presume to know the law of all 50 States, but that certainly is not true in New York where we have a long-arm statute that reaches all the way across the country.

Senator HATCH. One of the State attorneys general stated there is a difference between the long-arm of the State and Federal courts and in this modern age I pointed out that I don't think there is much difference.

Mr. MURPHY. There is not between the Federal and State courts in New York.

Senator HATCH. Do either of you have comments about that?

Mr. LIEDQUIST. As I recall, Arizona, just like your State, has a long arm statute.

Senator HATCH. Then it is pretty liberally used. Do you think *Illinois Brick* adversely affects *parens patriae* or do you agree with me that it does not?

Mr. MURPHY. I agree with you, Senator, but it seems to me they are talking about two different things. *Parens patriae* is a procedural device to deal with people who have clients.

Senator HATCH. Do you both agree with that?

Mr. GRAY. I agree.

Mr. LIEDQUIST. I agree.

Senator HATCH. Wouldn't the State courts be better off with assignments even if S. 300 passes?

Mr. GRAY. I believe that I may have said something in response to that already. I believe the courts would be better off, because use of assignments does not raise the question of proving offensively or defensively what happens to overcharge with respect to all of the companies usually small businesses, in the middle.

So even if S. 300 were to pass, I would think that the court system would be better off with the assignments, wherever that were financially or economically feasible.

Senator HATCH. Many States are taking assignments in the procurement process. Are you gentlemen aware of the use of the assignments by private and indirect purchasers and if so, again I will ask this question, what are the problems involved and if private parties are not trying to take assignment, can we construe that as a lack of interest in policing violations up the line?

Mr. GRAY. I was here only very briefly last Wednesday, when I recall a similar question was asked of the plaintiffs' attorneys who were here. They may actually be in a better position to answer that question than I am. One of the plaintiffs' attorneys as I recall answered that question in the affirmative, yes it did show perhaps

a lack of interest on the part of both the States and indirect, potential indirect private plaintiffs where they weren't taking assignments. But I am not so sure I am really qualified, being on the defense side more then the plaintiff side, to answer that.

Senator HATCH. Let me ask one more question. Can you think of any ways that the consumers might be benefited by S. 300 and can you list ways that they will not be benefited?

Mr. MURPHY. As a practical matter, it doesn't seem to me consumers will be benefited in any significant way at all. As a practical matter, I think consumers will be disadvantaged in the sense that this legislation would make antitrust trials less effective and far more unwieldy than they are now. It is a serious problem in many districts in the United States to get a case to trial, hardworking as the judges are, because of the Speedy Trial Act requiring them to try criminal cases in a short compass of time.

When you give a judge facing that kind of problem one of these enormous cases with all of these complications, even in the pretrial stage, I believe it has a serious negative effect on the administration of justice generally.

Senator HATCH. Would either of you other gentlemen have anything to say?

Mr. Chairman, I had not called on counsel for the majority. I wanted to get those questions asked before I have to leave.

So you will want to proceed right from the start here.

I appreciate eliciting your views as I have all of the witnesses who have testified. I am sorry I have to leave.

Senator THURMOND. I would like to propound this question and each of you can answer it or one can answer it speaking for all three of you. I gather that you disapprove of what you see as pure political motivation behind legislation that should be treated as a legal matter. Many States you know have begun routinely to take the assignments from middlemen and some have even obtained assignments in opinion cases.

Because assignments eliminate proof of pass-on, they would appear to be far preferable to indirect suits on S. 300, even if it is adopted. Yet some States claim difficulties with assignments and are awaiting to act under this legislation before changing the boilerplate on their purchase contracts.

Can you comment whether in your experience the problems proving pass-on vastly overshadows any problems of obtaining assignments?

Mr. GRAY. I believe the record certainly is complete on the difficulty of proving pass-on. That certainly is testimony of others more experienced than I, and the plaintiffs bar as well. I have not seen anything showing insuperable difficulties in getting assignments, Senator. So I would think the answer to that question is that the difficulty of getting assignments is far less than the difficulty of proof that is presented by the legislation.

Senator THURMOND. Do you other gentlemen agree with that answer?

Mr. MURPHY. I agree with that, Senator.

Mr. LIEDQUIST. I do, too, Senator. I noticed the only testimony we have in this record for this year is the assistant attorney general for antitrust for the State of Arizona, and he talked about trying to

obtain assignments and apparently from his testimony he was not working very hard at it probably in anticipation of the passage of S. 300.

Senator THURMOND. Lawyer Goldberg testified last year that nobody understood what last year's bills meant and the litigation to interpret the bill would set back antitrust enforcement for years. Do you feel the same as Mr. Goldberg about S. 300?

Mr. GRAY. I don't really know how the discretionary pass-on will work. I don't believe anybody really does. I really don't know what the words "chain of distribution" mean in current pending bills. It apparently does not mean capital goods, it does not mean energy supplies, it does not mean goods that are transformed significantly, but I don't know what "significantly" means. I know there has been testimony in connection with the gas meters case. Consumers get overcharged, there has been a price fix on gas meters. I believe that now is in litigation. But a gas meter is a capital item as I read last year's House report, and would not therefore be really affected at all by this legislation.

I really don't know what some of these phrases mean. I also believe it is true that as my colleagues have testified, it will be a lawyer's field day. We will have an awful lot of fun arguing about it, but I don't think that is really in the public interest.

Senator THURMOND. Any of you can answer this question, if you wish. Approximately how many cases that are pending would be affected by changing damage rules in midstream and what efforts are made by the Judiciary Committee of the administration advocates of the bill to obtain this information?

Mr. GRAY. Was the question how many damage claims?

Senator THURMOND. Approximately how many cases that are pending would be affected by changing damage rules in midstream?

Mr. GRAY. It probably would affect every case that is pending.

Mr. MURPHY. It must be a large number, Mr. Chairman. I have no hard information, but I counted for example 100 treble damage cases filed between last July and December 1 of last year, all of which are direct purchaser cases and as I understand this legislation, all of those cases would be affected by it.

Senator THURMOND. The second part of the question was, what efforts if you are familiar are made by the Judiciary Committee or the administration advocates of the bill to obtain this information?

Mr. MURPHY. I am not aware of any efforts having been made.

Mr. GRAY. I am not either. I can't remember whether any requests were made of the Assistant Attorney General or not. I just cannot remember. One of the things which we show in the underlying memorandum accompanying my testimony is that a very quick survey of just eight recently filed price fixing direct purchaser cases reveals they involve nearly $2 billion in damages which would be affected by the retroactivity provisions of the bill.

We can try to find out and supply the committee with that information, but I don't know that anyone has a firm grasp of precisely everything that is at stake.

Senator THURMOND. Proponents of retroactivity argue that this feature is needed to discourage ill-gotten gains from wrongdoers, but dislodgement will also occur if suits are brought by direct

purchasers under the existing rules. In how many cases where indirect purchaser suits have been terminated since June 1977 are defendants not involved in litigation brought by direct purchasers?

Mr. GRAY. I don't know the answer, but I think it would be very, very few indeed.

Senator THURMOND. What is the compelling need to change the rule retroactively?

Mr. MURPHY. The proponents of the bill could answer that better than we can, Mr. Chairman. I don't think there is any. I think there is a compelling need that it not be retroactive if adopted.

Senator THURMOND. I believe the Supreme Court has held that compelling need for retroactivity is necessary to meet the test of due process, isn't it? In other words, there must be a compelling need. In what other areas of Federal law has Congress retroactively created private damage actions based on that predated statute?

Mr. LIEDQUIST. I am aware of none, Senator.

Mr. GRAY. I know of none.

Senator THURMOND. In cases where a defendant has already paid a judgment to a direct purchaser that include an amount which the direct purchaser passed on to an indirect purchaser how can the defendant avoid a double recovery by an indirect purchaser?

Mr. GRAY. He wouldn't be able to unless the statute of limitations had run.

Senator THURMOND. Is there anything in the bill that allows the defendant to reopen a judgment in favor of the direct purchaser, to recover the amount that was passed on to the direct purchaser, or to force the direct purchaser to pay to the indirect purchaser the amount of the overchange that is passed on?

Mr. GRAY. No, Senator. I don't believe there is.

Mr. MURPHY. No.

Mr. LIEDQUIST. No.

Mr. BOIES. Mr. Liedquist, you testified that in your experience the deterrence effect of private treble damage suits came from direct purchaser lawsuits. Is that correct?

Mr. LIEDQUIST. That is correct.

Mr. BOIES. I believe that you testified that it is your experience when businessmen were making decisions the thing that deterred them from violating the antitrust laws was the threat of lawsuits by direct purchasers, and not the threat of lawsuits by indirect purchasers.

Mr. LIEDQUIST. That is correct.

Mr. BOIES. Can you give us some examples of situations that you are aware of where business conduct has been deterred by the threat of direct purchaser lawsuit; that is, examples of businessmen who decided not to do something that they were considering doing because of the threat of direct purchaser lawsuit?

Mr. LIEDQUIST. I find that very difficult to do. I can only deal in generalities without getting into problems of attorney-client privilege. I know this, that in certain situations because of direct purchaser suits in related industries, I have seen clients begin extensive antitrust audits of their corporate files and in effect initiate very strong antitrust policing and monitoring to prevent the possibility of eventual or possible direct purchaser suits.

What I did testify about is that, in recent conferences, there has been a tremendous concern by high ranking executives about the possibility of being faced with criminal indictments through the Hart-Scott-Rodino Act. There is a tendency on the part of the Antitrust Division, when it is running grand juries, to immunize people on the lower ranks of the executive level if they have testimony that will somehow implicate higher ranking executives. I think the policy at the Antitrust Division is to go as high up the ladder as it can, and I think you can appreciate that in certain situations, a chief executive of a company, a large company, can actually be implicated unfairly by a man who is seeking, in effect to avoid indictment.

Mr. BOIES. That doesn't have anything to do with allowing indirect purchasers to sue or not. The potential abuses of the felony prosecutions aren't affected by S. 300, are they?

Mr. LIEDQUIST. No. I am saying that your real concern here is to get deterrence. You haven't really felt the impact of Hart-Scott-Rodino on cutting down price fixing. The Antitrust Division hasn't come back and closed all its grand juries that are looking into price fixing. The last count was there were 110 grand juries looking into price fixing. What I am suggesting is that Hart-Scott-Rodino built in a new deterrent. When price fixing became a felony it became a very serious matter indeed. I am also relying on my experience as a prosecutor with the Federal Trade Commission and the fact I did chair at one time the evaluation committee of the FTC's Bureau of Competition. We did notice that direct purchaser suits were usually more successful and better for the public interest than indirect purchaser suits. With the passage of S. 300 it is my best estimate that you are not going to see many direct purchasers filing suits.

Mr. BOIES. We have gotten a little bit off the track. To return to my original question, the question was whether you had any particular experiences that you could relate to us to substantiate your assertion that businessmen would be deterred from antitrust violations by the threat of direct purchaser lawsuits. I realize in some instances you would invade attorney-client privilege and I don't want to do that. But are there any specific examples you can give us?

Mr. LIEDQUIST. I cannot give you a specific example at this time without violating the attorney-client privilege.

Mr. BOIES. Very well. I don't want you to violate the attorney-client privilege.

Mr. LIEDQUIST. Perhaps if you gave me sufficient time I might be able to present it in a situation that would protect that privilege and also help the committee.

Mr. BOIES. I think you also said that you were relying in part for your testimony on your experience with the Federal Trade Commission for your belief that there were direct purchaser lawsuits that deterred businessmen. Is that correct?

Mr. LIEDQUIST. That is correct.

Mr. BOIES. Are you aware that the chairman of the FTC has testified at these hearing, testified in favor of this bill, testified that he believed that indirect purchaser lawsuits were more important deterrents than direct purchaser lawsuits?

Mr. LIEDQUIST. Yes, I am aware of that.

Mr. BOIES. You testified I believe that it was practical for the States to get assignments and to sue on behalf of the consumers of their State based on such assignments. Is that correct?

Mr. LIEDQUIST. I believe they can do that. I don't know how practical it is because I haven't seen much in the way of experience in that area.

Mr. BOIES. Have you seen or are you aware of any instances in which a State attorney general has been successful in getting an assignment that has allowed him to sue on behalf of consumers based on that assignment?

Mr. LIEDQUIST. I am not aware of any instances, but I would think that the National Association of Attorneys General would be able to provide you with information on that subject.

Mr. CHUMBRIS. I believe the record shows that the State attorney general of Connecticut and a number of States in more recent, maybe in more recent times, through the time that Shenefield testified, that these States have picked up assignments.

Mr. BOIES. I think they have picked up assignments. I was wondering whether they have been successful in suing on those assignments.

Let me ask the other witnesses.

Mr. Gray, are you aware of any instance in which a State has successfully sued based on assignment?

Mr. GRAY. I believe some States are successfully suing now, yes. They are in litigation on the basis of assignments obtained from direct purchasers. I have attached some examples in my back-up statement.

Mr. BOIES. As I understand your testimony, the courts have upheld the assignments and the plaintiffs were able to recover.

Mr. GRAY. I don't have the cite in my head, but the question of the validity of assignments has been litigated and the answer is yes, it is valid as a matter of Federal law. Whether or not the plaintiff who—the assignee, if you will—in that case recovered something at the long end of the road, I don't know that the record reflects it. As you pointed out earlier, many of these cases are settled and we never can tell from a procedural motion of the beginning of the lawsuit what in fact the plaintiff ultimately recovered at the end of the litigation.

But I know it is valid as a matter of Federal law and I know that there are now plaintiffs currently in litigation on the basis of them. Whether they are recovering anything, of course, it may be years before we know.

Mr. BOIES. But you are saying they have recovered something in some settlements. Is that what you are saying?

Mr. GRAY. I can't answer that question. I do know that there are settlement discussions. I believe that there was testimony last Wednesday on the question of the sugar cases. I just don't know that I can answer that question with absolute certainty. But I would imagine that there would be recovery eventually, yes, of some sort.

Mr. BOIES. Eventually? You are saying you think there would be eventually?

Mr. GRAY. I can't say it is going to happen tomorrow.

Mr. BOIES. What I am asking you is has it ever happened yet either in terms of litigated judgment or in terms of settlement? Have any of the States ever recovered money for the consumers of those States based on assignment?

Mr. GRAY. That is a different question than I thought you were asking, whether they recovered for the consumers or whether they recovered for their own account.

Mr. BOIES. The first question was about the consumers, all of my questions have been about the consumers, about recoveries on behalf of the consumers based on assignment.

Mr. GRAY. I misunderstood your question. I don't know that the States are taking assignments for so-called *parens* suits.

Mr. BOIES. All *parens* suits are on behalf of the consumers, are they not?

Mr. GRAY. That is correct. I am not aware of any assignments that the States have been taking on behalf of consumers in *parens* cases. Assignments are limited to proprietary cases, the asphalt kind of situation you referred to earlier.

Mr. BOIES. Yes. I believe the examples Mr. Chumbris gave before related to proprietary suit assignments.

Mr. CHUMBRIS. Yes.

Mr. BOIES. Has any State received an assignment and went to trial and or brought a suit on behalf of consumers based on that assignment?

Mr. GRAY. No. I don't think so. No. I think the answer is no. In terms of the question related to consumers, I am not aware of any assignment activity in that area. I guess my answer to that question is you can sue under *parens* since *Illinois Brick* came down, and why more States haven't, I don't know, but a couple of States have. They don't need assignments in my view, and I think all three of us agreed with that assessment in response to an earlier question.

So you wouldn't need assignments. Assignments are not really relevant in the *parens* consumer context.

Mr. BOIES. So is it your judgment that *Illinois Brick* would not affect the ability of States to sue in behalf of consumers under *parens patriae?* Is that correct?

Mr. GRAY. That is correct.

Mr. BOIES. Is that also your testimony?

Mr. LIEDQUIST. I would agree with General Sneeden at the outset that one cannot say for certain what the Supreme Court will do. It is a question, if it got it, but I think it is just our view that we don't think there is adverse impact. We can never say for certainty what the Supreme Court will do.

Mr. BOIES. But it is your best legal judgment right now and as you are testifying before this committee that *Illinois Brick*—that is, the decision by the Supreme Court in *Illinois Brick*—does not adversely affect the ability of the State attorney general to sue in behalf of consumers. Is that correct?

Mr. LIEDQUIST. That is correct.

Mr. BOIES. Is that your judgment also, Mr. Murphy?

Mr. MURPHY. To make that a fair question, you would have to say does it adversely affect the ability of State attorneys general to

sue on behalf of consumers where consumers are at the end of a long and complicated chain of distribution.

Mr. BOIES. What I am saying is does it adversely affect the right of State attorneys general to sue on behalf of consumers who are indirect purchasers?

Mr. MURPHY. Not in those cases where the consumers as indirect purchasers have a claim.

Mr. GRAY. I don't know if this is what Mr. Murphy was referring to, but if you had a situation that was seven steps removed from the consumer, I don't think without *Illinois Brick* that the State could sue in behalf of *parens* in that situation.

Mr. BOIES. Suits on behalf of the consumers might certainly be barred by some doctrine other than *Illinois Brick*.

Mr. MURPHY. Take the hearing aid case that I mentioned to you and the Justice Department's view of that case. There is an instance in which the State attorney general could sue in behalf of purchasers of hearing aids in a *parens patriae* suit even though those hearing aid purchasers are indirect purchasers.

Mr. BOIES. That is your view?

Mr. MURPHY. What my opinion is, I don't think on a subject like that, is very relevant. I believe, though—and if you want to call it my best legal view, I suppose it is since I am here as a lawyer—I believe that if the Supreme Court, in the *Sonotone* case, holds that those plaintiffs have standing to sue, that the ultimate outcome of the case will be that they will recover even though they are indirect purchasers.

Mr. BOIES. That wasn't my question. Maybe my question wasn't clear. As I understood it in response to a previous question by Senator Thurmond, you testified that you believe that the *Illinois Brick* decision did not hinder State attorneys general from suing in behalf of consumers who were indirect purchasers. Is that a fair statement?

Mr. MURPHY. No, it is not. A fair statement is that we have all said that the *Illinois Brick* case does not deter State attorneys general from bringing proper *parens patriae* actions.

Mr. BOIES. Can there be a proper *parens patriae* action——

Mr. MURPHY. Yes.

Mr. BOIES. Let me finish my question, if I can. Can there be proper *parens patriae* actions in your view after the *Illinois Brick* decision where the consumers, on behalf of whom the suit is being brought, are indirect purchasers?

Mr. MURPHY. Yes. I thought I had answered that question in terms of the hearing aid case.

Mr. BOIES. Mr. Murphy, let me read you a question and answer from your prior testimony last Congress which leaves me a little confused comparing that testimony with this testimony.

At page 178, I asked you the question, "At least where you have violations by original manufacturers, ordinarily the consumers would not be purchasing directly from the manufacturers and consequently *parens* suits in behalf of those consumers would be barred by *Illinois Brick*," and you answered, "That would be my view, yes."

Is that still your view?

Mr. MURPHY. No, it is not. When you state it in such unqualified terms, it is my view that the *Illinois Brick* case will have that effect in many *parens patriae* question cases. The Justice Department's amicus brief in this hearing aid case made me focus much more on that footnote in *Illinois Brick* and the significance which it has as to an antitrust violation which affects the links in the chain of distribution between the manufacturer and the consumer, and I am persuaded of the soundness of the Justice Department's position in that brief that where the violation affects those links, and where, therefore, you may not face the kind of problems of proof which were the underlying elements in the *Illinois Brick* case, a *parens patriae* action could be maintained.

Mr. BOIES. Would it be fair to say that what you are saying is that the *Illinois Brick* decision would bar some but not all of the *parens* suits on behalf of indirect purchaser consumers that would have been permitted prior to the *Illinois Brick* decision?

Mr. MURPHY. I think that is probably so. If you don't mind, I would like to elaborate for just a minute.

One of the aspects of this matter that bothers me is that we are talking about a period of time since the *Illinois Brick* decision which, in relation to this field of litigation, is so short as not to have permitted us to have any really meaningful experience with the way in which the courts are going to handle these cases and it is my underlying fundamental principal belief that as cases arise in the future which do not present these insuperable practical problems of evidence that the courts are going to evolve the law bound where it is now and you will find that there will be cases in which indirect purchasers will be able to recover, whether they are consumers or purchasing businesses or States suing as *parens patriae* is immaterial.

Mr. BOIES. Do you believe that it is desirable that some indirect purchasers be able to recover? Do you think that trend in the law that you predict is a desirable trend?

Mr. MURPHY. In some instances.

Mr. BOIES. How would you define those instances in which you believe indirect purchasers should be allowed to recover?

Mr. MURPHY. Where it is clear that those between them and the manufacturer are simply passed on without qualification of the injury.

Mr. BOIES. Do you mean pass on the entire amount of the injury?

Mr. MURPHY. Yes, and not only the amount, but the character of the injury, if that makes sense.

Mr. BOIES. When you say character injury, do you mean without transformation of the product?

Mr. MURPHY. That is correct.

Mr. BOIES. Assuming that there is no transformation of the products, if you had a clear proof that one of the links in the chain passed on half of the injury, do you believe indirect purchasers there ought to be able to recover?

Mr. MURPHY. If you will pardon my saying so, I don't mean to be disrespectful, that is not a real question. You are not going to have a case in which there is clear proof that a clear percentage of the injury was passed on. You may have cases and the *Illinois Brick* and *Hanover Shoe* cases allow for them, where the proof is clear

that the injury was picked up by A and passed on to B as, for example, in a cost-plus contract.

But when you get into the situation of trying to establish how much of that injury was passed on, you have opened a can of worms and it is too late to put them back.

Mr. BOIES. You try antitrust lawsuits?

Mr. MURPHY. Yes, sir.

Mr. BOIES. Is it your experience in antitrust lawsuits that the courts ordinarily determine damages in situations where it is not ever possible to determine exactly how much the damage was?

Mr. MURPHY. Yes, that is correct.

Mr. BOIES. Indeed, in general, the courts have at least talked about antitrust damages as requiring somewhat less precision than is required in proving damages in most other kinds of cases precisely because it is so difficult to determine exactly what the damages are? Is that correct?

Mr. MURPHY. That is also correct.

Mr. BOIES. In terms of your experience as an antitrust lawyer, are you aware of any cases prior to the *Illinois Brick* decision in which indirect purchasers did sue and did recover a substantial amount of damages either from settlements of those lawsuits or through litigated judgment?

Mr. MURPHY. I am aware of such cases where recoveries were had as a result of the settlements.

Mr. BOIES. And the settlements were paid to indirect purchasers? Is that correct? At least in part?

Mr. MURPHY. At least in part.

Mr. BOIES. Can you give me examples that you are personally aware of where indirect suing under the antitrust laws prior to the *Illinois Brick* did receive substantial amounts in settlement of those lawsuits?

Mr. MURPHY. As you know in the antibiotic antitrust actions I have had some part in, there were recoveries of the kind that you described.

Mr. BOIES. Approximately how much were indirect purchasers paid in settlement of their antitrust claims in the antibiotic litigation?

Mr. MURPHY. I am embarrassed to say I can't quantify that. The total amounts paid out in settlement approach a quarter of a billion dollars. How much of that was direct to competitors as distinguished from how much was indirect, I cannot say. One reason I can't say it is that except for the consumer classes, many of the purchasing plaintiffs in that litigation were both direct and indirect purchasers. For example, State institutions.

Mr. BOIES. How much did the consumers get?

Mr. MURPHY. Ultimately, I don't know. I would have to go back and get you that information.

Mr. BOIES. Could you furnish that for the record?

Mr. MURPHY. Yes, for example, in the first settlement which was $82.5 million, as I recall, for about 42 State actions, the bulk of that did not go to consumers. But I don't recall the exact figures.

Mr. BOIES. Recognizing that you are going to present the figures for the record, can you give us an approximate figure as to what

the consumers got in that antibiotic litigation? If you can't, you can't. I just wondered if you can give an approximate figure.

Mr. MURPHY. Really, I cannot. But it was in the tens of millions of dollars.

Mr. BOIES. Are you aware of any other situations in which the consumers or other indirect purchasers received substantial amounts of money in settlement of antitrust claims prior to *Illinois Brick?*

Mr. MURPHY. None come to mind. But it is my general impression that there were a couple of others.

Mr. BOIES. Mr. Gray, are you aware of any cases other than the antibiotic cases in which consumers received substantial amounts of money in settlement of antitrust claims prior to the *Illinois Brick* decision?

Mr. GRAY. The only cases I am aware of are listed in Beverly Moore's testimony, I believe last year, in which he outlines three or four cases, one of which was the Arizona Bakery products case. I do know that, I am also aware, I believe, of the so-called operation money back—is that the name? It was the second settlement in the antibiotic cases, but Mr. Murphy would be more familiar with those. All I know about those is that there was a lot of difficulty in determining whether or not the claims that were submitted were in fact valid. They ran a spotcheck, as I recall, and found that 22,000 of the claimants were age five or under when the drugs were purchased, indicating that a lot of people were trying to "rip off" the settlement fund, to use a colloquial phrase.

Mr. BOIES. How many claims were there all together?

Mr. GRAY. They amounted to millions. Six million claims were mailed out. I don't know how many of those qualified.

Mr. BOIES. Six million claims?

Mr. GRAY. Were mailed out. How many recipients actually qualified I can't recall. It wasn't near that number, but it was obviously more than 22,000. But there aren't very many cases like this. I don't know of any others than the ones I have just mentioned.

Mr. BOIES. Other than the antibiotic cases and other than the cases that Mr. Moore testified about last year, those are the only cases that you know of prior to *Illinois Brick* where indirect purchasers sued under antitrust laws and received at least significant amounts of money under settlement of their claims?

Mr. GRAY. That is correct.

Mr. BOIES. Mr. Liedquist, are you aware of any other cases?

Mr. LIEDQUIST. Aside from tetracycline, no, I am not. I believe there was testimony by Governor Babbitt of Arizona, but I can't recall whether damage awards he received on behalf of the citizens of Arizona were related to indirect purchasers or not.

Mr. BOIES. But except for whatever Governor Babbitt testified about, and except for the tetracycline cases, you are not aware of any instances where indirect purchasers prior to *Illinois Brick* sued under the antitrust laws to recover by way of settlement or otherwise?

Mr. LIEDQUIST. No.

Mr. BOIES. Just one other question. Mr. Liedquist, you are here representing the National Association of Manufacturers. Is that correct?

Mr. LIEDQUIST. That is correct.

Mr. BOIES. Mr. Gray, are you representing anyone?

Mr. GRAY. Business Roundtable.

Mr. BOIES. Mr. Murphy, are you here representing anyone?

Mr. MURPHY. I would answer that by saying I am here because American Cyanamid asked me to come. It is not an experience I would have sought out, but I am representing myself. They did not tell me what to say nor have they seen my statement.

Mr. BOIES. Thank you.

Just one other question, if I may.

Mr. Murphy, you mentioned in New York State, the long arm statute.

Mr. MURPHY. Yes, sir.

Mr. BOIES. I believe the implication of what you were saying was that using long arm statute, people could sue in New York State courts for antitrust violations. Am I correct?

Mr. MURPHY. It is one of the devices by which New York State, and that was the example given in a damage action, can get jurisdiction over an out-of-State defendant that has committed a violation in the State.

Mr. BOIES. But you are not suggesting, are you, that a plaintiff can sue in New York State courts for price fixing, where that price fixing involved commodities in interstate commerce?

Mr. MURPHY. I am suggesting that it is possible that a suit could be brought, yes. It would most likely be brought in the Federal court, but in such an instance, there are going to be violations which occurred within the State of New York.

Mr. BOIES. It is the case, is it not, Mr. Murphy, that the New York State Antitrust Act, the Crawford Act, does not apply to interstate price fixing conspiracies?

Mr. MURPHY. Solely interstate, that is correct.

Mr. BOIES. And it is also correct, is it not, that you cannot sue in New York State courts for a violation of the Federal antitrust laws?

Mr. MURPHY. That is correct.

Mr. BOIES. Thank you.

Senator THURMOND. I want to thank you gentlemen for your appearance here. We appreciate your splendid testimony.

Our next witness is Mr. Beverly C. Moore, Jr., director, Citizens for Class Actions, Washington, D.C.

Mr. Moore, come around.

STATEMENT OF BEVERLY C. MOORE, JR., DIRECTOR, CITIZENS FOR CLASS ACTION

Senator THURMOND. Mr. Moore, without objection, we will place your entire statement in the record. If you can take about 10 minutes to summarize it for us, we would appreciate it. We have to stop at 12:30. We have another witness. We have 20 minutes to divide between you two. So we have 10 minutes each for you and 10 minutes for the next witness.

[The prepared statement of Mr. Moore follows:]

PREPARED STATEMENT OF BEVERLY C. MOORE, JR.

Citizens for Class Action Lawsuits, Inc., a nonprofit organization devoted to promoting the public interest in effective class action legal remedies, urges the prompt enactment of S. 300 in essentially its present form. This bill represents a substantial improvement over the bill on which we presented testimony in the 95th Congress.[1] We believe that S. 300 cures the two principal deficiencies contained in last year's bill.

The *Hanover Shoe* problem. The purpose of S. 300 is to overrule the Supreme Court's decision in *Illinois Brick Co.* v. *State of Illinois,*[2] which bars indirect purchasers or sellers from suing under the antitrust laws even where such persons have absorbed overcharges or underpayments from those dealing directly with the antitrust violators. The main problem with the bills considered by the 95th Congress was that they would have overruled not only *Illinois Brick* but also *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*[3] In *Hanover Shoe* the Supreme Court held that an antitrust violator cannot raise as a defense the fact that a direct purchasing plaintiff passed on some or all of its overcharges to indirect purchasers.

The consequence of overruling both *Illinois Brick* and *Hanover Shoe,* rather than *Illinois Brick* alone, might well have been to weaken rather than strengthen the deterrent impact of private damage suits which are (at least in theory) the principal means of enforcing our antitrust laws. Once an antitrust violator had established that direct purchaser plaintiffs had passed on overcharges to indirect purchasers, there would always be a substantial possibility that a suit on behalf of indirect purchasers would be denied class action status for failure to satisfy all of the requirements of rule 23 of the Federal Rules of Civil Procedure. The practical consequence of a denial of class certification would be that the indirect purchasers would recover nothing—and the overcharges absorbed by them would be retained by the antitrust violators. Potential violators, realizing that they might similarly escape a large proportion of damage liability even if their illegal activities were detected, would be that much less deterred from becoming actual antitrust violators.

The proponents of the legislation considered by the 95th Congress may have recognized this danger, but apparently they felt that it was necessary to overrule *Hanover Shoe* as a guarantee against the largely theoretical possibility of a defendant incurring duplicative liability to both direct and indirect purchasers. We disagreed and proposed a procedural mechanism which would have ensured against duplicative liability without overruling *Hanover Shoe.*[4] Briefly, our proposal would have brought plaintiffs at all levels in the distribution chain before the same court prior to the entry of any final damage judgment. No one has demonstrated to our satisfaction that our proposal would be legally deficient or unworkable. It simply has not been seriously considered by the staff, the Justice Department, or other proponents of this legislation. Apparently the procedural mechanism that we suggested is "too complicated" to be dealt with by the Congress.

Nevertheless, we believe that the new § 4I(b) contained in S. 300 satisfactorily resolves the *Hanover Shoe* problem:

> In any action under section 4 or 4A of this act, any defendant, as a partial or complete defense against a damage claim, may, in the discretion of the court, in order to avoid duplicative liability, be entitled to prove that a purchaser or seller in the chain of manufacture, production, or distribution who paid any overcharge or received any underpayment, passed-on all or part of such overcharge or underpayment to another purchaser or seller in such chain.

How this provision would be interpreted and applied by the courts is the key to whether it, like a provision completely overruling *Hanover Shoe,* would allow substantial damages to slip through the cracks via pass ons to uncertifiable classes of indirect purchasers. The language of § 4I(b) is clear that a court could permit a pass on defense only where necessary "to avoid duplicative liability". In this regard the legislative history should specify that courts should consider (1) whether suits which could result in duplicative liability had actually been filed by purchasers or sellers at other levels in the distribution chain, (2) whether such suits, if class actions (as they usually would be), had been or were likely to be certified as such under rule 23, (3) whether full consideration had been given by the Judicial Panel on Multidistrict Litigation and/or the various courts in which such actions were pending to their transfer to and consolidation in a single district, and (4) if no such suits were

---

[1] Hearings on Fair and Effective Enforcement of the Antitrust Laws, S. 1874, before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 95th Cong., 2d sess., pt. 2 (1978) at 448–469.

[2] 431 U.S. 720 (1977).

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

[4] *Hearings, supra* note 1, at 454–456, 466–469.

pending, whether or when their filing would be barred by the statute of limitations, by the antitrust standing/remoteness doctrines, or by other legal obstacles. The legislative history should also suggest the option of the court holding the entry of a final damage judgment in abeyance for a reasonable period pending completion of transfer and consolidation proceedings or the running of the statute of limitations against potential plaintiffs who had not filed suit. Finally, the legislative history should suggest judicial consideration of limited Rule 23(d)(2) notice to a sample of the members of any classes who had not filed suit.

The importance of the language requiring a defendant seeking a pass on defense to demonstrate the likelihood (or possibly even the certainty) or duplicative liability may be illustrated by the following examples. Suppose that a group of corporations has been sued for price fixing by two classes, one of direct purchasers and another of indirect purchasers, and there are no other levels in the distribution chain at which additional plaintiff classes would have standing to sue. If both classes had been certified under rule 23, the defendant would be entitled to a pass on defense, but each class would still be able to recover its proportionate share of the total damage liability. If the direct purchaser class had been certified but the indirect purchaser class had been denied (or vice versa), no pass on defense would be available (except perhaps against the named indirect plaintiffs), as the threat of duplicative liability would evaporate because the members of the rejected class would be unable to recover even if the direct purchaser class recovered the entire overcharge.

A serious problem does arise, however, where the direct purchaser class has been certified but the court has not yet ruled on certification of the indirect purchaser class. If the court granted the defendants a pass on defense because of the possibility of the indirect purchaser class subsequently being certified, the defendants woud escape liability for the portion of the overchager absorbed by the indirect purchasers if their class is instead denied. This loophole could be substantially closed by adding to the end of § 4I(b) the following sentence: "An order under this subsection is conditional and may be altered or amended before entry of a final judgment awarding damages." This language would authorize the court to rescind a previous order permitting a pass on defense after the threat of duplicative liability had vanished with the denial of the indirect purchaser class. Of course, the loophole would remain where certification of the indirect purchaser class had still not been ruled upon when a settlement on behalf of the direct purchaser class was approved.

The Manageability and efficiency of indirect purchaser antitrust class actions.— The opponents of this legislation continue to insist that Congressional authorization of indirect purchaser class actions would encourage wasteful and unproductive proceedings, in part because of the difficulty of "tracing" damages down the distribution chain and in part because the smaller and more numerous claims of indirect purchaser class members would render their recovery and distribution a less worthy objective relative to the costs involved. Senator Hatch in particular has leveled all sorts of wild and uninformed charges against this type of lawsuit. For example, he claims that indirect purchaser class actions would merely fatten the pocketbooks of plaintiff attorneys, presumably through their running up of additional legal bills to compute and distribute damage payments to the members of indirect purchaser classes.

Naturally, he cites no evidence for this proposition, nor could he. For we have assembled the evidence and it clearly contradicts Senator Hatch's hypothesis. Attached hereto as pages A-1 through A-29 is a study of fee awards to plaintiff attorneys in antitrust class actions from 1966, when rule 23 was amended to authorize the "modern" class action through 1978.[5] As summarized on page A-29, about 11.1 percent more money has been recovered per hour of compensated attorney time in class actions involving indirect purchasers ($1,116.40) then in class actions limited to direct purchasers ($1,005.10). By that measure, direct purchaser class actions have been litigated only 90 percent as efficiently as class actions that included indirect purchasers. While the number of successful antitrust class actions since 1977 may be too small to draw a firm conclusion from this data that indirect purchaser class actions are more cost-effective than cases limited to direct purchasers, it certainly cannot be argued, as Senator Hatch does, that indirect purchaser cases are less efficient.

It should also be noted (p. A-22) that in all of these successful antitrust class actions combined, attorney fees and other litigation expenses have consumed only 16.4 percent of the damages recovered. Thus, this type of litigation, rather than benefiting "only the lawyers", has resulted in 85.6 cents of every dollar recovered ending up in the pockets of the injured class members. It is well known that in most

[5]This study was published at 5 class Action Rep 331-359 (1978).

nonclass contingent fee cases, such as personal injury suits, plaintiff lawyers extract a third or more of the recovery. If anything, class action suits should be praised for having cut the attorney's "take" in half and for having reduced the cost of obtaining a recovery to less than the retail markups in efficient supermarkets and department stores.

The Classwide Application Provision.— We are also pleased that in § 4I(c)(1) S. 300 incorporates the classwide allocation provision contained in the bill considered by the House in the 95th Congress:

In any action brought under section 4 or 4C of this act by or on behalf of a class of purchasers or sellers, the fact of injury and the amount of damage sustained by or passed-on to or by the members of the class may be proven on a classwide basis, without requiring proof of such matters by each individual member of the class. The percentage of total damages attributable to a member of such class shall be the same as the ratio of such member's purchases or sales to the purchases or sales of the class as a whole.

As we pointed out last year,[6] without such a provision a significant number of indirect purchaser class actions would be—and have been—rejected by the courts as unmanageable. Defendants would attempt to show variations in the proportion of the total overcharge that different direct purchasers passed on to indirect purchasers. It would then have to be established (1) how much of the overcharge was absorbed or passed on by each direct purchaser at each point in time during the overcharge period and (2) how much each indirect purchaser bought from each direct purchaser at each point within the overcharge period.

Section 4I(c)(1) would avoid these unnecessary complications by directing the court to award each indirect purchaser class member the average proportion of the total overcharge passed on by all direct purchasers. Variations from the average are in most cases likely to be so modest that it would be ludicrous, from a cost-benefit perspective, to attempt to measure each and every one of those variations. Indeed, the classwide average pass on approach has been the method selected for distributing damages in every antitrust class action settlement in which indirect purchasers have participated. In short, this approach is directly responsive to the manageability objections raised by Senator Hatch and other opponents of this legislation. Their specific opposition to § 4I(c)(1) places them in the untenable position of arguing, on the one hand, that indirect purchasers should not be able to sue at all, because of the damage tracing complexities that such suits would introduce, but, on the other hand, that the very provision that would avoid those complexities should be stricken from the bill.

Unfortunately, there is every indication that § 4I(c)(1) will be stricken as the price that must be paid to gain enough "moderate" Republican votes to invoke cloture against Senator Hatch's inevitable filibuster. But striking § 4I(c)(1) would at least partially unravel § 4I(b)'s solution to the *Hanover Shoe* problem. Without a classwide allocation provision, more indirect purchaser classes would be denied certification in cases where defendants had already been granted pass on defenses against direct purchasers.

It has been argued that a bill to overrule *Illinois Brick* should not attempt to deal with manageability/tracing problems that were present in class action litigation even prior to *Illinois Brick*. But that argument ignores the fact that *Hanover Shoe* also existed prior to *Illinois Brick* and served as a guarantee that direct purchasers could recover the entire overcharge where indirect purchaser classes were denied. Now that S. 300 would overrule *Hanover Shoe* in certain limited circumstances, the classwide allocation provision is necessary to fully recreate private antitrust remedies as they existed prior to *Illinois Brick*. It has also been argued that prior to *Illinois Brick* indirect purchaser class actions were certified in spite of the difficulty of tracing pass ons. But such class actions were by no means always certified,[7] and there is every reason to believe that the casualty rate would be significant if S.300 were enacted without § 4I(c)(1).[8]

---

[6] Hearings, *supra*, note 1, at 459–461.

[7] *E.g. Boshes* v. *General Motors Corp.*, 59 F.R.D. 589, 599–602 (N.D. Ill. 1973); *Ralston* v. *Volkswagenwerk, A.G.*, 61 F.R.D. 427 (W.D. Mo. 1973).

[8] Somewhat analogous to indirect purchaser class actions are cases alleging vertical price fixing between a manufacturer and a large number of its retail dealers. Several courts have recently denied class certification in such cases due to the sheer number of dealer defendants and the issue of whether and to what extent each of them adhered to the alleged conspiracy. *E.g., Trecker* v. *Manning Implement, Inc.*, 73 F.R.D. 554 (N.D. Iowa 1976); *Smith v. Toyota Motor Sales, U.S.A., Inc.*, 1977-1 trade cases ¶61,252 (N.D. Ind.). *See also Kline* v. *Coldwell, Banker & Co.*, 508 F. 2d 226 (9th Cir. 1974). As in those cases, it would hardly be surprising for judges seeking refuge from complex litigation to deny certification of indirect purchaser classes because

Footnotes continued on next page

Those who want the classwide allocation provision deleted further argue that *Illinois Brick* was not a "class action" decision (though the case was brought as a class action) and that S. 300 therefore should contain no provisions that would enable opponents to characterize it as "class action" bill. It has even been suggested by proponents that the only way possible to "save" § 4I(c)(1) would be to substitute language which used a term such as "multiple plaintiffs" but contained no references to "classes", "classwide", or "class actions".

Although we have been urged to draft and propose such substitute language, we decline to participate in such ridiculous hypocrisy. S. 300 is a "class action" bill with or without § 4I(c)(1). The several volumes of hearings that have been generated by the various *Illinois Brick* bills are filled with descriptions of cases that would be dismissed if Congress allowed the Supreme Court's decision to stand, and practically every one of those cases was a class action. Antitrust suits alleging price fixing conspiracies are almost always brought as class actions. Not only is anyone who thinks that S. 300 is not a "class action" bill living in a fantasy world, but S. 300 is the only appropriate vehicle for dealing with the class action problems involving direct and indirect purchasers. These problems arise only in antitrust class actions involving violations of §§ 1 and 2 of the Sherman Act. Apportioning damages between direct and indirect purchasers would simply be too narrow an issue to be included in a general revision of class action procedures. Indeed, there is no mention of this issue in the Justice department's comprehensive class action legislative reform proposals.

Having disposed of the arguments on the merits for striking the classwide allocation provision, we come to the root of the problem, which appears to be Senator Danforth and other Republican "moderates" who may follow his lead. According to an aide, Senator Danforth insists upon deletion of § 4I(c)(1) because he fears that it would be politically unwise to antagonize his business community constituents by associating himself positively with anything that could be characterized as a "class action" bill. We find it most ironic that Senator Danforth and other "pro-business" members of Congress find class action bills so unpalatable. In the first place, the main purpose of these class actions is to enforce the antitrust laws for the benefit of our entire economy, including the business community. The anticlass action Congressmen seem to include in their political constituencies only those business firms that desire to escape damage liability if they are caught violating the antitrust laws.

The more extreme irony, however, is that about 76 percent of all the damages that have been recovered in antitrust class actions since 1966 have been recovered by business entity class members. The remaining recoveries have been as follows: consumers 10 percent, Government entities 9 percent, and farmers 5 percent.[9] Even in those cases involving only indirect purchasers or direct and indirect purchasers, which accounted for 39.8 percent of all antitrust class action recoveries and 75 percent of pre-*Illinois Brick* recoveries, 55 percent of the damages were paid to

---

Footnotes continued from last page
of the sheer number of direct purchasers whose prices would have to be individually analyzed to determine the degree pass on.

We note in passing that if § 4I(c)(1) is stricken from this bill, then § 4I(c)(2) must depart with it, as the latter provision was included only to make clear tht the former, in authorizing classwide "allocation" of damages among purchasers at different levels in the distribution chain, does not authorize the "assessment" of classwide damages in the aggregate. We urge that § 4I(c)(2) be deleted anyway, as the meaning of § 4I(c)(1) is quite clear standing alone. Furthermore, though most lower Federal courts that have addressed the issue have concluded that the aggregate class damage remedy is unavailable unless specifically authorized by Congress (as in the parens patriae legislation), the Supreme Court and a majority of the circuits have yet to rule upon this issue. This is a matter that should be considered in the context of the Justice Department's comprehensive class action legislative reform proposals that were introduced as S. 3475 in the 95th Congress and were the subject of hearings before the Subcommittee on Improvements in Judicial Machinery.

[9] These percentages were derived from an analysis of 49 antitrust class action settlements totaling $1,139,440,500. Of this total, about $809 million is accounted for by the recoveries included in the study of antitrust class action attorney fee awards attached hereto (pp. A-1—A-29) and the additional recoveries described at A-26n. 1 and 2 for which fees had either not been awarded or information as to fee awards was unavailable at the time the study was conducted. Since then we have learned of the following additional settlements: $3.5 million in *Plywood,* $35.5 million in *Sugar—Western Cases,* $290 million in partial settlements covering 80 percent of In re of *Corrugated Container* antitrust litigation, and $725,000 in *Cusick* v. *N.V. Nederlandsche Combinatie Voor Chemische Indus.* In addition, the "$30 million partial settlement" referred to for In re *Chicken* antitrust litigation at A-25n.2 was actually $30,420,000. As noted above, all of these recoveries total $1,139,440,500. Assuming that we may have failed to detect a few relatively small recoveries (the larger ones would have been brought to our attention through one source or another), it is reasonable to assume that $1.2 billion closely approximates the true total.

business entities, with 20 percent going to Government entities, 15 percent to consumers, and 10 percent to farmers.[10]

Given these facts, business entities and their favorite politicians should be in the vanguard of those opposed to striking § 4I(c)(1), for business entity classes would primarily be denied certification for lack of a statutory classwide allocation provision. Such "natural person" consumer suits as might be brought by State attorneys general under the *parens patriae* legislation would not need a classwide allocation provision, as those damages can be recovered in a lump-sum aggregate without regard to the amount by which each consumer was individually overcharged.

What we also do not understand is why so many members of Congress take at face value the shrill rantings against class actions of spokesmen for the largest corporations, who are most often the defendants in these cases, as distinguished from small and medium sized businesses, who recover most of the damages. We do not understand what the uproar is all about when only $1.2 billion has been recovered in all antitrust class actions since 1966.[11] This averages out to less than $100 million per year over a 12.5 year period in which annual GNP exceeded $1 trillion. Senator Kennedy has cited estimates that the cost of economic concentration and antitrust violations exceeds $150 billion per year—more than 1,500 times the damages recovered from antitrust violators in class action suits. Certainly a bill as narrow as S. 300 could not be of grave concern to a rational business firm, especially one that believes that the antitrust laws should be enforced.

Nevertheless, the mere mention of a "class action" bill seems to provoke a thumbs down reaction by many if not most Members of Congress. This is so in spite of the pusillanimous impact that class actions have thus far had in terms of total damage recoveries. Even though we have presented data showing that attorney fees consume quite modest proportions of class recoveries, these Congressmen insist upon ignoring the facts in their haste to parrot the big business propaganda that class actions "benefit only the attorneys". Even though every empirical study conducted by neutral researchers has concluded that in class actions more dollars are recovered per unit of judicial and legal resources consumed than in nonclass actions [12]—and thus that, forced to choose, we would have to place class actions before nonclass actions on the judicial calendar if we wanted to maximize the efficiency of our legal system's limited resources—these Congressmen blindly accept the corporate assertion that monstrous class action suits are grinding our court system to a halt. And always eager for a scapegoat, these Congressmen find the class action plaintiff attorney a convenient whipping boy who "coerces" innocent defendants to settle, in order to avoid enormous litigation expenses, through a process that is styled "legalized blackmail". This hypothesis is accepted on faith, though not a single real-case example has ever been described by its proponents, and though the argument ultimately boils down to the highly implausible assertion that a defendant would settle for perhaps $5 million in order to avoid perhaps $500,000 in additional legal expenses.[13]

We have no particular fondness for class action lawyers or for lawyers generally. But the type of "entrepreneurial" or even "champertous" activity which is so disparagingly attributed to the class action lawyer is, in the words of a classic law review article,

> [c]ertainly . . . a minute part in the indictment constantly repeated against the lawyers by laymen. That indictment enumerates venality, treachery, falsehood,

---

[10] In at least four cases, which accounted for only 9 percent of total recoveries, Government entities obtained an unspecified but clearly minority share of a recovery that we have classified as being paid to business entities. The business entity percentage shares cited in the text have been adjusted downward slightly to reflect this imprecision.

However, data was generally unavailable to break down the recoveries as between direct and indirect purchasers when both types of claimants were members of the same class or subclass. Thus, while we are able to conclude that cases involving only indirect purchasers or both direct and indirect purchasers have accounted for 39.8 percent of total antitrust class action recoveries, we cannot state precisely what percentage was recovered by indirect purchasers alone. But we can be confident that it has been at least 20 percent. Furthermore, the pre-*Illinois Brick* recoveries totaled only $532,780,430, or 46.8 percent of the $1,139,440,500 grant total, counting as pre-*Illinois Brick* two settlements totaling $41,420,000 entered into after that decision but including payments for indirect purchasers on the apparent assumption that Congress would ultimately overrule *Illinois Brick*. Cases involving only indirect or direct and indirect purchasers accounted for 75 percent of all pre-*Illinois Brick* recoveries as defined above. We believe that this single statistic deals a death blow to the Handler-Kirkham "studies" of antitrust cases pending in three Federal district courts, hearings, *supra* note 1, at 20–22, 26, 31, 303, 357–378, 463–465, which purport to demonstrate that indirect purchasers very rarely file antitrust suits.

[11] *See* note 10 *supra*.

[12] *See* 5 Class Action Rep. 309, 389 & n. 2 (1978).

[13] *See* 5 Class Action Rep. 10–17 (1978).

oppression and indifference to justice among its counts. The large fees of lawyers are attacked, which must be paid whether the case is lost or won, *not the readiness of lawyers to speculate on whether they will get a fee or not . . .* [14] by prosecuting a high-risk case on behalf of a faceless mass of antitrust victims who would otherwise have no chance of recovering any damages.

The Pfizer Amendment.—Although S. 300 presently contains no such provision, it is widely recognized that at some point an effort will be made to add a "Pfizer amendment", as happened in the Judiciary Committees of both Houses during the 95th Congress. The Pfizer amendment would overrule the Supreme Court's decision in *Pfizer, Inc.* v. *Government of India,*[15] which held that foreign governments are "persons" entitled to sue under our antitrust laws. The Pfizer amendment, if enacted, would exempt American corporations from damage liability to foreign governments injured by antitrust violations perpetrated within our borders and otherwise amenable to suit in our courts.

For Congress to give Pfizer and five other codefendant manufacturers of antibiotic drugs what they want would be a classic case of scandalous special interest legislation. The direct purpose of this amendment is to exempt these six drug companies from potential liability to foreign government antibiotic purchasers in the final phase of litigation in which these defendants have already paid $219,000,000 in settlements with classes of American consumers, farmers, and business and Government entities.

The closest analogy that comes to mind is the legislation introduced several years ago to exempt from the antitrust laws all mergers of natural gas pipelines that had been consummated between two specified dates. It so happened that there had been only one such merger—the acquisition of the Pacific Northwest Pipeline Corp. by the El Paso Natural Gas Co. El Paso had exploited every legal delaying tactic in the book to stave off divestiture. But after three adverse decisions of the U.S. Supreme Court, El Paso looked to the Congress for a final pardon.[16] With El Paso paying its lobbyists over a million dollars a year, its antitrust exemption bills were sailing through both Houses of Congress and ultimate passage was almost taken for granted. It was not until a Utah banker testified before this subcommittee that an El Paso attorney had offered to place a substantial interest-free deposit in his bank in return for his not testifying against the Senate bill that the Congress suddenly shunned as a leper the special interest legislation which it had theretofore so cozily embraced.

At least the antitrust exemption sought by El Paso was limited to the particular case in which it had been a defendant. The Pfizer amendment, however, would not be limited to the particular defendants in the antibiotics antitrust litigation. It would exempt all American corporations involved in all antitrust conspiracies from damage liability to foreign governments. And what is equally outrageous is that the proponents of legislation limited to overruling *Illinois Brick* seem quite willing to acquiesce in these drug companies' demands in hope of picking up a few more votes.

No one seems to realize—or care—that it is in the interest of American consumers, farmers, and business and Government entities that American corporations be liable for antitrust damages to foreign governments. An industry whose members conspire to fix the prices of products sold to foreign governments is very likely to be doing the same thing with respect to the same products sold to Americans. If such an industry made half of its sales to foreign governments and the other half of its sales to Americans, and if it settled class actions brought on behalf of Americans for full single damages (which has yet to be accomplished by antitrust class action plaintiffs), it would still retain the half of the illegal overcharges paid by foreign governments. This is hardly the way to deter antitrust violations affecting only Americans. By granting American corporations open season on foreign governmental consumers, the Congress will only further encourage the formation of foreign governmental cartels, such as OPEC, to overcharge American on a far more massive scale.

[See appendix for additional material supplied by Mr. Moore.]

Mr. MOORE. Thank you, Senator.

Before I even begin, I would like to clear up what I think is a bit of misinformation I just heard. Mr. Gray said that in the antibiot-

---

[14] Radin, "Maintenance by Champerty," 24 Calif. L. Rev. 48 (1935) [emphasis added].

[15] 46 U.S.L.W. 4073 (U.S. Jan. 11, 1978).

[16] *See* Hearings on Natural Gas Supply for Pacific Northwest before the Senate Commerce Committee, 92d Cong., 2d sess. (1972) at 241-281.

ics consumer settlement, the second one, that there was a great deal of difficulty in validating the claims. I believe he said there were 133,000 bogus claims. I wish to tell you that is simply not true. The volume of rejected claims was infinitesimal in that proceeding and the claims to which he refers, which were a tiny fractional of 133,000, were apparently claims submitted by people whose parents purchased the antibiotic drugs for them when they were children. Years later, when the settlement was accomplished, these people were of legal age to file claims, they received claim forms, and they filed claims for illnesses they had as children, when the proper procedure would have been for their parents to have filed such claims.

In any event, last year we testified as to significant reservations that we had about this bill. We are pleased to say today that we think the basic problems with the bill as drafted last year have been substantially, if not completely, removed. We wholeheartedly support it.

In particular, we think that section 4(I)(b), the discretionary pass-on provision, is a workable provision, although we have pointed out in our statement that the legislative history should specify certain standards that the courts should consider to ensure that the pass-on defense is granted only when there really is a serious threat of duplicative liability.

Furthermore, we suggest that a sentence be added to that provision by which an order allowing a pass-on defense would be provisional and could be altered or amended before a final damage judgment. Consider the situation where a court had given a pass-on defense, later the indirect purchasers had their class action denied or were otherwise unable to recover, and therefore the defendant no longer needed a pass-on defense. Without such a provision, we fear that a lot of money will slip through the cracks through the mechanism of court granting a pass-on defense with respect to claims by direct purchasers and the indirect purchasers not being able to recover.

Throughout these hearings, there have been a large number of what we consider to be totally unfounded statements about antitrust class action litigation in the past.

I see that Senators Hatch and Laxalt have conveniently left since they are the ones who make these statements. They have claimed throughout that these suits benefit primarily the attorneys. In order to counter that——

Senator THURMOND. I might state that Senator Laxalt and Senator Hatch had other commitments and committees and had to leave.

Mr. MOORE. I am aware of that.

Senator THURMOND. I am sorry they couldn't be here.

Mr. MOORE. They took their staff with them, too, I see.

Mr. BOIES. We will furnish the information to Senators Hatch and Laxalt as we have done before. They have followed, and are following, this matter closely.

Mr. MOORE. Included in our statement is a compilation of what we feel to be a practically complete analysis of all of the damage recoveries that have been obtained in antitrust class actions since 1966.

These total the rather puny sum of $1.2 billion or less than $100 million a year. But one of the startling points about this data is that when you analyze it you find that, contrary to the statements that indirect purchaser suits are wasteful and are simply means of running up additional attorney fee bills, through attempts to trace the identities of the indirect purchasers and to distribute small sums to them, it turns out that 11 percent more money per hour of compensated attorney time has been recovered in cases involving either only indirect or indirect and direct purchasers than in cases that were limited to direct purchasers. By this measure, cases involving only direct purchasers have been litigated only in 90 percent as efficiently as cases involving directs and indirects or only indirects.

This data also shows that attorney fees and litigation expenses sums combined consumed only 16.4 percent of all the money that has been recovered in antitrust class actions. In other words, 84 cents of every dollar recovered in antitrust class action actually does go to the members of the class.

Who are the members of those classes? In spite of all the business opposition to this bill, it turns out that 76 percent of all the money that has been recovered in antitrust class actions in the past 12 years has been recovered by business entities. Fifty-five percent of all the money that has been recovered in those class actions involving indirect or direct and indirect purchasers was recovered by business entities.

In addition to the 76 percent recovered by business entities, 10 percent has been recovered by consumers, 9 percent by Government entities and 5 percent by farmers. Focusing on the cases involving direct and indirect or only indirect purchasers, 55 percent has been recovered by business entities, 15 percent by consumers, 20 percent by Government entities, and 10 percent by farmers.

Our data also show that damages can be distributed and have been distributed in a number of these cases to hundreds of thousands of people in amounts as small as less than $10 per person on the average. And the attorney fee costs in even those cases still fall within the 10 to 25 percent of the recovery range.

This seems to me to refute the statements that I have heard from Senators Hatch and Laxalt, that it is simply impossible to distribute these small sums efficiently and that attorneys end up getting all of the money.

I would like to say further that we understand that there is a move afoot to delete from this bill section 4(I)(c)(1), the so-called classwide allocation provision. If that were done, the primary victims of the deletion would again be business entities, because it will not so much be the consumer suits that will be affected by the denial of class certification as a result of the difficulty of tracing to which this provision is directly responsive; it will be suits brought by business entities. The consumer suits can at least in some cases be brought under *parens patriae* authority. So again, we don't understand why business interests are opposing this legislation so forcefully when it is they who are the primary beneficiaries of these very suits, even with respect to the amounts recovered by indirect purchasers.

We also don't see how Senators Laxalt and Hatch and other opponents can focus on the alleged excessive cost of these suits—and we have just demonstrated that these suits are no more costly than suits by direct purchasers, indeed they are slightly less costly—how they can focus on that as or one of their main objections to this bill and yet they also would presumably be leading the charge to delete the classwide allocation provision (section (4)(I)(c)(1)) which would resolve this very problem to the extent that it exists as those Senators say it does.

I would also like to respond to Senator Laxalt's statement and to Senator Hatch's statement that most of these cases are settled and that there is a great deal of "extortion" going on, that these class action suits are just a means of "legalized blackmail" to "coerce" defendants into settling. That view is total nonsense in my judgment.

What it boils down to is that since these cases take 5.4 years to complete——

Mr. BOIES. Excuse me, Mr. Moore. Senators Laxalt and Hatch don't need any defense from me, but you are not disagreeing, are you, that most of the lawsuits are in fact settled?

Mr. MOORE. Yes, I am, as a matter of fact. Let me tell you why. Of the antitrust class actions that have reached the posture of either being settled or going to trial, excluding those that are still pending and the decision as to whether to settle or go to trial has not yet been made, about 11 percent, as I recall, of those cases have gone to trial.

Mr. BOIES. Let me make sure I understand. Are you suggesting that indirect purchaser antitrust actions in fact have gone to trial and plaintiffs recovered damages?

Mr. MOORE. No, I am not. I am saying—and I am not talking specifically about indirect purchasers—I am saying that of all antitrust class actions—direct, indirect, or whatever—about 11 percent of them have gone to trial.

Mr. BOIES. As I understand the point that Senators Laxalt and Hatch were making, it was that with respect to indirect purchaser lawsuits, those lawsuits did not go to trial, and the reason they didn't go to trial is that everybody knew that the damages were so speculative and difficult to prove and the fact that none of them ever went to trial was at least evidence that the conclusion is right.

Do you have any evidence that, or any examples of where, indirect purchaser antitrust lawsuits have in fact gone to trial?

Mr. MOORE. Yes. *North Carolina* v. *Chas. Pfizer & Co.,* one of the *Antibiotic* cases which went to trial. The defendants won, which seems to me to indicate—and indeed the defendants have won six of the seven cases that have gone to trial—that the defendants do not back down and settle when the defendants think that they have a strong case. They do press on to trial.

But it cannot possibly be the case that these cases are settled to avoid litigation expense. As I say, on the average, they are not settled until after 5 years. By that time, most of the money that the defendants are going to spend on the case has already been spent. By settling they can't save the money that they have already spent.

If you look at attorney fees on the plaintiff side, they have consumed about 15 percent of the recovery and are at a rate of two times the normal hourly rates. That is as a result of the multiplier analysis that the courts have applied in awarding attorney fees as compensation for the contingent risk.

Even if you assume the defense counsel have to spend twice as many hours on the case as plaintiff's counsel do, so that the defendant's fee costs would be approximately the same as the plaintiffs' fee costs, as only 15 or 16 percent of the recovery, the extortion argument boils down to suggesting that a defendant would settle a case in order to avoid attorneys' fees which could be no more than 15 percent or 16 percent of the amount for which the case is settled. Indeed, the future defense attorney fees are not going to be anywhere near as high as 15 or 16 percent because most of that litigation expense has already been incurred by the time of settlement.

I would like to finally say that none of these people who raise this legalized blackmail argument have ever given a single example of a real case in which this actually occurred. I think if they want to continue to make these totally unsubstantiated arguments about class actions, they should tell us what cases they are referring to.

Senator THURMOND. Mr. Moore, we do have another witness. I don't want to cut you off. As I say, your entire statement goes in the record. We have to hear this other witness now.

Mr. MOORE. I think I got in about all I needed to say. I appreciate the opportunity of appearing on, I think, Congress' 7th class action bill in the last decade.

Thank you very much.

Senator THURMOND. Thank you very much.

Our last witness is Mr. Rogers.

Mr. Rogers, won't you come around.

STATEMENT OF WILLIAM F. ROGERS, ANTITRUST COUNSEL, MONSANTO CO.

Mr. ROGERS. Thank you, sir.

Senator THURMOND. We are glad to have you. I might say that your full example in your testimony using the benzene illustrates dramatically the thousands upon thousands of decisions and points that are involved in manufacturing and distribution chains in benzene to nylon to the final consumers.

Mr. ROGERS. Yes, sir.

[The prepared statement of Mr. Rogers follows:]

PREPARED STATEMENT OF WILLIAM F. ROGERS

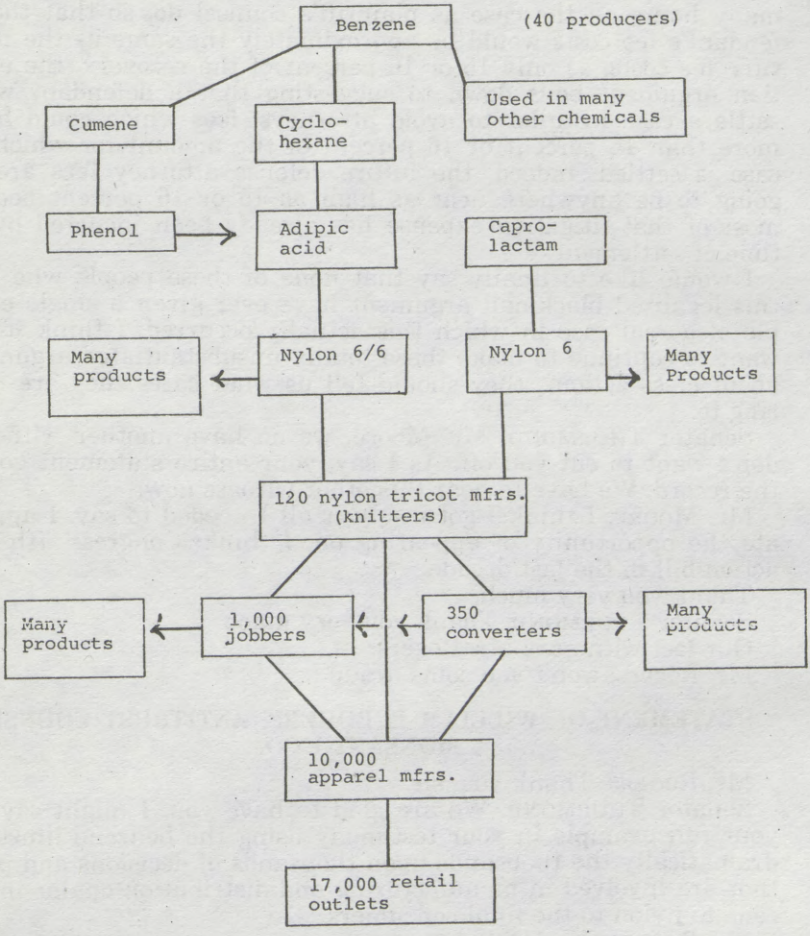
There are many reasons why the proposed *Illinois Brick* reversal legislation, S. 300, would not be good law. This statement will restrict its focus to one aspect of the proposal. The catastrophic effect that this legislation would have on the chemical industry is portrayed by the summary examination of one category of product produced and derived from benzene.[1]

As an example, let us consider nylon tricot apparel which is merely one of hundreds of categories of products produced from benzene. The following chart illustrates the manufacture and distribution chain from benzene to nylon tricot:

---

[1] The family of products derived from benzene is shown in the attached table from the Stanford Research Institute, and is referred to as the benzene tree.

NYLON TRICOT



A starting point for producing nylon tricot is the chemical benzene produced by some 40 petrochemical companies. Among the branches of the benzene tree are found cyclohexane (1–B) (references are to the attached benzene tree) produced by 9 companies and cumene (8–B) with 14 producers. Cumene is converted to phenol (C–6) by 13 producers and then to cyclohexanol and cyclohexane (F–1), which are made into adipic acid (G–1) by 4 manufacturers and caprolactam (H–1) by 3 producers. These are further processed into Nylon 6/6 and Nylon 6 (I–1). There are seven U.S. producers of nylon who employ different processes, but all use materials which begin with benzene. These producers of fiber sell to 120 manufacturers of tricot fabric who in turn distribute through 1,000 jobbers and 350 convertors to supply 10,000 apparel manufacturers producing all kinds of women's and children's apparel. The apparel items are then sold through 17,000 retail outlets to the United States consumer. There are thousands of individual nylon tricot products for use by women and children.

This specific example illustrates the virtual impossibility of assessing damage issues in an antitrust case brought by an indirect purchaser who seeks indirect damages for alleged overcharges in the purchase or sale of benzene. In tracing damages, it is necessary to assess costs, prices and profits and to use discovery processes to prepare for trail on these issues. Thus, in the trial of a case brought by a purchaser of tricot nylon apparel, the required discovery from thousands of parties in the benzene-nylon tricot chain to determine what, if any, of the alleged overcharges were passed along would be so extraordinarily complex, expensive and time consuming as to make such case not only unmanageable but unconscionable.

In my judgment, based on 26 years of experience in the practice of antitrust law, the practical result would be the impossibility of being able to prepare for trial and as such, would fundamentally deprive a defendant of its right to its day in court.

In addition, the above example identifies the thousands of causes of action that would be created in just one product line from a basic chemical if the Supreme Court's decision in *Illinois Brick* is reversed by Congress.

This proposed legislation would create such complexity in terms of time and costs for defendants, plaintiffs and the Federal courts that it would essentially nullify the private enforcement of the antitrust laws from any practical and realistic viewpoint.

ATTACHMENT

CHEMICAL ORIGINS AND MARKETS

Fifth Edition

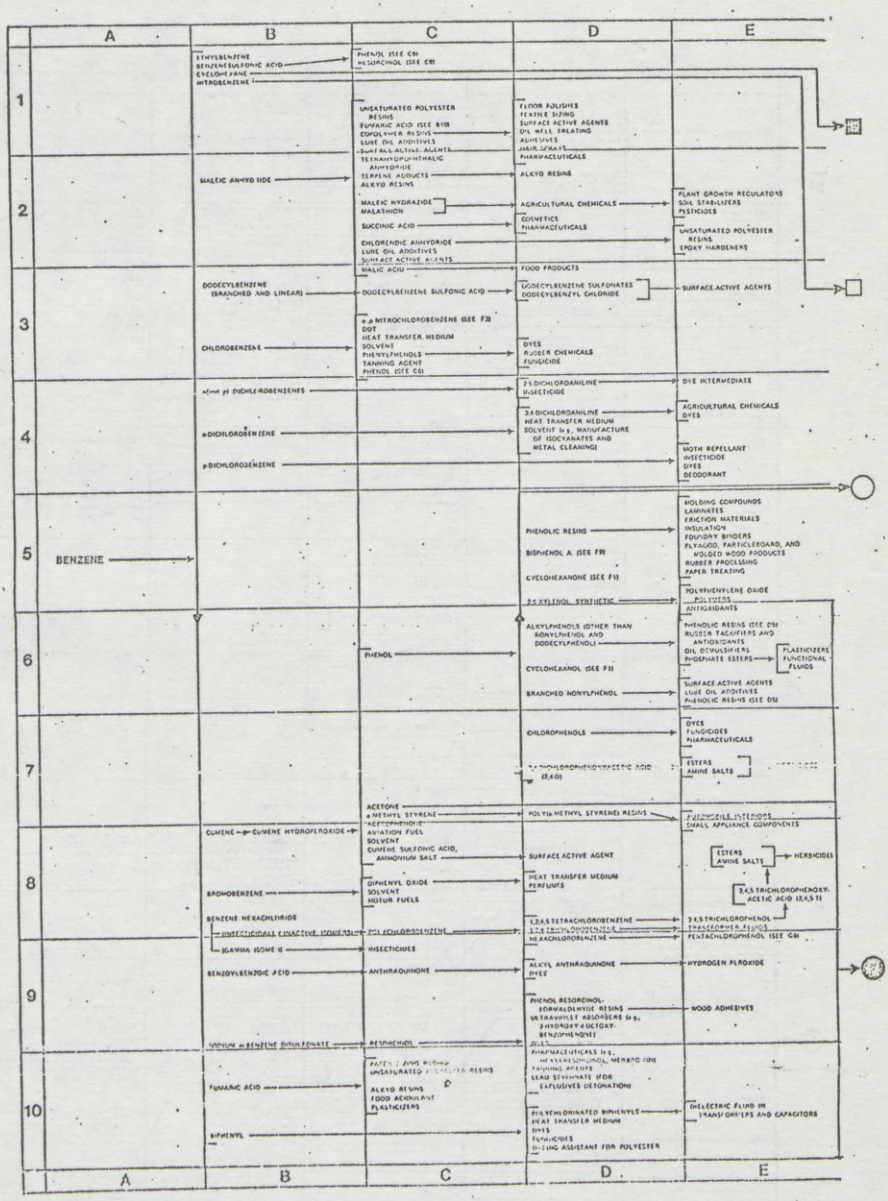
GLORIA M. LAWLER, Editor

Contributors

Kevin W. Allison
Dorothy L. Amos
Jeanie H. Ayers
Judith L. Blackford
Judith Ellen Blue
Thomas A. Blue
Rosemary F. Bradley
Arthur G. Brown
Sarah P. Carney
F. Y. (Fred) Chan
Eleanor M. Connolly
Scott E. Cooke
David S. Cox
Glenn R. Cummings
Robert E. Davenport
John C. Dean
Monica M. Ertel
Jerie L. Etherton
F. Alan Ferguson
H. Ernst Frey
Thomas C. Gunn
Francie J. Hillier
Betty J. Johnson
Elaine M. Klapproth
May J. Koo
Naomi F. Levinson
Linda J. Nutley
Dirk Oosterhof
Sharle K. Paul
Roberto Portillo
Koon Ling Ring
Varena Strandness
Dorothy J. Treskon
Peter T. Wallace
Andrew J. Wolfe
Rose M. Wright

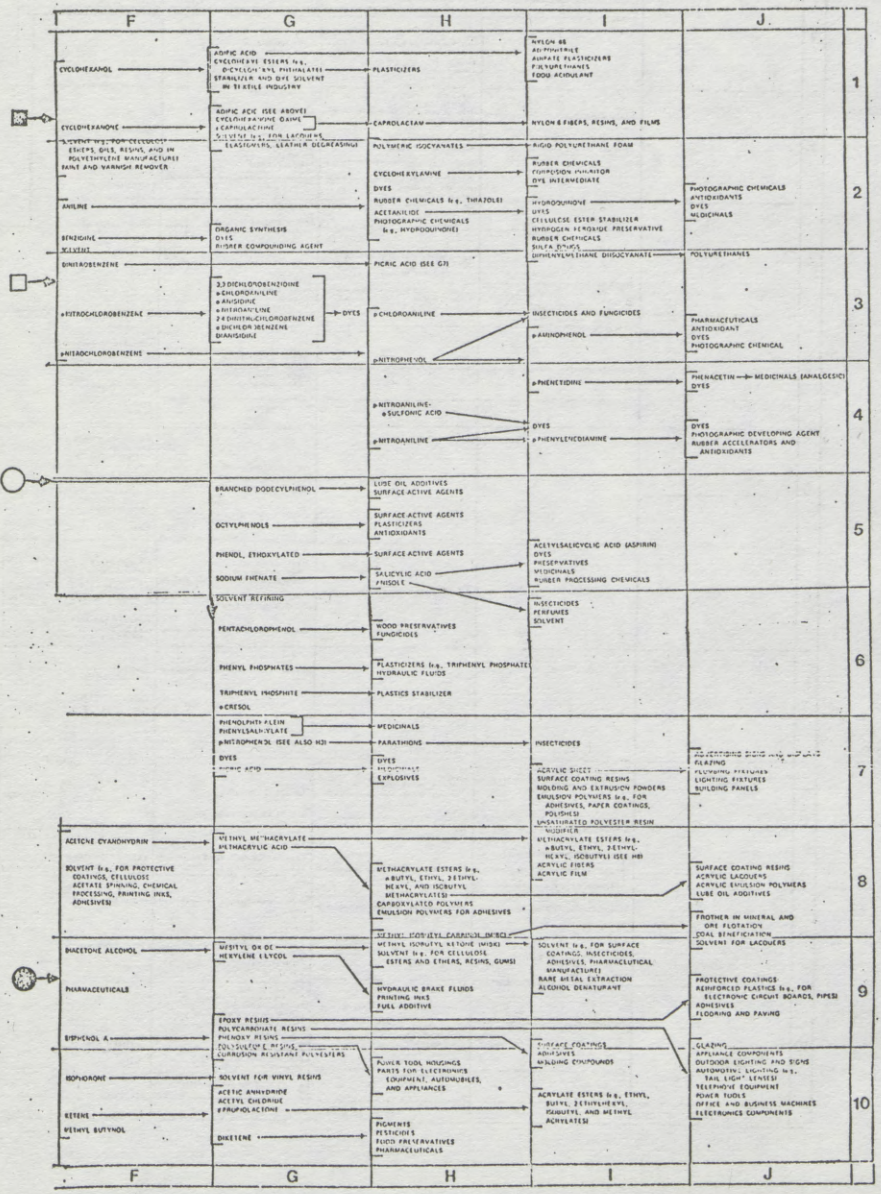
Published by:
CHEMICAL INFORMATION SERVICES
Stanford Research Institute
Menlo Park, California 94025

BENZENE TREE



BENZENE TREE

(cont'd.)



Senator THURMOND. Is this the usual pattern of complexity that we might expect to find involved in litigation under the proposed S. 300 and can you give us your feel for the range of complexity that we might expect under the proposed S. 300, and without objection, your entire statement will be printed in the record at the end of your oral testimony.

If you will answer that question, highlight anything else, in just about 6 or 8 minutes.

Mr. ROGERS. The example we have used on benzene is a very small segment of all of the complications of benzene. You have to start out at that point. Benzene is used in hundreds of different products that find their way to the consumer. We have taken only one segment of it in using the nylon tricot, the particular example set forth in our submitted statement.

In the chemical industry, you are going to find extreme difficulty in trying to trace overcharges in hundreds of different products. Benzene is only one of many products, chemical products, which we as a company use.

I do want to say this: That on behalf of the Monsanto Co., we try to comply with the antitrust laws, but at the same time, we want to defend ourselves when somebody comes along and wants to take our money away.

If we violated the law, that is one thing. On the other hand, we went right to trial. We think this proposed legislation basically destroys it. We have been through these cost problems. I personally have been through litigation of class action cases where we have got in to only Monsanto's cost, and it took years just to sort that out.

This proposed legislation would mean a necessity to prepare for trial beyond the comprehension of a company like Monsanto.

I use the nylon tricot for example, and I have tried to demonstrate it for your benefit, as just one segment of the chemical industry. There are hundreds of segments that are somewhat similar, but perhaps not as broad as this.

I would also like to say with respect to the transformation of the product, if you look at the chart that I submitted on nylon tricot, that there are 120 knitters. It is at that stage that this benzene product is no longer transformed.

When the fiber is produced, then it is dyed, cut, and put it into various apparel. You have thousands of people you have to look to to find out who passed on what, and when. You are talking about a ten-year discovery period. It is an impossibility.

Mr. BOIES. Just a couple of questions.

Mr. Rogers, from the standpoint of the chemical industry, is your problem primarily that you are taking chemicals and then converting them into some other form and it is difficult to trace through the elements?

Mr. ROGERS. That is the essence of it. But when it gets to the litigation of the antitrust case, the preparation of it is an impossibility. As an attorney, you have to prepare to defend your client in court. When you get into that, you have to get into the facts.

You get into the costs, profits, and the subjects of that nature. I will give you an example. In a case that the rice growers brought,

it took us 2 years to properly determine the facts for the costs on just one product by one company; hours and hours of time.

When you go through a problem like you have here that I have demonstrated in the chemical industry, I think it imposes upon a chemical company who believes in defending cases where improper charges are made against it an impossible task and deprives that company of its day in court.

We can't afford it. I don't think any company can. I can't go out and take the depositions and other discovery of 10,000 people.

Senator THURMOND. Can you estimate how much it will cost for that 2-year preparation?

Mr. ROGERS. Excuse me. I didn't understand your question.

Senator THURMOND. Can you estimate how much it would cost for a 2-year preparation?

Mr. ROGERS. We try to be very efficient. It cost us approximately a half a million dollar cost on the determination of the costs that I was referring to on the one product, in preparation for that trial.

We normally think in terms of a simple antitrust case, a case of a terminated distributor in terms of about a half million dollars short of appeal. You take a more complicated case such as the case I demonstrated here involving nylon tricot, you are talking about millions and millions of dollars of discovery.

Mr. BOIES. Prior to the *Illinois Brick* decision, was Monsanto ever sued under an antitrust claim by indirect purchasers?

Mr. ROGERS. Yes.

Mr. BOIES. Did those indirect purchasers recover anything?

Mr. ROGERS. They did not because they lost at trial.

Mr. BOIES. Thank you.

Mr. ROGERS. They had no proper claim to begin with.

Mr. BOIES. That was because they weren't able to make out any claim that Monsanto violated the antitrust laws. Is that correct?

Mr. ROGERS. That was because Monsanto did not violate the antitrust laws, regardless of the nature of the claimant.

Mr. BOIES. Exactly the point I was making.

Thank you.

Senator THURMOND. Thank you very much. We appreciate your apperance here. We are very grateful for your testimony which we think is very helpful.

Mr. ROGERS. Thank you.

[Whereupon, at 12:30 p.m., the committee was recessed, to reconvene subject to the call of the Chair.]

APPENDIX

S. 300, AS INTRODUCED

96TH CONGRESS
1ST SESSION

S. 300

To restore fair and effective enforcement of the antitrust laws.

IN THE SENATE OF THE UNITED STATES

JANUARY 31 (legislative day, JANUARY 15), 1979

Mr. KENNEDY (for himself, Mr. METZENBAUM, Mr. MORGAN, Mr. BAYH, Mr. CULVER, Mr. DOMENICI, Mr. DURKIN, Mr. EXON, Mr. GRAVEL, Mr. HART, Mr. LEAHY, Mr. LEVIN, Mr. MATSUNAGA, Mr. MOYNIHAN, Mr. NELSON, Mr. PELL, Mr. PROXMIRE, Mr. RIBICOFF, Mr. RIEGLE, Mr. STAFFORD, Mr. TSONGAS, and Mr. WILLIAMS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To restore fair and effective enforcement of the antitrust laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Enforcement Act of 1979".

SEC. 2. The Clayton Act is amended by inserting immediately after section 4H, the following new section:

"SEC. 4I. (a) Any purchaser or seller in the chain of manufacture, production, or distribution of goods or services shall, upon proof of payment or receipt of all or any part of any overcharge or underpayment for such goods or services,

be deemed to be injured within the meaning of section 4, 4A, or 4C of this Act whether or not such purchaser or seller dealt directly with the defendant.

"(b) In any action under section 4 or 4A of this Act, any defendant, as a partial or complete defense against a damage claim, may, in the discretion of the court, in order to avoid duplicative liability, be entitled to prove that a purchaser or seller in the chain of manufacture, production, or distribution who paid any overcharge or received any underpayment, passed-on all or any part of such overcharge or underpayment to another purchaser or seller in such chain.

"(c)(1) In any action brought under section 4 or 4C of this Act by or on behalf of a class of purchasers or sellers, the fact of injury and the amount of damages sustained by or passed-on to or by the members of the class may be proven on a classwide basis, without requiring proof of such matters by each individual member of the class. The percentage of total damages attributable to a member of such class shall be the same as the ratio of such member's purchases or sales to the purchases or sales of the class as a whole.

"(2) Except as provided in sections 4D and 4E of this Act, a defendant shall not be required to pay damages except to persons on whose behalf a valid claim is presented to the court.".

SEC. 3. Section 1407(h) of title 28, United States Code, is amended by striking out "Section 4C of".

SEC. 4. The amendments made by this Act shall apply to any action under section 4, 4A, or 4C of the Clayton Act which is pending on the date of enactment of this Act or which is commenced on or after such date of enactment.

from the office of

Senator Edward M. Kennedy

of Massachusetts

For Immediate Release
January 31, 1979

The following is the text of a statement by Senator Edward M. Kennedy, (D.-Mass.), upon introduction in the Senate of the Antitrust Enforcement Act of 1979:

Mr. President, during the 95th Congress both the House and Senate Judiciary Committes reported favorably legislation to establish the right of those injured by illegal pricefixing to recover damages measured by the extent of such injury, whether or not in privity of contract with those who violate the antitrust laws. That legislation, which would overrule the Supreme Court's decision of June 9, 1977 in Illinois Brick Co. v. Illinois, was a product of twelve days of hearings by the House and Senate Committees, involving fifty-five witnesses in the Senate hearings alone. Their testimony, as well as other evidence, makes clear the overriding mandate for the legislation which we reintroduce today: to compensate those who are actually injured as a consequence of antitrust violations; and to structure our laws to deter such violations to the greatest extent possible.

Without question, those twin goals comprise the central purpose of our antitrust laws, expressed by Congress in passage of the Sherman Act in 1890, the Clayton Act in 1914, and the recent Hart-Scott-Rodino Act adopted by the 94th Congress. As early as 1890, Senator George described the sense of Congress that:

> The right of action against the persons in the combination is given to the party damnified.
>
> * * *
>
> The consumer, therefore, paying all the increased price advanced by the middlemen and profits on the same is the party necessarily damnified or injured.

That central purpose had been reaffirmed in all the years since. None was more important to Senator Hart, who sought to fulfill it through the Antitrust Improvements Act by allowing state Attorneys General to commence actions on behalf of consumers under the theory of parens patriae. Yet that important tool was rendered hollow when the Supreme Court drastically constricted the underlying rights of consumers by its decision in Illinois Brick.

Despite a clear and consistent legislative history, recognized by five of six Federal Courts of Appeals to address the question, the Supreme Court held in Illinois Brick that only "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of Section 4 of the Clayton Act." Since most

individuals and organizations purchase goods through retailers and other "middlemen", that decision effectively precludes consumers, small businesses, farmers, state governments, many federal agencies, and other indirect purchasers from seeking redress for antitrust violations. In the process, it denies compensation to those who are injured, and undermines deterrence of the overwhelming force of illegal pricefixing in the United States today.

Conservative estimates place the cost of antitrust violations at $150 billion yearly. Over 25 percent of private damage actions brought since 1960 under Section 4 of the Clayton Act involved only indirect purchasers. Those actions are lost to Illinois Brick. And fully 2/3rds of all such private actions involved at least some indirect purchasers. Many would not have been filed without their involvement. Illinois Brick itself is an example, since all direct purchasers who were parties to that action settled very early on terms highly favorable to the defendant. The recent tetracycline litigation is another example, brought initially by indirect purchasers, and joined by direct purchasers only very late in the process, after a settlement had been proposed. These drug cases alone brought settlements of over $250 million.

California's former Attorney General told our Committee that claims of well over $100 million in pending cases just in that State were seriously jeopardized by the Illinois Brick ruling. Our colleague, Senator Danforth, testified that virtually all of $2.5 million collected on behalf of governmental and individual purchasers during his two terms as Attorney General of Missouri, would not have been collected under Illinois Brick. And evidence presented to our Committee set the loss in uncompensated overcharges just to indirect state and federal governmental purchasers at almost $1 billion a year.

The Illinois Brick decision strips from indirect purchasers, and from government lawyers acting on their behalf, the power to challenge conduct which harms them more than anyone else in our society. And we cannot be confident that those enforcement mechanisms left untouched by Illinois Brick -- the private actions of direct purchasers, and the power of criminal prosecution by the Justice Department -- will significantly prevent such harm to the indirect purchasers now powerless to help themselves. Most direct purchasers are middlemen. Most middlemen are not harmed by illegally exacted overcharges, because they pass them on to their own purchasers. All middlemen confront the costs and dangers both of extensive pre-trial discovery, and of courting the disfavor of their immediate suppliers. And all suppliers who engage in antitrust violations enjoy the power to select direct purchasers mindful of such costs and dangers.

Exclusive reliance upon criminal enforcement by the Department of Justice would be equally misplaced. Despite the training and talent of Department litigators, the resources of the Antitrust Division are necessarily limited, as Assistant Attorney General John Shenefield told our Committee. It is not surprising, therefore, that private damage actions exceeded governmental enforcement actions by more than tenfold before Illinois Brick. Moreover, the threat of private action is far more likely to deter misconduct. The stricter burden of proof in criminal prosecution, the necessarily superior knowledge of those

who participate directly in the distribution chain of a product, and the far more threatening prospect of treble damages instead of criminal fines, all operate to make private actions an indispensable tool of enforcement. One businessman observed that "most of us" would risk a $30,000 fine, or even 30 days in jail, to yield a profit of $30 million in fixed prices. Only a real threat of civil penalty -- here of $90 million -- would change that calculation.

The Supreme Court reached its judgment in Illinois Brick despite the obvious costs to consumers and other indirect purchasers, and the obvious inability of criminal prosecution or direct-purchaser suits to prevent them. It did so in reliance upon the Court's earlier decision in Hanover Shoe, Inc. v. United Shoe Machinery Corp., which held in 1968 that antitrust defendatns cannot escape liability by proving that a plaintiff had passed on illegal overcharges to its customers and thus had not been injured in its business or property. In light of that ruling, the Court reasoned in Illinois Brick that permitting suits by indirect purchasers would subject a defendant to the obvious unfairness of multiple liability for the same offense. Middlemen could collect the full amount of an overcharge even if they had passed it on to consumers, and consumers could then collect again.

But the ruling in Illinois Brick creates a situation equally or even more unfair. It permits the middleman to collect twice -- to reap the profits of overcharges from the consumer, and then to charge the manufacturer for the illegality. And it leaves the one party injured in fact -- the consumer -- wholly uncompensated.

That outcome would be unacceptable even if there were no alternative to subjecting a defendant to multiple liability. But it is especially unacceptable because there is an obvious alternative: overruling Hanover Shoe in part, and allowing the apportionment of damages according to the actual injury suffered by the parties to an action. That alternative was rejected by the Supreme Court in Illinois Brick, on the ground that apportionment of damages is a complex and time-consuming judicial task. Thus the Court found more important the swift and efficient disposition of antitrust cases, and the most wooden application of precedent, than the rights of consumers and the principles of fairness in our society. And despite the legislative record, the Court was confident of its power to make that judgment, absent "clear directions . . . to the contrary" by Congress.

Now is the time for Congress to provide that direction, clearly and unequivocally. This legislation will permit consumers and other indirect purchasers in a chain of product distribution to recover damages measured by the extent to which they are injured. But it will not alter traditional rules of standing, remoteness, and proximate causation which serve to limit the number of parties who can seek recovery.

This legislation subjects a defendant to liability to multiple claimants. But by apportioning damages according to actual injury, it will not permit multiple liability. The number of separate suits for a single offense can be minimized by existing principles of joinder, statutory interpleader, and informal coordination. The complexities of apportionment will be no more difficult

than those in a variety of other judicial undertakings -- in patent litigation, securities fraud, bankruptcy, and admiralty cases. In the nine-year period between Hanover Shoe and Illinois Brick, Federal Courts handled effectively cases brought by both direct and indirect purchasers. They capably apportioned damages, and they can do so again.

This legislation will permit defendants to restrict claimants to damages reflecting the actual losses which they suffer. But it will not permit defendants to engage in a judicial shell-game, shifting their identification of the truly injured party according to the plaintiff seeking redress. Existing principles of collateral estoppel and res judicata will operate to prevent that. And the bill permits apportionment of damages only for the purpose of preventing multiple liability. The pass-on defense cannot be used when the overcharge was exacted from persons too remote to recover under rules of standing, or those barred from recovery by the applicable statute of limitations of other rules.

At a time of serious and rising inflation, this legislation provides a weapon against prices illegally exacted from consumers. But it will not increase the costs of government, and it will not create new regulations.

Most important, this legislation will return to our antitrust laws the opportunity for enforcement consistent with its fundamental purposes: to deter violations, and to compensate victims. The importance of those objectives is undeniable, and support for this bill comes from every sector of our society: from President Carter; from Vice President Mondale, once Attorney General of Minnesota; from the Justice Department, the Federal Trade Commission and other Executive Agencies; from all fifty Governors last year, and all fifty State Attorneys General; from the National League of Cities, the 7,600 members of the National Conference of State Legislatures, and the National Association of Counties. And business entities, as well as labor, rancher, farmer and consumer groups have all offered strong support: the 100,000-member National Association of Home Builders, the Independent Bankers Association, the Consumer Federation of America, the National Council of Senior Citizens, United Mineworkers of America, and dozens of other groups. All of them recognize the strong and compelling mandate for this bill. And I introduce it today with great confidence that the Congress will do so as well.

Mr. President, I wish to place in the record some of the many letters and other indications of support which we have received on this bill. To these supporters, and many others, I can promise our vigorous effort to assure the swiftest possible passage of this important legislation.

II

Calendar No. 250

96TH CONGRESS
1ST SESSION

S. 300

[Report No. 96–239]

To restore fair and effective enforcement of the antitrust laws.

IN THE SENATE OF THE UNITED STATES

JANUARY 31 (legislative day, JANUARY 15), 1979

Mr. KENNEDY (for himself, Mr. METZENBAUM, Mr. DANFORTH, Mr. MORGAN, Mr. BAYH, Mr. CULVER, Mr. DOMENICI, Mr. DURKIN, Mr. EXON, Mr. GRAVEL, Mr. HART, Mr. LEAHY, Mr. LEVIN, Mr. MATSUNAGA, Mr. MOYNIHAN, Mr. NELSON, Mr. PELL, Mr. PROXMIRE, Mr. RIBICOFF, Mr. RIEGLE, Mr. STAFFORD, Mr. TSONGAS, Mr. WILLIAMS, and Mr. DANFORTH) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JULY 10 (legislative day, JUNE 21), 1979

Reported by Mr. KENNEDY, with an amendment

[Omit the part struck through and insert the part printed in italic]

A BILL

To restore fair and effective enforcement of the antitrust laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Enforcement Act of 1979".

SEC. 2. The Clayton Act is amended by inserting immediately after section 4H, the following new section:

"SEC. 4I. (a) Any purchaser or seller in the chain of manufacture, production, or distribution of goods or services shall, upon proof of payment or receipt of all or any part of any overcharge or underpayment for such goods or services, be deemed to be injured within the meaning of section 4, 4A, or 4C of this Act whether or not such purchaser or seller dealt directly with the defendant.

"(b) In any action under section 4 or 4A of this Act, any defendant, as a partial or complete defense against a damage claim, may, in the discretion of the court, in order to avoid duplicative liability, be entitled to prove that a purchaser or seller in the chain of manufacture, production, or distribution who paid any overcharge or received any underpayment, passed on all or any part of such overcharge or underpayment to another purchaser or seller in such chain.

"(c)(1) In any action brought under section 4 or 4C of this Act by or on behalf of a class of purchasers or sellers, the fact of injury and the amount of damages sustained by or passed on to or by the members of the class may be proven on a classwide basis, without requiring proof of such matters by each individual member of the class. The percentage of total damages attributable to a member of such class shall be

~~the same as the ratio of such member's purchases or sales to the purchases or sales of the class as a whole.~~

~~"(2) Except as provided in sections 4D and 4E of this Act, a defendant shall not be required to pay damages except to persons on whose behalf a valid claim is presented to the court.".~~

~~SEC. 3. Section 1407(h) of title 28, United States Code, is amended by striking out "Section 4C of".~~

~~SEC. 4. The amendments made by this Act shall apply to any action under section 4, 4A, or 4C of the Clayton Act which is pending on the date of enactment of this Act or which is commenced on or after such date of enactment.~~

SEC. 2. The Clayton Act is amended by inserting immediately after section 4H the following new section:

"SEC. 4I. (1) In any action under sections 4, 4A, or 4C of this 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 sections 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 sections 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.".

SEC. 3. Section 4 of the Clayton Act is amended by adding at the end of that section the following new language: "Provided, however, that suits under this section brought by foreign sovereign governments, departments, or agencies thereof, shall be limited to actual damages; and provided further, that no foreign sovereign may maintain an action in any court of the United States under the authority of this section unless its laws would have forbidden the type or category of conduct on which the action is based if that conduct had occurred within its territory at the time it occurred in the United States, and unless its laws allow the Government of the United States to recover damages caused by such conduct through the judicial or administrative processes of the foreign sovereign.".

SEC. 4. Section 1407(h) of title 28, United States Code, is amended by striking out "Section 4C of".

SEC. 5. Section 4 of the Clayton Act is amended by adding the following additional sentence: "The court may, in its discretion, award a reasonable attorney's fee to a prevail-

ing defendant upon a finding that the plaintiff has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.".

SEC. 6. (a) The amendments made by this Act, except as provided in section 6(b), shall apply to any action under section 4, 4A, or 4C of the Clayton Act which is pending on the date of enactment of this Act or which is commenced on or after the date of enactment of this Act. Provided, however, That when any such case is pending on the date of enactment of this Act, the Federal courts shall take all steps necessary to avoid duplicative liability for the same injury, including preclusion of subsequently filed actions not consolidated with previously filed actions seeking damages for the same injury. Provided further, That where such actions are consolidated, the court shall apportion damages according to actual injury.

(b) Section 4I(2) of the Clayton Act, as added by section 2 of this Act, shall apply to any action under section 4 or 4A of the Clayton Act which is commenced on or after the date of enactment of this Act.

ADDITIONAL SUBMISSION OF C. BOYDEN GRAY

Survey of State-Initiated Antitrust Actions

The most vocal supporters of legislation to overrule Illinois Brick have been the Attorneys General of a number of states, claiming that substantial pending litigation will be jeopardized unless Illinois Brick is abrogated retroactively. As discussed in Attachment B, the states appear to have a ready means of avoiding Illinois Brick in the future by obtaining assignments from their suppliers, and several states have obtained assignments to preserve their position in pending litigation.

To put into better focus the number of pending cases which might be subject to an Illinois Brick ruling, we undertook a survey of state-initiated antitrust actions. The cases included in the survey were based on a partial listing of state antitrust actions pending in federal district court compiled in late 1977 by the National Association of Attorneys General, supplemented by our own review of Current Filings Alert (published monthly by Want Publishing Company), covering the period from November 1975 through November 1978, and the case index of the Judicial Panel on Multidistrict Litigation. The survey thus encompassed a reasonably complete listing of all state-initiated antitrust

actions pending in federal district court as of December 1978.

A summary of the results of the survey are attached.*/ It should be noted that the information reported in the summary was obtained informally over the past six weeks. The summary represents an effort to describe and distill the issues in often complex pending and past litigation. While we have attempted to be as accurate as possible, the summary should not be viewed as an expression of an opinion on the factual or legal issues involved in the cases by Wilmer, Cutler & Pickering, the Business Roundtable, or counsel representing the parties to the litigation.

The survey results reveal several significant points. First, it is apparent that a clear majority of the pending state-initiated cases are unaffected by Illinois Brick because the states and subdivisions involved claim to be direct purchasers.

Second, only fourteen cases appear to involve currently pending claims of substantial indirect purchases

---

*/ To simplify the summary, we have listed only the state plaintiffs rather than all the separate governmental entities and political subdivisions which are frequently separate plaintiffs in a particular case. The column describing the plaintiffs' position in the chain of purchase covers the position of all governmental plaintiffs.

by governmental entities,*/ and the extent to which these cases may be subjected to Illinois Brick is questionable in view of the possibility of plaintiffs' obtaining assignments,**/ working out a settlement,***/ or coming within an exception to Illinois Brick.****/ Moreover, even if recovery is not available under federal antitrust law, the states may still have an effective damage remedy under state law.*****/ While it is not possible to calculate the total damages alleged for indirect purchases in these pending cases (in many instances damage allegations are the subject of ongoing discovery) it is possible to say that the potential damages recoverable under the proposed legislation is but a mere fraction of the $1 billion in damages mentioned by

---

*/ Alabama v. Chevron, USA; In re: Anthracite Coal; In re: Cement and Concrete; In re: Chicken Broiler (currently pending settlement); In re: Florida Rebar Steel; In re: Fertilizer; Oregon and Washington v. Bethlehem Steel; In re: Fine Paper; In re: Petroleum Products; In re: Plywood; In re: Sugar; In re: Eastern Sugar; Texas v. United States Steel Corp.; In re: Wiring Devices.

**/ See In re: Eastern Sugar; In re: Wiring Devices; Louisiana v. Armco Steel.

***/ See, e.g., In re: Chicken Broiler; Ohio v. Ric-Con Concrete.

****/ See, e.g., In re: Cement and Concrete; In re: Petroleum Products.

*****/ Alabama's antitrust statute, for example, specifically permits recovery for "direct" and "indirect" damages. Ala. Code Title 6, Chapter 5, Article 5 § 6-5-60. While other state statutes may not be so clear, they may well be interpreted by Federal and state courts as providing broader recovery than the Clayton Act. See Sugar Antitrust Litigation, 588 F. 2d 1270, 1273 and n. 6 (9th Cir. 1978).

Senator Kennedy at the opening day of the hearings and are inconsequential when compared to the pending direct purchaser claims which will be jeopardized by the bills. For example, in the Texas Rebar case, the state has alleged $30 million in damages after trebling. The state, however, concedes that under Texas law, it could recover $15 million in damages. If the proposed legislation passes, the amount of damages recovered by the state would be reduced by the recoveries of direct purchasers, and probably would be no more than that currently recoverable under state law. The net effect of the proposed legislation in that case would thus be to provide no more recovery than otherwise available, while disrupting numerous pending direct purchaser suits.

Third, the survey shows that Illinois Brick has not had the devastating impact claimed by state attorneys general. Our survey shows that dismissal motions under Illinois Brick have been successfully brought in only five cases to date,*/ and motions are pending in two other cases.**/ We do not know at this time if states have attempted to reinstitute these actions in state court.

---

*/ Alabama v. Armco Steel (state did not appeal dismissal); Alabama v. Chevron, USA; In re: Plywood; In re: Sugar; Texas v. United States Steel.

**/ In re: Anthracite Coal; Oregon and Washington v. Bethlehem Steel.

Clearly the survey does not indicate there has been a stampede by defendants and courts to dismiss all pending indirect actions on Illinois Brick grounds. Rather several cases, including some indirect purchaser cases and some parens patriae purchaser cases, were settled after Illinois Brick, and settlement is pending in other cases. Moreover, the courts have refused to apply Illinois Brick automatically without careful consideration of the particular case at bar. See, e.g., Oregon and Washington v. Bethlehem Steel, holding that prayers for injunctive relief by indirect purchasers are not prohibited by Illinois Brick, and Petroleum Products Antitrust Litigation indicating that Illinois Brick would not be applicable if the plaintiffs can show that they purchased petroleum from a seller "controlled" by the defendants. In all, the survey results demonstrate a healthy tendency by the parties and the courts to attempt to find a workable solution to potential Illinois Brick problems.

SURVEY OF STATE-INITIATED ANTITRUST ACTIONS

Case	State(s) (including subsidiaries where applicable)	Position in Chain of Sales	Status of Litigation
Alabama v. Armco Steel Corp., No. 76-G-563S, N.D. Ala.	Alabama	Direct and indirect.	Closed. Indirect claims were dismissed on basis of Illinois Brick State accepted small settlement for not appealing dismissal. Direct claims settled for $15,000.
Alabama v. Bluebird Bus Body Co., Inc., No. 75-23-N, M.D. Ala.	Alabama	Parens patriae count was dismissed before passage of Hart-Scott-Rodino Antitrust Improvements Act. Mainly indirect.	Pending.
Alabama v. Chevron, USA, Inc., No. 78-51-N, M.D. Ala.	Alabama	Mainly indirect.	Pending. Partial summary judgment for indirect claims granted on basis of Illinois Brick and Hanover Shoe. State has not appealed. State's claim under state law dismissed on pendant jurisdiction grounds.
In Re: Ampicillin Antitrust Litigation, MDL No. 50, D. D.C.	AL, AZ, AR, CA, CO, CT, FL, GA, HI, IL, IN, IA, KS, KY, LA, MA, MI, MN, MS, MO, NV, NM, NY, ND, OH, OR, PA, PR, RI, SD, TN, TX, VT, VA, WV, WI	Direct and for reimbursement of welfare purchases. Parens patriae claim (indirect purchases).	Pending. CT and MN dismissed during 1974 because of failure to respond to discovery demands. In October 1978 plaintiffs entered into a proposed settlement with all but one defendant.
In Re: Anthracite Coal Antitrust Litigation, MDL No. 293, M.D. Pa	New York, Pennsylvania	Direct and indirect. Parens patriae was dismissed before passage of Hart-Scott-Rodino Antitrust Improvements Act.	Pending. Two Illinois Brick motions pending.

ATTACHMENT A

SURVEY OF STATE-INITIATED ANTITRUST ACTIONS

Case	State(s) (including subsidiaries where applicable)	Position in Chain of Sales	Status of Litigation
Arizona v. Borden Inc., No. 74-594 PHX CAM, D. Ariz.	Arizona	Direct.	Pending. Settled with all but one defendant
Arizona v. Holsum Bakery, Inc., No. 74-330 PHX CAM, D. Ariz.	Arizona		Closed. Resolved prior to Illinois Brick.
Arkansas v. Borden, Inc., LRC-77-126, E.D. Ark.	Arkansas	Direct.	Pending.
In Re: Armored Car Antitrust Litigation, MDL No. 318, N.D. Ca.	AZ, CA, CT, MA, MO, OH, (MD has opted out)	Probably direct. Several states also filed parens patriae claims.	Pending. Court is considering proposed settlement also encompassing parens claims. MD has filed its own suit.
In Re: Auto Fleet Sales Antitrust Litigation, MDL 65, N.D. Ill.	AL, AZ, CA, CO, CT, FL IL, IA, KS, KY, LA, MD MA, MI, MN, MS, NV, NH NJ, NY, NC, ND, OH, OK OR, RI, SD, TN, TX, VA VT, WA, WV, WI	Indirect.	Closed. Judgment for defendants on the merits.
Francis B. Burch v. Goodyear Tire Co., B-75-132, D. Md	Maryland	Action was brought under state law and Sherman Act. (Not a damage action.)	Closed.
California v. Frito-Lay, No. 71-485-R, C.D. Ca.	California		Closed. Settled prior to Illinois Brick.

SURVEY OF STATE-INITIATED ANTITRUST ACTIONS

Case	State(s) (including subsidiaries where applicable)	Position in Chain of Sales	Status of Litigation
In Re: Cast Iron Pipe Antitrust Litigation, MDL No. 81, N.D. Ala.			Closed. Dismissed prior to Illinois Brick.
In Re: Cement and Concrete Antitrust Litigation, MDL No. 296, D. Ariz.	AZ, CA, CO, KS, MO, MT, NE, NM, OR, UT	Direct and indirect (but many states have cost-plus contracts).	Pending. Motions for partial summary judgment denied. All states also allege state law claims.
In Re: Chicken "Broiler" Antitrust Litigation, MDL No. 237, N.D. Ga.	AL, CO, CT, FL, IL, IA, KY, LA, MA, MI, MO, NJ, NY, OH, OK, OR, PA, RI, VA	States claims are both direct and indirect, mainly indirect	Pending. Settlement of all claims pending before court.
Colorado v. Bang & Olufson, No. 77-W-528, D. Colo.	Colorado	Parens patriae (indirect purchasers).	Closed. Settled after Illinois Brick 1/26/79.
Colorado v. Elder-Quinn & McGill, No. 77-K-779, D. Colo.	Colorado	Direct.	Closed. Settled after Illinois Brick 8/22/77.
Colorado v. Valley Petroleum Co., No. 77-W-352, D. Colo.	Colorado	Parens patriae (direct purchasers).	Closed. Settled after Illinois Brick 9/77.
In Re: Florida Rebar Steel Cases, No. 75-43-Civ-T-H, M.D. Fla.	Florida	Almost entirely indirect.	Pending.
In Re: Fertilizer Antitrust Litigation, M.F.No.75-1	AK, ID, MT, OR, WA	Mostly indirect	Pending. Court has ordered discovery to determine whether any sales fall into Illinois Brick exceptions No claims dismissed to date on Illinois Brick grounds.

Case	State(s) (including subsidiaries where applicable)	Position in Chain of Sales	Status of Litigation
Multidistrict Private Civil Treble Damages Antitrust Litigation involving Gypsum Wallboard, MDL No. 14 N.D. Ga.	AZ, CA, CO, CT, ID, IL, IN, KS, MD, NV, NJ, NM, ND, OR, SD, TN, TX, WA, WI	Indirect.	Closed. Settled prior to Illinois Brick.
Illinois v. Brighton Building & Maintenance Co., No. 77-C-45-41, N.D. Ill.	Illinois	Direct.(bid rigging on state road construction projects).	Pending. (Judge has ruled that state may not recover damages for that portion of highway construction costs which were actually paid for out of federal highway funds.) State has also alleged violation of state antitrust laws.
Illinois v. Calhoun Contracting Corp., No. 77-3163, S.D. Ill.	Illinois	Direct (bid rigging on state construction projects).	Pending.
Illinois v. Champaign Asphalt Co., S-Civ-73-0216, S.D. Ill.	Illinois	Direct (bid rigging on state construction projects).	Pending.
Illinois v. Howell Asphalt, No. 77-3003, S.D. Ill.	Illinois	Direct (bid rigging on state construction projects).	Pending.
Illinois v. Huckaba & Sons, S-Civ-75-0096, S.D. Ill.	Illinois	Direct (bid rigging on state construction projects).	Pending.
Illinois v. Sangamo Construction Co., No. 77-3004, S.D. Ill.	Illinois	Direct/indirect purchaser problem has not been resolved.	Pending. Illinois has added 2 counts under its antitrust law.

42-005 O - 79 - 23

SURVEY OF STATE-INITIATED ANTITRUST ACTIONS

Case	State(s) (including subsidiaries where applicable)	Position in Chain of Sales	Status of Litigation
Illinois v. W.J. Sheppard, S-Civ-76-0018, S.D. Ill.	Illinois	Direct (bid rigging state construction projects).	Pending.
Illinois v. E.T. Simonds Construction Co., S-Civ-75-0166, S.D. Ill.	Illinois	Direct (bid rigging on state construction projects).	Pending.
Illinois v. Standard Paving Co., S-Civ-76-0017, S.D. Ill.	Illinois	Direct. (There is a question whether state or Federal Government is purchaser.)	Pending.
Illinois v. Ralph Vancil, S-Civ-75-0053, S.D. Ill.	Illinois	Direct (bid rigging on state construction project).	Closed. Settled March, 1979.
Louisiana v. Armco Steel, No. 78-798, E.D. La.	Louisiana	State claims were indirect, but Illinois Brick caused state to obtain assignments from direct purchasers.	Pending.
Maryland v. Jack Foley Realty Inc., et al., B-77-617, D. Md.	Maryland	Parens patriae (direct purchasers).	Settlement pending.
Massachusetts v. Medical Oxygen Services, Inc., No. 77-1866, D. Mass.	Massachusetts	Direct and for reimbursement of state medicaid funds.	Pending.

SURVEY OF STATE-INITIATED ANTITRUST ACTIONS

Case	State(s) (including subsidiaries where applicable)	Position in Chain of Sales	Status of Litigation
In Re: Master Key Antitrust Litigation, MDL No. 45, D. Ct.	AZ, CA, CT, FL, IL, IN, KS, NJ, NY, OH, PA, WV	Indirect.	Settled for approximately $20 million before Illinois Brick.
Minnesota v. C. Reiss Coal Co., et al., No. 5-72-110, D. Minn.	Minnesota	Almost entirely direct.	Pending.
Minnesota v. Koch Refining Co., No. 4-78-Civ-135, D. Minn.	Minnesota	Direct and parens patriae (indirect purchasers).	Pending. (Not suing for damages.)
New Jersey v. Abbott Laboratories, No. 1769-73, D. N.J.	New Jersey	Official corruption case not involving Illinois Brick issues.	Pending.
Ohio v. Ric-Con Concrete, C-8985, S.D. Ohio	Ohio	Mainly indirect.	Settled after Illinois Brick.
Oklahoma, ex rel. Oklahoma Capital Improvement Authority v. Walter Noshert & Sons, et al., 74-391-C, W.D. Okla.	Oklahoma	Official corruption case not involving Illinois Brick issues.	Pending.
Oklahoma, ex rel. State Board of Public Affairs v. United Builders, Inc., et al., 74-392-C, W.D. Okla.	Oklahoma	Official corruption case not involving Illinois Brick issues.	Pending.

SURVEY OF STATE-INITIATED ANTITRUST ACTIONS

Case	State(s) (including subsidiaries where applicable)	Position in Chain of Sales	Status of Litigation
Oklahoma, ex rel. Oklahoma Capital Improvement Authority v. E.A. Cowen Construction Co., 74-390-C, W.D. Okla.	Oklahoma	Official corruption case not involving Illinois Brick issues.	Pending.
Oregon v. Bethlehem Steel Corp. et al., and Washington v. Bethlehem Steel Corp.et al, consolidated in No.C-75-767-M	Oregon ; Washington	Substantially indirect, minimally direct.	Partial summary judgment under Illinois Brick pending since 9-77. Court has determined injunctive relief to be unaffected by Illinois Brick. The states are also seeking recourse under state antitrust laws in Federal Court. Washington has also filed a separate state court action.
Oregon v. Champion International Corp., CV 77-309, D. Ore.	Oregon	Bid rigging on timbering on federal and state lands.	Claims pending regarding state lands. Court ruled that plaintiffs did not have standing to bring antitrust action for timbering on federal lands because their claims were based on a share of revenues derived from timbering on federal lands. Court specifically said that Illinois Brick was not a basis for the dismissal of the federal derivative claims.
In Re: Fine Paper Antitrust Litigation, MDL No. 323, E.D. Pa.	AK, AZ, AR, CA, CO, CT, IL, IA, KS, LA, MA, MN, MO, MT, NH, NM, OR, PA, SD, UT, VT, WA, WI	Mainly indirect	Pending.

SURVEY OF STATE-INITIATED ANTITRUST ACTIONS

Case	State(s) (including subsidiaries where applicable)	Position in Chain of Sales	Status of Litigation
In Re: Petroleum Products Antitrust Ligitation, MDL No. 150, C.D. Cal.	AZ, CA, CT, FL, KS, OR, WA	Direct and indirect. Parens patriae (direct and indirect purchasers).	Pending. Kansas claims dismissed by stipulation 2/79. In early 1978, defendants moved to dismiss indirect purchase claims based on Illinois Brick. Court denied motion and ordered discovery on whether defendants so "controlled" plaintiffs' sellers that Illinois Brick would be inapplicable. "Control" issues have not been resolved.
In Re: Plywood Antitrust Litigation, MDL No. 159 E.D. La.	CT, OR, VA	Indirect,	State indirect claims dismissed based on Illinois Brick. Private direct claims pending.
In Re: Potash Industry Antitrust Litigation, MDL No. 272, N.D. Ill.	CT, IL, MN	Direct, indirect and parens patriae.	Closed. Settled as to direct purchasers for approximately $3 million. Indirect purchaser cases dismissed during 1977. Dismissal of indirect claims with prejudice was related to settlements with direct purchasers. Illinois state law claim included in settlement.
Rhode Island v. Medical Oxygen Services, Inc., No. 77-2427-F, D. Mass.	Rhode Island	Direct and for reinbursement of state medicaid funds.	Pending.

SURVEY OF STATE-INITIATED ANTITRUST ACTIONS

Case	State(s) (including subsidiaries where applicable)	Position in Chain of Sales	Status of Litigation
In Re: Sugar Industry Antitrust Litigation, MDL No. 201, N.D. Calif.	AZ, CA, CO, IL, IN, KS, MN, MO, MT, NE, OR, WA, WI	Direct and indirect: CA, CO, WA, WI. Indirect only: IL, IN, KS, MO, MT, NE, MN, AZ, OR Parens patriae: CA (indirect purchasers). Based on common law and California Cartwright Act.	Nevada has stipulated to dismissal. All other pending. Summary judgment (Class Decertification Motions based on Illinois Brick granted in March 1979. States may undertake discovery to show that case falls into an Illinois Brick exception. California and Minnesota also have pendant state law claims.
In Re; Eastern Sugar Antitrust Litigation, MDL No. 201A, E.D. Pa.	CT, GA, LA, MA, NY, SC, VA, and City of Philadelphia	Direct and indirect purchaser claims for CT, MA, NY, SC, VA and Philadelphia. Indirect claims for GA and LA. CT, SC and Philadelphia have obtained assignments from direct purchasers.	Pending. Georgia and Louisiana moved to dismiss their respective complaints without prejudice. The court ordered the dismissal be with prejudice against Louisiana for failure to respond to discovery and against Georgia on the ground that the state admitted that it had made no direct purchases of sugar. Denial of class certification Massachusetts and N.Y. on Rule 23 grounds because of insufficient numerosity.
Texas v. U.S. Steel, No. 74-H-533, S.D. Tex.	Texas	Primarily indirect.	Pending. Illinois Brick motions to dismiss were granted, but no final order has been issued.

SURVEY OF STATE-INITIATED ANTITRUST ACTIONS

Case	State(s) (including subsidiaries where applicable)	Position in Chain of Sales	Status of Litigation
In Re: Wiring Devices, MDL, No. 331, E.D.N.Y.	CT, IL, LA, MA, MN, NJ, RI, VT	Indirect. Parens patriae (indirect purchasers). Louisiana has obtained assignments from direct purchasers.	Pending. IL, NJ, MN also have actions in state court. MN suit has been removed to federal court and conditionally transferred to MDL litigation.

ADDITIONAL SUBMISSION OF C. BEVERLY MOORE, JR.

Attorney Fee Awards

In Antitrust Class Actions

The remuneration of plaintiff attorneys has been a central and enduring subject of controversy over the class action device since the 1966 amendments to Rule 23. On the one hand, critics charge that class actions, however noble in theory, end up benefiting primarily the attorneys. Awards of attorney fees and costs, it is claimed, consume exorbitant proportions of class recoveries. It is also suggested that the lure of lucrative fees has produced a flock of conniving plaintiff attorneys whose motivation in filing suits relates more to a potential "pot of gold" than to the merits of the allegations or the interests of absent class members.

On the other hand, the proponents of the class action device, including plaintiff attorneys, counter that awards of fees and costs actually consume quite modest proportions of class recoveries. They also contend that fee awards in class actions, far from even remotely resembling a "pot of gold", frequently do not, in light of the very substantial risks involved and the deferred nature of compensation, provide remuneration sufficient to sustain the economic viability of plaintiff class action practice. It is suggested that defense attorneys make considerably more money by losing cases than plaintiff attorneys earn by winning cases.

Most of these issues can be resolved, or at least evaluated, only by collecting the empirical evidence as to what fees have actually been awarded, what percentages of class recoveries those fees consume, into what hourly rates the awards translate, what premium or "multiple" over noncontingent or "lodestar" hourly rates these fee awards represent, etc. Apart from helping to resolve philosophical controversies over the utility of the class action device, the collection and publication of such empirical data could be of substantial value to courts, plaintiff attorneys, and objectors to fee requests as a body of judicial precedent, much of it unreported, concerning fee awards in class action cases having similar or dissimilar characteristics.

With these objectives in mind, *Class Action Reports* has embarked upon a long term project to collect empirical data on class action attorney fee awards. This analysis of fees awarded in antitrust class actions is the first installment of a series which, in subsequent issues of this periodical, will examine fee awards in each of the other substantive areas that we cover—i.e., Securities, Employment Discrimination, Labor/Wage/Pension, Consumer Credit, Consumer Fraud/Warranty/Contract, Utilities, Mass Accidents/Diseases, Environmental Pollution, Social Welfare/Entitlements, Civil-Political Rights/Liberties, and Inmate Rights. At the outset, we will limit our objective to publishing our empirical findings for each of these categories of class actions. Later, we will compare the fee outcomes for the various categories with each other and probe the judicially applied criteria which tend to influence the relative generosity or niggardliness of the fees awarded.

Of course, from the very outset we want to keep in mind some of the contradictions that may later emerge. One important issue, for example, is whether there is a "double standard" by which compensation is far more generous for (1) profit-oriented private attorneys prosecuting "commercial" class actions in the antitrust, securities, and consumer areas, where the fee can often be paid out of a substantial class damage recovery, than for (2) "public interest" attorneys, including foundation-financed or legal services attorneys, prosecuting employment discrimination, welfare, civil rights, or inmate class actions, where the benefit conferred upon the class is often limited to prospective relief, the value of which is rarely quantified or quantifiable, though it may frequently equal or surpass that of retroactive damage recoveries in "commercial" class actions.

Particularly for those interested in this dimension of the subject, it is significant that we begin this series with fee awards in antitrust class actions. It is certainly a supposition supported by our accumulated knowledge that a comprehensive empirical study of fee awards would find the antitrust category at the very top of the list in terms of average hourly rates and contingent multiples awarded.

Several well known characteristics of antitrust class actions support this hypothesis. First, with the possible exception of securities and certain consumer credit class actions, antitrust class actions rank as the most "commercial" in the degree to which it is generally recognized that plaintiff attorneys are in it mainly for the money, just as are their usually very well paid defense counsel adversaries.

Another reason why counsel on both sides in antitrust class actions may command the highest fees relates to the mystique of antitrust as an area so vital to our free enterprise ideology yet so seemingly complex and esoteric that only the "cream" of legal minds can litigate such cases competently. We would suspect that this mystique of antitrust complexity would generally sustain higher than average fees even though we may find empirically an equally complex employment discrimination class action, for example, in which

plaintiffs' counsel was compensated at a small fraction of his antitrust counterpart's rate.

A more obvious reason why antitrust class actions attract such legal talent is that they tend to involve the potential recovery from defendants of more money than in any other type of class action. We would expect courts to be more liberal in awarding fees which are at least nominally deducted from funds "belonging" to class member claimants rather than to defendants.

The Sample. We have collected data on 36 post-1966 antitrust class actions. *Antibiotics* and *Plumbing Fixtures* are counted as two cases even though nine separate subclass settlements were involved. Given the substantial number of antitrust cases that have been brought as class actions during the past dozen years, it may seem odd that our sample size is as small as 36. We are confident, however, that this sample reasonably approaches the maximum sample possible. We are aware of only five other antitrust fee awards about which we have been unable to obtain any information. We are also aware of six other cases in which settlements have been reached but fees have not yet been awarded. We will add these cases to our sample if and when information concerning them becomes available, but their present non-inclusion does not significantly affect our findings. Because we naturally strive for the most comprehensive sample possible, we would appreciate any additional information that our readers can supply us.

Organization and Methodology. The cases have been grouped according to evolving stages of judicial fee award criteria. In Part I are cases for which data on hours expended were unavailable or incomplete. Most of these cases (Part IA) are from the pre-*Lindy* era in which fees were computed as a percentage of the class recovery and hourly data were usually not considered or even submitted to the court. A few of these cases (Pt. IB) fall within the post-*Lindy* era but hourly data were unavailable or are still being sought. In the early 1970's courts began to consider the number of hours expended as a factor in determining what percentage fee award would be appropriate. These cases are collected in Part II.

From approximately 1974 through the present, most courts have not only considered the number of hours expended but, following the *Lindy* approach, have awarded fees as a multiple of the noncontingent or "lodestar" value of those hours rather than as a percentage of the class recovery. The cases for which this lodestar/multiplier data have been collected are found in Part III.

In all of the cases in Parts I, II, and III fees were awarded out of a class damage fund. Part IV consists of cases in which the class obtained only prospective relief and fees were assessed directly against the defendants. As in Parts I-III, these cases are grouped into pre-*Lindy* (Pt. IVA), post-*Lindy* hourly data unavailable (Pt. IVB), and post-*Lindy* lodestar data available (Pt. IVC) subcategories.

The data collected for each case are set forth in tabular form as follows. In column 1 are the name of each case, the fee decision citations, and the names of the judges awarding the fees. Column 2 lists the total amount recovered in each case, including the amount awarded as fees and costs, and, where noted, interest accrued on the settlement fund. It is also noted whether the form of recovery is other than cash, such as, for example, credits on future purchases or the quantified benefits of changes in business practices. Prospective injunctive relief obtained in addition to damages is also described.

Column 3 lists the total fees awarded and, if different, the amount requested by counsel. Column 4 lists the costs and disbursements allowed. Where possible, these amounts are broken down by type, such as fees of special masters, accountants, or other experts; notice costs; and compensation of paralegals and law students. The amounts shown in Column 3 are limited to compensation awarded directly to the attorneys representing the class. Thus, even though courts frequently include compensation of paralegals and law students as part of an award of "fees", we have treated such compensation as an element of costs in Column 4. Column 5 shows the percentage of the class recovery consumed by the sum of fees and costs.

Column 6 lists the number of hours for which fees were awarded. Any hours disallowed by the court are also noted. The fee awarded is then divided by the hours recognized to produce the average hourly rate that appears in Column 7. Where hours have been disallowed, an average hourly rate is sometimes noted parenthetically which includes the disallowed hours as well. Column 8 lists the lodestar or noncontingent hourly rate recognized by the court, which when divided into the actual rate awarded (Col. 7) produces the "multiple" that appears in Column 9.

It should be emphasized that the lodestar and actual hourly rates are "average" or "mixed rates" for all attorneys participating on the plaintiffs' side, senior partners as well as junior associates, lead as well tag-along counsel. Where possible, the range of lodestar hourly rates recognized, from lowest to highest, is indicated parenthetically in Column 8. Similarly, where some attorneys were awarded higher multiples than others, or where higher multiples were awarded for hours expended on some phases of the litigation than on others, the range of multiples awarded is indicated parenthetically in Column 9.

In evaluating the adequacy or inadequacy of the fees awarded in these cases, it is desirable to take into account the deferred nature of compensation. How long did the attorneys have to wait after actually performing their services before being paid? How much less was payment worth to the attorneys when received after accounting for

intervening inflation? To answer this question, we assumed that the "midpoint" of the hours expended on each case occurred at the 40% point of the total time that the case was pending (Col. 13). We then applied the Consumer Price Index for Urban Wage Earners and Clerical Workers, U.S. City Average, All Items, to deflate the average hourly rate awarded (Col. 7) to its value at the time of the award (Col. 14).

The 40% midpoint approximates that recognized in *New York v. Darling-Delaware, Inc.* (Pt. III). It is probably a conservative midpoint in that, for purposes of multiplier analysis, hours expended earlier in a case are generally at higher risk and many hours expended later in the case may be devoted to post-settlement administrative work which involves no risk.

Because many of these fees were awarded several years ago when prices—and presumably attorney fees—were lower than today, we have employed a similar analysis to inflate the average hourly rate awarded into September 1978 dollars. To the extent that fee awards keep pace with the general level of inflation, the data presented in Column 15 represent the hourly rates that would have been awarded in these cases in September 1978.

Another hypothesis to be tested is whether fee awards tend to be higher in cases where private class counsel had no benefit of a parallel government or private nonclass action. Where the symbol "G" appears in Column 10 there was a parallel government suit. The symbol "P" refers to a parallel private nonclass action which significantly assisted the prosecution of the class action. The symbol "N" means that there was no significant government or private nonclass action.

One further issue to be explored, in light of the Supreme Court's *Illinois Brick* decision and legislation pending to overturn it, is whether there is any significant difference, in hourly rates awarded or in the percentage of the class recovery consumed by fees and costs, between cases in which indirect purchasers recovered and cases in which only direct purchasers recovered. Opponents of the *Illinois Brick* legislation contend that fees consume larger proportions of indirect purchaser class recoveries. The symbols "D" and "I" appearing in Column 11 refer, respectively, to classes of direct and indirect purchasers or sellers. The symbol "D(u)" refers to classes of direct purchasers who were also "ultimate" or "final" consumers of the product in suit—i.e., there could not have been an indirect purchaser class. Column 11 is left blank for certain distribution restraint and monopolization cases which are irrelevant to the direct-indirect purchaser controversy.

At the end of each major case grouping (Pts. I-IV) and their various subcategories, totals and averages are presented. Two types of averages are given. The first is weighted by the number of hours for which fees were awarded in each case within the group. For Part I cases for which no hourly data were available, the amount of fees awarded in each case is used as the weighting factor. The second type of average is unweighted. Comparisons of the weighted and unweighted averages may reveal the latter measure's distortion in treating all cases equally when large recovery cases may involve substantial economies of scale.

(1) Name of Case	(2) Recovery	(3) Fee Awarded	(4) Costs	(5) Fee & Costs As % of Recovery [(3)+(4)/(2)]	(6) Hours Awarded
I. Cases for Which Data on Hours Expended are Unavailable or Incomplete					
A. Pre-*Lindy* Cases					
In re Plumbing Fixtures Antitrust Ligitation I. WHOLESALER CLASS– *Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp.*, No. 41, 773 (E.D. Pa. Dec. 7, 1970) (Harvey, J)	$1,000,000 (plus interest)	$150,000	N/A	15	N/A
II. CONTRACTOR CLASS– *Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp.*, 322 F. Supp. 834 (E.D. Pa. 1971) (Harvey, J), *aff'd as modified sub nom. Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971) (Seitz, J, w/Biggs & Rosenn, JJ)	$2,000,000 (plus interest)	$477,956 ($504,956 requested)	$120,175	29.9	N/A
III. GOVERNMENT ENTITY CLASS– *Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp.*, No. 41,774 (May & Nov. 19, 1971) (Harvey, J)	$3,000,000 (plus interest)	$750,000	N/A	25	N/A
IV. BUILDER-OWNER CLASS– *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (Seitz, J, w/Weis & Scalera, JJ), *on remand*, 382 F. Supp. 999 (E.D. Pa. 1974) (Harvey, J), *vacated & remanded*, 540 F.2d 102 (3d Cir. 1976) (en banc) (Aldisert, J, w/Weis, Rosenn & Hunter, JJ, Gibbons & Seitz, JJ, dissenting in part)	$29,300,000 (plus interest)	$1,059,435 ($3,500,000 requested)	$227,669 (including $4,550 paralegal)	4.4	6091 (497 hrs. spent negotiating contingent fee agreements w/individual clients, processing their claims, & preparing class fee petition excluded, including 1007 of 1235 paralegal hrs. & atty. hrs. devoted to class fee petition valued at $40,654)
Total Parts I-IV	$35,300,000 (plus interest)	$2,437,391 ($4,904,956 requested)	$347,845	7.9	N/A
Philadelphia Elec. Co. v. Anaconda American Brass Co., 47 F.R.D. 557 (E.D. Pa. 1969) (Fullam, J)	$22,175,000 (plus interest)	$5,443,750	$50,000	24.8 (counsel had private 25% contingent fee agreements w/93% of class members)	N/A
Philadelpha v. International Pipe & Ceramics Corp., No. 43,008 (E.D. Pa. June 30, 1971) (Davis, J)	$5,000,000	$1,250,000	N/A	25	N/A

(7) Average Hourly Rate [(3)/(6)]	(8) Lodestar Hourly Rate	(9) Multiple [(7)/(8)]	(10) Gov't Suit	(11) Direct/ Indirect Plaintiffs	(12) Year	(13) Years Case Pending	(14) Deflated Value of Hr. Rate When Rec'd [(7)(13)(.6)]	(15) Present Value of Hr. Rate Awarded [(7) in 1978 $]
N/A	N/A	N/A	G	D	1970	2.5	92%	171.2%
N/A	N/A	N/A	G	I	1971	3.5	90%	164.1%
N/A	N/A	N/A	G	I	1971	3.5	90%	164.1%
$173.95	$87.80 ($35–$125)	1.98 (2.0 for all hrs. except 100 post-settlement hrs.)	G	I	1976	8	$124.57	$203.13
N/A	N/A	N/A	G				90.2% (excluding Pt. IV)	164.8% (excluding Pt. IV)
N/A	N/A	N/A	G	D & I	1969	2.5	91.1%	181.3%
N/A	N/A	N/A	G	D&I	1971	4	86.6%	164.1%

(1) Name of Case	(2) Recovery	(3) Fee Awarded	(4) Costs	(5) Fee & Costs As % of Recovery [(3)+(4)/(2)]	(6) Hours Awarded
In re Cast Iron Pipe Cases, No. 71-516 (N.D. Ala. 1973) (Pointer, J)	$1,700,000	$327,079	N/A	19.2	N/A
Nurserymen's Exchange, Inc. v. Yoder Bros., Inc., No. 70-1510 (N.D. Cal. Dec. 17, 1971) (Harris, J)	$112,438 ($87,438 plus attorney fees) plus unquantified prospective relief	$25,000	N/A	22.2	N/A
SUBTOTAL (excluding *Plumbing Fixtures* IV, which is included in Pt. III total; including portion of recovery from *School Dist. of Philadelphia*, Pt. II, for which hours (6) data are unavailable)	$35,804,229	$8,515,785	$205,485	24.4	N/A
Unweighted Average (*Plumbing Fixtures* I, II & III treated as separate cases)	$4,475,529	$1,064,473	$25,686	22.1	N/A
B. Post-*Lindy* Cases					
In re International House of Pancakes Franchise Litigation, 1974 Trade Cases ¶74,932 (W.D. Mo.) (Collinson, J), *rev'd & remanded in part sub nom. Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975) (Stephenson, J, w/Lay & Vogel, JJ)	$14,325,000 ($500,000 plus lease & franchise modifications valued at $12,500,000 plus $1,250,000 attorney fees & $75,000 costs)	$1,250,000 ($325,000 of which was remanded for reconsideration of factual basis; $1,425,000 requested)	$75,000	9.2	N/A
Forbes v. Greater Minneapolis Area Bd. of Realtors, No. 72-569 (D. Minn. Aug. 8, 1975) (Larson, J)	$7,385,000 (attorney fees plus $6,750,000 in negotiable script usable as credit against brokerage fees in future real estate sales) plus unquantified prospective injunctive (*cont'd*)	$635,000	N/A (included in attorney fees)	8.6	N/A

(7) Average Hourly Rate [(3)/(6)]	(8) Lodestar Hourly Rate	(9) Multiple [(7)/(8)]	(10) Gov't Suit	(11) Direct/ Indirect Plaintiffs	(12) Year	(13) Years Case Pending	(14) Deflated Value of Hr. Rate When Rec'd [(7)(13)(.6)]	(15) Present Value of Hr. Rate Awarded [(7) in 1978 $]
N/A	N/A	N/A	G	I	1973	2	93.5%	150%
N/A	N/A	N/A	N		1971	1.5	96.3%	164.1%
N/A	N/A	N/A				2.9	90.4%	174.6%
N/A	N/A	N/A				3.1	90.9%	164.7%
N/A	N/A	N/A	N		1975	4.5	73.7%	123.5%
N/A	N/A	N/A	N	D(u)	1975	3	84.4%	123.5%

(1) Name of Case	(2) Recovery	(3) Fee Awarded	(4) Costs	(5) Fee & Costs As % of Recovery [(3)+(4)/(2)]	(6) Hours Awarded
(*Forbes cont'd*)	relief against alleged price fixing practices				
Hemley v. American Honda Motor Co., No. 72-4127 (S.D.N.Y. Sept. 28, 1976) (Owen, J)	$6,600,000	$827,500 ($600,000 plus $5 for each of 45,500 validated claims)	$8,637	12.7	N/A
SUBTOTAL	$28,310,000	$2,712,500	$83,637	10.2	N/A
Unweighted Average	$ 9,436,667	$ 904,167	$27,879	10.2	N/A
TOTAL PARTS 1A & B	$64,114,229	$11,228,285 (17.5% of (2))	$289,122 (0.5% of (2))	18	N/A
II. Cases for Which Data on Lodestar Hourly Rates are Unavailable or Incomplete					
In re Antibiotics Antitrust Litigation I. *GLOBAL SETTLEMENT* 1A. CONSUMER/GOVERNMENT ENTITIES CLASSES– *West Virginia v. Chas. Pfizer & Co., Inc.*, 3 *Newburg on Class Actions* 1586-1656 (Report of Special Master); 1973 Trade Cases ¶ 74, 749, ¶ 74,827 (S.D.N.Y.); *Philadelphia v. Chas. Pfizer & Co., Inc.*, 345 F. Supp. 454 (S.D.N.Y. 1972) (Wyatt, J)	$82,927,226	$10,406,984 ($14,403,737 requested)	$782,138 (including $606,411 special masters)	13.4	71,700
1B. WHOLESALER/RETAILER CLASSES– *Alpine Pharmacy v. Chas. Pfizer & Co., Inc.*, 1973 Trade Cases ¶ 74,350 (S.D.N.Y.), *aff'd in part & remanded*, 481 F.2d 1045 (2d Cir. 1973) (Smith J, w/Mulligan & Timbers, JJ), 1973 Trade Cases ¶ 74,826 (S.D.N.Y.) (Wyatt, J)	$13,168,217 (including interest)	$2,532,372 ($5,387,000 requested)	$270,663	21.3	25,000
Subtotal Parts IA & B	$96,095,443 (including interest)	$12,939,356 ($19,790,737 requested)	$1,052,801	14.6	96,700
II. PRIVATE HOSPITAL/BLUE CROSS CLASSES– *Hartford Hospital v. Chas. Pfizer & Co., Inc.*, 1972 Trade Cases ¶ 74,112 (S.D.N.Y.) (Wyatt, J)	$32,500,000 (plus interest)	$2,122,500 ($4,941,000 requested)	$155,439	7.0	23,348

(7) Average Hourly Rate [(3)/(6)]	(8) Lodestar Hourly Rate	(9) Multiple [(7)/(8)]	(10) Gov't Suit	(11) Direct/ Indirect Plaintiffs	(12) Year	(13) Years Case Pending	(14) Deflated Value of Hr. Rate When Rec'd [(7)(13)(.6)]	(15) Present Value of Hr. Rate Awarded [(7) in 1978 $]
N/A	N/A	N/A	N	D(u)	1976	4	83.3%	116.8%
N/A	N/A	N/A				3.7	79.1%	121.5%
N/A	N/A	N/A				3.8	80.5%	121.3%
N/A	N/A	N/A				3.1	87.7%	161.8%
$145.15	N/A	N/A	G	I	1973	5	$126.82	$217.13
$101.29	N/A	N/A	G	D & I	1973	4.5	$ 89.65	$151.52
$133.81	N/A	N/A	G				$117.21	$200.17
$ 90.91	N/A	N/A	G	I	1972	3	$ 85.11	$144.45

(1) Name of Case	(2) Recovery	(3) Fee Awarded	(4) Costs	(5) Fee & Costs As % of Recovery [(3)+(4)/(2)]	(6) Hours Awarded
III. "NONSETTLING" CONSUMER/GOVERNMENT ENTITIES CLASSES– 410 F. Supp. 706 (D. Minn. 1975) (Lord, J)	$41,103,284 (including interest)	$6,767,781	$3,409,533 (including $128,889 paralegal; $375,673 pendency notice cost; assumed $2.1 million distribution costs, based on court's statement that such costs would be approx. equal to interest earned on settlement fund)	24.8	40,207
IV. *FARM CASES* IVA. FARMER/VETERINARIAN CLASSES– 410 F. Supp. 680,704 (D. Minn. 1975) (Lord, J)	$45,000,000 (including interest)	$13,356,907 ($14,328,197 requested)	$489,380 (including $48,115 paralegal)	30.8	64,686 (up to 1,000 hrs. disallowed that were claimed by counsel who contributed little to creation of class fund)
IVB. WHOLESALER CLASS– 410 F. Supp. 722 (D. Minn. 1975) (Lord, J)	$4,396,000 (including interest)	$1,500,000 (court would have awarded $1,760,322 if requested)	$87,807 (including $20,906 for special master & $2,978 awarded class representatives for their own time & effort)	36.1	10,257
Subtotal Parts IVA & B	$49,396,000 (including interest)	$14,856,907 ($15,828,197 requested)	$577,187	31.2	74,943
Total Parts I-IV	$219,094,727	$36,686,544 ($47,327,715 requested)	$5,194,890	19.1	235,199
Philadelphia v. American Oil Co., No. 647-68 (D.N.J. June 22, 1973) (Augelli, J)	$29,875,000	$6,111,000	$74,987 (includes $20,000 for accountants)	20.7	12,768 (100 paralegal hrs. also claimed)
School District of Philadelphia v. Harper & Row Publishers, Inc., No. 68-2144 (N.D. Ill. Sept. 28, 1970), *sub nom. Illinois v. Harper & Row Publishers, Inc.*, 55 F.R.D. 221 (N.D. Ill. 1972) (Decker, J); *see also* DuVal, (*cont'd*)	$7,912,659 (includes $297,744 interest) plus prospective benefits of "in- (*cont'd*)	$1,332,000 ($1,499,600 requested; DuVal lists $92,000 in fees awarded in additional settlements totalling $817,229)	$118,205 (DuVal lists $35,310 in costs awarded in additional settlements totalling $817,229)	18.3 (18.1% including the additional settlements totalling $817,299 for which fee and cost data are listed by DuVal)	16,152

(7) Average Hourly Rate [(3)/(6)]	(8) Lodestar Hourly Rate	(9) Multiple [(7)/(8)]	(10) Gov't Suit	(11) Direct/ Indirect Plaintiffs	(12) Year	(13) Years Case Pending	(14) Deflated Value of Hr. Rate When Rec'd [(7)(13)(.6)]	(15) Present Value of Hr. Rate Awarded [(7) in 1978 $]
$168.32	$100 (all counsel)	1.68	G	I	1975	7	$125.61	$207.89
$206.49	$102.35 ($40-$200)	2.02 (1.0-3.0)	G	I	1975	7	$154.10	$255.04
$146.24 (court would have awarded $171.62 if requested)	$86.72 ($40-$100)	1.69 (would have been 1.98 if fee request had not been limited)	G	D	1975	6	$111.49	$180.62
$198.24	$100.21	1.97	G				$148.27	$244.85
$155.98	$100.14 (includes only 105,151 hrs. [49% of total] for which data available)	1.88 (includes only hrs. for which data on noncontingent rates available)	G				$125.36	$210.19
$478.62	N/A	N/A	G	D & I	1973	5	$418.21	$715.95
$82.47 ($119.50/hr. firm ave. awarded counsel for superior results achieved in third settlement, reached while (*cont'd*)	N/A	N/A	G	D(u)	1972	5	$ 72.27	$131.04

(1) Name of Case	(2) Recovery	(3) Fee Awarded	(4) Costs	(5) Fee & Costs As % of Recovery [(3)+(4)/(2)]	(6) Hours Awarded
(*School Dist. of Philadelphia—cont'd*) "The Class Action as an Anti-trust Enforcement Device—II," 1976 *A.B.F. Res. J.* 1273, 1311.	creasingly offered . . . discounts of as much as 42% on trade editions & over 16% on library editions; DuVal lists additional class settlements totalling $1,017,229				
Colson v. Hilton Hotels Corp., 59 F.R.D. 324 (N.D. Ill. 1972) (Marovitz, J)	$6,928,008	$950,000 ($1,783,702 requested)	$32,329	14.2 (excluding any fees & costs in $769,293 N.Y. settlements)	6,238
James v. Phoenix Real Estate Bd., Inc., No. 73-559 (D. Ariz. 1975) (Craig, J)	$5,065,000 (attorney fees and costs; $5,000,000 in assignable credits entitling each holder to a percentage point reduction in brokerage commissions payable on future sales of residential real estate) plus prospective injunctive relief	$53,000	$12,000	1.3	2,385
Donson Stores, Inc. v. American Bakeries Co., 60 F.R.D. 417 (S.D.N.Y. 1973) (Bauman, J)	$1,225,000	$200,000 ($306,250 requested)	$14,625 (includes $7,500 for settlement adm. & notice)	17.5	908
Philadelphia v. General Host Co., No. 68-704 (E.D. Pa. Nov. 24, 1970) (Weiner, J)	$475,000 (excluding interest)	$125,000	$5,899	27.6	403

(7) Average Hourly Rate [(3)/(6)]	(8) Lodestar Hourly Rate	(9) Multiple [(7)/(8)]	(10) Gov't Suit	(11) Direct/ Indirect Plaintiffs	(12) Year	(13) Years Case Pending	(14) Deflated Value of Hr. Rate When Rec'd [(7)(13)(.6)]	(15) Present Value of Hr. Rate Awarded [(7) in 1978 $]
trial was beginning)								
$152.29	N/A (court observed only that counsel "are of the highest possible standing providing services of the highest caliber conceivable and that 6,238 man-hours represents a great deal of time, effort and exposure")	N/A	N	D(u)	1972	1.5	$147.91	$241.99
$22.22 (fees resulting "in an hourly rate very substantially lower than the average hourly rate which counsel . . . ordinarily receive . . . for prosecution of complex litigation" were agreed to as part of settlement "because of the belief by counsel . . . that the remaining terms of the settlement are extremely advantageous" to the class)	N/A	N/A	N	D(u)	1975	2	$ 20.16	$ 27.04
$220.26	N/A	N/A	G	D	1973	1	$212.28	$329.48
$310.00	N/A	N/A	G	D	1970	2	$289.84	$530.71

(1) Name of Case	(2) Recovery	(3) Fee Awarded	(4) Costs	(5) Fee & Costs As % of Recovery [(3)+(4)/(2)]	(6) Hours Awarded
TOTAL PART II (excluding *Antibiotics* III & IV, which are included in Part III total)	$180,076,110	$23,832,856 (13.2% of (2))	$1,466,195 (0.8% of (2))	14	158,902
Unweighted Average (*Antibiotics* IA, IB & II treated as separate cases)	$20,008,456	$2,648,095	$162,911	15.7	17,656
III. Cases for Which Data on Hours Expended and Lodestar Hourly Rates are Available					
In re Gypsum Cases, 386 F. Supp. 959 (N.D. Cal. 1974) (Zirpoli, J)	$75,000,000 (includes $7,360,000 interest) plus price reduction savings of $86,813,265 in first three years of cessation of alleged price fixing	$8,846,393 (excluding fees awarded in nonclass "dealer" pilot cases & fees obtained through private contingent fee contracts w/ individual class members; $20,953,310 requested)	$416,162 (paralegal)	12.4	59,195 (plus 663 hrs. for which compensation was not specified; 18,067 hrs. were for post-settlement adm. work; 8630 hrs. excluded, primarily for work benefiting clients w/whom counsel had private contingent fee contracts)
In re Master Key Antitrust Litigation, 1978-1 Trade Cases ¶61,887 (D. Conn.) (Blumenfeld, J)	$21,000,000 (excluding interest)	$3,963,173 ($5,578,104 requested)	$286,032 (including $118,126 paralegal	20.2	29,528 (596 hrs. of lead counsel disallowed by (1) limiting each attorney to 12 billable hrs. per day & (2) crediting only 1/2 hrs. spent assembling purchase data for individual class members; 7370 hrs. disallowed counsel for state attorneys general for (1) attending pretrial conferences, (2) other work benefiting only the particular state & not the common fund; (3) 1/2 hrs. spent assembling purchase data)
Dorey Corp. v. E.I. duPont de Nemours & Co., 1977-1 Trade Cases ¶61,313 (S.D.N.Y.) (Bonsal, J)	$16,700,000 (including $1,700,000 interest)	$1,085,000 ($2,785,000 requested)	$92,408 ($10,810 denied for lack of itemization)	7.1	9807 (731 hrs. of co-counsel valued at $109,636 disallowed as inadequately documented; 3397 hrs. of co-counsel's settlement negotiation work valued noncontinently at (*cont'd*)

(7) Average Hourly Rate [(3)/(6)]	(8) Lodestar Hourly Rate	(9) Multiple [(7)/(8)]	(10) Gov't Suit	(11) Direct/ Indirect Plaintiffs	(12) Year	(13) Years Case Pending	(14) Deflated Value of Hr. Rate When Rec'd [(7)(13)(.6)]	(15) Present Value of Hr. Rate Awarded [(7) in 1978 $]
$149.98	N/A	N/A				4.4	$132.84 (88.6% of (7))	$227.02
$178.13	N/A	N/A				3.2	$162.46	$276.59
$149.44	$67.80 ($79.55 excluding 18,067 post-settlement adm. hrs. ($50-$100 range); $30/hr. awards for post-settlement adm. work allocated between attorneys & paralegals at $15/hr for latter)	2.2 (1.0-2.0)	N	D & I	1974	7.5	$107.81	$201.45
$134.22 ($53.41 for state attorneys general, $149.59 for private lead & co-liaison counsel; $105.70 including hrs. disallowed ($18.72 for state attorneys general, $143.44 for private lead & co-liaison counsel))	$72.55 ($40-$150; hourly rate of lead counsel reduced approx. $10/hr. because rates & experience of counsel were lower during earlier stages of 7 yr. litigation & stated hourly rates had been increased near end of case)	1.85 (2.0 for lead counsel, 1.75 for co-liaison counsel, 1.0 for state attorneys general; 1.48 including hrs. disallowed (mainly to state attorneys general))	N (gov't lost and did not allege same violation)	I	1977	7	$ 97.27	$143.60
$110.64 ($157.58 for all firms but one; $22 for one firm ($18.17 including 731 hrs. excluded))	$70.85 ($65.94 including 731 hrs. excluded; $96.70 for all firms but one)	1.56 (1.63 for all firms but one, with multiple of 2.0 for the 63% pre-settlement hrs.; one firm whose hrs. were noncontingently (*cont'd*)	G	D	1977	2	$102.80	$124.38

(1) Name of Case	(2) Recovery	(3) Fee Awarded	(4) Costs	(5) Fee & Costs As % of Recovery [(3)+(4)/(2)]	(6) Hours Awarded
(*Dorey Corp. cont'd*)					$221,899 awarded $75,000 without explanation)
Labbee v. Wm. Wrigley Jr. Co., 719 BNA Antitrust & Trade Reg. Rep. A-29 (W.D. Wash. [illegible], J)	$13,580,000 (excluding interest; including $27,750 research fund) plus injunctive relief & "tens of millions" of dollars in prospective benefits	$4,348,706 (class counsel requested that 38.3% contingent fee agreements w/43.5% of class members be extended to entire class)	$506,131 (includes $70,334 paralegal and $163,730 expert fees)	35.7	18,768
Alexander v. National Football League, 1977-2 Trade Cases ¶61,730 (D. Minn.) (Larson, J)	$13,675,000 plus $90 million estimated collective bargaining benefits	$147,570	$24,221 (including $437 for paralegal & $18,000 for future adm. expenses)	1.13 (0.17 including prospective relief)	1,251 (42 hrs. spent preparing fee application excluded; 13.5 hrs. disallowed objector who withdrew objections)
In re Ampicillin Antitrust Litigation, MDL No. 50 (D.D.C. Nov. 22, 1978) (Richey, J)	$11,000,000 (including interest)	$1,139,617 (interim award may be increased at later date, $1,550,000 requested; $211,113 sought by counsel for nonsettling classes for recognized work benefiting settling classes denied without prejudice to resubmission and supplementation at later date)	$33,630 (includes $383 paralegal)	10.7 (will probably increase with final award)	6,254 (all hrs. credited, including those for "general" or "miscellaneous" activities)
Detroit v. Grinnell Corp., 1976-1 Trade Cases ¶60,913 (S.D.N.Y.) [illegible]'d, 560 F.2d [illegible]93 (2d Cir. 1977), 1978-1 Trade Cases ¶61,111 (2d Cir.) (Moore, J, w/Mulligan & Clark, JJ)	$10,000,000 (excluding interest)	$333,073 (excluding 6% post-judgment interest of $106,583 allowed; 1,500,000 requested)	$80,772 (paralegals $53,267; accountants $27,505)	4.1	3,384 (194 hrs. disallowed for preparing fee petition)
In re Arizona Bakery Products Litigation, No. 74-208-A-[illegible]HX (D. Ariz. Oct. 28, 1976) (Muecke, J)	$6,000,000 (excluding interest)	$1,047,925 (plus up to $94,561 in future fees for settlement adm.)	$330,197 (plus up to $22,840 in future settlement adm. expenses)	23	7759

(7) Average Hourly Rate [(3)/(6)]	(8) Lodestar Hourly Rate	(9) Multiple [(7)/(8)]	(10) Gov't Suit	(11) Direct/ Indirect Plaintiffs	(12) Year	(13) Years Case Pending	(14) Deflated Value of Hr. Rate When Rec'd [(7)(13)(.6)]	(15) Present Value of Hr. Rate Awarded [(7) in 1978 $]
		valued at $65.32 was awarded 0.34 (0.27 including 731 hrs. excluded))						
$231.80	$57.51 est. ($45-$75)	4.03	N	D	1975	7	$172.99	$286.30
$117.98 ($114.14 including fee petition hours disallowed)	$58.00 ($35-$80)	1.95 (1.35 for contingency + 1.60 for quality)	P	D(u)	1977	1.5	$111.54	$128.15
$182.23	$121.17 ($40-$200; current hourly rates used to offset burden of inflation)	1.5	G	D & I	1978	8.5	$123.20	$182.23
$98.44 ($93.10 including fee petition hrs. disallowed; $129.92 including post-judgment interest)	$98.44	1.0	G, P	D(u)	1978	10	$83.15 (after adjusting for interest awarded)	$116.52 (from Apr. 1976 when hourly rates were fixed)
$135.06	$74.51 ($40-$100)	1.81 (1.0-2.0)	G	D & I	1976	3	$108.56	$154.72

(1) Name of Case	(2) Recovery	(3) Fee Awarded	(4) Costs	(5) Fee & Costs As % of Recovery [(3)+(4)/(2)]	(6) Hours Awarded
Dennis v. Saks & Co., 1978-1 Trade Cases ¶61,871 (S.D.N.Y.) (Werker, J)	$5,211,000	$757,652 ($1,508,496 requested)	$35,596 (includes $14,257 paralegal; $1719 for business meals & secretarial services disallowed)	15.2	5505 (42 hrs. of co-counsel disallowed; hrs. spent preparing fee petitions not claimed)
New York v. Darling-Delaware, Inc., 440 F. Supp. 1132 (S.D.N.Y. 1977) (Stewart, J)	$5,100,000	$1,279,027 ($1,650,000 requested)	$246,311 (including $60,484 paralegal, $65,000 accountants' fees, & $6981 awarded firm that located class members)	29.9	6888
Butowsky v. Prince George's County Bd. of Realtors, Inc., No. 71-1086 (D. Md. Nov. 10, 1975) (Kaufman, J)	$3,305,000 ($305,000 cash plus certificates of entitlement to reduced commission rates on future real estate sales valued at $3,000,000 on assumption that 20% of class members will (*cont'd*)	$104,170 ($119,170 requested)	$22,708 (includes $830 paralegal and $11,949 in settlement notice and distribution costs)	3.8	1222

(7) Average Hourly Rate [(3)/(6)]	(8) Lodestar Hourly Rate	(9) Multiple [(7)/(8)]	(10) Gov't Suit	(11) Direct/ Indirect Plaintiffs	(12) Year	(13) Years Case Pending	(14) Deflated Value of Hr. Rate When Rec'd [(7)(13)(.6)]	(15) Present Value of Hr. Rate Awarded [(7) in 1978 $]
$137.62	$104.72 ($50-$150; hourly rate reductions for four attorneys were from (1) $250 to $150; (2) $200 to $150; (3) $150 to $125; & (4) $125-$150 to $85-$100)	1.31 (1.5 for lead counsel, which would have been only 1.18 if lodestar had been computed on basis of firm's billing rates at time fee was awarded rather than earlier when case was being litigated; in light of government's criminal indictments, to which defendants pled *nolo contendere*, court considered class certification only significant risk for plaintiffs' attorneys, after which settlement was "predictable")	G	D(u)	1978	3.5	$121.33	$145.44
$185.08	$104.48 (up to $175/hr.; current rates awarded as partial compensation for interest & inflation during 7 yrs. of litigation)	1.78 (2.0 for lead counsel; 1.6-2.0 for another firm; 1.0 for others)	G	D	1977	7	$136.10	$203.69
$85.27	$68.90 ($35-$125)	1.24	G	D(u)	1975	4.5	$ 62.07	$102.53

(1) Name of Case	(2) Recovery	(3) Fee Awarded	(4) Costs	(5) Fee & Costs As % of Recovery [(3)+(4)/(2)]	(6) Hours Awarded
(*Butowsky cont'd*)	eceive and use the certificates)				
Liebman v. J. W. Peterson Coal & Oil Co., 63 F.R.D. 684 (N.D. Ill. 1974) (Will, J)	$2,300,000 (includes $500,000 in future credits)	$312,018 ($504,900 requested)	$37,675 (includes $3,200 for expert, $21,813 for accounting fees, & $2,700 for paralegals)	15.2 (10.3% on basis of state attorney general donating his $111,900 fee for distribution to class)	4437 (231 hrs. rejected as duplicative; 100 hrs. disallowed for work on settlement proposal that was rejected as inadequate)
In re Clark Oil & Refining Corp. Antitrust Litigation, 422 F. Supp. 503 (E.D. Wis. 1976) (Reynolds, J)	$1,900,000 plus "real and substantial" but unquantified benefits affording class member-dealers protections against franchise terminations & elimination of alleged price fixing & tying practices	$481,488 ($595,869 requested)	$64,409	28.7	7056 (less up to 500 hrs. of lead counsel, whose award was conclusorily reduced in unspecified proportions for (1) excessive noncontingent hourly rate, (2) "unavoidable" duplication of work, & (3) ministerial & adm. nature of some of 16 hrs.; 7948 hrs. claimed)
Mazur v. Behrens, 1974 Trade Cases ¶75,213 (N.D. Ill.) (McMillen, J)	$347,287 (includes attorney fees & costs paid by defendants & $210,000 in class member claims which could have totaled $1,750,000) plus unquantified prospective relief from alleged price fixing of real estate brokerage fees	$130,237 ($375,000 requested)	$ 7,049	39.5	1737

(7) Average Hourly Rate [(3)/(6)]	(8) Lodestar Hourly Rate	(9) Multiple [(7)/(8)]	(10) Gov't Suit	(11) Direct/ Indirect Plaintiffs	(12) Year	(13) Years Case Pending	(14) Deflated Value of Hr. Rate When Rec'd [(7)(13)(.6)]	(15) Present Value of Hr. Rate Awarded [(7) in 1978 $]
$70.32 ($65.44 including 331 hrs. disallowed)	$70.32 ($45-$90)	1.0 (0.93 including 331 hrs. disallowed; court credited recovery primarily to evidence generated in state government's unsuccessful criminal prosecution)	G	D(u)	1974	3	$60.39	$94.79
$68.24 ($60.58 including 892 hrs. of co-counsel excluded as duplicative or excessive)	$68.24 (plus unspecified proportion by which $125/hr. claimed rate for 2000 of 7056 awarded hrs. was (1) reduced to as low as $93.75 per hr. solely for being excessively valued or (2) reduced instead for duplication & ministerial nature of some hours)	1.0 (0.81 if total hrs. & hourly rates claimed had been awarded)	N		1976	4	$57.95	$78.17
$75	$75	1.0	N	D(u)	1974	4	$62.81	$101.10

(1) Name of Case	(2) Recovery	(3) Fee Awarded	(4) Costs	(5) Fee & Costs As % of Recovery [(3)+(4)/(2)]	(6) Hours Awarded
Barr v. WUI-TAS, 1976-1 Trade Cases ¶60,725 (S.D.N.Y.)	$336,160 (includes 25% of fees & costs payable by defendant in addition to settlement fund)	$78,500	$2,500	24.1	1064
Goldfarb v. Virginia State Bar, No. 75-72 (E.D. Va. 1977) (Bryan, J)	$226,000 plus unquantified prospective injunctive relief against use of minimum fee schedules for legal services	$53,000 (includes $3,000 interest)	$9131	27.5	719
TOTAL PART III (including *Plumbing Fixtures* IV from Pt. IA and *Antibiotics* III & IV from Pt. II)	$305,479,720	$46,791,672 (15.3% of (2))	$6,409,341 (2.1% of (2))	17.4	285,815
Unweighted Average (*Antibiotics* III, IVA & IVB treated as separate cases)	$15,273,986	$2,339,584	$320,467	19.7	14,291
GRAND TOTAL ALL DAMAGE RECOVERY CASES (Pts. I-III)	$549,670,050	$81,852,813 (14.9% of (2))	$8,164,658 (1.5% of (2))	16.4	444,717 (Pts. II & III only)
Unweighted Average (*Plumbing Fixtures* I-IV & *Antibiotics* I-IV treated as separate cases, N = 40)	$13,741,751	$2,046,320	$204,116	18.6	11,118
IV. Cases in Which No Class Damages Were Recovered **A. Pre-*Lindy* Cases in Which Data on Hours Expended But Not Lodestar Rates Are Available**					
Sunrise Toyota, Ltd. v. Toyota Motor Co., 1973 Trade Cases ¶74,398 (S.D.N.Y.) (MacMahon, J)	$60,000 attorney fees plus unquantified prospective benefits including termination of exclusive dealing requirements, allocation (*cont'd*)	$60,000	N/A	100 (excluding value of prospective relief; "the fee clearly falls within the generally accepted range of 20% to 30% of the value of the benefit bestowed upon the class")	1050

(7) Average Hourly Rate [(3)/(6)]	(8) Lodestar Hourly Rate	(9) Multiple [(7)/(8)]	(10) Gov't Suit	(11) Direct/ Indirect Plaintiffs	(12) Year	(13) Years Case Pending	(14) Deflated Value of Hr. Rate When Rec'd [(7)(13)(.6)]	(15) Present Value of Hr. Rate Awarded [(7) in 1978 $]
$73.76	$61.42	1.2 (plaintiffs agreed not to seek more as part of settlement)	N	D(u)	1976	1.5	$ 70.31	$ 87.89
$69.54	$69.54 ($40-$75)	1.0 (attorneys employed by externally financed "public interest" firm that normally charged no fees & did not request multiple or even regular commercial rates)	N	D(u)	1977	5	$ 56.59	$ 76.28
$163.71	$84.53	1.94				6.6	$122.62 (75% of (7))	$200.21
$131.01	$81	1.64				5.4	$102.50	$153.70
$158.81 (Pts. II & III only)	$84.53 (Pt. III only)	1.94 (Pt. III only)				5.4	79.5% ($126.27/ hr. Pts. II & III)	136.2% ($209.79/ hr. Pts. II & III)
$145.63 (Pts. II & III only)	$81 (Pt. III only)	1.94 (Pt. III only)				4.3	83.8% ($121.11/ hr. Pts. II & III)	135.6% ($191.84/ hr. Pts. II & III)
$57.14 (named plaintiff received $100,000 in settlement of non-class claims, for which class counsel presumably received additional compensation; $60,000 class fee was all that counsel requested)	N/A	N/A	N		1973	2	$53.45	$85.47

(1) Name of Case	(2) Recovery	(3) Fee Awarded	(4) Costs	(5) Fee & Costs As % of Recovery [(3)+(4)/(2)]	(6) Hours Awarded
(*Sunrise Toyota cont'd*)	of more Toyotas to plaintiff dealer class, extension of franchise terms from one to five years, and $750,000 advertising outlays				
G & K Foods, Inc. v. Kentucky Fried Chicken, No. 71-5 (M.D. Fla. Dec. 13, 1972) (Krentzman, J)	$258,923 in attorney fees & costs plus unquantified prospective contract reformation relief	$250,000	$8,923	100 (excluding value of prospective relief)	2230
SUBTOTAL	$318,923	$310,000	$8,923	100	3280
B. Post-*Lindy* Cases for Which No Data on Hours Expended or Lodestar Rates Are Available					
Hill v. Art Rice Realty Co., 66 F.R.D. 449 (N.D. Ala. 1974) (Grooms, J)	$52,500 attorney fees plus prospective injunctive relief against suggested fee schedules for real estate commissions	$52,500	N/A	100 (excluding value of prospective relief)	N/A
C. Post-*Lindy* Cases for Which Data on Hours Expended and Lodestar Rates Are Available					
Arenson v. Board of Trade of City of Chicago, 372 F. Supp. 1349 (N.D. Ill. 1974) (Bauer, J)	$1,353,546 in attorney fees & costs plus prospective benefit of restructuring commission rate practices of commodities exchange industry estimated at $800 million	$1,339,000 ($2,250,000 requested)	$14,486	100 (0.17% of estimated prospective relief)	3735 (194 hrs. spent on unrecorded correspondence excluded)

(7) Average Hourly Rate [(3)/(6)]	(8) Lodestar Hourly Rate	(9) Multiple [(7)/(8)]	(10) Gov't Suit	(11) Direct/ Indirect Plaintiffs	(12) Year	(13) Years Case Pending	(14) Deflated Value of Hr. Rate When Rec'd [(7)(13)(.6)]	(15) Present Value of Hr. Rate Awarded [(7) in 1978 $]
$112.11	N/A	N/A	N		1972	1.5	$108.50	$175.34
$ 94.51	N/A	N/A				1.7	$ 90.88	$146.57
N/A	N/A	N/A	N	D(u)	1974	2	89%	135%
$358.56 ($340.90 including 194 hrs. disallowed)	$89.64 ($35-$125)	4.0	N	D(u)	1974	3	$319.32	$483.34

(1) Name of Case	(2) Recovery	(3) Fee Awarded	(4) Costs	(5) Fee & Costs As % of Recovery [(3)+(4)/(2)]	(6) Hours Awarded
Merola v. Atlantic Richfield Co., 515 F.2d 165 (3d Cir. 1975) (Seitz, J, w/Aldisert & Garth, JJ), No. 71-1020 (W.D. Pa. May 30, 1975) (Teitelbaum, J)	$ +2,366 in attorney fees & costs plus unquantified value of long term leases (plaintiffs' estimate of $8 million value held not adequately supported)	$36,519 ($250,000 requested)	$5,847	100 (excluding value of prospective relief)	264 (871 hrs. claimed; time spent successfully appealing initial fee award not claimed)
SUBTOTAL	$1,395,912	$1,375,579	$20,333	100	3999
Unweighted Average	$697,956	$687,790	$10,167	100	2000
TOTAL PART IV	$1,767,335	$1,738,079	$29,256	100	7279 (Pts. IVA & C only)
Unweighted Average	$353,467	$347,616	$ 5,851	100	1820 (Pts. IVA & C only)
TOTAL PARTS IB, III & IVC	$333,789,720 (Pts. IB & III only)	$49,504,172 (Pts. IB & III only; 14.8% of (2))	$6,492,978 (Pts. IB & III only; 1.9% of (2))	16.8 (Pts. IB & III only)	289,814 (Pts. III & IVC only)

Analysis. One of the more remarkable findings is that during the entire 12.5 year period since Rule 23 was amended in 1966, only about $809 million has been recovered in all antitrust class actions combined. This assumes that the recoveries totalling $549,670,050 from Parts I-III of our sample plus the recoveries in five other cases for which we have yet to obtain fee information[1] and in six other settled cases in which fees have not yet been awarded[2] are all of the antitrust class recoveries that have been obtained under amended Rule 23. The few additional recoveries that probably exist but of which we are unaware are unlikely to increase this rough total by much. With our public officials placing the cost of

[1] *In re Potash Antitrust Litigation, M.D.L. No. 272 (N.D. Ill. 1978) (a3.2 million settlement); In re* Sugar Industry Antitrust Litigation—Western Cases, M.D.L. No. 201 (N.D. Cal. Aug. 16, 1976) ($24 million partial settlement); Stabler Construction Co., Inc. v. R & G Sloane Mfg. Co., No. 71-1589 (C.D. Cal. 1974) ($3.5 million settlement, notice published at 3 *Newberg on Class Actions* 581 (1977)); Herrmann v. Atlantic Richfield Co., No. 71-842 (W.D. Pa. Sept. 21, 1978) (fees and costs of $146,700 awarded out of settlement valued at $425,000); *In re* Private Civil Treble Damage Actions Against Certain Snack Food Cos., No. 71-2007-R (C.D. Cal. 1978) ($2.3 million settlement).

[2] *In re* Chicken Antitrust Litigation, No 74-2454 (N.D. Ga. Dec. 30, 1977) ($30 million partial settlement); *In re* Anthracite Coal Antitrust Litigation, 79 F.R.D. 77 (M.D. Pa. 1978) ($4.5 million partial settlement); *In re* Plywood Antitrust Litigation, 859 BNA Antitrust & Trade & Reg. Rep. A-18 (E.D. La. 1978) ($4.85 million partial settlement); *In re* Folding Carton Antitrust Litigation, M.D.L. No. 250 (N.D. Ill. 1978) (partial settlements aggregating over $170 million); *In re* Arizona Dairy Products Litigation, No. 74-569 (D. Ariz. 1978) ($4 million settlement); HEW Corp. v. Tandy Corp., No. 73-2654 (D. Mass. Jan. 16, 1979) (settlement including $900,000 in cash and valued at $10-$15 million over ten year period).

(7) Average Hourly Rate [(3)/(6)]	(8) Lodestar Hourly Rate	(9) Multiple [(7)/(8)]	(10) Gov't Suit	(11) Direct/ Indirect Plaintiffs	(12) Year	(13) Years Case Pending	(14) Deflated Value of Hr. Rate When Rec'd [(7)(13)(.6)]	(15) Present Value of Hr. Rate Awarded [(7) in 1978 $]
$138.22	$65.8_ ($50-$100)	2.1	N		1975	4	$111.45	$170.72
$343.96	$88.07	3.9				3.1	$305.59	$462.69
$248.39	$77.73	3.1				3.5	$215.39	$327.02
$231.56 (Pts. IVA & C only)	$88.07 (Pt. IVC only)	3.9 (Pt. IVC only)				2.4	90.2% ($208.84/ hr. Pts. IVA & C)	138.2% ($320.24/ hr. Pts. IVA &C)
$166.51 (Pts. IVA & C only)	$77.73 (Pt. IVC only)	3.1 (Pt. IVC only)				2.5	89.8% ($148.18/ hr. Pts. IVA & C)	139.9% ($228.72/ hr. Pts. IVA & C)
$166.20 (Pts. III & IVC only)	$84.58 (Pts. III & IVC only)	1.97 (Pts. III & IVC only)				6.5 (Pts. III & IVC only)	$125.14 (Pts. III & IVC only)	$203.84 (Pts. III & IVC only)

"monopoly and economic concentration" at over $100 billion per year (not all of which is actionable under the antitrust laws), it can hardly be suggested that antitrust class recoveries averaging about $65 million annually have posed a serious deterrent to potential antitrust violators or have meted out the "annihilating punishments" or "horrendous liabilities" claimed by class action critics.

Nor is it likely that annual fees of about $7 million would be sufficient, without income from other types of legal work, to support the economic viability of the plaintiff antitrust class action bar. In contrast to the 47 cases in which fees have been or soon will be awarded, our records identify about 320 antitrust class actions filed since 1966 in which there have been one or more reported or unreported judicial decisions. Of course, many of these cases are still pending and may eventually result in class recoveries and fee awards, but the fact that recoveries have been obtained in only 47 cases to date underscores the high degree of risk faced by the plaintiff antitrust class action attorney.

Another surprising finding is that use of the *Lindy* standards has not reduced the percentage of class recoveries consumed by awards of attorney fees and costs. In fact, the percentage consumed increased to 16.8 during the post-*Lindy* era (Pts. IB & III) after being 14.3 during the pre-*Lindy* era (Pts. IA & II). Even after disregarding *Antibiotics* I & II, which account for 69.7% of the damages recovered in all pre-*Lindy* cases, the 18.1% of recoveries consumed by fees and costs is not substantially higher than the 16.8% for post-*Lindy* cases. The *Lindy* standards have had a somewhat greater impact on the hourly rates awarded. Expressed in 1978 dollars, these rates have declined from $227.02 (Pt. II) to

$203.84 (Pts. III & IVC), a reduction of 10.2%.

The information available as to fees requested shows that, for the entire sample, plaintiffs' counsel were awarded 70.2% of what they sought. Attorneys in pre-*Lindy* cases (Pts. IA, II & IVA), who received 75.2% of what they requested, did not fare a great deal better than attorneys in post-*Lindy* cases (Pts. IB, III, IVB & IVC), who received 67.6%. Excluding *Gypsum*, 77.4% of the fee requests in post-*Lindy* cases were granted, about the same as in pre-*Lindy* cases.

Notwithstanding the *Lindy* requirement that courts carefully examine whether it was reasonable for counsel to have expended all of the hours for which compensation is sought, of the total 309,621 hours claimed (Pts. III & IVC) only 19,807, or 6.4%, were disallowed as being duplicative, as conferring no benefit on the class, etc. (excluding hours spent preparing fee petitions). And only two cases, *Gypsum* and *Master Key*, accounted for 16,000, or 81%, of the excluded hours.

These findings suggest that federal courts have made a "federal case" out of a matter of relatively minor significance. The "only the lawyers benefit" allegation of class action critics is simply not borne out of the evidence. Overall, fees (14.9%) and costs (1.5%) have consumed a modest 16.4% of class recoveries (Pts. I—III), with class members receiving 83.6 cents of each dollar recovered. This is certainly a favorable margin when compared with the levels of attorney fees extracted from personal injury victims and even when compared with the retail mark-ups of supermarkets, department stores, and other relatively efficient sectors of our economy.

Furthermore, expressing attorney fees and costs as a percentage of damages recovered ignores the substantial but usually unquantified prospective relief that was obtained in *Nurserymen's Exchange, Inc., Forbes, School Dist. of Philadelphia v. Harper & Row Publishers, James, Gypsum, Labbee, Alexander, Clark Oil & Refining Corp., Mazur, Goldfarb, Sunrise Toyota, Ltd., G & K Foods, Inc., Hill, Arenson*, and *Merola*. The prospective benefits in only three of these cases—*Arenson, Alexander*, and *Gypsum*—were valued at $976,813,265, nearly 1.2 times more than the damages recovered in all cases (Pts. I-III).

The average hourly rate awarded in all post-*Lindy* cases (Pts. III & IVC) was $166.20. In 1978 dollars, however, the hourly rate was $203.84. On the other hand, the average hourly rate of $166.20 was worth only $125.14 when received, inflation's bite having been 24.7%. Applying this same inflationary bite to the 1978 value would produce an average hourly rate of $153.48 instead of $203.84. Another way of looking at the impact of inflation is that it reduces the average multiplier from 1.97 to 1.48. Although *Lindy* explicitly recognizes the deferred nature of compensation as a contingent risk factor to be considered in at arriving at the appropriate multiplier, the closest that any of these decisions comes to doing that is in *New York v. Darling Delaware, Inc.* and in *Ampicillin*, where the courts awarded fees based upon current billing rates rather than those in effect during the litigation's pendency.

Another factor recognized by *Lindy* to be considered in arriving at the appropriate multiplier is the amount of out of pocket costs advanced by counsel and the length of time that those funds are at risk. The unweighted average amount of costs that were reimbursed in all damage recovery cases (Pts. I-III) was $204,116, roughly 10% of the unweighted average fee awarded. These cases were pending for a weighted average of 5.4 years and an unweighted average of 4.3 years. For Part III costs averaged $320,467 per case, 13.7% of the fee awarded. These cases were pending for a weighted average of 6.6 years and an unweighted average of 5.4 years. The Part III costs should be discounted by at least a third and perhaps by more than 50% because they were incurred in the post-settlement context where the existence of the settlement fund either obviated the need for attorney advancement or virtually guaranteed repayment.

Even without considering additional necessary outlays for associates' salaries and other office overhead, these cost advancements represent very substantial investments for lengthy periods of time. Yet none of these decisions place any particular emphasis on these risks in determining the appropriate multiplier. Nor did any attorneys seek prejudgment interest on costs advanced.

Disregarding the deferred nature of compensation and contingent risk, plaintiff antitrust class action attorneys appear to have done rather well. Lodestar hourly rates ranged from $35 to $200 and multipliers from 1.0 to 4.03. Most of the cases in which relatively low mutlipliers or lodestars were awarded can be explained as aberrations. In *Goldfarb*, for example, counsel requested only a modest fee with no multiplier. In *Barr* the settlement agreement contained a ceiling on fees. In *Mazur* the attorneys were able to distribute only 12% of the potential class recovery. In *Liebman, Grinnell*, and *Alexander*, the courts credited the government or private nonclass plaintiffs with having carried the "laboring oar"

Clark Oil & Refining Corp. is the most exasperating type of decision for plaintiff attorneys. There the court excluded hours for "unavoidable" duplication but, as in most other decisions of this type that we have seen, did not specify which hours were duplicative or excessive or why. In fact, because the court also indicated that one attorney had claimed too high a lodestar, it is impossible to discern precisely whether the outcome relates to exclusion of hours or to reductions in hourly rates. Plaintiffs' counsel would have had a difficult time describing to an appellate court exactly what was being appealed, even if this were not the type of decision

committed to the virtually unreviewable discretion of the trial judge.[3]

Another finding which contradicts the conventional wisdom is that class counsel's lack of any assistance from a government or private nonclass suit did not, as a general rule, result in more generous fee awards. For Part III cases for which complete data are available, fees and costs awarded in cases involving parallel government or private nonclass suits consumed 17.6% of class recoveries and averaged $172.22 per hour—$207.51 per hour in September 1978 dollars. Fees and costs awarded in cases unassisted by parallel government or private nonclass suits consumed 17.1% of class recoveries and averaged only $151.62 per hour—$189.84 per hour in September 1978 dollars.

These overall findings may be somewhat misleading. The lack of government or private nonclass assistance was clearly a factor in the awards of relatively generous fees in *Gypsum, Master Key,* and *Labbee.* The relatively ungenerous fees awarded in *Clark Oil & Refining Corp., Mazur, Barr,* and *Goldfarb* may have been primarily attributable to other special considerations previously described.

We also find, contrary to the suggestions of opponents of legislation to overturn the *Illinois Brick* decision, that there is no significant efficiency difference between cases involving indirect purchasers and all other cases. Again focusing upon Part III of the sample, we do find that the percentage of class recoveries consumed by fees and costs in the six cases[4] involving indirect purchasers is slightly higher, 18.1%, than the 15.3% consumed by fees and costs in the other cases. However, closer examination shows that the difference is entirely attributable to the higher average hourly rates awarded in indirect purchaser cases—$169.29 vs. $147.17. The amount recovered per hour of compensated attorney time is exactly the same—$1,069—in indirect purchaser cases as in other cases.[5]

Looking next at the cases in Part II, we also find that fees and costs awarded in cases involving indirect purchasers[6] consumed a slightly higher proportion of class recoveries (14.2%) than in cases not involving indirect purchasers (13.2%). Again, however, this difference is entirely explained by the higher average hourly rates awarded in indirect purchaser cases ($159.41) than in other cases ($101.97). In fact, as measured by the amounts recovered for each hour of compensated attorney time, indirect purchaser cases ($1,190.10) were litigated more efficiently than were other cases ($828.25).

For Parts II and III combined, the slight difference between the proportion of class recoveries consumed by fees and costs in indirect purchaser cases (16.5%) and in other cases (14.9%) is again explained by higher average hourly rates in indirect purchaser cases ($165.51) than in other cases ($135.16). But when measured by the amount recovered per hour of compensated attorney time, direct purchaser cases ($1,005.10) were litigated only 90% as efficiently as indirect purchaser cases ($1,116.40).

---

[3] More generally, we have found that decisions awarding fees under *Lindy* criteria leave a great deal to be desired. The various adjustments made are often not adequately explained, and sometimes numbers cited by a court simply do not add up to the cited total. We often had to look beyond the court's decision to the attorneys' fee petitions to determine what actually happened.

[4] *Antibiotics* III & IVA; *Plumbing Fixtures* IV; *Gypsum*; *Master Key*; *Ampicillin*; and *Arizona Bakery Products*.

[5] The amount of damages recovered per hour of compensated attorney time in any particular case may not be an accurate efficiency indicator. The case may by chance be of a nature which requires more or less than the average number of hours of a given degree of efficiency to obtain a standard measure of recovery. However, if the sample size is large enough, the distortion caused by atypical cases will average out. If the sample is relatively free of distortion, it can then be used as a general indicator of whether the number of hours for which attorneys are requesting fees in a given case were reasonably expended. However, further inquiry may be necessary to determine whether an atypically higher or lower number of hours were necessary to obtain the recovery in that case because of its inherent characteristics. For example, if the hours expended in the case compare favorably with the hours in cases of the same substantive type and recovery size, but the case was also characterized by novel legal issues, appeals, or voluminous defense motions or briefs that forced plaintiffs' counsel to expend many hours responding, it would be a fair assumption that the hours expended were efficient and reasonable.

The comparison with amounts recovered per attorney hour should be limited to other cases involving roughly the same class recovery size. One reason is the pattern of scale economies that is evident from the data presented. In cases involving relatively large recoveries, the number of attorney hours per dollar recovered is for that reason likely to be lower than in cases involving smaller recoveries. Atypically large or small recoveries should therefore be excluded from the sample with which the particular case is compared. A second reason why the class recovery is relevant is that the size of the potential liability substantially influences the amount of litigational resources that the defendant will devote to the case. How much the defendant will spend to avoid or minimize liability in turn influences the number of hours that the plaintiffs must expend to obtain a recovery.

[6] *Antibiotics* IA, IB & II; *Philadelphia v. American Oil Co.*

ADDITIONAL SUBMISSION OF A.P. ACTION
AND COMPANY, INC.

SUMMARY STATEMENT OF RECOMMENDATIONS, EXPLANATIONS AND OBSERVATIONS RELATIVE TO THE PROPOSED "ANTITRUST ENFORCEMENT ACT" (S.300)

SUBMITTED TO

THE COMMITTEE ON THE JUDICIARY
THE UNITED STATES SENATE

BY

A. P. ACTION AND COMPANY, INC.

Mr. Chairman and distinguished members of the Committee, I am making the following contribution, i.e., recommendations in hope that I can assist the Committee in its review of the issues addressed in S.300 and possibly offer some compromise approach to deal with the serious injustice that price fixing or gauging imposes upon the consumer public and the overall competitiveness of the American economy.

Our particular recommendation as it relates directly to S.300 is not to be confused with a means of prevention, but to redress the unnatural economic consequence its actions have caused to come under serious reconsideration at this time. Following these remarks, however, is attached, also for the record, a brief theoretical discussion of possible means that have been designed to expand upon existing deterrent capability and which in addition could make a substantial contribution to the process of preventing potential abuse of the consuming public through pricing.

It is generally understood that matters of this sort when submitted in legal proceedings often mandate an oral representation to the court. The most likely reasoning behind this practice was in the interest of illuminating, spontaneous clarifications. Absent this opportunity, there may be aspects of our recommendations which are subject to varying misinterpretations.

Mr. Chairman, having those comments behind, I turn directly to S.300. It is my understanding that it is the intent of S.300 to allow the consuming public, when purchasing through distributers other than the original manufacturer to seek redress through civil suits filed directly against the manufacturer in circumstances that involved an illegal fixing of prices. And that a legislative reconsideration of this issue has been prompted by the Supreme Court when it found that the Clayton Act as presently constituted does not allow (for whatever reason) third parties or other indirect purchasers that option.

In the absence of authority, vis a vis the Court's interpretation of the Clayton Act, to sue manufacturers except in circumstances where one is not the original

purchaser, and in an effort to avoid what could be an extraordinary additional burden to the judicial system (that could possibly be brought about through S.300), it is our recommendation that the Clayton Act be amended to allow, on a limited basis (to be addressed later) an indirect purchaser (consumer) to sue a distributer(s) that purchased from the manufacturer as a deliberate or unknowing co-conspirator, with the manufacturer, charging that the distributer and the manufacturer are for purposes of abuse, one and the same.

Any such distributer(s) that finds itself between a manufacturer and consumer groups should in such cases have an option, in order to avoid further processing against him by the consumer, of entering into a court-supervised settlement of the suit that binds the defendant (distributer) therein to undertake action or cause to be begun a legal action against the manufacturer naming itself as plaintiff.

In any circumstance where there was only the manufacturer at fault, said manufacturer would be forced to bear the cost of the legal action against itself and the distributer (which could be interpreted as an admission of collusion and/or of misleading the distributer) to prove no conspiracy to fix prices and thus the absence of fixed prices, in which case the spirit of the original Act prevails. Otherwise, one or both must negotiate or cause to be negotiated an agreement satisfactory to the consumer group prompting the original action.

Our reasoning is as follows: If the distributer is selling a product he knowingly paid too much for and he passed this inflated cost on to the consumers, in effect he is acting as an extension of the manufacturer. For all practical purposes, if he undertook to transfer or cause to be transferred illegally obtained finds in the form of profits from the consumer to the manufacturer, he is in fact a willing, unwilling, knowing or unknowing participant in a scheme to violate the law. Otherwise, if he (the distributer) is confronted and accused of being a willing participant and denies the allegation, the distributer must join with the consumer group in

a suit against the manufacturer -- or seek to determine before the Court the exact procedure within which the pricing in question was done, thus disclosing the pricing procedure in use.

Otherwise, there should be some provision in the amended Act to allow the consumer group that prompted the initial suit to assume the cost to a cooperating direct purchaser (distributer) for any of his actions against the manufacturer. There should also be a provision added that prohibits in any such action (where any award is realized from the forced action), with the exception of reasonable compensation, for cost, time, etc. to the distributer resulting from the action. Thus, the remaining proceeds would be distributed to the plaintiff (consumer group) filing the class action in the original instance.

Mr. Chairman, if I may venture to suggest, an amendment of the Act in this way would not be necessary if a resolution were adopted by the Congress outlining a concurrence with the above and generally mandating an expansion of the sphere of the Clayton Act to encompass the above.

However, the Clayton Act, as do other isolated reactions, serves only to redress a particular wrong done to consumers offering only a procedure to pursue redress. The following (Appendix A) discusses a concept and refers to a method of implementation that could provide the consumer a vehicle through which to exercise that flexibility, on an ongoing basis, through a conglomerated, revitalized third, non-profit sector.

Thank you.

Copyright 1979 in U.S.A. by Larry Napoleon Cooper

DRAFT

APPENDIX A

THE CONGLOMERATED THIRD SECTOR ROLE IN A

REVITALIZED CLASSICAL AMERICAN ECONOMY

The following represents theoretical analysis in support of specific structural modifications and accompanying mechanics through which they could be phased into the American economy in an orderly Congressionally-scrutinized manner and on a pilot program basis. The purpose of this presentation is to aid a general discussion of the concept alternative offered to, within reason and without additional budgetary expense, arrest the nation's economic and thus socio-political problems. There is no effort made to elaborate on the nature of their causes or any deviation they may represent in the American economy.

The concept in general may very well confirm that a neutral competition source is preferable and infinitely more apt to be successful than government intervention at subordinating the enterpriser or business operating within the American economy to the demands and desires of the consuming public. It is the contention of this paper that the concept around which it is presented, within reason, satisfies this desirable end and, in addition, recognizes the fact that any proposal or concept alternative (long or short term) should meet most of the current needs of the American economy. Also referred to (method of implementation) is a specific plan of action to bring about the birth of this neutral competitive force and to elicit and encourage the cooperation of the other elements of the economy vital to any success along these lines.

That is to say that the concept and the proposed redirection of the third, nonprofit sector and the revitalization of the American economy it represents offers a specific viable alternative to plummeting productivity, escalating inflation, technological (energy) shortcomings, exorbitant taxation at the consumer level, dumping,

balance of trade deficits, ineffective antitrust statutes, over-regulation, and federal budget deficits.

DEFINITIONS

The originator of the concept and method of non-budgetary implementation offers, for purposes of discussion, a definition of the terminology used throughout this essay. However, before we proceed with these definitions, among the other purposes of the author for this writing is to elicit economic and political reaction to the concept's implementation. For example, does the concept as proposed or in its method of implementation represent further socialism and/or does it have the potential to otherwise call into question political and economic freedoms; or could it play a positive role in the rehabilitation of a reasonably self-regulated, non-inflationary American economy?

The third sector herein referred to is made up of private, non-profit, charitable, social welfare or other public service organizations that have in the past made a quite different contribution to the well-being of the nation than is proposed in its role as the classical revitalizer of the American economy. The other two sectors are: (1) the private sector, made up of the profit-making businesses, both large and small, that constitute the balance of the American economy; and (2) the public sector which is, of course, government (federal, state, county and municipal).

For purposes of distinction, the author defines and makes reference to at least two subsystems within the private, profit-making sector of the economy; the first of which is composed of smaller businesses, generally of entrepreneurial nature. These firms are currently relegated to the whims of the consuming public and are generally incapable of circumventing open market supply and demand forces during either the design, manufacture or marketing phases of its production processes. In referring to that subsector the author makes use, interchangeably, of unorganized, entrepreneurial or market system. For the purpose of making reference to monopolies, oli-

gopolies, conglomerates or any other aspect of the economy that may not (for whatever reason) be strictly relegated to free market forces, the terms programmed and organized systems and sectors are employed interchangeably. Finally, the term revitalized has a double meaning in that the author contends that real growth, increased productivity and competitiveness (revitalized classicism) can most likely only be realized without increased deficits or large expenditures of tax money collected at the consumer level, through an invigorated and greatly conglomerated third (revitalized, non-profit) sector.

SUMMARY

The role visualized for the third sector within this conceptual presentation is basically to spearhead the resuscitation and reinvigoration, where possible, of a relatively free market American economy. If in fact it is to perform this vital function, certain other questions immediately come to mind. For example, could it replace the need for most major antitrust or other regulatory statutes? Could it enhance and further ensure an overall competitive environment? Might it compensate for, or utilize within reason, unchanging human nature to advance productivity levels necessary for the fulfillment of its proposed new responsibilities (returning absolute control of the entire economy to the consumer)? Hence, should it serve as a new economic foundation if in addition it can satisfy the current inflation concerns and employment demands that are so urgently being pressed upon America.

In general, the proposed third sector role (conglomeration) in the overall domestic economy is to, where feasible, inspire its rejuvenation. The concept holds that through this action and in conjunction with a reasonable self-regulation of the economy (cooperative public and private sector), the revitalization could reinforce the superiority of America's economic and thus social and political system.

The popular argument (valid or not) of opponents to the American system, due to sporadic government controls and organized corporate (monopoly, oligopoly, conglomer-

ate) intervention in the affairs of the economy, is that for all practical purposes, neoclassicism equates to the letter with socialism. And, but for the artificial and misleading success of these largely unacknowledged interventions, the system would have long since collapsed. It is further argued that unless there is some public acknowledgement of the failings of the system (need for an ongoing corrective capacity), human nature could bring on, in the near future, a complete and total breakdown of the American system.

THEORETICAL OBSTACLES

The originator of the concept and methodology of implementation under discussion is well aware of the implications of the preceeding arguments and disagrees vehemently to the contention that a classical (free market) system is unworkably out of the question or that all political systems, including that of the U.S., must subordinate their economies to strict state controls in order to counteract instances of high inflation, unemployment, price-fixing, etc. The architect of the concept is aware that some monopolies, oligopolies, horizontal and verticle conglomerates, which in some cases abuse the consuming public, can be useful to the overall economy. The concept, in these cases, endeavors to encourage rather than confront them through its support of growth, profit and a freer trading environment.

For the sake of theory and to neutralize the innuendo raised by the preceeding arguments, it is the author's intent to demonstrate that unemployment, taxation, and inflation, in addition to major instances of abuse at the consumer level, could be substantially reduced through third sector conglomeration and other actions provided for in the implementation mechanism; incentive-based utilization of the domestic labor supply, and substantially expanded, less capital-intensive gains in per-man-hour productivity. To stay within the classical model, the author does not propose as the intent of concept or its method of implementation, to outlaw programmed or otherwise organized elements of the American economy or those of foreign economies with

high instances of subsidized industry, but to be adequately competitive with them in the American public interest. Further, in order to achieve any facsimile of success, the concept demands, and the author finds it especially desirable, to further encourage the long term continued concentrations of research, development and overall stability for which the programmed sector of the American economy is primarily responsible. Thus, we come to the acknowledged theoretical requirement of overall cross-sector management cooperation. It is conceded by the author that to inspire management into a spirit of cooperation, the concept itself must allow for a realization of the legitimate GROWTH and PROFIT objectives of these sectors. At this point the author concedes that it is the responsibility of the implementing mechanism itself to satisfy the reasonable demands as stated above.

To achieve this desirable end, the implementing mechanism's most immediate benefit to this task could be a definite, gradual, but in ideal circumstances, major reduction in the total amount of individual income tax collected at the federal level (without concommitant reductions in available services). The mechanism's mandated demonstration of possibilities in this area is vitally important in that the cooperation of the market sector and benefits at the consumer level of the economy must also be obtained. That is, proceeding on the assumption that the cooperative effort can be theoretically enhanced by adding directly to demand for consumer goods manufactured by both the programmed and market sectors.

As stated earlier, growth and profit satisfy the basic demands of private sector management if and only if the probability exists that these legitimate goals might be reached without wringing from competitors, or other segments of the economy, market shares, new business or expensive labor resources.

In that a major element of the implementing mechanism of the concept at issue is to steadily (given the full cooperation of all parties) reduce taxation, without reducing services, there could be annually added to the overall economy buying power in excess of billions upon billions of dollars, plus billions of dollars in the form

of potential labor-intensive productivity increases. Further, should all theories in that connection prove correct, a further by-product on the demand side of the equation could be an overwhelming increase in corporate demand for goods and services (in addition to that resultant from potential tax cuts), i.e., that generated by the newly organized, greatly (but gradually) expanded economic activity of the third, non-profit sector. (Currently this unorganized sector has outlays of $80 billion, spends $36 billion in payrolls annually, and owns 11% of land in the U.S.) If as implied, there exists a possibility of greatly improving upon product and service demand as described above, both the market system and programmed sector corporation objectives can reasonably be fulfilled. Hence, their cooperation (as far as profit and growth are concerned) can reasonably be expected.

The reader should note at this point that while enhanced profit and growth possibilities in normal circumstances would be sufficient to enlist general cooperation, an additional incentive must be identified to encourage the small businesses that make up the market system sector to undertake activities (organization) traditionally not associated with them. Further, the concept's insistence on a freer trading (less government intervention) environment means that should there be among the participants within the domestic or foreign national economies, subsidized industrial competitors that refuse, for whatever reason, to abide by the general American position (spirit of trading fairness), all potential benefits to her consuming public would thus fail to materialize (to be addressed later).

Assume that the management and/or owners on the domestic scene and/or foreign national corporations from the programmed aspect of the world economy ignored their traditional objectives and persisted with attempts, through other than open market forces, to conduct activities prohibited in spirit by the current international trade, antitrust, etc. regulations to the disadvantage of the American consumer. Where is redress to be found? How is the society to compensate and take the hundreds of interrelated actions necessary to overcome obstacles which trade agreements

and antitrust provisions of the law have failed up to this point to effectively deal with.

At maximum point, when currently available regulation and antitrust restraints and trade agreements have been, wherever possible, phased out through the implementing apparatus, there will exist deterrents equal to or in excess of those contained in the old regulatory processes which may continually be brought to bear by the Congress of the United States on an ongoing basis through its direct and continued oversight of the then substantially enlarged third, non-profit sector.

THE THIRD SECTOR ROLE

In a case where in order to protect the American public from foreign national or domestic abuse because of exposure to concentrations of economic power, the Congress could exert itself. In order for it to do so, in any pragmatic sense, within the concept's recommended bounds (classical economy), there need only be in place an equally concentrated, potentially competitive, non-profit segment of the economy that could produce the end-products or services in question. However, unlike the profit-making sector, that influential concentration of economic capability must be subject to control at the consumer level. This necessary competitive force of corporate organizations must, in that case, compare in size and scope with the largest conglomerates in the world, or to some combinations thereof. The author emphasizes that to subject this concentration to consumer control, it must in some concrete way (preferably that recommended in the concept's method of implementation) be dependent on the Congress of the United States for its very life.

THE THIRD SECTOR ORGANIZATION

In order to carry out the above and allow in conjunction for a return of the American economy to a free market system, the author's concept requires that a combination small business-third sector conglomerate be built and within reason suc-

cessfully operated to the advantage of its small business and non-profit membership. It is proposed that a revitalized non-profit sector be pursued, building from it a conglomerate in the public interest.

It should be noted at this point that a majority of the advantages associated with the concept that have any direct bearing upon the nation's SHORT TERM Economic Outlook, Formula Approaches to a Balanced Budget, Inflation, Unemployment, National Priorities, Fraud and Abuse in Federal Programs, Taxation at the Consumer Level, and Aid to State and Local Governments are to be realized primarily through the enactment of its implementing mechanism.

Thus, the success of the concept is in large part based on its meeting the challenges presented by the anti-organizational nature of the entrepreneur (small, for-profit businessman) and encouraging him to undertake the development of new economic activity in his current, as well as the non-profit sector.

To further encourage the entrepreneur (generally a single proprietor) to first submit to organization and then to cooperate with the non-profit sector, the management structure of the conglomerate created thereby must minimize authority over the proprietor, including any vestiges which would subordinate or in any way stifle the initiative, creativity and/or productivity associated with him, through other than consumer wishes or supply and demand open market forces.

The mechanical representation of the conceptual alternative utilizes an organizational structure where all membership (profit and non-profit) would be by association only; the assets and liabilities of the members would remain separate and distinct, as would all authority over individual corporate decisions. The concept recognizes that to succeed as a large organization, assuming the cooperation of its profit and non-profit entrepreneurial membership, the abilities, activities and skills must be of sufficient variety that combined, all benefits commonly associated with conglomerates from within the private profit-making sector would be readily available to each. Thus, it follows that what would be a relatively loose organization,

is in fact cohesive and competitive, serving the financial and long-term planning needs of its combined membership.

The success of the overall concept and proposed method of implementation will depend entirely upon its ability to revitalize the third, non-profit sector. The benefits sought will yield valued results in direct proportion to its effectiveness in attracting existent market system companies, and in addition, to encouraging expansion of their traditional business relations.

In summary, the concept proposes to fight fire with fire, ambition with ambition, uncontrolled greed with a calculated use of unchanging human nature, all of which would be without undue complication and subject on an ongoing basis to the will of the citizens of the United States through duly elected public officials after a complete series of experimentations over a specific period of time and on a Congressionally reviewed pilot program basis.

Any details required to implement, in general, the ideas presented thus far have been for the most part, resolved and are available via dialogue and support materials upon request. The particular mechanics and any resultant public interest benefits potentially realizable have been very favorably received by some leading House and Senate members of the U.S. Congress (both parties), top 500 business executives, dedicated entrepreneurs (in and out of the profit-making sector), ex-cabinet and retired military officials.

Copyright 1979 in U.S.A. by Larry Napoleon Cooper

ADDITIONAL SUBMISSION OF FRANCIS KIRKHAM

April 18, 1978

EXHIBIT I

Analysis of Pending Civil Antitrust Cases - United States District Court - Northern District Of California

MR. FRANCIS KIRKHAM:

In response to your recent request, we have analyzed the available complaints in all non-government civil antitrust cases pending in the United States District Court for the Northern District of California. Our purpose was to identify those cases which involved direct or indirect sales relationships and which might therefore be affected by legislation overruling the Supreme Court's decisions in Hanover Shoe and Illinois Brick. We used the same approach adopted by Milton Handler in his recent review of antitrust cases pending in the Southern District of New York.

Our basic case source was a computer printout prepared by the Administrative Office of the United States Courts. That printout, which is dated November 29, 1977,* identifies 289 civil antitrust cases as presently pending in San Francisco.** Of these, we analyzed 197. The remaining 92 cases had either been brought by the government or were closed, in chambers, misplaced, or otherwise unavailable for review. The results of our analysis, which are described below, are striking. In order to keep those results in perspective, however, you should be aware of the following:

1. When we started this project, we analyzed both the initial and the most recent amended complaint on file. After reviewing approximately 20 cases, however, we abandoned this approach. Our reasons were twofold: First, we found that none of the amendments was significant for our purposes. Second, in addition to being a very time-consuming

---

* Due to the constricted time frame and the cumbersome procedure involved, we did not identify cases filed from December 1, 1977 to date.

** One hundred seven of these are Sugar cases consolidated for pretrial proceedings before Judge Boldt.

operation, we found that the most recent pleadings were frequently checked out to the court. Accordingly, this study is based on an analysis of the complaints as originally filed.

2. For statistical purposes we placed each case into one of four categories: (1) Direct sales; (2) Indirect sales; (3) Both direct and indirect sales (e.g., multiple parties); and (4) Other antitrust (e.g., horizontal competition, etc.). All categories are self-explanatory, although one fact is worth mentioning regarding category number (3). These cases generally include defendants that operated on various levels in the flow of commerce, e.g., manufacturers, wholesalers and distributors. Some of these defendants dealt directly with the plaintiffs and some did not. We found, however, that the plaintiffs in each of these cases had alleged a single conspiracy among all of the defendants, thereby subjecting each of them, including those whose dealings with the plaintiffs were indirect, to joint and several liability for the full amount of damages proved. Although the plaintiffs in these cases would not lose their cause of action against any defendant notwithstanding the Illinois Brick decision (and thus could technically be treated as direct purchasers for purposes of this study), we have, in an effort to be as precise as possible, placed these cases in the "Both" category.

3. Finally, although all of us who worked on this project sought to be as uniform as possible in our analyses, there is an element of subjectivity involved, particularly with complex antitrust complaints, some of which exceeded 50 and 60 pages. Although this might affect the statistics for a few cases, I feel it has no substantial impact on our overall results.

With the foregoing in mind, I turn to the results of our survey.* We found that the statistics for the Northern District of California are similar to those cited by Milton Handler for the Southern District of New York. Of the 197 antitrust cases we analyzed, 163 (82%) involved purchase or sales situations such as price fixing, refusals to deal, tie-ins, etc. Of these cases, the substantial majority, or

---

* These results are presented in statistical form on Exhibit A to this memorandum.

110 (67%), involved direct sales situations.* Of the remainder, 16 (10%) cases involved both direct and indirect sales, while 37 (23%) covered a purely indirect sales relationship.** Significantly, all the indirect sales cases stem from the unique circumstances involved in the Sugar litigation. If the Sugar cases are not considered, then there is not a single antitrust case pending in the Northern District of California that was brought by an indirect purchaser or seller of a product or services.

Of the 110 direct sale cases, we found that 106 of them (or 96%) involved plaintiffs who later resold the item. Thirty-eight of those resale cases (or 36%) involved resale of the product in the form in which it was originally purchased while in 68 of the cases (or 64%) the plaintiff altered the product in some way prior to resale. In this respect, our situation differs somewhat from Handler's in New York. That is, we tended to find more "middlemen," e.g., persons who purchase and resell an item in the same form, than Mr. Handler found in the Southern District of New York.***

Of the 37 cases where indirect sales were involved, we found that 25 of the plaintiffs (68% of the total) resold the product to another person. Of these 25 resales, only 7 of them (28%) involved a sale in the same form,*** while the remaining 18 sales (72%) were in a different form. This also represents a somewhat higher percentage of middlemen than Mr. Handler found in the Southern District of New York.

Finally, of the 34 cases that did not involve the purchase or sale of a product, 33 of them (or 97%) involved horizontal competitors who dealt directly with each other.

---

* This figure assumes a special significance in light of the Ninth Circuit's 1973 ruling in the Liquid Asphalt cases, where the court expressly held that indirect purchasers had a cause of action under the antitrust laws. Despite this holding, the greater number of private enforcement actions continue to be brought by the direct purchaser or seller.

** These cases, broken down into categories, are identified on Exhibit B to this memorandum.

*** Again, this is primarily due to the Sugar cases, where a large number of plaintiffs are grocery stores or mid-level wholesale distributors who resell the packaged sugar to their own customers.

Clearly, therefore, our survey supports Mr. Handler's conclusion that the majority of the antitrust cases are brought by those who deal directly with the alleged violator.

James L. Warren

Attachments

EXHIBIT A

I.	Total Case Analysis		
	A. Total cases		197
	1. Direct Sales	110 (56%)	
	2. Indirect Sales	37 (19%)	
	3. Both	16 (8%)	
	4. Other	34 (17%)	
II.	Total Direct Case Sales Analysis		
	A. Total Direct Cases		110
	1. Total Resold	106 (96%)	
	(a) Same Form 38 (36%)		
	(b) Different Form 68 (66%)		
	2. Total Not Resold	4 (4%)	
III.	Total Indirect Case Sales Analysis		
	A. Total Indirect Cases		37
	1. Total Resold	25 (68%)	
	(a) Same Form 7 (28%)		
	(b) Different Form 18 (72%)		
	2. Total Not Resold	12 (32%)	
IV.	Total Both Direct and Indirect Case Sales Analysis		
	A. Total of Both Types of Sales		16
	1. Total Resold	15 (94%)	
	(a) Same Form 5 (33%)		
	(b) Different Form 10 (67%)		
	2. Total Not Resold	1 (6%)	
V.	Total Other Case Analysis		
	A. Total Other Cases		34
	1. Direct Dealing Relationship (e.g. horizontal competitors)	33 (97%)	
	2. Miscellaneous (unions, stockholders, etc.)	1 (3%)	

EXHIBIT B

ANTITRUST CASES PENDING IN THE NORTHERN DISTRICT OF CALIFORNIA

I. DIRECT PURCHASER/SELLER SUITS.

1. USA v. Westinghouse
2. Presidio Golf Club v. National Linen
3. Sun Garden v. Crocker, et al.
4. McKissack v. Patrick, et al.
5. Sosa, et al. v. Sta-Power, et al.
6. Javelin Corp. v. Uniroyal, et al.
7. Knutsonet, et al. v. Daily Review
8. Group Cable, Inc. v. PG&E
9. Northwest Publications v. John D. Crumb, et al.
10. Bohaty v. Holiday Magic, et al.
11. Bridgeman v. Holiday Magic, et al.
12. Deupree, et al. v. Auto Driveaway Company, et al.
13. Northern California Supermarkets v. Central California Lettuce Growers, et al.
14. Heat Transfer Co., et al. v. Crane, et al.
15. Sun Garden v. Consolidated Foods, et al.
16. Eng-Skell Company v. California and Hawaiian Sugar Co.
17. Zoslaw, et al. v. CBS, et al.

18. Lahidji v. Mobil Oil Corp., et al.

19. Blum's of San Francisco Inc. v. California and Hawaii Sugar Co.

20. Martin v. Holiday Magic Inc.

21. Henderson v. P.C.C.B., Inc.

22. Garcia v. Phillips Petroleum Company, et al.

23. Armstrong v. California Canning Association

24. Markham v. Central California Lettuce Growers, et al.

25. Baldi Candy Company v. Great Western Sugar Co., et al.

26. Zion Industries v. Amalgamated Sugar Co., et al.

27. Treasure Island Foods, Inc. v. Great Western Sugar Co., et al.

28. Home Juice Company, et al. v. Great Western Sugar Co., et al.

29. Washington Beverages, Inc. v. Utah-Idaho Sugar Co., et al.

30. California v. California and Hawaiian Sugar Co., et al.

31. Mother's Cake & Cookie Co. v. California and Hawaiian Sugar Co.

32. Northwest Candy, Inc. v. Utah-Idaho Sugar Co.

33. Rebar Santa Clara v. Bethlehem Steel Co.

34. ITT Continental Baking Co. v. Great Western Sugar Co.

35. ITT Continental Baking Co. v. California and Hawaiian Sugar Co.

36. King Kelly Marmelade Co. v. California & Hawaiian Sugar Co.

37. General Bottlers, Inc. V. California and Hawaiian Sugar Co. et al.

38. Merchant's Restaurant, Inc. et al. v. Great Western Sugar Co.

39. Schulze & Burch Biscuit Co. v. Great Western Sugar Co.

40. Grist Mill Company v. Great Western Sugar Co.

41. Morgan Equipment Co. v. GMC, et al.

42. Zarda Brothers Dairy, Inc. v. California and Hawaiian Sugar Co.

43. Smith Cookie Co. v. Amalgamated Sugar Co., et al.

44. 1812 Distributing Corp. v. Utah-Idaho Sugar Co.

45. United A.-G. Coop, Inc. v. Amalgamated Sugar Co.

46. Bresler Ice Cream Co. v. Great Western Sugar Co.

47. Colorado v. Great Western Sugar Co.

48. The Paniplus Co. v. Great Western Sugar Co.

49. Milford Canning Co. v. Great Western Sugar Co.

50. Tri-R-Vending Service Co. v. Amalgamated Sugar Co.

51. Sethness Greenleaf Co. V. Amalgamated Sugar Co.

52. Harold Freund Baking Co. v. California and Hawaiian Sugar Co.

53. CFS Continental-Los Angeles Inc. v. California and Hawaiian Sugar Co.

54. Courtesy Food Market, Inc., et al. v. Great Western Sugar Co., et al.

55. Campbell Plaza Theatres Inc. v. Syufy Enterprises, et al.

56. Marine Propulsion Systems v. Chrysler Corp., et al.

57. Schwan's Sales Enterprises, et. al v. Amalgamated Sugar Co., et al.

58. American Bakeries Company v. Amalgamated Sugar Co. et al.

59. The Dickinson Family Inc. et al. v. California and Hawaiian Sugar Co. et al.

60. CFS-Continental, et al. v. California and Hawaiian Sugar Co., et al.

61. Northwest Packing Co., et al. v. Utah-Idaho Sugar Co., et al.

62. Cotton v. Executone Inc, et al.

63. E. O. Hudson Senior v. Savannah Food Industries, et al.

64. Imperial Preserves v. Great Western Sugar Co., et al.

65. Goelitz Confectionery Co. v. Amalgamated Sugar Co., et al.

66. Interstate Brands Corp. v. California and Hawaiian Sugar Co., et al.

67. Flair Beauty Supply Co., et al. v. Turner Hall Corp., et al.

68. Interstate Brands Corporation v. Great Western Sugar Co., et al.

69. Boardwalk Markets v. Associated Foodstores, et al.

70. DiGiorgio Corporation v. Amstar Corp., et al.

71. Pepsi Cola Bottling Co. of Topeka v. Great Western Sugar Co., et al.

72. Sambo's Restaurant v. Amalgamated Sugar Co., et al.

73. Sinco Oil Corp. v. Dow Chemical Corp.

74. Mid-America Dairymen Inc. v. California and Hawaiian Sugar Co.

75. Pioneer Appliance Co. v. Mason Corp.

76. Gramophone v. CBS

77. West Coast Growers and Packers v. California and Hawaiian Sugar Co., et al.

78. Jianas Brothers Candy Company, Inc. v. Great Western Sugar Co., et al.

79. Intercon v. General Instrument Corp.

80. Mortensen v. Texaco, et al.

81. Clarkson and Co Limited v. North American Rockwell, et al.

82. Hawthorne Melody v. Great Western Sugar Co., et al.

83. Waldorf Bakers, Inc. v. Amstar Corp.

84. Continental Coffee Company of Florida v. Amalgamated Sugar Co., et al.

85. Farmhouse Food Corporation v. Great Western Sugar Co., et al.

86. Sethness Greenleaf, et al. v. Amalgamated Sugar Co., et al.

87. Federal Bake Shops, Inc. v. Amalgamated Sugar Co., et al.

88. A & P Bakery Supply and Equipment Company, et al. v. Amstar Corp.

89. A Barr Sales Company v. Amalgamated Sugar Co.

90. Tripper Corp. v. Chrysler Corp., et al.

91. Kallmeyer v. California and Hawaiian Sugar Co., et al.

92. Plantation Baking Co. v. Great Western Sugar Co., et al.

93. Sunmark, Inc. v. Amalgamated Sugar Co., et al.

94. Bulzan v. Atlantic Richfield Co.

95. Barkley v. TRW, Inc., et al.

96. Sambo's, et al. v. California and Hawaiian Sugar Co., et al.

97. James Dione v. Holiday Magic

98. Lawrence Sizar v. Holiday Magic

99. Carr Electronics Corp. v. Sony Corp. of America

100. Jerry Cullen v. Sonoma County Multiple Listings, et al.

101. Omi, et al. v. Saxon

102. Hydraulic Controls v. Greer Hydraulics

103. Gelsey v. Maico

104. MAP Oil Co. v. Texaco

105. Award, et al. v. Hartz, et al.

106. Watson v. Dana

107. Magic v. Mattel

108. Aamco v. Wells, et al.

109. KDK v. Commercial, et al.

110. Copeland, et al. v. Arco

II. INDIRECT PURCHASER/SELLER SUITS

1. Zim's Restaurant, Inc. v. California and Hawaiian Sugar Co.

2. Paoli's Restaurant, Inc. v. Consolidated Foods Corp., et al.

3. Fantasia Confections, Inc. v. California and Hawaiian Sugar Co.

4. Board of Education of the City of Berkley v. California & Hawaiian Sugar Co.

5. Illinois v. Great Western Sugar Co.

6. Scandia Bakery v. California and Hawaiian Sugar Co.

7. Oregon v. Utah-Idaho Sugar Co.

8. Ewald Brothers v. Great Western Sugar Co.

9. Johns Food Centers Inc. v. California and Hawaiian Sugar Co.

10. Minnesota v. Great Western Sugar Co.

11. The Brothers Restaurant, Inc. v. Amalgamated Sugar Co.

12. Steak-O-Rama, Inc. v. Amalgamated Sugar Co.

13. Missouri Farmers Association v. California and Hawaiian Sugar Co.

14. Orange Julius of America v. California and Hawaiian Sugar Co.

15. Passengers Restaurants v. Great Western Sugar Co.

16. Kansas v. Great Western Sugar Co.

17. Wisconsin v. Great Western Sugar Co.

18. Armand's Inc. v. Utah-Idaho Sugar Co.

19. Heckel v. Utah-Idaho Sugar Co.

20. International Kings Table, Inc. v. Utah-Idaho Sugar Co.

21. International Kings Table, Inc. v. California and Hawaiian Sugar Co.

22. Arizona v. California and Hawaiian Sugar Co.

23. Indiana v. Great Western Sugar Co.

24. Topsy's International v. California and Hawaiian Sugar Co.

25. Montana v. Amalgamated Sugar Co.

26. Brinker v. Amalgamated Sugar Co.

27. Martinez v. Great Western Sugar Co.

28. Nevada v. California and Hawaiian Sugar Co.

29. M. A. Lopez Supermarkets, Inc. v. Great Western Sugar Co.

30. TAE Corporation v. Great Western Sugar Co.

31. A C. Jordan, et al. v. Amalgamated Sugar Co.

32. Missouri v. Great Western Sugar Co.

33. Genesis Group et al. v. Great Western Sugar Co.

34. Klein v. Amalgamated Sugar Co.

35. McCormick v. Great Western Sugar Co.

36. Garcia v. Amalgamated Sugar Co.

37. The Bakery, Inc. v. California and Hawaiian Sugar, et al.

III. BOTH DIRECT AND INDIRECT PURCHASER/SELLER SUITS

1. Grover, Easterly, et al. v. Fiske Brothers Refining Co., et al.

2. Dunn Chemical Co. v. Sybron

3. Raleys, Inc. v. California and Hawaiian Sugar Co.

4. Superior Beverage Co. v. Great Western Sugar Co.

5. Seeco, Inc., et al. v. Great Western Sugar Co., et al.

6. International Industries, Inc. v. California and Hawaiian Sugar, Co.

7. Benner Tea Co. v. Great Western Sugar Co.

8. Bay Area Glass Co. v. Sunglo, et al.

9. El Camino Glass Co. v. Sunglo, et al.

10. International Industries, Inc. v. California and Hawaiian Sugar Co.

11. Boaz v. Sunglo Glass Co., et al.

12. Food Mart-Eureka, et al. v. California and Hawaiian Sugar Co.

13. Owens Enterprises, Inc. v. California and Hawaiian Sugar Co.

14. Heinemann's Inc. v. Great Western Sugar Co.

15. Washington v. Utah-Idaho Sugar Co.

16. International Industries v. California and Hawaiian Sugar Co.

IV. OTHER SUITS

1. Certified Garment Corp. v. Peerless Linen, et al.

2. Multiple Listing Service v. SF Real Estate Board, et al.

3. Frost, et al. v. Shipowners & Merchants Towboat, et al.

4. Timberlane Lumber v. Bank of America, et al.

5. Murphy Tugboat Co. v. Crowley, et al.

6. Murphy Pacific Co. v. Crowley, et al.

7. Hudson General Corp. v. IBM, et al.

8. Forro v. IBM

9. Sanders Associates v. IBM

10. Memory Technology v. IBM

11. Pacific Sun Publishing Co. v. Chronicle Publishing, et al.

12. International News v. San Francisco Newspaper, et al.

13. Dollar Rent-A-Car v. Hertz Rent-A-Car Systems, et al.

14. Pacific Mailing, et al. v. Pitney Bowes, et al.

15. Berkeley News, et al. v. Chronicle Publishing Co., et al.

16. Shipowners & Merchants, Inc. v. Murphy Pacific, et al.

17. Davis v. Northern California Sanitation, et al.

18. Lewis, et al. v. Baker Industries, et al.

19. Frensley, et al. v. San Francisco Newspaper Printing Co., et al.

20. Marnell v. United Parcel Service of America, et al.

21. Barker v. General Mills, et al.

22. Fun Games Inc. v. Atari, et al.

23. P.F.E.L. v. R. J. Reynolds, et al.

24. Budget Rent-A-Car v. Hertz Rent-A-Car Systems, et al.

25. Martinoni, et al. V. American Distilling Co., et al.

26. Siltec Corp. v. Kyocera International, et al.

27. Burnup & Sims v. Cypherd, et al.

28. Aircraft Tech v. Cessna

29. Clipper Carloading v. Rocky Mountain, et al.

30. Cullen v. Bundeson

31. Bay Area Seating Services v. Select-A-Seat Corp.

32. Diablo v. Lesher, et al.

33. Worrell v. Antioch, et al.

34. States Steamship Co. v. Sea-Land Service, Inc.

April 22, 1978

Analysis of Pending Antitrust Cases - United States District Court - District of Arizona

MR. FRANCIS KIRKHAM:

We have reviewed the available complaints in all non-government civil antitrust cases pending in the United States District Court for the District of Arizona. Although our time was short, with the cooperation of the Clerk we were able to examine all cases filed in both the Phoenix and Tucson Divisions.

Our case source was again the computer printout prepared by the Administrative Office of the United States Courts. That printout, which is dated November 29, 1977, identifies 84 civil antitrust cases as then pending in the District of Arizona. We analyzed 53. Of the remaining cases, four were closed, two were sealed, and 25 were in chambers. *

Our results are similar to those found in San Francisco and in New York. Of the 53 cases we analyzed, 32 involved the purchase or sale of a product or service and 21 touched other antitrust problems. ** Of the 32 sales cases, the clear majority, 26 (81%), involved direct sales situations. Of the remainder, five cases (or 16%) involved both direct and indirect sales situations, while one (3%) covered an indirect sale transaction.

Of the 26 direct sale cases, we found 21 where the plaintiffs later resold the product, and four where some plaintiffs did and some plaintiffs did not. One case

---

* The 25 complaints that were out to the court were filed in the Cement cases which were then the subject of motions for partial summary judgment under Illinois Brick. Although we could not review any Cement complaints in Arizona, we did find in our office files a copy of the complaint in 19 of the 25 cases identified by the Administrative Office. Fifteen of those complaints (or 79% of the total) involved direct purchases, one (5%) alleged both direct and indirect purchases, and three (16%) were brought by indirect purchasers.

** These results are presented in statistical form on the annexed Exhibit A. The cases are identified by name on Exhibit B.

involved the ultimate consumer only. Of the 25 resale cases 11 involved resale in the same form, nine involved resale in a different form, and five involved situations where some plaintiffs resold the item in the same form and some resold it in a different form.

In the five cases where we had both direct and indirect sales, two involved resale, two more had some resale and some non-resale, and one was an ultimate consumer situation. Of the four resale cases, one-half covered resale of the commodity in the same form and the other half involved some modification of the item prior to resale.

The only purely indirect case we found was brought by an association of consumers. They did not resell the product.

Finally, of the 20 miscellaneous cases, all involved situations where the parties dealt directly with each other.

In my opinion, this survey further supports the position that most private enforcement actions are brought by parties dealing directly with each other.

James L. Warren

Attachments

EXHIBIT A

District of Arizona

I. Total Case Analysis

A. Total Cases 53

1. Direct Sales 26
2. Indirect Sales 1
3. Both 5
4. Other 21

II. Total Direct Case Sales Analysis

A. Total Direct Cases 26

1. Total Resale 21 (81%)
2. Both Resale and Non-Resale 4 (15%)

(a) Same Form 11 (44%)
(b) Different Form 9 (36%)
(c) Some Same; Some Different 5 (20%)

3. Total Not Resold 1 (4%)

III. Indirect Case Sales Analysis

A. Total Indirect Sales 1

1. Total Resale 0
2. Total Not Resold 1

IV. Total Both Direct and Indirect Case Sales Analysis

A. Total of Both Types of Sales 5

1. Total Resale 2 (40%)
2. Both Resale and Non-Resale 2 (40%)

(a) Same Form 2 (50%)
(b) Different Form 0
(c) Some Same; Some Different 2 (50%)

3. Total Not Resold 1 (20%)

EXHIBIT B

CIVIL ANTITRUST CASES PENDING

IN THE

DISTRICT OF ARIZONA

I. DIRECT PURCHASER/SELLER SUITS.

1. Fashion Floors, Inc. v. Arizona Sash & Doors

2. Central Distributing Co. v. Adolph Coors

3. Giant Service Stations, Inc., et al. v. Phillips Petroleum Corp.

4. Gas-a-Tron of Arizona v. Union Oil Co., et al.

5. Petrol Stops Northwest v. Continental Oil Co., et al.

6. P & P, Inc. v. Texaco, Inc.

7. United States of America v. Holsum Bakery, et al.

8. Jimmy Jack's Drive-In v. Rainbow Baking Co. of Phoenix, et al.

9. State of Arizona v. Holsum Bakery, Inc., et al.

10. Samaritan Health Services v. Holsum Bakery, Inc., et al.

11. School District No. 48, et al. v. Holsum Bakery, Inc., et al.

12. Whipple v. Shamrock Foods Co., et al.

13. United States of America v. Borden, Inc., et al.

14. Sborocco, et al. v. Borden, Inc., et al.

15. Begonia, Inc. v. Borden, Inc., et al.

16. State of Arizona v. Borden, Inc., et al.

17. Cosma Corp., et al. v. Foremost-McKesson, et al.

18. St. Luke's Hospital Medical Center, et al. v. Borden, Inc., et al.

19. Nogales Service Centers v. Atlantic Richfield Corp.

20. Benjamin Supply, Inc. v. McGrain Edison Co.

21. Braun v. Heller

22. DeBeers Diamond, et al. v. Anglo American DeBeers, et al.

23. American Bethlehem v. Fenwick

24. Standard Glass v. Universal Waste

25. Charles H. Lucas, et al. v. Bechtel Corporation

26. Supersonic Car Wash v. Texaco, Inc.

II. INDIRECT PURCHASER/SELLER SUITS.

1. Arizona Consumers Council, et al. v. Rainbow Baking Company of Phoenix, et al.

III. BOTH DIRECT AND INDIRECT PURCHASER/SELLER SUITS.

1. Miller, et al. v. Holsum Bakery, et al.

2. Wallace Imports, Inc. v. Renault West, Inc.

3. Miller, et al. v. Borden, Inc., et al.

4. Walton, et al. v. Borden, Inc., et al.

5. Duppa Villa Liquors, Inc. v. Zeb Pearce & Sons Wholesale Liquors

IV. OTHER SUITS.

1. D & S Redi-Mix v. Sierra Redi-Mix Contracting Co.

2. Producers Minerals Corp. v. Essex International

3. Capin's Automatic Car Washes, Inc. v. Atlantic Richfield Company

4. Precision Toyota, Inc. v. Toyota Motor Co., Ltd., et al.

5. Palmer v. Nester, et al.

6. Wilt, et al. v. Wright Investors Services

7. Lutheran Hospitals v. State of Arizona, et al.

8. Hankins v. Dion's Le Wig

9. Purcell v. Phoenix Board of Realtors, et al.

10. Pop Palace v. Fry's Food Stores of Arizona, et al.

11. Anrix Corp. v. Datapoint Corp.

12. Vinall, et al. v. Southern Arizona Dental Society, et al.

13. Tucson Truck Terminal, Inc. v. Mid-Construct, Inc., et al.

14. Cineworld Corp. of Texas, et al. v. United Artists Theater Circuit, et al.

15. Creative Builders v. Marston's, Inc., et al.

16. The Norton Corp.-Turf Equipment v. Weed Eater, Inc.

17. Sam Naso v. Arizona State Board of Funeral Directors, et al.

18. Jarman v. City of Phoenix, et al.

19. Territorial Thrift and Loan Association v. Financial Federal, Inc., et al.

20. Communiverse, Inc. v. Sun World Corp.

21. Fox Distributors, Inc. v. Pacifico, Incorporated, et al.

LETTERS

THE WHITE HOUSE

WASHINGTON

April 23, 1979

To Senator Edward Kennedy

I am writing to ask for your support in favorably reporting the Illinois Brick legislation out of the Judiciary Committee. One of our key weapons in the fight against inflation is effective enforcement of the antitrust laws. Historically, the ability of private parties to bring treble damage actions against antitrust violators has been crucial in deterring illegal conduct. Government criminal and civil actions alone are not sufficient. The Supreme Court's Illinois Brick decision, by barring recovery for all indirect purchasers who have suffered injury due to a violation of the antitrust laws, has significantly undermined the effectiveness of the private damage remedy and, thus, the effectiveness of antitrust enforcement. If our antitrust enforcement efforts are to work well, there must be a broad range of potential plaintiffs, including indirect purchasers, available to challenge those who would violate the law by conspiratorially raising prices.

At this time when we need to devote all possible efforts to controlling the cost-of-living, I am particularly concerned that the antitrust laws be vigorously enforced. Passage of this legislation is essential to this goal.

Sincerely,

Jimmy Carter

The Honorable Edward M. Kennedy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

United States Department of Justice
WASHINGTON, D.C. 20530

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

7 MAR 1979

Honorable Edward M. Kennedy
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to requests for additional information made by you and Senators Thurmond and Laxalt during my testimony on S. 300, before the Committee on the Judiciary on February 1, 1979.

1. You requested data regarding whether there has been a reduction in the number of cases filed as a result of the Illinois Brick decision. Data obtained from the Administrative Office of United States Courts, 1978 Annual Report of the Director, 78 (1978), indicates that in fiscal year 1978, private litigants commenced 1,435 antitrust cases. This figure represents a decline of 176, or 10.9 percent, from the 1,611 cases that were filed in fiscal year 1977.

In fiscal years 1974 through 1977, the number of private antitrust cases filed in each year increased at rates of 6.7, 11.8, 9.3, and 7.1 percent, respectively. If the number of filings had increased at the average of these four rates, or 8.7 percent, then 1,751, or 316 more cases than the number actually filed, would have been commenced in 1978. While the fiscal year 1978 figures may conceivably be attributable to a number of possible factors, it is certainly likely that the Illinois Brick decision was an important factor in this change in the trend of the number of private antitrust cases filed.

2. Senator Thurmond requested that we supply the Committee with information concerning the number of government antitrust suits impacted by the Illinois Brick decision. At the time of the decision, the United States had four damage actions involving indirect purchases that were affected by the decision. The cases involved recoveries in the order of $200 million.

The cases are as follows:

(1) United States v. Armco Steel Corp., Civ. No. 73-H-1427 (S.D. Tex., filed Oct. 15, 1973);
(2) United States v. Bristol-Meyers Co., Civ. No. 822-70 (D.D.C., filed March 19, 1970);

(3) United States v. Chas. Pfizer & Co., Civ. No. 1966-69 (D.D.C., filed July 15, 1969); and

(4) United States v. Alton Box Board Co., Civ. No. 76C 1638 (N.D. Ill., filed April 31, 1976).

The Armco Steel case was dismissed in light of Illinois Brick, and the Alton Box case has been settled. In Bristol-Meyers and Chas. Pfizer, the Department is arguing that most of the affected sales come within the cost-plus exception to the Illinois Brick rule; whether we will be successful in these arguments is presently unclear. It is clear, however, that these difficult legal arguments would be unnecessary but for the Illinois Brick decision.

While these cases are significant, it is important to recognize, as I outlined in my testimony before the Committee, that the real danger to antitrust enforcement is prospective. The above cases, representing millions of dollars in potential damage recoveries, cover only a short span of time. If the Illinois Brick rule is allowed to stand, the loss to the government over, for example, the next 50 years will be staggering.

3. Senator Laxalt requested statistics regarding the percentage of price-fixing cases that are brought as class actions. Unfortunately, precise data on this matter is not available. However, data are available on the number of antitrust actions brought each year as class actions, but these are not identified as to the type of violation. According to the 1978 Annual Report of the Director of the Administrative Office of the United States Courts, in 1978, 1,435 antitrust cases were filed, 183 of which were class actions. In 1977, there were 235 class actions out of 1611 cases filed. It is also important to note that a study of 354 damage actions by Benjamin Duval, The Class Action as an Antitrust Enforcement Device: The Chicago Experience, 1976 A.B.F. Res. J. 1023, indicates that a great majority of antitrust actions of all

types are not brought as class actions, although the percentage of class actions appears somewhat larger for per se offenses such as price fixing.

4. Senator Thurmond requested data on the number of cases filed by indirect purchasers. Precise data on this question are not available from public sources. We have also determined that it is not possible in many cases to readily determine from the complaint or other public documents whether a particular plaintiff, or class of plaintiffs, purchased indirectly from the antitrust violator.

Nevertheless, there have been several studies focusing on this issue. Bartholomew Lee surveyed a number of reported antitrust cases and identified 47 major cases where he concluded that indirect purchasers were the instigating parties and that the cases probably would not have been brought had the indirect purchasers not filed first. See Effective Enforcement of the Antitrust Laws: Hearings on H.R. 8359 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 467-70 (1978).

In addition, Milton Handler and Michael Blechman conducted a study of 203 nongovernmental cases pending in the Southern District of New York in January of 1978. Of the 203 cases pending, Professor Handler and Mr. Blechman were able to review the public documents in 116 cases. Of the 116 actions, 69 involved purchasers or sellers, and 66 of these were reportedly brought by direct purchasers. However, this study is misleading and also probably grossly understates the percentage of indirect purchaser cases. First, Handler and Blechman chose a district which had been generally hostile to indirect purchaser suits, and since antitrust plaintiffs have some flexibility in picking the locus of the suit, indirect purchaser plaintiffs undoubtedly would choose a more favorable district in which to file. More fundamentally, the study failed to review 87 cases pending during their survey, most of which were in judges chambers. Inasmuch as the survey was conducted during the first few months of 1978, an inordinant number of these cases may have been the subject of a motion to dismiss in light of Illinois Brick. A similar study by Francis Kirkham in the districts of Northern California and Arizona is subject to the same bias. See generally Fair and Effective Enforcement of the Antitrust Laws, Hearings on S. 1874 Before the Subcomm. on Antitrust and Monopoly of the

Senate Comm. on the Judiciary, 95th Cong., 2d Sess, 2-32 (1978). Nevertheless, it is clear even from these studies that a number of cases have been brought by indirect purchasers alone.

Moreover, a number of cases involving primarily indirect purchasers are listed in Appendix A to House Report No. 1397, 95th Cong., 2d Sess. 47 (1978). It is not a disputed issue that there were a large number of antitrust cases prior to Illinois Brick, where indirect purchasers were the only plaintiffs to sue or where they were the instigating plaintiffs. Thus, absent this legislation, virtual antitrust immunity may be conferred on important areas of the economy. As I testified before your Committee, the possibility of private treble damage actions acts as the most effective deterrent to antitrust violations, and it is important that persons contemplating such a violation not be able to entirely discount the possibility of a future treble damage suit. If Illinois Brick legislation is not enacted, potential antitrust violators could discount the possibility of a treble damage action in those circumstances where direct purchasers have not sued in the past and where only indirect purchasers have sued, and also probably in those situations where direct purchasers have sued only after suit was first brought by indirect purchasers. In the latter cases, the disincentive for directs to sue is greatly reduced.

I hope these answers are sufficient. If you or members of your Committee desire further assistance concerning this important piece of legislation, please contact me or my staff.

Sincerely yours,

John H. Shenefield

John H. Shenefield
Assistant Attorney General
Antitrust Division

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE CHAIRMAN

February 27, 1978

The Honorable Edward M. Kennedy
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Kennedy:

This letter is in response to your request for the views of the Federal Trade Commission on S. 300, entitled the "Antitrust Enforcement Act of 1979." The Commission supports S. 300 for the same reasons that it supported similar legislation in the last Congress. Those reasons are fully set out in the Commission's letters of April 28, 1978 and July 15, 1977 to Senator Eastland and you, respectively. Copies of those letters are enclosed.

In essence, S. 300 would overturn the Supreme Court's decisions in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), and Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968). Together, those decisions established the present rule of law that (1) ordinarily only direct purchasers from persons violating the antitrust laws may collect damages pursuant to the Clayton Act for injuries resulting from such violations, and (2) conversely, antitrust violators cannot reduce their liability to direct purchasers by asserting that the direct purchasers were able to "pass on" some of the injury to purchasers further down the chain of distribution. This rule may often leave indirect purchasers, including consumers, uncompensated for injuries that are in fact passed on to them. At the same time, direct purchasers might sometimes be able to collect "windfall" compensation for injuries they have been able to pass on. The rule was apparently adopted in large part to avoid the danger that allocating damages among direct and indirect purchasers would so complicate antitrust damage actions as to make them unmanageable.

S. 300 would alter this rule by allowing all injured parties to collect from antitrust violators all the damages they actually suffer (trebled pursuant to existing law) -- and only such damages -- regardless of whether they are

Chairman Kennedy

direct purchasers from the violators. In addition, it would specifically authorize courts to calculate on a classwide basis damages suffered by classes of indirect purchasers or passed on by direct purchasers.

The Commission supports S. 300, principally because its approach -- to allow compensation of all victims of antitrust violations -- is fairer than the rule established in Illinois Brick and Hanover Shoe, which provides compensation only for injuries suffered by direct purchasers. Moreover, that approach appears to effectively serve the deterrent purposes of the antitrust laws, and the provision in S. 300 that would authorize courts to compute damages on a classwide basis alleviates somewhat the fear that allocating damages among direct and indirect purchasers will unduly complicate antitrust damage actions. Consequently, although (as discussed more fully in the attached letter to Senator Eastland) the Illinois Brick issue involves a weighing of competing considerations, for the reasons given here and in the enclosed letters, the Commission supports replacing the present rule of law with the rule contained in S. 300.

By direction of the Commission.

Michael Pertschuk
Chairman

Enclosures

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE CHAIRMAN

April 28, 1978

The Honorable James O. Eastland
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Senator Kennedy has requested that the Federal Trade Commission communicate to you its views concerning proposed legislative action to overturn the Supreme Court's recent decision in Illinois Brick Co. v. Illinois. */ Accordingly, this letter sets out the Commission's position in support of such legislation.

The rule of law established by the Illinois Brick decision, read in conjunction with the Court's previous decision in Hanover Shoe, Inc. v. United Shoe Machinery Corp., **/ is that except in very limited circumstances ***/ only direct purchasers from persons violating the antitrust laws may collect damages pursuant to the Clayton Act for overcharges or other injury resulting from such violations. The Hanover Shoe decision established that antitrust violators are precluded from asserting as a defense to an action by a direct purchaser that the purchaser passed all or part of the overcharge on to subsequent indirect purchasers. Indirect purchasers--including, ultimately, consumers and their representatives--are in turn, pursuant to Illinois Brick, precluded from collecting damages. In effect, then, the

---

*/ 431 U.S. 720 (1977).

**/ 392 U.S. 481 (1968).

***/ The Court has recognized an exception to the general rule of these cases for situations involving pre-existing cost-plus contracts, and possibly for instances in which the direct purchaser is owned or controlled by its customer. See 431 U.S. at 735-36 & n.16.

present state of the law is that there is an irrebuttable presumption that direct purchasers are injured by the full amount of the overcharge and pass no part of that overcharge on to indirect purchasers. The Commission believes that this rule is inconsistent with fair and effective administration of the antitrust laws; consequently, as the Commission indicated in a July 15, 1977 letter to Senator Kennedy--a copy of which is enclosed--we believe that legislation should be enacted to change the law on this point.

The issue involved is not an easy one. As the Illinois Brick decision indicates, it involves balancing several important competing interests. One of those interests is fairness; ideally, whatever rule is adopted should compensate all parties who are actually injured by antitrust violations--and if possible it should also avoid multiple treble-damage recoveries against defendants for the same injury. The rule should in addition be consistent with the purpose of the treble-damage provision of Section 4 to deter antitrust violations. Finally, the rule should be workable; it should not add so much complication to antitrust litigation as to make such cases unmanageable, ultimately resulting in decreased deterrence and fairness.

S. 1874, which is presently before the Senate Committee on the Judiciary, would--like H.R. 11942, its counterpart in the House of Representatives--essentially overturn both Illinois Brick and Hanover Shoe. It would allow all injured parties, whether direct or indirect purchasers from alleged antitrust violators, to collect three times the amount of any damages which they could prove. */ Defendants would be allowed to defend against

---

*/ We understand, however, that the bill would not extend a right of action to sue pursuant to the antitrust laws to persons whose injury is so remote or unrelated to the purpose of those laws that they are presently denied standing. See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Matic, 429 U.S. 477 (1977).

damage claims by proving that the plaintiff, whether a direct or indirect purchaser, had passed on all or part of an overcharge to a purchaser farther down the chain of distribution.

Enactment of S. 1874 would improve upon the present state of the law. First, the rule laid down by the bill seems to be fair. It would allow any party injured by a violation to recover three times the damages which that party could prove; under present law, by contrast, indirect purchasers are precluded from recovery regardless of whether they have been injured. And because it would allow defendants to assert a "pass-on" defense to damage claims, the proposed legislation would not contemplate unfair multiple recoveries against defendants; although there would be some possibility of multiple recoveries resulting from inconsistent adjudications, */ that danger would be reduced to an acceptable level by the availability of procedural devices such as transfer and consolidation of suits relating to the same subject matter.

Secondly, the rule of S. 1874 appears to provide adequate incentives for potential plaintiffs to bring suits, thereby serving the deterrent purpose of the treble-damage provision of Section 4. Of course, incentives to sue would not be the same under the proposed legislation as they are now. Pursuant to S. 1874, direct purchaser plaintiffs would share damage recoveries with indirect purchasers, if any, to whom overcharges had been passed on; as a result, in many instances no single plaintiff or class of plaintiffs would have as great a potential recovery--and, therefore, as great an incentive to sue--as direct purchasers have under present law. The total number of potential plaintiffs would be greater, however, since indirect purchasers who

---

*/ For instance, it might be determined in a suit brought by a direct purchaser that that purchaser had borne 100% of the cost of the overcharge, while in a suit brought against the same defendant by indirect purchasers it might be determined that some of that cost had been passed on to the indirect purchasers.

presently have no right to sue--including state attorneys general in parens patriae actions pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 */--would be potential plaintiffs under the bill. Moreover, in at least some instances direct purchasers may be reluctant to sue their suppliers because of a fear of reprisals or a simple reluctance to disturb established business relations. In such cases, indirect purchasers would be the most likely potential plaintiffs.

The principal drawback of S. 1874 is that it would add to the complexity of antitrust litigation. However, it is difficult to predict how much added complexity would result from its enactment, and we believe that the advantages which S. 1874 (like H.R. 11942) has over current law justify its enactment.

In our view it is important for Congress to move expeditiously with respect to this issue, in order to resolve the uncertainties faced by current and potential plaintiffs whose interests are impaired or otherwise affected by the Illinois Brick rule--and, indeed, by defendants who must face the question of whether dismissals or other favorable rulings will be affected by subsequent legislative action. At the same time, we also suggest that if S. 1874 or similar legislation (such as H.R. 11942) is enacted, there should be careful monitoring of its effects on treble-damage litigation.

In short, the Commission favors legislation such as S. 1874 as a satisfactory solution to the problems raised by the Illinois Brick decision.

By direction of the Commission.

Michael Pertschuk
Chairman

---

*/ Pub. L. No. 94-435, § 301, 90 Stat. 1394 (1976).

Encl.
cc: Senator Kennedy

Collier, Shannon, Rill, Edwards & Scott
Attorneys at Law
1055 Thomas Jefferson Street, N.W.
Washington, D. C. 20007

Robert A. Collier
Thomas F. Shannon
James F. Rill
Max N. Edwards
William W. Scott
Waller Flowers
Philip C. Olsson
Donald E. deKieffer
David A. Hartquist
Richard E. Schwartz

• Admitted to PA. Bar only

Telephone: (202) 337-6000
Cable: Colshan-Washington
Telex: Colshan 440434

J. Stephen Street
R. Timothy Columbus
Lauren Oldak Howard
Kathleen E. McDermott
Michael D. Sherman
Richard H. Eidelt
Richard L. Frank
Jeffrey P. Metzger
Susan B. Nealon
Robert E. Sylvester •
Thomas L. Anderson
John B. Williams
David W. Burling
Daniel O'Connell

March 19, 1979

David Boies, Esquire
Chief Counsel and Staff Director
Senate Committee on the Judiciary
2226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Boies:

During my testimony on S.300, March 9, you requested that I review the Supreme Court's recent decision in Group Life & Health Ins. Co. v. Royal Drug Co., 47 U.S.L.W. 4203 (Feb. 27, 1979) and comment regarding the relevance of that case to legislation which would overrule the Supreme Court's 1977 Illinois Brick decision, 431, U.S. 720 (1977). While the Royal Drug case is not directly related to the pending legislation certain implications in the opinion and, particularly, language in the brief of the United States amicus curiae support the views of the Food Marketing Institute on S.300.

The issue before the Supreme Court in Royal Drug was whether or not the McCarran-Ferguson Act antitrust exemption was applicable to contracts between the insurance company and providers of prescription drugs under which maximum reimbursement was made to the insured persons only if they obtained the drugs from pharmacies who agreed to charge at cost plus a fixed markup. Plaintiffs had challenged these contracts as constituting price fixing agreements establishing maximum sale prices in violation of §1 of the Sherman Act. The Supreme Court held that the McCarran-Ferguson exemption was inapplicable, observing that, of course, the mere absence of an exemption does not imply the existence of an antitrust violation. 47 U.S.L.W. 4204, n. 5.

In expressly declining to reach the question of whether the provider agreements violate the antitrust laws, an issue for the lower court, the Supreme Court referred to the amicus curiae brief of the United States. Id. That brief, a copy of which is enclosed, contains statements which strongly

support the Food Marketing Institute's testimony that the public interest militates against a legislative overruling of Illinois Brick which would make it possible for indirect sellers to claim injury under the antitrust laws.

The government's brief first observes that the objective of the provider agreements challenged in Royal Drugs is to reduce costs and that, in general, these agreements are reasonable and in the interest of consumers. Brief for the United States as Amicus Curiae at 11, Group Life & Health Ins. Co. v. Royal Drug Co., 47 U.S.L.W. 4203 (Feb. 27, 1979). Recognizing that the Court should not resolve the legality of these agreements in the Royal Drug case, the government nevertheless next offers the following highly significant comments:

> Nothing in the antitrust laws requires drug purchasers . . . to offer greater compensation necessary to satisfy less efficient pharmacies or suppliers interested in providing expensive but unwarranted services at the point of sale. To the contrary, antitrust policy seeks to preserve to consumers the opportunity to obtain a better deal. Its goal is consumer welfare, not competitor welfare. [Id. at 12].

The government has reiterated this conclusion in its recent amicus brief in Reiter v. Sonotone Corp. Brief for the United States as Amicus Curiae at 19, No. 78-690, cert. granted, 99 S.Ct. 830 (1979).

This view as to the paramount goal of antitrust is exactly the same as that expressed in the March 9 testimony of Robert Aders and, for that matter, in the Senate Judiciary Committee report on similar legislation last year.

The prospect of antitrust litigation in the name of indirect sellers would very likely discourage innovative attempts by remote buyers to seek, as in Royal Drug, means for maximizing cost reductions. The indirect nature of the suit potentially produces an especially enervating effect on buyers simply by reason of the accumulation of larger numbers of claims which though individually relatively small represent vast sums in the

aggregate and the complexity, and attendant risk of incorrect outcome, in attempting to trace alleged injury back through successive levels of production and distribution. The complexity, moreover, would be compounded by the absence of any established means whereby proof of a "pass back" of underpayments, even in the short run, might be approached. Almost without exception, the target in "seller" plaintiff antitrust cases is either a direct buyer or a competitor. We have thus far been unable to locate any reported indirect seller cases against remote customers other than Bray v. Safeway Stores, Inc. and its progeny, the Beef Antitrust Litigation. A list of seller antitrust actions together with an identification of the nature of the claim is enclosed. The fact that virtually all these actions are against direct buyers or competitors strongly suggests that, as in the Beef cases where cattlemen's suits against the packers are actively being pursued, the fundamental controversy is between companies having a direct relationship with one another.

I hope this information is useful to you and the Committee and would be pleased to furnish whatever other materials or views you might request.

Sincerely,

James F. Rill

JAMES F. RILL

Enclosures

LIST OF REPORTED SELLER-PLAINTIFF PRIVATE ANTITRUST CASES

I. Supreme Court Cases

A. Mandville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948)

II. Court of Appeals Cases

A. Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977)

Direct action by growers of tobacco who sold to the defendant tobacco manufactures.

B. Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976)

Direct action by egg producers who sold to defendant egg distributor.

C. Webster County Memorial Hospital v. Limited Mineworkers of America Welfare and Retirement Fund of 1950, 536 F.2d 419 (D.C. Cir. 1976)

Direct action by hospital who sold to defendant Trust Fund's Medical Plan.

D. Hudson Valley Asbestos Corp. v. Tougher Heating and Plumbing Co., Inc., 510 F.2d 1140 (2nd Cir. 1975)

Direct action by insulating contractor who sold to defendant general contractor.

E. South Carolina Council of Milk Producers, Inc., v. Newton, 360 F.2d 414, (4th Cir. 1966)

Milk producers action against a milk processor to whom they did not sell.

F. Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir. 1964)

Direct action by movie producer against several film distributing companies and their subsidiary theaters.

G. Union Carbide & Carbon Company v. Nisley, 300 F.2d 561 (10th Cir. 1962)

Direct action by independant ore mining company who sold to defendant ore processing company.

H. Volasco Products Co. v. Lloyd A. Fry Roofing Corp., 308 F.2d 383 (6th Cir. 1962)

Action by asphalt refiner and an affiliated asphalt roofing manufacturer against several asphalt roofing manufacturers. Plaintiff refiner could have, but did not, sell directly to the defendant manufacturers.

I. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955)

Plaintiff auto wax seller sued defendant auto wax seller who had entered in exclusive purchasing contracts with independant gas stations who were the potential customers of both plaintiff and defendant.

III. Federal District Court Cases

A. Wheat Farmers Antitrust Litigation, 440 F. Supp. 1022 (D.D.C. 1977).

Wheat farmers claiming direct sales to grain dealers.

B. Bray v. Safeway Stores, Inc., 392 F.Supp. 851 (N.D. Calf. 1975)

Indirect action by cattlemen who sold only indirectly to defendant retailer.

C. Snow Crest Beverages Inc. v. Recipe Foods, Inc., 147 F.Supp. 907 (D. Mass. 1956)

Plaintiff bottler action against competitor defendant bottler who had unlawfully entered into exclusive purchasing contracts with its customers.

THE UNIVERSITY OF UTAH
SALT LAKE CITY 84112

COLLEGE OF LAW

February 20, 1979

The Honorable Scott Matheson
Governor
State of Utah
State Capitol Building
Salt Lake City, Utah 84114

Dear Governor Matheson:

In response to your request for my views on the Illinois Brick decision and proposals to overrule that decision now pending in Congress, I am happy to submit the following views for which I alone take responsibility and are not attributable to my employer or any client or other interest. The Illinois Brick decision struck me and all those I know and discussed the decision with in the academic world as a bizarre decision undermining and doing great damage to effective antitrust enforcement. That consensus of most of the leading academic antitrust experts that I know is shared by many of the leading practitioners in the field as well, when they discuss the matter outside the context of their immediate clients' needs and interests.

It is difficult to see how anyone could argue otherwise, since Illinois Brick has the absurd consequence of denying damage recovery to the ultimate victims of an antitrust violation. At the same time, the decision holds the obvious potential for antitrust violators to retain illegal gains, since many who bear the ultimate cost of the violation are foreclosed from bringing suit. Rather than discouraging violations of the law in many areas, the decision is a perverse invitation to violate the law and retain the fruits of the violation. One need look no further than the several hundred million dollars in claims by state governments placed in jeopardy by the decision, to appreciate these implications of the case for encouraging violations of the law. In fact, "economic man" would be stupid in not choosing to violate the law by the reasoning of neo-classical economics. The benefits will frequently far exceed the risks of detection or punishment exceeding the gains that may be realized by violating the law. From whatever perspective one examines Illinois Brick, it is apparent that there is no basis in the existing statute for reaching the decision made other than judicial legislation to limit access to the federal courts; that the decision seriously undermines effective antitrust enforcement; that the decision denies justice and compensation for injuries caused by illegal activity in violation of our fundamental economic policies; and, that the only beneficiaries of the continued delay in overruling

Illinois Brick are those who have illegally gained millions at the expense of the American consumer. Opposition to reversing Illinois Brick can have no other functions than achieving these goals that I can fathom; and, I have yet to hear a persuasive rationale for the opposition other than tawdry suggestions of political gain hardly worth discussing.

I have closely followed the hearings and debates concerning proposals to overrule Illinois Brick. The small minority fighting reversal of Illinois Brick succeeded in tacking on the bill a proposal to overrule the rejection of a claimed "passing on" defense by a series of Supreme Court cases. The "passing on" issue is a damage issue, principally involving the equitable distribution of damages among injured plaintiffs. Injecting that issue into the Illinois Brick question of who should have "standing" to maintain an antitrust suit has the potential for complicating treble damage litigation; a result no doubt intended by those injecting the issue into the debate in hopes of defeating efforts to overturn Illinois Brick. As a separate and distinct issue, there is reason for overturning the "passing on" cases. The "passing on" decisions have struck me as being wrongly decided, because they have the potential for giving recoveries to those not injured as well as the potential for multiple liability on defendants beyond that intended by the law. The remedy for this state of affairs, however, is not to inject "passing on" as a "defense" or an issue between injured plaintiffs and wrongdoing defendants. The problem can be solved by providing the courts with authority to measure damages by treble the amount of ill-gotten gain obtained by the defendant, establishing a fund for injured plaintiffs to receive the recovery and by limiting "passing on" disputes thereafter over allocation of the fund to disputes among and between plaintiffs claiming injury. Appropriate notice should be given all potential plaintiffs and those not filing claims against the fund would be precluded from filing future claims. In this way, the "passing on" issue can be satisfactorily resolved to all concerned, while the red herring of "passing on" as a device used by defendants and opponents of Illinois Brick to defeat any recovery can be eliminated from antitrust litigation and the debate over Illinois Brick.

Other red herrings drawn across the trail of securing justice for victims of antitrust violations and effective antitrust enforcement, include statements to the effect that most scholars of the subject support Illinois Brick, that treble damage litigation is the major form of "legal extortion" in America today, and that treble damage litigation should be a secondary consideration in antitrust enforcement. The first is false, the second is ridiculous, and the third is absurd. The vast majority of scholars on antitrust that I know, support legislative overruling of Illinois Brick. The only individuals I am aware of holding a contrary view are a few academic economists

who oppose private litigation altogether, based on theoretical models suggesting litigation is an inefficient method (economically) for rectifying wrongs. One, of course, could make the same argument about democracy as a method of government, except upon pausing to consider the alternatives. Without elaborating on the models or the unrealistic and narrow ideological assumptions upon which they are based, suffice it to say I have not found the models, evidence offered in support of the models or the underlying assumptions of the analysis persuasive or well informed of reality or the litigation process. Nor am I aware of a vast horde of antitrust scholars who agree with this type of analysis. The only other "scholarly" contributions on the subject I am aware of are those by defense attorneys, obviously delighted with an additional device to litigate issues other than issues directed to the merits of a plaintiff's antitrust claim. Confusing "standing", causation in law, causation in fact and proof of the amount of damages is a frequent tactic used in antitrust litigation by plaintiffs and defendants. Illinois Brick represents the height of that confusion by making causation in fact an issue of "standing" despite no language in the statute requiring such an absurd result. The consequences are obvious: Those injured but indirect purchasers are unable to sue; those not injured but direct purchasers may sue but cannot show damage; and the wrongdoer frequently keeps the fruits of its wrong. Franz Kafka could not have written a better script to demonstrate the occasional asininity of the law.

As for the claim of "legal extortion", I have yet to see or experience treble damage litigation used for this purpose. In fact, it is amusing to hear what many consider the major form of "illegal extortion" (antitrust violations) in our country today defended in this way. No empirical evidence is offered in support of claims suggesting treble damage litigation is "extortion" and I doubt any could be generated. It appears to be a case of exaggerated and unsupported claims like those successfully used to complicate derivative suits three decades ago or to market snake oil in this part of the country for generations. Treble damage litigation, and I have been involved deeply on both sides over the past fifteen years, is extremely expensive litigation to undertake. A major entry barrier to redressing rights in such cases is the initial costs a plaintiff must meet before a lawsuit is filed and the prospects of an ongoing demand to meet the costs of discovery, motions, expert witnesses, and so on. No attorney in his right mind would undertake such a suit and remain solvent for long unless there is some basis to the suit and substantial funds available to bring the suit. I have seen many legitimate claims never filed because of an inability to meet these costs or the prospects of being bankrupt by seeing a case to trial. If there is a problem in this area, it is that justice carries a price tag which is so great that many of the victims of antitrust violations cannot afford to pursue their claims, rather

than the reverse. Even if there were any cases of treble damage litigation being used for "legal extortion", the obvious remedy is not to bar all private litigation. The remedy of abuse of process, close judicial supervision of cases where such a potential is present, and disbarment of any attorney silly enough to consider such a course of conduct should be more than adequate to curb any abuse -- real or imagined. Throwing out babies with the bath water has long been seen as an unacceptable solution for disposing of dirty bath water, except by those whose real aim is to get rid of the baby as well.

As for the claim that treble damage litigation is not a deterrent in an economy where profit maximization is thought to be the main drive to compete, the assertion would seem to fall flat of its own weight, inherent inconsistency, and insult to common sense. Taking the profit out of conduct motivated by the urge to make profit by illegal means is not only eminently sensible, but a major deterrent to engage in the illegal activity in the first place. This was the primary reason for enactment of the parens patriae amendment to the Clayton Act, where it was found that other remedies were totally inadequate to deter antitrust violations promising huge profits and little risk of treble damage litigation by plaintiffs with small individual claims. Illinois Brick clearly undermines the judgment of Congress that extension of treble damage recoveries by parens patriae suits would be a significant factor in deterring antitrust violations. That judgment was amply supported by the Hearings on parens patriae legislation, where the obvious was made explicit by the testimony of many witnesses.

The temptation of realizing great profits is not adequately deterred by criminal sanctions or the limited enforcement resources of the Antitrust Division, even outside the parens patriae situation. The stream of clear-cut antitrust violations continues unabated, despite the increase of criminal sanctions from misdemeanors to felonies. It has been my experience in private litigation and in counseling defendants in civil and criminal antitrust cases that the lure of profit still is a major factor causing violations of the law. Criminal penalties are not viewed as a realistic risk, and where they are viewed as a risk they are considered a risk worth running in view of the profits to be realized. Those profits often run into the hundreds of millions of dollars, and I seriously believe that profits of this type would still be a significant incentive to violate the law even if we relied on flogging, hanging and quartering as sanctions for such violations. Without a substantial and realistic risk of being deprived of three times the illegal profit gained, the potential for gaining millions with little or no risk of criminal prosecution or fines and jail sentences if prosecution does take place makes many antitrust violations economic good sense. Treble damage litigation is the most effective deterrent to what has

become an epidemic of violations of our fundamental economic policy doing great damage to the efficiency and equity of our economy. Rather than being of only "secondary deterrent" value, treble damage litigation by those injured by a violation is clearly the major way to secure effective enforcement of the law and removal of the incentive for violating the law in the first place.

I have found it difficult to understand the rationale of those opposing overruling Illinois Brick (currying political favor from those with deep pockets to one side) in the face of widespread academic support for the bill, unanimous support by the nation's attorneys General and the widespread support for the bill by others from all walks of life. The "passing on" issue is of some concern but not an insurmountable issue. As explained above, that question can be resolved without exposing defendants to multiple liability or so complicating treble damage litigation as to make it unmanageable and a new impediment to victims securing recoveries. The remaining objections are smokescreens with no substance other than to obscure the underlying issues: Whether the ultimate victims of antitrust violations will be denied standing to seek recovery for their injury and whether antitrust violators will be allowed to defeat such claims and retain the fruit of their violations in those many cases where no plaintiff can or will bring suit. The answer is clear. The demand for immediate action is pressing. It is time for those who support the public interest, the effective enforcement of the antitrust laws, and the deterrence of the antisocial activities of those who would violate antitrust policy to see that Illinois Brick is overruled. I strongly urge you to join in the task for the best interests of the citizens of Utah as well as the nation as a whole.

Very truly yours,

John J. Flynn

John J. Flynn
Professor of Law

JJF:bm

THE WHITE HOUSE

WASHINGTON

January 29, 1979

Dear Mr. Chairman:

I am writing to express my strong support for the proposed "Antitrust Enforcement Act of 1979." This bill would amend the Clayton Act to permit indirect purchasers -- consumers, businesses, farmers, government agencies, and others -- to recover damages whenever they pay inflated prices because of price-fixing or other antitrust violations.

Competition is one vital safeguard against the kind of inflation we have been experiencing; and vigorous enforcement of the antitrust laws is an essential plank in any anti-inflation program. And damage suits by purchasers -- direct or indirect -- who have paid unlawfully inflated prices are enormously important in enforcing the antitrust laws, both in deterring anti-competitive practices and in providing redress when they have taken place.

Before the Supreme Court's decision in the Illinois Brick case, it was widely assumed that indirect purchasers, no less than direct, could recover antitrust damages under existing laws. It is often -- perhaps typically -- they who bear the full cost of illegally inflated prices, since direct purchasers are frequently middlemen who simply pass the charges on to their customers. It is important to assure indirect purchasers the right to recover damages also because the direct purchasers often have little incentive to enforce the antitrust laws by suing their own suppliers.

The proposed "Antitrust Enforcement Act of 1979" would correct the imbalance created by Illinois Brick. It would help assure competitive prices in our economy by permitting indirect purchasers to take part in enforcing the antitrust laws; at the same time it would avoid unfairness by authorizing the courts to prevent overlapping recoveries by successive purchasers.

This is sound legislation that will be of significant help in the anti-inflation effort; I urge its adoption.

Sincerely,

Alfred E. Kahn
Advisor to the President
on Inflation

Honorable Edward M. Kennedy
Chairman, Committee on the
Judiciary
United States Senate
Washington, D.C. 20510

National Governors' Association

Julian M. Carroll
Governor of Kentucky
Chairman

Stephen B. Farber
Director

January 29, 1979

Honorable Edward M. Kennedy
Chairman, Committee on the Judiciary
2226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed is the policy position adopted by the National Governors' Association last August which calls upon Congress to pass, and the President to sign "legislation amending the antitrust laws (to) overrule the Supreme Court's decision in Illinois Brick..." NGA urges speedy passage of such legislation by the 96th Congress.

Sincerely,

John P. Lagomarcino

John P. Lagomarcino
General Counsel and
Legislative Director

Enclosure

A. - 20

ANTITRUST ENFORCEMENT

As major consumers, states spend billions of dollars each year on the procurement of goods and services. As one means of ensuring that taxpayers receive a fair return on the use of their taxes, states have actively used antitrust laws to recover damages for the violation of those laws by suppliers of goods and services needed by states.

Recently, the Supreme Court of the United States decided in Illinois Brick Company v. Illinois that in most cases state and local governments may recover for injuries sustained as a result of antitrust violations only if they deal directly with violators of the law, that is, if a state purchases goods or services directly from a manufacturer rather than through a wholesaler. The decision bars states from recovering tax dollars from violators with whom they have dealt indirectly, thus hindering efforts to hold down the cost of government.

The judiciary committees of the Senate and the House of Representatives have approved legislation that would amend the antitrust laws and effectively overrule Illinois Brick by allowing states to recover damages for injuries sustained as a result of antitrust violations of indirect as well as direct suppliers of goods and services.

The National Governors' Association strongly recommends that Congress enact and the President sign legislation amending the antitrust laws that would overrule the Supreme Court's decision in Illinois Brick and enable states and other antitrust plaintiffs to maintain suits against antitrust violators from whom they have purchased goods or services either directly or indirectly.

Adopted August 1978.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
HALL OF THE STATES
444 NORTH CAPITOL STREET
WASHINGTON, D.C. 20001
(202) 624-5450

C. RAYMOND MARVIN
WASHINGTON COUNSEL

January 29, 1979

Honorable Edward M. Kennedy
Chairman, Senate Judiciary Committee
2241 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

On behalf of the Association, I am writing to express our appreciation for your prompt legislative response to remove the barriers to effective antitrust enforcement which the Supreme Court established in its Illinois Brick decision. We are grateful for your commitment to reverse Illinois Brick as your highest antitrust priority this session and for the time which you and your staff devoted to this task in the last Congress.

The state Attorneys General share your commitment to restore effective antitrust enforcement. At our winter meeting, the Association reaffirmed by the enclosed resolution its support for reversal of the Illinois Brick case. The impact of the ruling on the states is disastrous. As you know, state governments rarely purchase goods directly from the manufacturer and under Illinois Brick they are virtually foreclosed from suing for overcharges from price-fixers and other violators of the antitrust law. In the broad commercial experience of the states, it is not common that the bids are rigged, or the prices jacked-up by an agreement. But it does happen, and when it does and when we can prove it with evidence, we believe that the state governments should be permitted to present their cases in the courts of this land. It is that which your bill seeks to set right and we will help you to get it to the Senate floor.

Our sense of urgency in this matter derives from the fact that throughout the nation, the states have pending cases valued at at least $200-300 million, all jeopardized by Illinois Brick. Unless the Congress acts to reverse this ruling, this money will be lost forever from state and local government treasuries.

Effective enforcement of the antitrust laws is one of the best tools we have to fight inflation. Every President in recent history, of either party, has agreed as does President Carter. But, Illinois Brick weakens this tool and opens a gap for price-fixers, bid-riggers and other violators of the antitrust laws to continue their illegal practices undeterred; the price for this gap will be paid for by the citizen-taxpayer in higher prices. For these reasons we support your and your bipartisan groups' efforts and will help you in any way possible.

With sincere thanks for your efforts, and

Respectfully yours,

C. Raymond Marvin

CRM:MDH

Enclosure

RESOLUTION

AS ADOPTED BY THE
NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
1978 MID-WINTER MEETING
NOVEMBER 30-DECEMBER 3, 1978
DORADO, PUERTO RICO

RESOLUTION ON ILLINOIS BRICK

WHEREAS, the United States Supreme Court held in June 1977 in Illinois Brick Co. v. Illinois that only direct purchasers of price-fixed items may sue the antitrust violator and that all who purchased on an indirect basis through a middleman are precluded from recovering damages; and

WHEREAS, the states purchase billions of dollars each year in the procurement of goods and services for state and local government on an indirect basis; and

WHEREAS, under Illinois Brick the states are unable to recover tax dollars from price-fixers and other antitrust violators from whom they have purchased indirectly; and

WHEREAS, the effectiveness of the parens patriae provision of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 may be severely diminished by Illinois Brick and at the least, casts the Act's effectiveness in grave doubt; and

WHEREAS, the 96th Congress will consider legislation which would overrule this Supreme Court decision;

THEREFORE, BE IT RESOLVED THAT:

(1) This Association urges the Congress of the United States to adopt legislation to reverse the Illinois Brick decision so that all purchasers, whether direct or indirect, whether governments, businesses, or citizens, may have an opportunity to prove injury by price-fixers and other antitrust violators; and

(2) The Association's Washington Counsel is authorized and directed to take all reasonable and appropriate steps to communicate the Association's position to the United States Congress and to the Administration; and

(3) A special Illinois Brick subcommittee appointed by the Chairman of the Antitrust Committee will manage the Association's efforts on behalf of this legislation in conjunction with the Washington Counsel; and

(4) The Chairman of the Senate Judiciary Committee, Senator James O. Eastland, the Chairman of the Senate Antitrust Subcommittee, Senator Edward M. Kennedy and the Chairman of the House Judiciary Committee and Monopolies Subcommittee, Mr. Peter W. Rodino, Jr. be commended for their assistance in developing the legislative record and gaining committee approval of the bills considered by the 95th Congress.

AFSCME®
American Federation of State, County and Municipal Employees
1625 L Street, N.W., Washington, D.C. 20036
Telephone (202) 452-4800
Telex 89-2376

January 24, 1979

Jerry Wurf
President

William Lucy
Secretary-Treasurer

Vice Presidents

Bob Anderson
Jefferson City, Mo.

Dominic J. Badolato
Berlin, Conn.

Rev. Albert B. Blatz
St. Peter, Minn.

Joseph Bolt
Richmond, Ind.

Joseph M. Bonavita
Boston, Mass.

Robert A. Brindza
Cleveland, Ohio

Ernest B. Crofoot
Baltimore, Md.

Albert A. Diop
New York, N.Y.

Irving Flaumenbaum
Hempstead, N.Y.

Thomas G. Gerber, Sr.
Eau Claire, Wisc.

Larry Goodman
Olympia, Wash.

Victor Gotbaum
New York, N.Y.

Bob Johnson
Garden City, Mich.

Henry LeBert
Baton Rouge, La.

Larry Marquardt
Chicago, Ill.

Gerald W. McEntee
Harrisburg, Pa.

Georgia M. McGhee
Grand Rapids, Mich.

William L. McGowan
Albany, N.Y.

Jack Merkel
Trenton, N.J.

Richard P. Morton
New York, N.Y.

John Seferian
Manhattan Beach, Cal.

Earl Stout
Philadelphia, Pa.

Lee A. Tafel
Miami, Fla.

David K. Trask, Jr.
Honolulu, Hawaii

Maynard White
Houston, Texas

The Honorable Edward M. Kennedy
United States Senate
Washington, D. C. 20510

Dear Senator Kennedy:

On behalf of over a million members of the American Federation of State, County and Municipal Employees, I commend you for your continued support and leadership for the legislation to amend the antitrust laws reversing the Illinois Brick Supreme Court decision.

Without such legislation, effective antitrust enforcement for all purchasers will not be possible. Taxpayers and their governments will pay more for goods as price-fixers and antitrust violators reap the profits.

This unfair situation must be reversed. In the interest of fairness to all American consumers, I hope the Congress will grant prompt and favorable consideration to this critical matter.

Sincerely,

Anthony Carnevale
Director of Legislation

AC:rh

in the public service

MEAT PRICE INVESTIGATORS ASSOCIATION
"Our purpose is to re-instate the free enterprise system"

Glen Freie - Chairman
Phone Latimer 515/579-6168

P.O. Box #66
Des Moines, Iowa 50301

January 25, 1979

Honorable Edward M. Kennedy
431 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

First, I would like to take this opportunity to thank you and your staff for the great amount of effort which you have put forth to remedy the problem which we as cattlemen face today.

Because of the decision handed down in the Illinois Brick case, we as cattlemen now have no place in which we can seek recovery for the great amount of damages which were incurred by us in the past. The sad part of this matter is that we have the evidence in our posession which would prove our charges.

Over 50,000 cattlemen who are independent businessmen face a very bleak future if Congress fails to overrule the Illinois Brick decision. I know that you are very concerned by the inflation which we face in America. Unless we have the right to enforce anti-competitive laws in the courts of our land, we will never conquer the evil of inflation.

We greatly appreciate your leadership to restore effective antitrust enforcement.

Thank you,

Glenn Freie

Glenn Freie
Chairman, Meat Price
Investigators Association



disability rights center inc

Senator Edward Kennedy
2241 Dirksen Senate Office Building
Washington, D.C. 20510

January 25, 1979

Dear Senator Kennedy:

I am writing to express the strong support of the Disability Rights Center for the legislation which you have introduced to overrule the Supreme Court decision in the Illinois Brick case. The Disability Rights Center is a non-profit public interest group concerned with issues involving the civil rights and consumer protection rights of persons with disabilities. The Center's interest in this issue stems from our involvement in an anti-trust action that is currently pending against the major U.S. manufacturer of wheelchairs. Since almost all wheelchair consumers do not purchase wheelchairs directly from the manufacturer, they cannot use the Federal Courts to seek redress for anti-trust violations

We commend you for your prompt scheduling of hearings on Illinois Brick and hope that the Congress will reverse the ruling as soon as possible. If Illinois Brick is allowed to stand, individual citizens as well as states and businesses will be denied access to the courts. We believe that all who have been injured by illegal antitrust practices, including citizens, governments and businesses should be able to recover damages.

Your leadership in restoring effective antitrust enforcement is much appreciated.

Sincerely,
Deborah Kaplan
Deborah Kaplan
Director

1346 CONNECTICUT AVENUE, NW SUITE 1124 WASHINGTON, DC 20036 (202) 223-3304

AREA

Associated RETAIL BAKERS of AMERICA

OFFICE OF THE PRESIDENT
JOSEPH A. BECKER
DIXIE BAKE SHOP
1105 S. MINNESOTA AVENUE
SIOUX FALLS, SOUTH DAKOTA 57105
AREA CODE 605, PHONE: 336-1035

PRESIDENTIAL BUILDING—SUITE 250
6525 BELCREST ROAD, HYATTSVILLE, MARYLAND 20782
• ADJOINING THE NATION'S CAPITAL •

PHONE IN WASHINGTON, D.C., AREA: 277-0990
FROM OTHER POINTS ADD AREA CODE 301

DIRECTORS

GEORGE E. ANDREWS
COBOURG, ONTARIO, CANADA
RICHARD P. BAKER
McKEES ROCKS, PENNSYLVANIA
BERNARD BOWLING
LOUISVILLE, KENTUCKY
D. PAGE BUSKEN
CINCINNATI, OHIO
ROBERT H. CARPENTER
DENVER, COLORADO
JOSEPH V. CINOTTI
JACKSONVILLE BEACH, FLORIDA
EUGENE M. DOMINICK
MANOPAC, NEW YORK
JACOB ELMER
BORING, OREGON
HENRY A. FISCHER
CALDWELL, NEW JERSEY
HARRY E. FOLTZ, JR.
LA GRANGE, INDIANA
HELMUT GERST
SEAFORD, L.I. NEW YORK
CHARLES B. HARPER
FORT WORTH, TEXAS
DAVID L. HAYDEL
JEFFERSON, LOUISIANA
FRED G. HEINBURGER
ST. LOUIS, MISSOURI
ROBERT W. HILLER
JANESVILLE, WISCONSIN
ROBERT LARSON
CINCINNATI, OHIO
JAMES W. LARY, SR.
MACON, GEORGIA
LLOYD L. LUEKEN
MITCHELL, SOUTH DAKOTA
LEE R. MOWER
SILVER SPRING, MARYLAND
HANS B. NADLER
SAN ANTONIO, TEXAS
JACK G. NELDAM
OAKLAND, CALIFORNIA
ALBERT R. OLSON
ASHTABULA, OHIO
VICTOR OLSON
WAYZATA, MINNESOTA
CARMEN P. PIAZZA
TRENTON, NEW JERSEY
RICHARD F. PIETRZAK
BUFFALO, NEW YORK
KENNETH G. PISE
CLEVELAND, OHIO
JERRY L. POTTER
TRAVERSE CITY, MICHIGAN
TRUMAN G. REED
PASADENA, TEXAS
BENJAMIN RUBIN
SOUTHINGTON, CONNECTICUT
WILLIAM H. "BILL" SEIBOLD
GRANITE CITY, ILLINOIS
MILTON SIXTA
CHICAGO, ILLINOIS
JAMES R. SLOOP
HIGH POINT, NORTH CAROLINA
PETER A. VANDER MEER, JR.
LE MARS, IOWA
ROBERT A. WEDEKING
ESCONDIDO, CALIFORNIA
EDWARD M. WEINRICH
WILLOW GROVE, PENNSYLVANIA
EUGENE W. WILSON
VALDOSTA, GEORGIA

WILLIAM A. QUINLAN
GENERAL COUNSEL
ANNAPOLIS, MARYLAND
GERARD P. PANARO
ASSOCIATE DIRECTOR,
GOVERNMENT AFFAIRS
HYATTSVILLE, MARYLAND
BARNEY L. SCHMITZER
DIRECTOR OF PROMOTIONS
PITTSBURGH, PENNSYLVANIA

January 24, 1979

Hon. Edward M. Kennedy
Senate Judiciary Committee
3226 Dirksen SOB
Washington, D.C. 20510

Dear Senator Kennedy:

The Retail Bakers of America, founded in 1918, is the national trade association for the nation's retail baking industry, which comprises in excess of 20,000 retail bakeries according to U.S. Census figures.

I am writing on behalf of the association to express our support for S. 1874 (H.R. 11942), as it was styled in the last Congress, the Clayton Act Amendments of 1978, otherwise known as the Illinois Brick bill.

We support such legislation because if the Supreme Court's decision in the Illinois Brick case is allowed to stand, it will deprive many of our members, all of whom are small businessmen, of a cause of action they otherwise would have had. Most retail bakers buy the materials they use as ingredients in the many varieties of freshly baked foods they make on a daily basis and sell directly to the ultimate consumer indirectly from wholesalers, middlemen, suppliers and others. In the event a group of sellers were alleged or found to have violated the anti-trust laws, our members would be prevented from recovering damages under the Supreme Court's decision because they were indirect purchasers.

As a specific example of this, I cite the Eastern and Western Sugar Anti-trust litigations. In the Western case, the percentage of the settlement fund available for distribution to the industrial-user class (the class into which our members and other retail bakers would fit) has

OFFICERS

JOSEPH A. BECKER
PRESIDENT
SIOUX FALLS, SOUTH DAKOTA

W. JAMES GREBE
1st VICE PRESIDENT
MILWAUKEE, WISCONSIN

JACK W. McLAIN
2nd VICE PRESIDENT
KANSAS CITY, MISSOURI

RAYMOND N. GUILLEMETTE
3rd VICE PRESIDENT
DOVER, NEW HAMPSHIRE

LORING J. LARSON
TREASURER
WAKEFIELD, MASSACHUSETTS

RICHARD C. GOHLA
EXECUTIVE VICE PRESIDENT
HYATTSVILLE, MARYLAND

DOROTHEA L. RUSSELL
DIRECTOR OF ADMINISTRATION
AND EXECUTIVE SECRETARY
HYATTSVILLE, MARYLAND

been reduced as a direct result of the decision in Illinois v. Illinois Brick. Similarly, in a letter addressed to me from counsel for the Wholesaler Class in the Eastern Sugar Anti-trust litigation, I was informed:

> "Since your membership undoubtedly consists of a number of firms which were indirect purchasers only, under the present status of the law they would have no claim in the above pending litigation."

The reference to the "present status of the law" of course was to Illinois Brick.

For these reasons, then, the Retail Bakers of America supports your efforts to enact legislation which will overrule the Supreme Court's decision in Illinois v. Illinois Brick and restore the right of indirect purchasers, such as retail bakers, to sue or share in damages awarded for cases in which sellers further up the distributive chain are alleged or found to have violated the antitrust laws.

Sincerely,

Gerard Paul Panaro,
Associate General Counsel

cc: Richard C. Gohla, RBA Executive Vice-President
Dorothea L. Russell, RBA Secretary
William A. Quinlan, RBA General Counsel

Oil, Chemical and Atomic Workers International Union

A. F. GROSPIRON
PRESIDENT

P. O. BOX 2812
PHONE: (303) 893-0811
DENVER, COLORADO 80201

January 26, 1979

The Honorable Edward M. Kennedy
2241 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Kennedy:

I am writing on behalf of the 180,000 members of the Oil, Chemical and Atomic Workers International Union to express our support for legislation which would reverse the disastrous impact of the Illinois Brick decision. Effective antitrust enforcement has always been a major concern of OCAW and we are pleased that you are introducing corrective legislation early in the 96th Congress.

We believe that the Illinois Brick ruling is a serious obstacle to effective antitrust enforcement in this nation. We urge the Congress to act as soon as possible to reverse this ruling so that all citizens as well as business may avail themselves of the benefits that the antitrust laws were designed to provide. Competition is a basic element in our national economy and every step must be taken to ensure its preservation. Reversal of Illinois Brick is a step in the right direction.

Your leadership on this issue is much appreciated.

Sincerely yours,

A. F. Grospiron

A. F. Grospiron, President

CLUSA
COOPERATIVE
LEAGUE OF THE
USA

"common ground for cooperatives"

GLENN M. ANDERSON, President

January 26, 1979

Senator Edward M. Kennedy
United States Senate
Washington, D. C. 20510

Dear Senator Kennedy:

The Cooperative League which is the United States member of the International Cooperative Alliance, represents both urban and rural cooperatives and has a long history of support for vigorous enforcement of the antitrust laws. We are pleased that reversal of the Illinois Brick decision is a priority issue on your legislative agenda this year, and commend you for your leadership in this matter.

That decision which barred indirect purchasers from recovering damages from price-fixers and other violators of the antitrust laws is a step backwards from effective antitrust enforcement. The Cooperative League joins with a broad coalition of consumer, business, labor, farm and state government organizations in urging that Congress act as soon as possible to overturn this ruling and restore effective antitrust enforcement in this nation.

Sincerely,

Shelby E. Southard
Legislative Director

SES:mlj

The National Confederation of Cooperatives

SUITE 1100 / 1828 L ST., N.W.
WASHINGTON, D.C. 20036
202 / 872-0550 CABLE: CLUSA

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA—UAW

DOUGLAS A. FRASER, PRESIDENT EMIL MAZEY, SECRETARY-TREASURER

VICE-PRESIDENTS

PAT GREATHOUSE • KEN BANNON • ROBERT WHITE • IRVING BLUESTONE • ODESSA KOMER • MARC STEPP • MARTIN GERBER

IN REPLY REFER TO
1125 FIFTEENTH STREET, N. W.
WASHINGTON, D. C. 20005
PHONE: (202) 296-7484

January 26, 1979

Hon. Edward M. Kennedy, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The UAW worked in coalition with many groups in the 95th Congress for legislation to overturn the Supreme Court decision in the Illinois Brick case. As you know, this is vitally needed consumer legislation to permit indirect purchasers of items sold in restraint of trade to undertake legal action for redress. We understand that it is your intention to renew the effort for legislation to overturn the Illinois Brick decision. I am writing at this time to thank you for taking the initiative in this area and to assure you of our continued active support for such legislation.

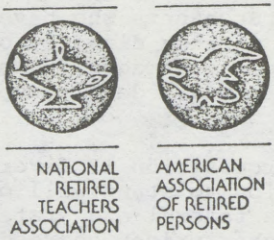
Thank you very much.

Sincerely,

Howard G. Paster

Howard G. Paster
Legislative Director

HGP:cd
opeiu-494



January 29, 1979

The Honorable Edward M. Kennedy
Chairman
Senate Judiciary Committee
Washington, D.C. 20510

Dear Senator Kennedy:

The National Retired Teachers Association and the American Association of Retired Persons, representing more than 12 million older Americans, are glad to have this opportunity to reaffirm our strong support for legislation which will overturn the Supreme Court's ruling in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

Our Associations have constantly supported strengthened antitrust legislation which would deter antitrust violations in the first place, which would insulate marketplace mechanisms from the artificial maneuvering of price fixing and other antitrust activity, and which would provide consumers with adequate recourse once victimized by an antitrust violator.

The Court's decision in the Illinois Brick case seriously undermines antitrust enforcement activities. To remove the ability of indirect purchasers to regain losses suffered through price fixing violations is a great disservice to the American public. It eliminates any opportunity for those who must pay the full cost of the violation to regain their losses and it removes a substantial deterrent against violation of antitrust statutes.

Americans, particularly older Americans and others who are living on extremely small, fixed incomes, should not and cannot be asked to bear the costs of illegal excesses in business and industry. If the law is not strong enough to prevent such abuses, certainly the Congress must recognize its responsibility to provide citizens with appropriate rights to protect themselves.

Frank M. Hughes
President, NRTA

J. Leonard Johnson
President, AARP

Cyril F. Brickfield
Executive Director

We believe that all purchasers who have been injured by antitrust violators, whether directly or indirectly, should be able to recover damages; this includes individuals as well as states, federal government, businesses and producers.

In an era of "Proposition 13 fever," allowing the Illinois Brick decision to stand will only mean that taxpayers at both the federal and state levels will be asked to bear the higher prices charged to government as indirect purchasers of illegally priced goods. The California experience clearly illustrates that Americans do not want to continue shouldering this burden.

NRTA/AARP offer their support of the Antitrust Enforcement Act of 1979 as the means of achieving the reversal of the Illinois Brick decision. We pledge to work singly and with other organizations and groups to win passage of this significant antitrust legislation.

Sincerely,

Peter W. Hughes

Peter W. Hughes
Legislative Counsel

PWH/FLM

PARALYZED
VETERANS
OF
AMERICA

CHARTERED BY THE CONGRESS OF THE UNITED STATES

January 26, 1979

The Honorable Edward M. Kennedy
United States Senate
431 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

The Paralzyed Veterans of America support your efforts in overturning the June 9, 1977, Supreme Court ruling in Illinois Brick Company vs. Illinois. PVA encourages you to again introduce legislation in the 96th Congress that would make violators of the antitrust bills subject to court review.

PVA, along with many other organizations and consumers, believes that injured consumers, whether government, businesses or individuals, should have access to the court. The courts should have the flexibility to determine on a case-by-case basis whether the suit has merit and is to be pursued. Furthermore, we believe that all purchasers who have been injured by antitrust violations, whether direct or indirect, including the federal government, states, businesses and consumers should be able to recover damages.

In addition to reviewing cases of price-fixing, the courts should have the power to rule on cases where monopolistic manufacturers of specialty items injure their often small but dependent market.

Thank you for your consideration of our views.

Sincerely,

Gerald Jones

Gerald Jones
Legislative Director

GJ:amj

4330 East-West Highway, Suite 300, Washington, D.C. 20014 301/652-2135

National Association of Counties
Offices • 1735 New York Avenue N.W., Washington, D.C. 20006 • Telephone 202/785-9577

January 25, 1979

Senator Edward M. Kennedy
Chairman, Senate Judiciary Committee
431 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

The nation's county officials would like to extend our warmest congratulations and best wishes to you on becoming Chairman of the Senate Judiciary Committee. This committee will be the forum for the development of some of the nation's most important legislation and we look forward to a hard working and productive congressional session.

County officials strongly endorse legislation to broaden the ability of consumers to recover damages resulting from violations of the antitrust laws. The nation's 3,600 counties are responsible for a wide variety of public services. In performing these services, counties are continually purchasing a multitude of products, making us a large, albeit vulnerable, consumer.

In protecting the rights of consumers to receive products at the lowest price possible, it is essential that ultimate purchasers be able to recover damages for antitrust violations whether or not they have dealt directly with an antitrust violator.

Counties and other units of government purchase extensive amounts of materials and supplies. As the ultimate purchaser, counties must often absorb the entire cost of overcharges that result from antitrust practices. While these overcharges are "passed on" through the chain of manufacture, production and distribution, it is the final purchaser who is the one bearing the burden.

When county governments are forced to incur higher prices due to such practices, it adversely affects county finances and budgeting. In the final analysis, it is the individual taxpayer, the ordinary citizen, who is affected by seeing his tax dollars absorbed by illegal private sector practices without having any recourse. Therefore, units of government injured by antitrust violations should have the right and ability to recover damages whether or not they have dealt directly with the actual antitrust violator.

To accomplish this, NACo strongly endorses legislation that would overturn the "Illinois Brick" decision of the Supreme Court. This legislation would enable the ultimate consumer to recover damages for antitrust violations.

We once again support your efforts in sponsoring this legislation and congratulate your leadership in this field. We hope to work closely with you on this and related matters. Thank you.

Sincerely,

Elliott A. Alman

Elliott A. Alman
Legislative Representative

EAA/vlo

NATIONAL ASSOCIATION OF HOME BUILDERS
FIFTEENTH AND M STREETS, NORTHWEST
WASHINGTON, D.C. 20005

VONDAL S. GRAVLEE
1979 President

January 29, 1979

The Honorable Edward M. Kennedy
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the 113,000 members of the National Association of Home Builders, I would like to thank you for your efforts in support of legislation to overrule the effects of the Supreme Court's Illinois Brick decision.

As you are aware, the National Association of Home Builders strongly supported such legislation in the last session of Congress. We believe it is essential for Congres to amend Section 4 of the Clayton Act to once again allow indirect purchasers the standing to sue for injuires they sustain as a result of antitrust violations. The vast majority of NAHB's members are in the class of indirect purchasers because they purchase building materials from supplier-middlemen rather than directly from manufacturers. Thus, unless Congress passes legislation to overrule the decision in Illinois Brick, most, if not all of NAHB's members have no standing to be plaintiffs or class members in such litigation. As indirect purchasers, they could not recover damages against the manufacturers of building materials, despite the fact that the illegal overcharges had been passed on to them.

NAHB will continue its support for legislation to reverse the Illinois Brick decision and appreciates your prompt scheduling of the bill for hearings early in the new Congress.

Sincerely,

Vondal S. Gravlee

Vondal S. Gravlee
President

National Conference of State Legislatures

Office of State Federal Relations

444 North Capitol Street, N.W. 2nd Floor Washington, D.C. 20001 202/624-5400

President Jason Boe President of The Oregon Senate

Executive Director Earl S. Mackey

January 30, 1979

The Honorable Edward Kennedy
Chairman, Judiciary Committee
U.S. Senate
Washington, D.C. 20510

The Honorable Peter Rodino
Chairman, Judiciary Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Kennedy and Chairman Rodino:

The National Conference of State Legislatures is pleased to join with other groups in supporting legislation which would overturn the Supreme Court's Illinois Brick v. Illinois decision. We believe this decision violates the spirit of the anti-trust statutes adopted by the state and federal governments and weakens a state's ability to protect its own and its citizen's rights as consumers.

Your legislation is a positive step toward resolving this continuing controversy, and you have the full support of our organization.

Sincerely,

Jason Boe
President, NCSL
President, Oregon Senate

John Bragg
Chairman, State-Federal Assembly of NCSL
Chairman, Tennessee House Finance, Ways and Means Committee

JB:JB:lv

42-005 O - 79 - 30

AMERICAN ASSOCIATION OF STATE HIGHWAY
AND TRANSPORTATION OFFICIALS

THOMAS D. MORELAND, President
Commissioner and State Highway Engineer
Georgia Department of Transportation

HENRIK E. STAFSETH, Executive Director
444 N. Capitol Street, N.W., Suite 225
Washington, D.C. 20001
Telephone: (202) 624-5800

January 29, 1979

The Honorable Edward M. Kennedy, Chairman
Senate Judiciary Committee
Senate Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

The American Association of State Highway and Transportation Officials (AASHTO) would like to express our appreciation for your early introduction of a bill which would reverse the disastrous effects on States of the United States Supreme Court ruling in Illinois Brick Company v. Illinois which held that indirect purchasers of a price-fixed item cannot bring suit against an antitrust violator.

AASHTO is an organization of the departments of highways or transportation of each of the fifty States, the District of Columbia, Puerto Rico, and the U.S. Department of Transportation. The Association was created in 1914.

A minimum two-thirds approval of the States is required before positions involving questions of policy are taken as an Association.

AASHTO supports legislation which would reverse the Supreme Court decision in Illinois Brick. Without corrective legislation State transportation departments would have no recourse in cases of price fixing by materials suppliers on contracted transportation construction projects.

We hope these comments will be helpful as the Judiciary Committee proceeds in the legislative process.

Respectfully submitted,

Henrik E. Stafseth

Henrik E. Stafseth
Executive Director

HES/DL/js

pie-f
PUBLIC INTEREST ECONOMICS FOUNDATION

January 30, 1979

Senator Edward Kennedy
Room 1418
Dirkson Senate Office Bldg.
Washington, D.C. 20510

Attn: Joel Perwin

Dear Senator Kennedy:

The principal goals of the National Institute of Law and Economics, a division of the Public Interest Economics-Foundation, are to foster free and open competition and to decrease the concentration of economic and political power by encouraging effective enforcement of laws to curb monopolistic and unfair business practices.

In light of our aims as stated above, we express our appreciation of, and support for your efforts to strenghten and expand the anti-trust laws; and to provide the necessary legal tools to effectively enforce those laws.

Sincerely,

Allen R. Ferguson
President

ARF/bc

1714 Massachusetts Avenue, N.W. / Washington, D.C. / 20036 / 202 - 872-0313

STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION
TO THE SENATE JUDICIARY COMMITTEE
WITH REGARD TO S. 300

March 21, 1979

We appreciate this opportunity to present the views of Farm Bureau on S. 300. Farm Bureau members produce every type of agricultural commodity that is grown commercially in the United States. The livelihood of our members is dependent on the marketplace. We are concerned not only as sellers but also as consumers. We seek protection from any price-fixing and other monopolistic practices.

The stated objective of S. 300 is to deter antitrust violations and provide for compensation to those injured by such actions. However, we contend that present laws, along with past judicial rulings, provide adequate protection.

The best way to protect the public from antitrust violations is to deter such activity. Private civil suits under Section 4 of the Clayton Antitrust Act--which allows those who have been injured by an antitrust law violation an opportunity to seek to recover treble damages from the offending party--aid the government's enforcement efforts and effectively act as a deterrent to violations of the antitrust laws.

The Supreme Court, in Illinois Brick v. Illinois, 431 U.S. 720 (1977), held that only overcharged direct purchasers, and not others in the chain of manufacture or distribution, are parties injured in their "business or property" within the meaning of the Clayton Act.

On March 6, 1979, the Board of Directors of the American Farm Bureau Federation voted to oppose any proposed legislation which would make ineffective the Supreme Court's decision in the "Illinois Brick" case.

Direct purchaser suits constitute a large proportion of antitrust cases. These suits provide for the establishment of identifiable proof of damages and, due to the possibility of court decisions awarding large damages, effectively act as a deterrent to antitrust violations. It would be extremely difficult, and in many cases impossible, to identify and trace any losses that may be claimed by indirect purchasers. Further, to allow indirect purchaser suits would significantly consume the courts' time, and would delay fair judgments.

We believe that Section 4 of the Clayton Act, as interpreted in the opinion delivered by Justice White in the "Illinois Brick" case, provides reasonable opportunity for purchasers who have been injured by antitrust violations to recover treble damages from the offending party. There is no need for new legislation.

We thank you for this opportunity to express the views of Farm Bureau.

United Mine Workers of America

ARNOLD MILLER
PRESIDENT

TELEPHONE
AREA CODE 202-638-0530

UNITED MINE WORKERS' BUILDING
900 FIFTEENTH STREET, N.W.
Washington, D.C.
20005

January 29, 1979

The Honorable Edward M. Kennedy
United States Senate
2241 Dirkson Senate Office Building
Washington, D. C. 20510

Dear Senator Kennedy:

The United Mine Workers of America believes that strong anit-trust enforcement is essential to the well being of the nation. The right of consumers to participate in class action suits, whether individually or in concert through their representatives in state and federal government, should not be abridged by the courts as is the case in the Illinois Brick decision.

In this age of rapid conglomeration and both vertical and horizontal monopolies, it is imperative that the teeth not be pulled from the Clayton Act. We feel that legislation must be enacted to correct the errors made by the courts in Illinois Brick.

As you are well aware, this legislation is supported by a diverse coalition of business, labor, government and consumer interest groups. It is in light of this that we join you in support of this much needed legislation.

Sincerely,

Arnold Miller

Arnold Miller

Lynn R. Williams
International Secretary

Frank S. McKee
International Treasurer

Lloyd McBride
International President

Joseph Odorcich
International Vice President
(Administration)

Leon Lynch
International Vice President
(Human Affairs)

United Steelworkers of America
AFL-CIO-CLC

815 16TH ST., N.W. WASHINGTON, D.C. 20006

Suite 706

Phone: (202) 638-6929

January 30, 1979

The Honorable Edward M. Kennedy
United States Senate
Washington, D. C. 20510

Dear Senator Kennedy:

On behalf of the 1.2 million members of the United Steelworkers of America, we are writing to express our strong support for legislation which would overrule the Supreme Court in the case of Illinois Brick Company v. Illinois. In that case, the Court held that only direct purchasers of price-fixed items could sue the antitrust violator; all who purchased indirectly through a middleman were precluded from recovering damages.

United Steelworkers agrees with you that the war against inflation which threatens the well-being of the nation must be fought through vigorous enforcement of the antitrust laws. Further, we believe that all who are injured through illegal practices, whether directly or indirectly, whether state, federal or local governments, businesses or individual citizens should be able to recover damages under the antitrust laws.

Your efforts to reverse the crippling effects of the Supreme Court ruling in Illinois Brick are much appreciated and we hope that the Congress will act on this matter as soon as possible.

Sincerely,

John J. Sheehan
Legislative Director

JJS/hhh

PRINTED IN U.S.A.

AMERICAN ASSOCIATION OF STATE HIGHWAY
AND TRANSPORTATION OFFICIALS

THOMAS D. MORELAND, President
Commissioner and State Highway Engineer
Georgia Department of Transportation

HENRIK E. STAFSETH, Executive Director
444 N. Capitol Street, N.W., Suite 225
Washington, D.C. 20001
Telephone: (202) 624-5800

January 29, 1979

The Honorable Edward M. Kennedy, Chairman
Senate Judiciary Committee
Senate Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

The American Association of State Highway and Transportation Officials (AASHTO) would like to express our appreciation for your early introduction of a bill which would reverse the disastrous effects on States of the United States Supreme Court ruling in Illinois Brick Company v. Illinois which held that indirect purchasers of a price-fixed item cannot bring suit against an antitrust violator.

AASHTO is an organization of the departments of highways or transportation of each of the fifty States, the District of Columbia, Puerto Rico, and the U.S. Department of Transportation. The Association was created in 1914.

A minimum two-thirds approval of the States is required before positions involving questions of policy are taken as an Association.

AASHTO supports legislation which would reverse the Supreme Court decision in Illinois Brick. Without corrective legislation State transportation departments would have no recourse in cases of price fixing by materials suppliers on contracted transportation construction projects.

We hope these comments will be helpful as the Judiciary Committee proceeds in the legislative process.

Respectfully submitted,

Henrik E. Stafseth

Henrik E. Stafseth
Executive Director

HES/DL/js

One Jefferson Square
P.O. Box 50
Boise, Idaho 83728
208/384-7455

John E. Clute
Senior Vice President
and General Counsel

Boise Cascade Corporation

January 26, 1979

The Honorable Edward Kennedy
U.S. Senate
2244 Dirksen Senate
Office Building
Washington, DC 20510

Dear Senator Kennedy:

I urge you to oppose the legislation soon to be introduced to overrule Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). We believe the Supreme Court was correct when it decided in that case that indirect purchasers should not be able to sue for antitrust violations.

Overturning Illinois Brick will fuel inflation by increasing enormously the cost and complexity of antitrust litigation. Furthermore, as Professor Milton Handler and others have said, the Illinois Brick legislation would weaken antitrust enforcement, because the direct purchasers, who have historically prosecuted the bulk of private antitrust cases, would no longer enjoy the incentive of full treble damages unless they could win a costly battle against the indirect purchasers over the pass-on issue.

The Illinois Brick legislation in my opinion is not advisable even from the point of view of indirect purchasers. The few dollars each indirect purchaser might recover after years of legislation would neither offset his loss from the market-wide inflationary impact of high litigation costs nor provide an incentive for him to help enforce the antitrust laws. I fear that any increased benefits and incentives flowing from overturning Illinois Brick would accrue instead to a segment of the citizenry not deserving of special favor under the antitrust laws: plaintiffs' lawyers.

While I would be happy to provide further information or testify in support of the Illinois Brick decision, I believe the testimony already heard by the Committee clearly favors letting the decision stand.

Very truly yours,

J. E. Clute

JEC/jsy

Phone 712 262-1180

PETERSEN SHEEP & CATTLE CO.

FEEDER LIVESTOCK

P. O. BOX 390 — SPENCER, IOWA 51301

April 25, 1979

The Honorable Edward M. Kennedy
Chairman
Committee of the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Kennedy:

I have been very disturbed to learn that legislation (H.R. 2060) is being reintroduced to overrule the Illinois Brick Decision. It is our opinion that the relatively small numbers of cattlemen backing this legislation hold a minority view in the industry and in no way represent the feelings of most cattle feeders or producers.

I am President of Petersen Sheep & Cattle Company located in Spencer, Iowa. Since 1933 our firm has been in the business of supplying feeder livestock to farmer customers, mainly in the Midwest. Last year our company shipped nearly 100,000 cattle worth over $33 million to feeders in the Midwest, mainly in Iowa. We think our customers represent a true cross-section of the 30,000 cattle feeders in the state. Of all the cattlemen we do business with, I can identify only two who actively support the lawsuits against the meat packers and the chain stores.

Today in 1979 we are selling cattle at the highest price in the history of the country. While fed cattle have not only reached new price peaks, feeder cattle, the replacement supply for those feeders, have also reached new peaks; and time and time again we hear from our customers, "I can stand the high price of feeder cattle and the ups and downs of the markets, if you'll just guarantee that the government will stay out of the cattle market."

Let me assure you, the longer I am in the business, and I have been in the business now for a good many years, the more I am convinced that the law of supply and demand does work.

Senator Kennedy April 25, 1979

Whether the market goes up or down is the result of decisions made by many many people acting individually. That's the way cattlemen accept it. That's the way they want it. Those people who claim the packers and the chain stores illegally lowered the price are not being factual. Would those same packers raise the price to the present levels? I think not.

The market moved down in 1974-1975 because there simply were too many cattle. It was aggravated by price control and other government action, and the cattle herd was over liquidated. The market has moved up now because there are not enough cattle and price has to ration the supply. That system has produced the best-fed people anywhere in the world. It has provided them with an abundance of good wholesome food and at a lower percentage of disposable income than in any other country in the world. Only in the United States where agriculture has been relatively free from government directives and decrees is there a surplus of food. The system has worked. It has done a marvelous job of providing food and substance to the American people. It will continue to do so if the regulators and planners will let it alone.

I would appreciate it, Senator Kennedy, if you will enter my letter into the proceedings of your Committee.

Sincerely yours,

L. Stanley Schoelerman

LSS:kj

LAW OFFICES

HALFPENNY, HAHN & ROCHE

111 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60602
(312) 782-1829

HAROLD T. HALFPENNY
RICHARD F. HAHN
THOMAS F. ROCHE
JAMES F. FLANAGAN
JOSEPH J. NAGLE
MARY M. SHAW (DEC'D)
RICHARD F. FRIEDEMAN, JR.
LOUIS R. MARCHESE
NEIL J KUENN
GEORGE W. KEELEY

WASHINGTON OFFICE
HALFPENNY, HAHN & ROCHE
1725 K STREET, N. W.
WASHINGTON, D. C. 20006
(202) 659-8735

Please refer to
Our file: 8562
E-2.2

February 8, 1979

Mr. Michael Glaser
Senate Judiciary Committee
2226 Dirksen Senate Office Building
Washington, D. C. 20510

Re: Illinois Brick Legislation

Dear Mr. Glaser:

I am general counsel for the National Association of Wholesaler-Distributors (NAW). On behalf of NAW I submit these comments to legislation now under the Committee's consideration that would overturn the recent U.S. Supreme Court decision in Illinois Brick Company v. Illinois, 431 U.S. 720, which barred remote purchasers of a product supplied by an antitrust violator from bringing treble-damage antitrust actions.

NAW represents 108 national wholesaler-distributor associations, the members of which account for over sixty percent of the estimated $735 billion in sales which were made by wholesaler-distributors in 1978. Our members purchase goods from manufacturers and resell them to industrial, institutional, commercial and other types of business users, as well as to government. The wholesale distribution industry is characterized by small, closely-held, family-owned businesses. In our membership, the average annual sales volume is approximately $2.5 million, with an average of 25 employees. It is through this size of business that the vast bulk of products move to market.

NAW expresses its strong opposition to legislation which would sweep aside the well-reasoned decisions by the Supreme Court in Illinois Brick and Hanover Shoe, and open the gates of private antitrust actions to "indirect purchasers" who did not deal directly with the antitrust offender. Relaxation

of the direct purchaser doctrine would create severe hardships which would fall particularly hard on small business. Such a change would encourage the filing of frivolous class action suits and make the treble-damage remedy so complex and expensive that a victim of an antitrust violation would forgo private enforcement. Finally, indirect purchaser suits would draw businesses at all levels into litigation, resulting in costly and unmanageable multiple party proceedings.

Under present law as set forth in Illinois Brick, a distributor-direct purchaser who has been overcharged by a price-fixing manufacturer may maintain a private antitrust action against the manufacturer to recover treble damages for such overcharge. The manufacturer may not thwart this private enforcement action by raising the complex issue of "pass-on," i.e., that the distributor passed-on all or part of the overcharge to his customers. Also, the distributor's customers or other remote purchasers who did not deal with the violator may not commence such an action, or intervene in the distributor's suit and lay claim to part of a recovery. Thus limited, private antitrust actions provide an efficient administration of justice and encourage the private enforcement of antitrust laws.

On the other hand, if such actions were opened up to indirect purchasers, including consumers, there would be a serious disincentive for direct purchasers to file suit on even the most meritorious claim. Doing so invites indirect purchasers (or classes of indirect purchasers) to intervene in the suit; to interject the complex issues of pass-on not once, but at each level in the chain of distribution; and to demand all or some portion of the direct purchaser's recovery. The apportionment of recovery among all purchasers in the chain of distribution -- direct and indirect -- may have a nice ring to it using an economist's hypothetical model, but in the real economic world it will make treble-damage proceedings unmanageable, with overall costs of recovery being prohibitive.

Mr. Michael Glaser
Washington, D. C. 20510

Moreover, an indirect purchaser suit would draw all prior purchasers in the distribution chain into the lawsuit as party litigants, and force them to sustain substantial litigation costs as potentially adverse claimants to the recovery fund. This chaotic result was aptly described by the Court in Illinois Brick:

> ". . . allowing indirect purchasers to recover using pass-on theories * * * would transform treble-damage actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant. In treble-damage actions by ultimate consumers, the overcharge would have to be apportioned among the relevant wholesalers, retailers and other middlemen, whose representatives presumably should be joined."

When this increased cost of litigation is multiplied by the number of businesses which would be subject to such litigation, the cost to society is indeed staggering. Of course these costs ultimately will be borne by the public in the form of higher prices charged to cover the cost of litigation.

A vast number of NAW members are small businesses. If Illinois Brick is cast aside, the detrimental consequences will hit small business especially hard. The resultant escalation of litigation costs and complexity in treble-damage cases will make it far more difficult for small businesses to protect themselves if they are injured under the antitrust laws, or to defend themselves if accused under the antitrust laws. It will be big business, and big business alone, which can afford to expend the substantial resources to pursue a private action against an antitrust violator. Consequently, enforcement suffers for violators who overcharge small business will have a better possibility of retaining the fruits of their illegality.

Mr. Michael Glaser
Washington, D. C. 20510

February 8, 1979
Page Four

If Illinois Brick is overturned and the now single cause of action is spread among numerous indirect purchasers and consumers, massive class action suits of questionable merit will be encouraged. The benefits will go largely to class action attorneys working on a contingency basis rather than those injured by an antitrust violation. Settlements of even the most frivolous suit would be the rule, not the exception, in view of the costs of litigation and indeterminate liability. Such litigation would increase greatly in complexity, with various classes of plaintiff-purchasers arguing that it alone has been damaged because the other purchasers have passed-on the overcharge to them.

We respectfully urge that the direct purchaser doctrine stated in Illinois Brick be left intact so that private treble damage action will not become the subject of abuse. A contrary course of action would complicate these private suits with extraneous issues to the point where small and medium-sized business will not pursue meritorious claims in light of increased litigation costs and the diffusion of benefits, and would be drawn into class suits filed by indirect purchasers.

Very truly yours,

HALFPENNY, HAHN & ROCHE

By: Harold T. Halfpenny
Harold T. Halfpenny

HTH/va

cc: National Association of
Wholesaler-Distributors

○