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Advancing Consumer Standing Under Section 4 of the Clayton Act

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CASE COMMENTS

ADVANCING CONSUMER STANDING UNDER SECTION 4 OF THE CLAYTON ACT

Reiter v. Sonotone Corp., 442 U.S. 330 (1979)*

Petitioner[1] brought a class action seeking treble damages under section 4 of the Clayton Act.[2] The complaint alleged that she and persons similarly situated had purchased hearing aids from respondent corporations[3] and were forced to pay illegally fixed higher prices because of respondents' antitrust violations.[4] Respondents moved to dismiss,[5] arguing that as a noncommercial consumer neither petitioner nor the class she represented had been injured in their "business or property" within the meaning of section 4.[6] The district court held that an injury to "property" under section 4 included a monetary injury[7] and there-

*EDITOR'S NOTE: This case was awarded the *George W. Milam Award* as the outstanding case comment submitted by a Junior Candidate in the Fall 1979.

1. Petitioner, Kathleen Reiter, was referred to by the district court as "the classic consumer plaintiff." 435 F. Supp. 933, 934 (D. Minn. 1977).

2. Clayton Act § 4, 15 U.S.C. § 15 (1976) (original version at ch. 323, § 4, 38 Stat. 731 (1914) (superseding Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890)). Section 4 provides that: "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 . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." (emphasis added). Petitioner also sought injunctive relief under § 16 of the Clayton Act, Clayton Act § 16, 15 U.S.C. § 26 (1976). 579 F.2d 1077, 1078 n.1 (8th Cir. 1978). Section 16 does not contain the requirement of injury to one's "business or property."

3. The class action was brought on behalf of those who purchased either directly or indirectly from respondents for personal use. 579 F.2d at 1078. Respondents were five hearing aid manufacturers: Sonotone Corporation, which neither appeared nor participated in any proceeding, 435 F. Supp. at 934, Beltone Electronics, Dahlberg Electronics Corp., Textron Incorporated and Radio Ear Corp. *Id.* Respondents were engaged in the business of manufacturing, distributing, selling and repairing hearing aids in various states. Brief for Respondents in Opposition to Petition for Certiorari at A-5, Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

4. Specifically, the petitioner alleged that respondents violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 (1976), by combining and conspiring to restrain and monopolize domestic and foreign commerce in hearing aids. Respondents were also charged with violating § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), restraining interstate commerce with respect to leases, sales and contracts. *See* Brief for the states of Alabama, et. al., as Amici Curiae, A-8, Reiter v. Sonotone Corp., 442 U.S. 330 (1979). Petitioner claimed respondents imposed restrictions on their retail dealers, thus limiting territories, customers and brands of hearing aids sold, and conspired with the dealers to fix hearing aid prices. 442 U.S. 330, 335 n.1 (1979).

5. 435 F. Supp. at 934. In the alternative, respondents moved for summary judgment. *Id.*

6. Respondents argued that an injury to "business or property" had to refer to a commercial, business injury. *Id.* at 935-36.

7. *Id.* at 936-37. The district court relied primarily on Justice Holmes' opinion in Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 395 (1906). See notes 21-23 and accompanying text, *infra*.

fore denied the motion to dismiss. The Eighth Circuit Court of Appeals, on certification,[8] reversed and found a commercial injury necessary to invoke the Clayton Act's treble damage provision.[9] On certiorari, the United States Supreme Court reversed, remanded and HELD, noncommercial consumers who pay higher prices for goods because of antitrust violations have sustained an injury to their "property" within the meaning of section 4 of the Clayton Act.[10]

Congress, by enacting the Sherman Act[11] and supplementing it with the Clayton Act,[12] sought to encourage free competition by controlling monopolies and the resulting restraint of trade.[13] Section 4 of the Clayton Act provides a treble damage remedy[14] to encourage private citizens to supplement government enforcement by providing meaningful compensation.[15] Read literally, the language of section 4 provides that, "*any* person" injured in his "business or property" can bring suit.[16] However, judicial concern over voluminous litigation has resulted in limiting standing requirements.[17]

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8. The district court noted that the case was one of first impression nationwide, 435 F. Supp. 933, 934 (1977), and involved a question of law on which there was substantial difference of opinion. Therefore, it certified the question for interlocutory review to the Eighth Circuit Court of Appeals under 28 U.S.C. § 1292(b) (1970). 435 F. Supp. at 938.

9. 479 F.2d 1077, 1078-79 (1978). Relying primarily on the legislative history of the Clayton Act, the Court of Appeals construed the statute's intent as limiting "the class of persons able to bring a private damage action." *Id.* at 1080.

10. 442 U.S. 330, 340 (1979). Chief Justice Burger authored the opinion for a unanimous court, with a concurring opinion by Justice Rehnquist.

11. Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)).

12. Clayton Act, ch. 323, § 4, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27, 44 (1976)).

13. *See* Standard Oil Co. v. United States, 221 U.S. 1, 52, 59-62 (1911). *See also* 579 F.2d at 1079, n.4 (*citing with approval* M. FORKOSCH, ANTITRUST AND THE CONSUMER (ENFORCEMENT) 32 (1956) as an "exhaustive analysis" of the legislative history of the Sherman Act); Note, *Denial of Standing to Private Noncommercial Consumers Under Section 4 of the Clayton Act*, 31 VAND. L. REV. 1531, 1533-34 (1978).

14. See note 2 *supra*. Senator Sherman originally proposed a recovery of full consideration. However, the proposal was increased to double damages in March of 1890, and finally emerged from the Senate Judiciary Committee in April of 1890 with the treble damage provision. *Compare Congressional Record*, S.3445, 50th Cong., 1st Sess., 19 CONG. REC. 8483 (1888) *with Congressional Record*, S.1, 51st Cong., 1st Sess., 21 CONG. REC. 2455 (1890) *and Congressional Record*, S.1, 51st Cong., 1st Sess., 21 CONG. REC. 2901 (1890).

15. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977); 21 CONG. REC. 1767-68, 2612, 3146-50 (1890). *See also* Note, *Closing the Door on Consumer Antitrust Standing*, 54 N.Y.U.L. REV. 237, 249-52 (1979); Note, *supra* note 13, at 1531-36. *See generally* Rashid, *A Government Perspective*, 8 S.W.U.L. REV. 515 (1976).

16. "Section 4 conveys the impression that Congress conferred a broad grant of standing upon treble damage [plaintiffs]." Note, *Standing to Sue Under Section 4 of the Clayton Act*, 35 OHIO ST. L.J. 723, 725-26 (1974). The absence of common potential barriers such as the "amount in controversy" requirement, fortifies this impression. The provisions for recovering costs of the suit and attorneys' fees, combined with the treble damage provision, constitute inducements for potential plaintiffs to pursue legal redress for injuries resulting from antitrust violations. *Id. See also* Note, *supra* note 13, at 1532; Note, *supra* note 15, at 238, 242-45; Note, 35 OHIO ST. L.J., *supra*, at 725-28. *But see* Radovich v. National Football League, 352 U.S. 445, 454 (1957) (Court should not add requirements to burden private litigants beyond what Congress has specified).

The Supreme Court first addressed the injury issue in *Chattanooga Foundry & Pipe Works v. City of Atlanta.*[18] In *Chattanooga Foundry*, because of the defendant corporation's illegal price fixing activities, the city of Atlanta paid an excessive price for pipes used in its waterworks system.[19] The Supreme Court rejected defendant's argument that "property" referred only to "physical damage to tangible property,"[20] but reasoned instead that "[t]he damage complained of must almost . . . always be damage in property, that is, in the money of the plaintiff. . . ."[21] Speaking for the Court, Justice Holmes specifically premised the holding on a "property" injury, rather than relying on the injury to the city's "business."[22] For over half a century following *Chattanooga Foundry*, Justice Holmes' interpretation of section 4 not only remained unquestioned, but was expanded.[23]

The scope of protection afforded by the Sherman Act was considered in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*[24] In *Mandeville*, California sugar beet growers alleged monetary injuries resulting from a price fixing agreement by the local beet refiners who constituted the only available market for sugar beets grown in the locality.[25] Rejecting respondents' contention that the Sherman Act protected only consumers and buyers, the Court broadly defined the statutory protection as extending to competitors and sellers as well.[26] In reaching this conclusion, the Court stated that "[t]he Act is compre-

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17. *See, e.g., In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31 v. Automobile Mfrs. Ass'n, 481 F.2d 122 (9th Cir.) (injury to commercial interest is required under § 4 treble damage actions), *cert. denied*, 414 U.S. 1045 (1973); GAF Corp. v. Circle Floor Co., 463 F.2d 752 (2d Cir. 1972) (treble damage standing requires injury in competitive ability of the plaintiff resulting from an antitrust violation), *cert. dismissed*, 413 U.S. 901 (1973); Weinberg v. Federated Dep't Stores, Inc., 426 F. Supp. 880 (N.D. Cal. 1977) (nonbusiness consumer alleging pocketbook injury resulting from price-fixing violation did not sustain a "property" injury under § 4), *rev'd*, No. 77-1547 (9th Cir. June 25, 1979); Ragar v. J.T. Raney & Sons, 388 F. Supp. 1184 (E.D. Ark.) (rise in interest rates to property owners is not a competitive, business injury by reason of antitrust violations as required by § 4), *aff'd per curiam*, 521 F.2d 795 (8th Cir. 1975).

18. 203 U.S. 390 (1906). In *Chattanooga Foundry*, Justice Holmes construed what is now § 4 of the Sherman Act. 15 U.S.C. § 15 (1976).

19. 203 U.S. at 395.

20. *Id.* at 398.

21. *Id.* at 397.

22. "It was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Id.* at 396.

23. *See, e.g.*, Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968) (dictum that ultimate purchaser of a pair of shoes could sue for injury caused by antitrust law violation); Thomsen v. Cayser, 243 U.S. 66, 88 (1917) (Sherman Act injury construed as the excess paid over a reasonable amount for services rendered). *See also* Tyler, *Private Antitrust Litigation: The Problem of Standing*, 49 U. COLO. L. REV. 269, 270 (1978); Note, *supra* note 15, at 237; Note, *supra* note 16, at 725-27.

24. 334 U.S. 219 (1948).

25. *Id.* at 221-24. Because the refiners composed the entire market for sugar beets, they could effectively control the prices.

26. *Id.* at 236.

hensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."[27]

The expanding definition of section 4 was curtailed by dictum in the 1972 Supreme Court decision of *Hawaii v. Standard Oil Co.*[28] The Court construed the words "business or property" as denoting commercial interests.[29] The state of Hawaii, in its capacity as *parens patriae*, sought treble damages for injuries to its general economy allegedly attributable to a violation of the antitrust laws.[30] Recognizing that a large portion of Hawaii's injury would be directly compensable to consumers, the Court feared opening the door to duplicate recoveries.[31] Furthermore, the Court was concerned about the feasibility of proving an independent, identifiable harm to Hawaii's general economy.[32] While specifically recognizing the right of private citizens to bring treble damage actions,[33] the Supreme Court declined to extend section 4 to Hawaii's *parens patriae* claim. The Court thereby concluded that damage to a state's general economy did not suffice as a compensable property injury.[34] However, the Hawaii Court allowed the state to sue in its proprietary capacity as a consumer in the market place.[35] The Court concluded that the terms "business or

27. *Id.* Following *Mandeville*, judicial construction of "business or property" gradually expanded to include, *inter alia*, employment contracts, North Texas Producers Ass'n v. Young, 308 F.2d 235, 243 (5th Cir. 1962), *cert. denied*, 372 U.S. 929 (1963), rights under lease, Congress Building Corp. v. Loew's, Inc., 246 F.2d 587, 594 (7th Cir. 1957), and a contractual relationship subject to termination by a third party, VTR, Inc. v. Goodyear Tire & Rubber Co., 303 F. Supp. 773 (S.D.N.Y. 1969). *See also* Waldron v. British Petroleum Co., 231 F. Supp. 72 (S.D.N.Y. 1964), in which the court carefully scrutinized the "business or property" provision of § 4. Reasoning that the disjunction in the statute was meaningful, the court held that: "[t]he word 'property" has wider scope and is more extensive than the word 'business.' Less is required to prove 'property' than to prove 'business.' " *Id.* at 86.

28. 405 U.S. 251 (1972).

29. *Id.* at 264.

30. Hawaii sued to recover for overcharges paid by its citizens. The *parens patriae* claim was based on alleged injuries from changes in revenues, increased taxes affecting citizens and commercial enterprises, restrictions and losses of business opportunities, prevention of full utilization of the state's resources, rising state manufacturing costs, thus inhibiting equal competition in the national market, and frustration of the state's policy of general progress. All injuries allegedly stemmed from defendant's violation of the Sherman Act. *Id.* at 253-56.

31. *Id.* at 264. Duplicate recovery could occur if the state as *parens patriae* recovered damages on behalf of consumers and the same consumers brought suits in their own right.

32. *Id.*

33. *Id.* at 264-66. The Court also emphasized that Congress made the treble damage remedy available to all persons in order to encourage people to act as "private attorneys general." *Id.* at 262.

34. *Id.* at 264.

35. Justice Marshall, speaking for the Court explained the differences between the two injuries: "Where the injury to the State occurs in its capacity as a consumer in the marketplace; through a 'payment of money wrongfully induced,' damages are established by the amount of overcharge. . . . Measurement of an injury to the general economy, on the other hand, necessarily involves an examination of the impact of restraint of trade upon every variable that affects the State's economic health—a task extremely difficult, 'in the real economic world rather than an economist's hypothetical model.' " *Id.* at 262-63 n.14 (*quoting* Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906) *and* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 493 (1968)).

property" required an injury to consumer interests. The Court did not compare consumer interests with business interests, rather it used the phrase to distinguish the state's interest in its general economic welfare from its interest in compensation for injuries to its general economy.[36]

The dicta in *Hawaii* became a source of confusion for many lower courts. They extended *Hawaii* beyond its expressly narrow holding by asserting that to fall within the protection of section 4, an injury to "business or property" had to be commercial in nature.[37] The reasoning of the lower courts is exemplified in *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31 v. Automobile Manufacturers Association.*[38] In *Multidistrict,* governmental plaintiffs alleged diminution in the value of their property and increased expenses due to defendants' alleged conspiracy to eliminate competition in research and development of motor vehicle pollution control devices.[39] Relying on *Hawaii,* the Ninth Circuit Court of Appeals determined that because the governmental plaintiffs had not alleged an injury to their commercial interests they were without standing to sue for treble damages.[40] The Ninth Circuit concluded that because the primary purpose of the antitrust laws was to ensure unfettered competition, a commercial injury must be alleged as a prerequisite standing.[41]

Hawaii's complaint also stated a class action and a claim in its proprietary capacity. 405 U.S. at 253-55.

36. "A large and ultimately indeterminable part of the injury to the 'general economy,' as it is measured by economists, is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under § 4." 405 U.S. at 264. *See also* L. SULLIVAN, ANTITRUST 771 n.3 (1977).

37. *See, e.g.,* GAF Corp. v. Circle Floor Co., 463 F.2d 752, 757 (2d Cir. 1972), *cert. dismissed,* 413 U.S. 901 (1973) (treble damages remedy only available to those who suffered a competitive injury); Weinberg v. Federated Dep't Stores, Inc., 426 F. Supp. 880 (N. D. Cal. 1977), *rev'd,* No. 77-1547 (9th Cir. June 25, 1979); Gutierrez v. E. & J. Gallo Winery Co., 425 F. Supp. 1221 (N.D. Cal. 1977), *vacated in part and remanded,* No. 77-1896 (9th Cir. Sept. 20, 1979); Smith v. Toyota Motor Sales, U.S.A., Inc., 1977 Trade Cas. ¶ 61,251, at 70,760 (N.D. Cal. 1977), *vacated,* (9th Cir. Sept. 14, 1979); Ragar v. J.T. Raney & Sons, 388 F. Supp. 1184 (E.D. Ark. 1975) (denied standing to residential homeowners; the court reasoned that only persons injured in their competitive positions should be permitted standing under § 4), *aff'd per curiam,* 521 F.2d 795 (8th Cir. 1975). In *Weinberg, Guttierrez,* and *Smith,* standing was denied under § 4 to noncommercial consumers forced to pay inflated prices for goods for personal use because of a price fixing scheme. *See also* L. SULLIVAN, ANTITRUST 771 n.3 (1977); 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 334, 334(b), 337(a)(1), 337(b) (1978); Blackford, *"Business or Property" Entitled to Protection Under Section 4 of the Clayton Act,* 26 MERCER L. REV. 737, 738-44 (1975); Note, *supra* note 13, at 1532-33; Note, *supra* note 15, at 239.

38. 481 F.2d 122 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973).

39. *Id.* at 124-25. The complaint also alleged that defendants, the nation's automobile manufacturers, conspired to eliminate competition in the manufacture, installation and patenting of antipollution devices. *Id.*

40. *Id.* at 126. The court noted that the "business or property" provision was "definitively limited to interests in commercial ventures or enterprises. . . ." *Id.* (*citing* Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972)).

41. *Id.* at 128. The Ninth Circuit's conclusions have also been reached by other circuit courts. *See, e.g.,* Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976) (standing to sue for treble damages requires an injury to commercial interests or enterprises); GAF Corp. v. Circle Floor Co., 463 F.2d 752, 757 (2d Cir. 1972) (competitive injury required for treble damage standing), *cert. dismissed,* 413 U. S. 901 (1973).

Although the Supreme Court through its dicta in *Hawaii* had severely circumscribed the definition of an injury to one's "business or property," the Court, in *Pfizer, Inc. v. Government of India*[42] recognized that the broad purposes of section 4 were deterrence and punishment of the violator and compensation of the victim.[43] In *Pfizer*, several foreign nations, as purchasers of antibiotics, instituted treble damage actions against six pharmaceutical manufacturing companies alleging injuries in their "business or property" under section 4 of the Clayton Act.[44] The *Pfizer* Court determined that the foreign governments had standing,[45] recognizing that antitrust laws would attain the maximum deterrent effects if violators were held accountable for the full costs of their conduct.[46] Noting that Congress' main concern in passing the antitrust laws was protection of American consumers,[47] the Court reasoned that American consumers would ultimately benefit from treble damage suits brought by foreigners.[48] While *Pfizer* did not specifically address the "business or property" issue, the Supreme Court's review of section 4 and its purposes seemed incongruous in juxtaposition with the *Hawaii* dictum.[49] Intensified confusion in the lower courts was the natural result of this inconsistency.[50]

42. 434 U.S. 308 (1978).

43. *Id.* at 314. *See also* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 n.10 (1977); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

44. 434 U.S. at 309-10. Originally brought as separate actions, the claims of the governments of India, Iran and the Republic of the Philippines were consolidated for pretrial purposes in the district court. The complaints alleged violation of §§ 1 and 2 of the Sherman Act, including *inter alia*, price fixing, market division and fraud. The suits were instituted under § 4 of the Clayton Act on respondents' behalf and on behalf of several classes of foreign purchasers of antibiotics. *Id.*

45. Specifically the Court held that a foreign nation was a "person" within the meaning of § 4. *Id.* at 320. Referring to the original legislative debates accompanying the passage of the Sherman Act, the Court observed that the phrase "any person" was intended to have its naturally broad, inclusive meaning. *Id.* at 312-13. *See* 21 CONG. REC. 2569, 3148 (1890) (remarks of Senator Edmunds).

46. 434 U.S. at 315.

47. *Id.* at 314. In his dissenting opinion, Chief Justice Burger, joined by Justices Powell and Rehnquist, also concluded that the treble damage provision was enacted for the American consumers' benefit: "[T]his Court observed just last Term, the legislative history of the treble-damage remedy which does exist 'indicate [sic] that it was conceived of primarily as a remedy for' [t]he people of the United States as individuals, 'especially consumers.'" *Id.* at 325 (Burger, C.J., dissenting) (*quoting* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977), (*quoting* 21 CONG. REC. 1767-68 (1890) (remarks of Senator George))).

48. 434 U.S. at 315. The majority noted several possible effects on American consumers. The Court relied primarily upon the theory that excluding foreign suits would lessen the deterrent effect of treble damages. Potential antitrust violators doing business in the United States and abroad could use illegal profits obtained abroad to offset any potential liability to American plaintiffs. Additional effects of excluding foreign plaintiffs included contributing to inflation at home by raising worldwide prices, allowing antitrust volators to acquire sufficient profits to effectively defend domestic cartels from antitrust attacks, and discouraging possible foreign competitors who might try to set prices below monopoly prices in the United States. *Id.* & n.14 (*citing* Velvel, *Antitrust Suits by Foreign Nations*, 25 CATH. U.L. REV. 1, 7-8 (1975)).

49. See note 29 and accompanying text, *supra.*

50. *See, e.g.*, 579 F.2d 1077 (8th Cir. 1978) (a commercial injury is a prerequisite to stand-

The present case settled these contradictions by rejecting the respondents' contention that the phrase "business or property" limited standing solely to litigants alleging commercial injuries.[51] The Court based its decision on a statutory construction maxim requiring that effect be given to every word.[52] Because Congress used the disjunction "or" connecting the words "business" and "property," the Court reasoned that each must be given independent meaning.[53] Utilizing the common dictionary definition,[54] as well as Justice Holmes' definition in *Chattanooga Foundry*,[55] "property" was defined by the Court as "comprehend[ing] anything of material value owned or possessed."[56] Relying on the *Chattanooga Foundry* decision, the instant Court clearly established that a monetary injury alone would suffice to constitute an injury to one's property" within the meaning of section 4.[57]

Focusing on the nature of petitioner's injury and the meaning of "property" within section 4, the Court next considered whether petitioner's status as a noncommercial consumer of retail goods affected her standing to sue.[58] Although the instant Court declined to rule on the effect of *Illinois Brick Co. v. Illinois*,[59] which held that only direct purchasers have standing to sue for treble damages under section 4,[60] it noted that it was implicit in numerous

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ing under the "business or property" provision of § 4). *But see, e.g.*, DeGregario v. Segal, 443 F. Supp. 1257 (E.D. Pa. 1978) (denial of medicaid benefit constituted an injury to one's "property" within the meaning of § 4); Theophil v. Sheller-Glove Corp., 446 F. Supp. 131, 135 (E.D.N.Y. 1978) (retail purchaser of a 1971 motor home represented as a 1972 model sustained a property injury under § 4; "property" injury defined as pocketbook injury), *leave to appeal vacated*, No. 78-7389 (2d Cir. Jan. 3, 1979).

51. 442 U.S. 330, 336-37 (1979).

52. *Id.* at 339. (*citing* F.C.C. v. Pacifica Foundation, 438 U.S. 727, 739-40 (1978) *and* United States v. Menasche, 348 U.S. 528, 538-39 (1955)). Referring specifically to the phrase "commercial interests or enterprises" used in Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1979), the instant Court noted that decisional language is not meant to be dissected and analyzed in the same way as statutes. The Court recognized that this language taken literally, would ignore *Hawaii's* explicit reaffirmance of Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906), as well as the concern in *Hawaii* over duplicate recoveries by individual consumers. 442 U.S. at 341-42. See notes 29-36 and accompanying text, *supra*.

53. 442 U.S. at 338-39.

54. *Id.* at 338. The Court cited WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1818 (1976).

55. See notes 21-22 and accompanying text, *supra*.

56. 442 U.S. at 338.

57. *Id.* at 339-42.

58. *Id.* at 340-42.

59. 431 U.S. 720 (1977). The Court of Appeals expressly declined to decide if plaintiff's claim was barred by *Illinois Brick's* direct purchase rule because it determined that the petitioner lacked standing on other grounds. 579 F.2d 1077, 1079 n.3 (1978). Thus, the *Illinois Brick* issue was not before the instant Court. 442 U.S. at 347 n.3.

60. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), extended the holding of a previous Supreme Court case, Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968). In *Hanover Shoe* the Court had held that under § 4 of the Clayton Act persons directly overcharged were considered injured to the full extent of the overcharge. In effect, this barred the antitrust defendant from proving that indirect purchasers, the ultimate consumers, were in fact injured by the illegal overcharges. *Id.* at 489-94. *Illinois Brick* prevented the ultimate consumer from asserting an injury under § 4 by establishing that the direct purchaser passed

decisions that purchasers of retail goods have standing.[61] Moreover, the present Court observed that the basis of the antitrust laws is to ensure fair price competition[62] and that a retail purchaser, wrongfully deprived of money due to artificially inflated prices had sustained the requisite injury to his "property."[63]

The legislative histories of section 4 of the Clayton Act and its precursor section 7 of the Sherman Act formed the basis of the Court's rationale. Congress' intent in enacting the Sherman Act was interpreted by the Court as attempting to create a "consumer welfare prescription."[64] Although some members of

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on the overcharge to ultimate purchasers. The *Illinois Brick* Court noted two possible exceptions for the pass-on defense. The first was a preexisting cost-plus contract, 431 U.S. at 736, and the second when the direct purchaser is owned or controlled by its customer, *id.* at n.16. These exceptions could be permitted since they were considered "easy proof" cases. *See* P. AREEDA & D. TURNER, *supra* note 37, at ¶ 337.

One basis for the *Hanover Shoe* decision had been the Court's belief that the pass-on defense could allow antitrust violators to retain their illegally obtained profits, 392 U.S. at 494. Since ultimate consumers would have such a small stake in any litigation, "[T]reble damage actions, . . . would be substantially reduced in effectiveness." *Id.* By not allowing the pass-on theory to be used offensively by indirect purchasers, after *Illinois Brick* the number of potential plaintiffs is severely curtailed. The ultimate consumer is frequently the major victim of price fixing schemes and denial of standing to obtain damages is inconsistent with the statutory purposes of deterrence and compensation as well as the rationale of *Hanover Shoe. See* P. AREEDA & D. TURNER, *supra* note 37, at ¶ 337; Calkins, *Illinois Brick and its Legislative Aftermath*, 47 ANTITRUST L.J. 967, 969-70 (1978).

Former Senator Hugh Scott criticized the Court for "flout[ing] the will and purpose of Congress in a most crass fashion." [1977] 824 ANTITRUST & TRADE REG. REP. (BNA) A-13. *See generally* Calkins, *supra*. Presently both the House and Senate have bills in the Judiciary Committees to amend § 4 of the Clayton Act by adding language which gives indirect purchasers standing to sue, thus reversing *Illinois Brick. See* [1979] 922 ANTITRUST & TRADE REG. REP. (BNA) A-38, A-39; 37 CONG. Q. 917, 917-18 (May 12, 1979).

Private treble damage actions have had a significant role in supplementing the Justice Department's limited resources. *See* Rashid, *supra* note 15, at 518. Thus, had the instant Court upheld the appellate court's decision, the few potential consumers who survivied the *Illinois Brick* test would have been dealt a final deadly blow. *See* P. AREEDA & D. TURNER, *supra* note 37, at ¶ 337(e); Note, *supra* 15, at 242 n.30.

61. *See, e.g.*, Pfizer, Inc. v. Government of India, 434 U.S. 308, 312 n.9, 313-15 (1978) (treble damage provision was not restricted to American consumers); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) (Sherman Act's treble damage provision enacted primarily as meaningful remedy for individuals, providing ample damages as an incentive to bring private actions); Goldfarb v. Virginia State Bar, 421 U.S. 773, 782, 793 (1975) (consumers of legal services could maintain a treble damage action against the Virginia bar association); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968) (dictum that ultimate purchaser of a pair of shoes could sue for injury caused by an antitrust law violation); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (Sherman Act protection broadly construed, applicable to consumers, purchasers, sellers and competitors).

62. 442 U.S. at 342.

63. *Id.*

64. *Id.* at 343 (*citing* R. BORK, THE ANTITRUST PARADOX 66 (1978)). Recognizing the ambiguity inherent in the legislative histories of § 4 of the Clayton Act and § 7 of the Sherman Act, the Court noted that the legislative record "shed no light on Congress' original understanding. . . ." 442 U.S. at 342.

Congress had questioned the feasibility of individual consumers bringing actions, the right of a consumer to bring a suit for damages was never doubted.[65]

The Clayton Act's treble damage provision was construed as a remedy for all, "especially consumers."[66] Thus, respondents' contention that such an interpretation of section 4 would unduly burden the already overcrowded federal courts was rejected.[67] This decision was predicated upon the belief that Congress had "created the treble-damages remedy of [section] 4 precisely for the purpose of encouraging *private* challenges to antitrust violations."[68]

Finally, the respondents argued that the cost of defending consumer class actions would financially burden, if not destroy, many small businesses. Recognizing that the Federal Rules of Civil Procedure give the district courts a wide range of power to cope with spurious claims, the Court rejected the argument in favor of the "plain language in [section] 4."[69] The Supreme Court warned the district courts to be aware of potentially frivolous claims and exercise their discretion by using the tools available to them.[70]

Through use of the "plain meaning" rule and recognition of Congressional

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65. *See* 21 CONG. REC. 1767-68, 3150 (1890) (remarks of Sen. George); *id.* at 2612 (remarks of Sen. Sherman); *id.* at 3147-48 (remarks of Sen. Edmunds). Congress had rejected the concept of class actions, therefore, while individuals could maintain an action for damages under § 4 in theory, litigation costs made the suit impractical.

The district court observed that the absence of consumer protection arguments from the 1890 legislative debates must be construed "in light of the knowledge and assumptions held by society in that period." 435 F. Supp. 933, 937 (D. Minn. 1977). At the time the Sherman and Clayton Acts were passed, consumers "were not identifiable as a constituency, and protection of their economic interests was an unknown concept." *Id.* Recognizing that differing conclusions could be drawn from the debates, the district court noted that it was as probable that the concept of consumer standing "did not exist in the minds of Congressmen as that they were deliberately ignored." *Id.*

Although Congressional intent in the 1890 and 1914 debates remains unclear, the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 undeniably reveals that Congress understood the Sherman and Clayton Acts to grant standing to consumers for monetary injuries. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified in 15 U.S.C. §§ 15c-15h (1976) and scattered sections of 15, 18, 28 U.S.C. 1976)). This Congressional response to *Hawaii*, see notes 28-36 *supra* and accompanying text, grants state attorneys general the power to bring civil atcions as *parens patriae* on behalf of citizens to receive monetary relief for nonbusiness injuries to their property as a result of antitrust violations. 15 U.S.C. § 15c(a)(1)(B)(ii) (1976). *See* H.R. REP. No. 499, 94th Cong., 2d Sess. 3, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2572. *See also* Note, *supra* note 15, at 252-54 for an excellent discussion on the subject.

66. 442 U.S. at 343 (*citing* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977)).

67. 442 U.S. at 344.

68. *Id.* (emphasis in original). The Court observed that private suits supplement the Justice Department's efforts in controlling antitrust violators. *Id.* at 344. (*citing* DIRECTOR OF ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT, 1978 ANNUAL REPORT 78 (Table 28)). *See generally* Rashid, *supra* note 15.

69. 442 U.S. at 345. The decision pointed out that Rule 23 of the Federal Rules of Civil Procedure gives the district courts power to deal with frivolous claims through their control of certification and management of class actions. *Id. See* FED. R. CIV. P. 23.

70. 442 U.S. at 345. In his concurring opinion, Justice Rehnquist observed that the Court's warning to the district courts would not be a complete solution to the problem of "frivolous claims brought to extort nuisance settlements." *Id.* at 345-46.

intent, the instant decision rendered unequivocal support for the proposition that section 4 directly protects consumer interests. The Court has emerged as a conduit for effectuating Congressional intent by construing the treble damage provision as a door opening devise for every man to recover adequate damages.[71] Although the case in point recognized ambiguities in the Sherman and Clayton Acts' legislative histories[72] the decision reflects the definitive stance adopted by the modern Congress that noncommercial consumers may sue for treble damages under section 4.[73] While *Illinois Brick* and lower court interpretations of *Hawaii* dealt sharp blows to consumer standing, the instant decision makes a significant shift back to a broader construction of section 4.[74] The Supreme Court heeded its own admonition of two decades ago that "this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws."[75]

In conjunction with numerous prior Supreme Court decisions espousing the importance of private antitrust actions,[76] the instant decision represents an advancement of consumer interests. However, by not addressing the effect of *Illinois Brick*,[77] a significant barrier to consumer suits remains.[78] A noncom-

71. *Id.* at 343-44. *See also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977).

72. 442 U.S. at 342-43. *See* Clayton Act § 4, 15 U.S.C. § 15 (1976) (original version at ch. 323, § 4, 38 Stat. 730 (1914)) (superseding Sherman Act ch. 647, § 7, 26 Stat. 209 (1890)). See notes 64-65 *supra.*

73. 442 U.S. at 344 n.7. Although the instant Court recognized Congress' assumption, it emphasized that it was "in no sense a controlling consideration." *Id.*

The legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c-15h (1976), clearly demonstrates the Congressional belief that all consumers have a cause of action under § 4. The 1976 House Report stated that this "subsection creates no new substantive liability. Each person on whose behalf the state attorney general is empowered to sue already has a cause of action under § 4 of the Clayton Act, even if, for practical reasons, the right to sue is not likely to be exercised." H.R. REP. No. 499, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 2578, 2578. See notes 60, 65 *supra.* The 1976 *parens patriae* provision, 15 U.S.C. § 15c(a)(1)(B)(ii) (1976), is specifically limited to recovery, for non-business injuries, thus confining recovery exclusively to noncommercial consumer injuries.

74. Perhaps even more significant was the Congressional response to each decision. *Hawaii* was overturned by the *parens patriae* provision of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, see notes 65, 73 *supra,* and legislation is underway in both Houses of Congress to overturn *Illinois Brick,* see note 60 *supra.*

75. Radovich v. National Football League, 352 U.S. 445, 454 (1957).

76. *See, e.g.,* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 635 (1977) (recognition of congressional policy favoring private enforcement of antitrust laws); Illinois Brick Co. v. Illinois, 431 U.S. 720, 734-35, 745 (1977) (longstanding policy of encouraging vigorous private antitrust enforcement supports adherence to *Hanover Shoe* rule); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (treble damage provision enacted as a door opening device to all persons injured by antitrust violations); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968) (importance of private treble damage actions emphasized); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968) (private treble damage actions conceived of as everpresent threats deterring potential antitrust violators).

77. 431 U.S. 720 (1977). See note 59 and accompanying text, *supra.*

78. Petitioner in the instant case will probably face the *Illinois Brick* requirement upon demand in view of the fact that both the appellate and Supreme Courts' specific refusal to decide on the issue. See note 10 *supra.*

mercial consumer must still prove that he is a direct purchaser injured by an antitrust violation or that he falls within one of the narrow exceptions recognized in the *Illinois Brick* holding.[79] Moreover, the recently acquired right of state attorneys general to sue on behalf of consumers[80] has been effectively emasculated insofar as the class upon whose behalf the action is brought is composed of indirect purchasers.[81] Judicial concern over frivolous claims and floodgating litigation causes courts to be circumspect in their assessment of private treble damage actions.[82] Although the instant Court declined to accept these problems as dispositive, it was still cognizant of them.[83] As long as these concerns exist, the plain meaning of section 4 may never be recognized.[84] Albeit, "[a]ny person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue therefor . . . without respect to amount in controversy,"[85] the restrictive standing limitation imposed by *Illinois Brick* has made it improbable that "plain meaning" will be given to the words.

Whether the instant case marks the beginning of a judicial trend to expand section 4 standing to all injured victims of antitrust violations is uncertain. The recognition of noncommercial consumer standing will secure the implementation of the basic policy considerations of compensation and deterrence. Had the instant Court not determined that noncommercial consumers had standing, all businesses which sold directly to nonbusiness purchasers would have been immune from treble damage actions brought by their customers. Public policy would have been thwarted because purchasers would have had no standing to

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79. See note 60 *supra*. *Illinois Brick* emphasized that exceptions to the rule barring the pass-on defense would be narrow in scope. 431 U.S. at 744-45. Nevertheless, suits for injunctive relief under § 16 of the Clayton Act, Clayton Act § 16, 15 U.S.C. § 26 (1976), may provide an alternative. Section 16 provides in part: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws. . . ." Since § 16 has less demanding injury requirements than § 4, and because many of the complexities of proving damages which confronted the *Illinois Brick* Court are absent in a suit for injunctive relief, some commentators suggest that § 16 may come to play an important role in future antitrust litigation. *See* Calkins, *supra* note 60, at 980-81; Analysis, *Illegal Overcharges and Inquiry—Equal Application of the Pass-On Rule*; [1977] 822 ANTITRUST & TRADE REG. REP. (BNA) B-1, B-6.

Although an injunction provides some relief, it lacks the essential qualities provided in § 4 which encourage private enforcement of antitrust violations. Injunctive relief lacks the deterrent effect of a treble damage action and fails to compensate the injured victim for his damages. For these reasons § 16 has been termed a "sleeping giant" in the antitrust world. Calkins, *supra* note 60, at 981.

80. 15 U.S.C. §§ 15c-15h (1976). See note 65 *supra*.

81. *See* Stone, *Reviving State Antitrust Enforcement: The Problems with Putting New Wine in Old Wine Skins*, 4 J. CORP. L. 547, 585, 602 (1979).

Because the Hart-Scott-Rodino Act did not confer any additional substantive right to sue, but merely created a new procedural device, see note 74 *supra*, a *parens patriae* action can only be brought on behalf of direct purchasers. State attorneys general may also avoid the *Illinois Brick* issues through utilization of § 16 of the Clayton Act, 15 U.S.C. § 26 (1976). See note 79 *supra*.

82. *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

83. 442 U.S. at 344-45.

84. See note 16 *supra*.

85. Clayton Act § 4, 15 U.S.C. § 15 (1976).