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**Antitrust - Treble-Damage Action - Hanover Shoe Inc. Rule Bars Offensive Use of Passing-On Doctrine by Indirect Purchaser**

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rule and once the interpretative and administrative problems are resolved, the goals of certainty, judicial economy and preservation of an accused's rights will certainly be enhanced.78

Carol J. Young

ANTITRUST — TREBLE-DAMAGE ACTION — Hanover Shoe Inc. Rule Bars Offensive Use of Passing-on Doctrine by Indirect Purchaser.

Illinois Brick Co. v. Illinois (U.S. 1977)

The State of Illinois and seven hundred local government units in the Greater Chicago area brought suit in the District Court for the Northern District of Illinois1 under section 4 of the Clayton Act (section 4),2 against eleven manufacturers and distributors of concrete block in the Greater Chicago area, alleging a combination and conspiracy to fix the price of concrete block in violation of section 1 of the Sherman Act.3 Plaintiffs

78. See notes 40 & 41 and accompanying text supra. It is submitted that the police will adjust to Davenport in the same manner that police eventually adjusted to the per se rules in Miranda v. Arizona, 384 U.S. 436 (1966). Although the requirements of Miranda — providing notice to an accused of his right to remain silent and be represented by counsel — were practically easier to comply with, there was a concern among law enforcement officials that Miranda would seriously inhibit a defendant from confessing. These fears eventually subsided, as, it is submitted, shall the similar concerns about the feasibility of implementing Davenport. For studies on the actual impact of Miranda on police interrogation, see generally Medalie, Zeitz & Alexander, Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda, 66 Mich. L. Rev. 1347 (1968); Robinson, Police and Prosecutor Practices and Attitudes Relating to Interrogation as Re-Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply, 1968 Duke L. J. 425 (1968); Seeburger & Wettick, Miranda in Pittsburgh — A Statistical Study, 29 U. Pitt. L. Rev. 1 (1967); Witt, supra note 60; Younger, Interrogation of Criminal Defendants — Some Views on Miranda v. Arizona, 35 Fordham L. Rev. 255 (1966); Comments, supra note 49 at 1519. For a discussion of the practical problems associated with application of Davenport rule, see notes 63-74 and accompanying text supra.


2. 15 U.S.C. §15 (1976). Section 4 provides in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Id. States and local governmental bodies are considered persons under § 4 when suing on their own injuries. Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

3. 67 F.R.D. at 463. Section 1 of the Sherman Act, 15 U.S.C. §1 (1976), provides in part: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal . . ." Id.

The instant action was brought after the United States had filed criminal and civil proceedings against the same defendants. See Illinois v. Ampress Brick Co., 536 F.2d 1163, 1164 (7th Cir. 1976). A consent decree was entered in the civil suit, and a
contended that the overcharge resulting from the defendants' price fixing had been paid by masonry contractors who passed the overcharge on to general contractors, who in turn, included it in their bids on plaintiffs' construction projects.\(^4\)

The district court granted defendants' motion for summary judgment on the grounds that the indirect purchasers lacked standing to sue.\(^5\) The United States Court of Appeals for the Seventh Circuit reversed.\(^6\) The Supreme Court granted certiorari\(^7\) and reversed, holding that its decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*\(^8\) barred a private treble-damage action based on offensive use of the passing-on theory.\(^9\) *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

In enacting the antitrust laws, Congress intended to create a scheme that allowed any injured party to recover.\(^10\) The Supreme Court has interpreted these laws broadly to effectuate what it perceived as the dual congressional purposes of deterrence and compensation through effective private enforcement.\(^11\) Until recently, the Court reasoned that the statutes

\(^4\) *Id.* at 463. Plaintiffs alleged that the amount of their injuries as a result of the overcharge and passing-on practices exceeded three million dollars. *Id.* For a discussion of the passing-on doctrine, see notes 19-21 and accompanying text infra.

\(^5\) *Id.* at 468. Although granting summary judgment for the defendant, the district court rejected as the basis for summary judgment the defendants' contention that indirect purchasers were barred, as a matter of law, from bringing suit by the Supreme Court's decision in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). *Id.* at 466. See notes 22-30 and accompanying text infra.

\(^6\) *Illinois v. Ampress Brick Co.*, 536 F.2d 1163, 1167 (7th Cir. 1976). The Seventh Circuit held that plaintiffs had standing to sue and rejected defendants' argument that the suit was barred as a matter of law. *Id.* at 1164-67.


\(^8\) 392 U.S. 481 (1968). For a discussion of the *Hanover Shoe* decision, see notes 21-29 and accompanying text infra.


\(^10\) Section 4 provides that any injured party may sue and recover damages, regardless of the amount in controversy. 15 U.S.C. § 15 (1976). For the text of this section, see note 2 supra. This provision suggests that Congress intended a remedy irrespective of the degree of injury. See also 21 CONG. REC. 2612, 3148, 3149 (1890) (remarks of Sen. Sherman). Further, by allowing a plaintiff to use a judgment obtained by the Government as prima facie evidence of a violation, Congress made it possible for a plaintiff to establish an injury without fully litigating liability. Clayton Act, § 5(a), 15 U.S.C. § 16(a) (1976).

11. *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958). In *Northern Pacific*, the Supreme Court noted that the Sherman Act was designed to be a "comprehensive charter of economic liberty." *Id.* The Court in Minnesota Mining &
were “best served by insuring that the private action will be an ever present threat,” thereby deterring violations. In order to promote deterrence through the vigilance of private parties, the Court has directed that courts “not add requirements to burden the private litigant beyond what is specifically set forth by Congress . . . .” It was also recognized by the Court that section 4 “does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . . [It] is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.” To facilitate enforcement of the antitrust laws, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976. One section of this legislation authorizes state attorneys general to sue as parens patriae on behalf of state citizens. This provision was adopted in order to establish “an effective mechanism to

Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1964), stated that the antitrust laws intended to “use private self-interest as a means of enforcement. The [law] was intended to help persons of small means who are injured in their property or business.” Id. at 318–19 (citations omitted). In recognition of its paramount enforcement role, the Supreme Court determined that the private action was not to be burdened. Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 130–31 (1969). In Perkins v. Standard Oil of Cal., 355 U.S. 642 (1939), the Supreme Court cautioned against a narrow reading of §2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13 (1976), since the defendant might thereby avoid the sanctions of the statute. 395 U.S. at 647.


13. Radovich v. N.F.L., 352 U.S. 445, 454 (1957). The Court reemphasized this position in Radiant Burner, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656 (1961) (per curiam), where it was noted that “Congress [has] determined its own criteria of public harm and it [is] not for the courts to decide whether in an individual case injury [has] actually occurred.” Id. at 660, quoting Klor’s Inc. v. Broadway-Hale Stores, 359 U.S. 207, 211 (1959). The Court has also frequently stated that uncertainty of proof, especially in antitrust treble-damage actions, should not bar recovery. See, e.g., Bigelow v. RKO Radio Pictures Inc., 327 U.S. 251, 256 (1946). In Bigelow the Court remarked that “[t]he constant tendency of the courts is to find some way in which damages can be awarded when a wrong has been done.” Id. at 266, quoting Story Parchment Co. v. Paterson Co., 282 U.S. 555, 556 (1931).

In outlining the plaintiff’s burden of proof in antitrust suits, it has been suggested that

[u]nder Section 4, plaintiff must show not only that the defendant violated the antitrust laws but that his conduct caused the damages alleged in the complaint. Normally it would be enough with respect to causation if the defendant “materially contributed” to the plaintiff’s injury or “substantially contributed, notwithstanding other factors contributed also.” The plaintiff need not show that the illegality was a more substantial cause than any other. Perma-Life v. International Parts Corp., 392 U.S. 134, 143–44 (1968) (White, J., concurring) (citations omitted).

14. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (citations omitted). While the courts have not lost sight of the compensatory goal of the antitrust laws, they have employed various criteria to determine who is a sufficiently injured party to bring suit. See note 106 and accompanying text infra.


Any attorney general of a State may bring a civil action in the name of such State as parens patriae on behalf of natural persons residing in such State to secure monetary relief . . . . for injuries sustained by such natural persons to their property by reason of any violation . . . . The court shall exclude from the
permit consumers to recover damages by giving state attorneys general a cause of action against antitrust violators."

The passing-on doctrine has been asserted as a method of proof in private antitrust actions. A party seeking to establish its applicability would attempt to trace the effects of an illegal overcharge through the various levels of a product's chain of distribution. The passing-on doctrine is used defensively to show that the claimants, usually direct purchasers, were not in fact injured by the overcharge since they were able to pass the added cost on to the next purchaser. The doctrine is invoked offensively by claimants who are indirect purchasers to prove that they were in fact injured and therefore entitled to recover under section 4.

In Hanover Shoe, the Supreme Court ruled that passing-on could not be asserted as a defense to an antitrust action brought by a direct

amount of monetary relief awarded in such action any amount of monetary relief . . . which duplicates amounts which have been awarded for the same injury . . .

Id. 17. S. Rep. No. 803, 94th Cong., 2d Sess. 6 (1976). The parens patriae method of litigation was designed to ensure that ultimate consumers would be able to recover for their injuries without being precluded by concepts of "standing, privity, target area, remoteness and the like." Id. at 42. The Supreme Court in Illinois Brick interpreted the Parens Patriae legislation as merely establishing a new procedural device to enforce § 4 remedies, rather than as creating a substantive right of recovery. 431 U.S. at 733-34 n.14. For a discussion of this point see notes 52 and 108 and accompanying text infra.


21. Hanover Shoe, a lessee of shoe making equipment, alleged that United, in refusing to sell the equipment, had violated the antitrust laws. 392 U.S. at 483. The primary issue was whether the district court had erred in precluding United from asserting passing-on as a defense. Id. at 487-88. United argued that Hanover was not injured because any illegally high rental price it had paid to United had been passed-on to Hanover's customers in the form of higher shoe costs. Id. at 491-92. The district court ruled that this defense was impermissible because Hanover was the ultimate consumer of the machinery and had suffered a legal injury. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 185 F. Supp. 826, 829 (M.D. Pa. 1960). On interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1970), the district court's ruling was affirmed. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 281 F.2d 481 (3d Cir.), cert. denied, 364 U.S. 901 (1960). United preserved the issue and presented it again after losing on the merits, but the Third Circuit affirmed. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 377 F.2d 776, 781 (3d Cir. 1967). The Supreme Court then granted certiorari. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 389 U.S. 818 (1967). For a discussion of the Supreme Court's decision, see notes 22-29 and accompanying text infra.
purchaser, except in limited circumstances. This decision was based on what the Court perceived to be insurmountable difficulties of proof, the resulting need for complex multiparty litigation, and the consequent diminished effectiveness of private antitrust enforcement. The Court further reasoned that the compensatory aim of the antitrust laws would be circumvented if the direct purchaser could not allege an injury. The Court concluded that the plaintiff in Hanover Shoe could establish a prima facie case, demonstrating a legally cognizable injury, if it showed that it paid an

22. 392 U.S. at 488.
23. Id. at 494. The Court stated:

We recognize that there might be situations — for instance, when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easier to prove that he has not been damaged — where the considerations requiring that the passing-on defense not be permitted in this case would not be present. Id. For a discussion of this limitation, see Beane, supra note 18, at 343-44.

24. 392 U.S. at 492. The Court noted that if the defense were allowed, defendants in every case would seek to show that the plaintiff had not been injured under the prevailing economic circumstances. Id. However, the Court considered this method of proof to be very tenuous, stating that it was extremely difficult in the "real economic world" to establish the precise effects of an illegal overcharge by a supplier on the final price. Id. at 493. Not only did the Court consider the task insurmountable, but it was also concerned with the burdens that would be placed on the judicial system if defendants were permitted to raise the passing-on defense. Id.; see Note, supra note 20, at 105. This concern stemmed from the Court's recognition that the use of the passing-on doctrine would place each factor affecting a pricing decision in issue. 392 U.S. at 493. For example, the Hanover Shoe Court noted that the mere fact that a direct purchaser increased his selling price after a violation was committed by his supplier could not be attributed to a passing-on practice until all other factors affecting the pricing decision of the direct purchaser were considered. Id. at 493 n.9.

25. Id. at 494. The Court noted that the use of the passing-on defense would require that each buyer in the chain of distribution, except the ultimate consumer, refute the defense in order to establish a right to recover. Id.

26. Id. The Court noted that the ultimate consumer, who alone as plaintiff would be immune to the assertion of the defense, would have little incentive to sue because of the small stake involved. Id. Thus, the violators would "retain the fruits of their illegality." Id. The effectiveness of the treble-damage action as a deterrent would thereby be impaired. Id. Given the importance of private enforcement of the antitrust laws, the Court feared that increased procedural complexity in antitrust litigation would ultimately reduce the number and efficacy of such suits. Id. See notes 88-93 and accompanying text infra.

27. 392 U.S. at 494. The Court noted that if a buyer absorbs the loss he is entitled to damages. Id. If, in the face of an overcharge, he maintains his price but adjusts volume or costs to maintain his profit margin, the Court reasoned that he could still recover. Id. Even if the buyer raises his prices, the Court stated that he would also be entitled to recover because his injury is complete at the time he pays the illegal overcharge. Id., citing Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 396 (1906); Southern Pac. Co. v. Darnell-Taenzer Co., 245 U.S. 531, 533 (1918). The cases cited by the Hanover Shoe Court have been construed as holding that liability is established when the party in privity to the defendant suffers the loss. See Note, supra note 20, at 104. Moreover, the Court dismissed as dicta the alternate holding of Keogh v. Chicago N.W. Ry., 260 U.S. 156, 164-65 (1922), that despite liability being established when a plaintiff pays an illegally high price, his recovery of damages is conditioned on proof that another has not suffered the loss. 392 U.S. at 491 n.8. For a criticism of this treatment of the alternate Keogh holding, see Pollock, supra note 19, at 1193 n.26 (alternate ground constitutes a separate holding).
illegally high price, and also showed the amount of the overcharge, regardless of the subsequent mitigation achieved by passing it on. Although Hanover Shoe considered only the defensive use of the passing-on doctrine, the precedent it established had obvious bearing on the offensive use of passing on. Since the defendant could no longer contend that the direct purchaser had passed-on the overcharge, the question whether any injured party besides the direct purchaser could sue was soon raised. In Mangano v. American Radiator and Standard Sanitary Corp., the Third Circuit affirmed the district court’s dismissal of a complaint filed by indirect purchasers of goods that were alleged to have been overpriced because of price fixing. Although the issue did not need to be addressed, the district court had ruled that offensive use of the passing-on doctrine was barred by the concern with insurmountable difficulties of proof expressed in Hanover Shoe and by the tenuous economic connection between the initial overcharge and the remote purchasers. The court also stated that the

28. 392 U.S. at 494.
29. Id. at 489. At least one court considering the offensive use of passing-on interpreted Hanover Shoe to impart an element of privity into the right to sue on an antitrust violation. Denver v. American Oil Co., 53 F.R.D. 620, 637 (D. Colo. 1971). However, it should be noted that Hanover Shoe did not mention, much less overrule, cases that had already held that privity was not required for a plaintiff to establish standing in an antitrust action. See, e.g., South Carolina Council of Milk Producers v. Newton, 360 F.2d 414, 419 (4th Cir.), cert. denied, 385 U.S. 934 (1966); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564, 566 (7th Cir.), cert. denied, 375 U.S. 834 (1963); Karseal Corp. v. Richfield Oil Co., 221 F.2d 358, 363 (9th Cir. 1955).
33. 438 F.2d at 1188. The Third Circuit noted that the plaintiffs were purchasers of homes containing illegally overpriced plumbing fixtures, but that they were not the first consumers in the chain of distribution. Id. The first consumer, the builder, was in much the same position as Hanover. Id. See note 21 supra.
34. The district court’s dismissal of the action resulted from the plaintiffs’ failure to answer interrogatories. 50 F.R.D. at 18.
35. Id. at 26. For a discussion of the Supreme Court’s concern with difficulties of proof in Hanover Shoe, see note 24 and accompanying text supra.
36. 50 F.R.D. at 29. The court construed the issue facing it, to be whether or not an injury could be demonstrated, and concluded that none could be shown because the claims were too remote. Id. at 31. Determining that Hanover Shoe rested primarily on the difficulty of proving an economic connection, the district court rejected the proposition that Hanover Shoe also rested on the need for vigilant enforcement of the antitrust laws. Id. at 29. For a discussion of the concern in Hanover Shoe with enforcement through private suits, see note 26 and accompanying text supra. See also, Rodos & McMahon, Standing to Sue of Subsequent Purchasers, 20 S.D.L. Rev. 107, 116 n.56 (1975).
Hanover Shoe precedent mandated dismissal because offensive use of passing-on would be accompanied by the potential for double recovery of treble damages. The Third Circuit agreed that the difficulties of proof precluded the plaintiffs from demonstrating that any overcharge by the manufacturer was "a causa sine qua non of any payment any of them had to make." Mangano, which some commentators interpreted as imposing a privity requirement for standing to sue in an antitrust action, was followed in a number of district courts, but by no other circuit court.

In *in re Western Liquid Asphalt Cases*, the Ninth Circuit championed the view that Hanover Shoe did not bar offensive use of passing-on. In *Liquid Asphalt*, the court concluded that the Supreme Court in Hanover Shoe was more concerned with promoting the effective enforcement of the antitrust law through private treble damages actions, than with the difficulties of proof. The court reasoned that if indirect purchasers were not allowed to

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37. 50 F.R.D. at 30. The district court stated that unless the Supreme Court in Hanover Shoe "intended to state a rule permitting double [treble-] [sic] recovery of the same loss, which this court cannot believe, such a position must preclude recovery . . . ." *Id.* The district court gave little weight to the distinction that in Hanover Shoe no other plaintiff was available to bring suit. *Id.* at 29. This fact alone might justify allowing one plaintiff to be overcompensated in order to foster the deterence objective of private antitrust litigation. See text accompanying note 88 infra. Further, it appears that the district court's concern with multiple liability was unwarranted since district courts have various procedural tools at their disposal with which they may deal with the problem. See notes 49 & 102-104 and accompanying text infra.

In addition, although plaintiffs argued that exceptions should be available that allowed them to utilize passing-on to prove their case, the district court felt that Hanover Shoe would only allow a single exception—a preexisting cost-plus contract—to the bar of offensive and defensive use of passing-on. 50 F.R.D. at 30.

38. 438 F.2d at 1188.


42. 487 F.2d 191 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974).

43. 487 F.2d at 201.

44. *Id.* at 196. The Ninth Circuit reasoned that the policy of promoting enforcement favored allowing plaintiffs to demonstrate injury. *Id.* at 197. Permitting indirect purchasers to sue, it was believed, would contribute to the goal of fewer antitrust violations. *Id.* at 199.

Moreover, the Ninth Circuit determined that the issue of difficulty of proof raised in Hanover Shoe should not be used to foreclose recovery by an injured plaintiff particularly since the issue was raised in Hanover Shoe as a means of aiding the plaintiff in establishing liability. *Id.* at 196 n.5, 199. The court noted that complexity of proof problems could arise in one of three areas: 1) establishing liability; 2) measuring damages; and 3) determining standing. *Id.* at 197 n.5. The court specifically rejected the notion that complexity of proof "would foreclose recovery on
sue, the compensatory aim of antitrust legislation would be frustrated, and in most cases the violator would retain the fruits of his illegality because direct purchasers would not sue. Therefore, the Ninth Circuit concluded that Hanover Shoe could not have intended to foreclose proof of illegality or proof of damages by an indirect purchaser. The Ninth Circuit thus rejected the use of a privity test as a means of determining standing and imposed instead the target-area test. The court also noted that even though it was not an issue in the case before it, federal courts were well equipped to prevent multiple liability. To resolve the conflict among the circuits that had arisen after the Hanover Shoe decision concerning the offensive use of the passing-on theory, the Supreme Court granted certiorari in Illinois Brick.

The Illinois Brick Court began its analysis with the premise that symmetry should be required in determining the fate of the passing-on doctrine; therefore it concluded that whatever rule was adopted, it had to be equally applicable to plaintiffs and defendants. As a result of its decision the grounds of difficulty of trial." Id. As the court remarked: "It has never been thought that an antitrust violation was irremediable because done on a grand scale." Id. The Ninth Circuit felt that in Hanover Shoe the Supreme Court was concerned with aiding the first purchaser in establishing liability, but not primarily concerned with the amount of damages. Id. The court concluded that the issue facing it was one of standing, which could be determined as a matter of law, rather than of causation or damages, both of which are questions for the jury. Id. at 199, citing Perkins v. Standard Oil Co. of Cal., 395 U.S. 642, 648-49 (1969).

45. 487 F.2d at 196. The court stated that the underlying rationale of Hanover Shoe was to "preserve the antitrust suit and to promote compensation to those injured." Id.

46. Id. at 198. The court noted that most direct purchasers do not bring suit. Id. In Liquid Asphalt only four contractors brought suit despite the fact that the conspiracy extended over seven states and affected a large number of people. Id. Direct purchasers did not sue for a number of reasons, the most important being their need to maintain good relationships with their suppliers. Id.

47. Id. at 200. The court determined that the rule of Hanover Shoe did not establish a per se rule barring defensive use of passing-on, but rather should be viewed in light of its specific facts. Id. at 199. Under the interpretation, the Ninth Circuit concluded that Hanover Shoe would aid antitrust enforcement and not exclude injured parties from court based on the remote possibility of multiply liability. Id.

48. Id. at 199. The target-area test treats an antitrust violation as a shot aimed at particular segment (e.g., petroleum-based products) of the economy — the target. Any injured party within that segment of the economy could bring suit. Karseal Corp. v. Richfield Oil Co., 221 F.2d 358, 363-64 (9th Cir. 1955).

49. 487 F.2d at 201. The Ninth Circuit recommended the consolidation of cases and the appointment of special masters in difficult cases as methods to avoid imposing multiple liability on the antitrust violator. For an example of consolidated proceedings by direct and indirect purchasers, see West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971). Moreover, the Liquid Asphalt court noted that defendants could interplead all parties under 28 U.S.C. §1335 (1970). 487 F.2d at 201. Further, the four year statute of limitations, 15 U.S.C. §15b (1976), coupled with the protracted nature of antitrust litigation, would prevent anyone from bringing suit after another plaintiff obtained a judgment. 487 F.2d at 201. Inconsistent adjudications could be prevented by the doctrines of collateral estoppel and res judicata. Id. For a discussion of the practical aspects of the multiple liability problem, see text accompanying notes 75 & 102-104 infra.


51. 431 U.S. at 729-36. The Court considered symmetry to be essential for two reasons. First, the Court concluded that permitting offensive but not defensive use of
to impose symmetrical rules on the offensive and defensive use of passing-on, the Court perceived that its prior holding in *Hanover Shoe* had to be considered in the disposition of the instant case.\textsuperscript{52}

In reappraising the viability of the passing-on theory, the Court determined that its use in private treble damage actions would inject "new dimensions of complexity" into such suits.\textsuperscript{53} The Court foresaw that passing-on would cause conflicting claims to be asserted,\textsuperscript{54} which would require either compulsory joinder or interpleading of all potential plaintiffs in one action.\textsuperscript{55} Such a requirement, the Court concluded, would unnecessarily complicate private antitrust actions.\textsuperscript{56} Further, as in *Hanover Shoe*, the
Illinois Brick Court was concerned that the use of the passing-on doctrine would burden the treble-damage action with "massive evidence and complicated theories." The Court determined that the use of economic models would not be sufficient to resolve the passing-on issues that could be raised. Faced with the complexity of proof and multiparty litigation that would accompany the use of passing-on, the Court concluded that the doctrine would unjustifiably diminish the effectiveness of private treble-damage actions.

In the Court's view, the importance of avoiding procedural and substantive complexity in treble-damage actions lay in the need to preserve the incentive for private parties to undertake such suits. If the use of the passing-on doctrine were authorized, the stake for each party after apportionment of damages would be too small to make litigation economically feasible, and the amount recovered would bear little relation to the actual injury. Thus, the Court concluded that the assertion of the passing-on doctrine could erode the use of private treble-damage actions as a means of deterring antitrust violations. While conceding that a direct purchaser might not be willing to sue, the Court determined that until Congress clearly indicated otherwise, private enforcement and the legislative purpose in establishing an army of private attorneys general would be better served by permitting direct purchasers to recover the full amount of the


58. 431 U.S. at 741-42. In concluding that economic studies would not alleviate the problems of complicated proof posed by the use of the passing-on doctrine, the Court noted that courts have encountered difficulties when dealing with sophisticated economic models. Id. at 742, citing Gregg v. Georgia, 428 U.S. 153 (1976). The Court, relying on Hanover Shoe, also noted that hypothetical economic models were not determinative of real world conditions. 431 U.S. at 742, citing Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 493 (1968).

59. 431 U.S. at 742. If the passing-on doctrine were an element in private antitrust actions, the Court stated that the relevant market conditions would have to be ascertained, the amount of the overcharge would have to be allocated to each level in the chain of distribution, and the damages for lost profits would have to be quantified. Id. at 743 n.27.

60. Id. at 742. The Court recognized that there were at least three situations in which the complexities of proof and multiparty litigation would not be a substantial barrier to proving injury: 1) when goods are resold without being altered; 2) when middlemen use a fixed percentage markup in pricing; and 3) where the item is a small but vital component of a larger product, causing demand to be highly inelastic for the price-fixed item. Id. at 743-44. However, the Court refused to establish these situations as exceptions to the Hanover Shoe rule. Id. at 744. The Court determined that carving out exceptions would entail the very problems that prompted the Hanover Shoe Court to bar the defensive use of passing-on. Id. at 744-45. Therefore, the Court concluded that Hanover Shoe implicitly rejected the creation of exceptions other than the enumerated situation of a preexisting cost-plus contract. Id. at 745.

61. Id. at 745-46.

62. Id. at 746-47.

63. Id. at 747.

64. Id. at 746. See notes 10-12 and accompanying text supra.

65. 431 U.S. at 748. The Court acknowledged that "direct purchasers sometimes may refrain from bringing a treble-damage suit for fear of disrupting relations with their suppliers." Id. (citations omitted).
overcharge.\textsuperscript{66} Although refusing to extend the compensatory goal of the antitrust laws to its "logical extreme"\textsuperscript{67} the Court did state that barring the use of the passing-on doctrine furthered the compensatory goal "to the extent that the direct purchaser absorbs some and often most of the overcharge."\textsuperscript{68} Thus, the Court held that the goals of compensation and deterrence both would be furthered by applying the Hanover Shoe rule to the offensive use of passing-on.\textsuperscript{69}

In his dissent, Justice Brennan stated that privity was a justifiable reason for denying the defensive use of the passing-on doctrine since otherwise the wrongdoer would be able to escape liability.\textsuperscript{70} He pointed out, however, that privity was not required to establish a right to recover.\textsuperscript{71} Justice Brennan then rejected the majority's symmetrical treatment of the passing-on doctrine, asserting that different policy considerations supported its offensive use.\textsuperscript{72} Although recognizing the difficulties of proof and the complicated trial proceedings inherent in either use of passing-on, the dissent noted that every antitrust case involves intricate proof of what would have happened absent the violation.\textsuperscript{73} Justice Brennan maintained further that regardless of which standing test is used — the direct injury-privity test or the more liberal target-area test — recovery should at least extend to all potential plaintiffs within the defendants' chain of distribution in order to preserve the thrust of section 4.\textsuperscript{74} The dissent concluded with the

\textsuperscript{66} Id.
\textsuperscript{67} Id. The Court admitted that it was unwilling to attempt "to allocate damages among all 'those within the defendant's chain of distribution,'" and recognized that, as a result, some indirect purchasers who "have actually been injured by antitrust violations" may be denied recovery. \textit{Id}. at 746-47.
\textsuperscript{68} \textit{Id}. at 746.
\textsuperscript{69} \textit{Id}. at 754-58 (Brennan, J., dissenting). Justice Brennan expressed concern over the possible frustration of major policy objectives established by Congress in enacting the antitrust laws and providing for private enforcement. \textit{Id}. at 754-58 (Brennan J., dissenting). Justice Brennan stated that allowing offensive use, without allowing defensive use, would insure "the continued effectiveness of the treble-damage action and [prevent] wrongdoers from retaining the spoils of their misdeeds," while denying defensive use would prevent defendants from escaping liability. \textit{Id}. at 753 (Brennan, J., dissenting). Further, Justice Brennan interpreted the recently enacted \textit{Parens Patriae} legislation as reinforcing the policy considerations favoring suits by indirect purchasers utilizing passing-on concepts to establish injury. \textit{Id}. at 756-58 (Brennan, J., dissenting). See notes 15-18 and accompanying text supra.
\textsuperscript{70} \textit{Id}. at 753 (Brennan, J., dissenting). Justice Brennan emphasized that the difficulty of tracing an economic consequence and the use of "reasoned estimation" is present in all cases, not just those involving passing-on. \textit{Id}. at 758-59 (Brennan, J., dissenting).
\textsuperscript{71} \textit{Id}. at 760-61 (Brennan, J., dissenting). It was pointed out that these standing tests had been developed in recognition of the limits on recovery under § 4. \textit{Id}. at 760 (Brennan, J., dissenting).
observation that although problems of multiple liability were theoretically possible, such considerations were not sufficiently pressing in practice to justify barring recovery.\textsuperscript{75}

Given the goals of the antitrust laws and the favorable position occupied by antitrust plaintiffs,\textsuperscript{76} it is suggested that \textit{Illinois Brick} is open to criticism in the following areas: 1) its extension of \textit{Hanover Shoe};\textsuperscript{77} 2) its insistence on symmetry;\textsuperscript{78} 3) its failure to consider the practical aspects of the multiple liability problem;\textsuperscript{79} and 4) its views of congressional intent and the statutory purposes to be furthered.\textsuperscript{80}

It is submitted that the Court, in its refusal to limit \textit{Hanover Shoe},\textsuperscript{81} has added an unjustified privity requirement to antitrust treble-damage actions.\textsuperscript{82} Although \textit{Hanover Shoe} relied upon prior Supreme Court cases to support the theory that liability is complete at the time the direct purchaser suffers a loss,\textsuperscript{83} it can be argued that this theory does not mean that the amount of the direct purchaser's damages could not be mitigated by a passing-on practice.\textsuperscript{84} Prior to \textit{Illinois Brick}, the privity requirement was expressly rejected in favor of only requiring the plaintiff to establish causation.\textsuperscript{85} By applying the \textit{Hanover Shoe} rule to offensive use of the passing-on doctrine,\textsuperscript{86} the Court appears to have acted in contradiction to its

\textsuperscript{75} Id. at 761-64 (Brennan, J., dissenting). Justice Blackmun, in a separate dissent, noted that if \textit{Hanover Shoe} were not "on the books," the Court would have probably unanimously rejected defendants' argument. \textit{Id.} at 765 (Blackmun, J., dissenting). Justice Blackmun expressed his regret that because of the \textit{Hanover Shoe} decision Congress will have to enact new legislation in order to achieve "the obvious congressional aim." \textit{Id.} at 766 (Blackmun, J., dissenting).

\textsuperscript{76} See notes 10-14 and accompanying text \textit{supra}.

\textsuperscript{77} See notes 83-93 and accompanying text \textit{infra}.

\textsuperscript{78} See notes 94-98 and accompanying text \textit{infra}.

\textsuperscript{79} See notes 101-104 and accompanying text \textit{infra}.

\textsuperscript{80} See notes 99-100 & 103-109 and accompanying text \textit{infra}.

\textsuperscript{81} See text accompanying note 69 \textit{supra}.

\textsuperscript{82} See note 72 and accompanying text \textit{infra}.

\textsuperscript{83} One court, considering the applicability of the \textit{Hanover Shoe} rule to the offensive use of the passing-on doctrine, noted:

The attempt to transform a rejection of a defense because it unduly hampers antitrust enforcement into a reason for a complete refusal to entertain the claims of a certain class of plaintiffs seems an ingenious attempt to turn the decision [in \textit{Hanover Shoe}] and its underlying rationale on its head. \textit{In re Master Key Antitrust Litigation, 1973-2 Trade Cas. (CCH) ¶ 74,680 at 94, 978-79 (D. Conn. 1973)}.

\textsuperscript{84} See note 27 supra.


\textsuperscript{86} Confronted with the choice in \textit{Illinois Brick} of either denying the indirect purchasers recovery or imposing partial liability on the defendants, the Court failed to distinguish the situation presented in \textit{Hanover Shoe} where either the direct purchaser would have been overcompensated or the defendants would have escaped liability. 431 U.S. at 752 (Brennan, J., dissenting). This distinction between the two cases could have supported a rule contrary to \textit{Hanover Shoe} for the offensive use of passing-on. Another significant distinction that could have been noted was that, unlike in \textit{Hanover Shoe}, multiple liability would not have occurred in the instant case since the suits by the direct purchasers were settled without prejudice to recovery in the instant case. See note 3 \textit{supra}.
earlier determination that the antitrust laws are designed to protect all victims.\textsuperscript{87}

It is further submitted that the Court failed to consider the importance of the role of the treble-damage action and the special features of section 4 that are designed to facilitate suits by plaintiffs with small economic stakes.\textsuperscript{88} At least one court\textsuperscript{89} and commentator\textsuperscript{90} believe that the overriding concern in \textit{Hanover Shoe} was to preserve the effectiveness of the private treble-damage action.\textsuperscript{91} Although \textit{Illinois Brick} purportedly seeks to strengthen such actions,\textsuperscript{92} it must be noted that there is no guarantee that direct purchasers will be any more willing to sue now than they were in the past. This continued unwillingness may result in a situation in which no one provides the vigorous enforcement sought by Congress.\textsuperscript{93}

The Court's requirement of symmetry — imposing the same rule on defensive and offensive use of the doctrine — seemed to stem primarily from the Court's concern with the burdens placed on the judicial system.\textsuperscript{94} It is conceded that the same difficulties of proof are encountered in defensive or offensive use;\textsuperscript{95} however, the interests sought to be furthered in each are different. In his \textit{Illinois Brick} dissent, Justice Brennan noted that the \textit{Hanover Shoe} Court was concerned that the defendant "would escape liability and frustrate the objectives of the treble damage action."\textsuperscript{96} In considering offensive use, it is submitted that the policy of favoring private enforcement and insuring its continued availability argues against imposing burdens on the plaintiff.\textsuperscript{97} It appears that the \textit{Illinois Brick} Court has given greater emphasis to considerations of judicial efficiency than to the compensatory or deterrence goals of antitrust enforcement.\textsuperscript{98}

\textsuperscript{87} See Mandeville Island Farms Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1946). See note 13 supra. The Court conceded in \textit{Illinois Brick} that the indirect purchaser may in fact be injured. 431 U.S. at 746-47. See note 67 supra.

\textsuperscript{88} See notes 10-17 and accompanying text supra.

\textsuperscript{89} See, \textit{In re Western Liquid Asphalt Cases}, 487 F.2d 191, 198 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974).

\textsuperscript{90} See, Comment, supra note 39, at 408-09.

\textsuperscript{91} See notes 44 & 45 supra.

\textsuperscript{92} See notes 61-69 and accompanying text supra.

\textsuperscript{93} See \textit{In re Western Liquid Asphalt Cases}, 487 F.2d 191, 201 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974). See also note 65 and accompanying text supra.

\textsuperscript{94} See 431 U.S. at 732. In the Court's view, \textit{Hanover Shoe} applies equally to the "costs to the judicial system" when plaintiffs attempt the difficult problems of proof. \textit{Id.}, see Note, supra note 20, at 105.

\textsuperscript{95} It should be noted that the burden of demonstrating passing-on may be no more difficult than the burdens facing the plaintiff in establishing an overcharge. See, Pollack, supra note 19, at 1210. For example, in \textit{Hanover Shoe}, the plaintiff had to establish, in order to recover, the difference between the amount paid to lease the machinery and the amount it would have paid if United had agreed to sell. \textit{Id.}

\textsuperscript{96} 431 U.S. at 753 (Brennan, J., dissenting).


\textsuperscript{98} The dissent in \textit{Illinois Brick} argued that recovery was precluded by the majority because of difficulty of proof. 431 U.S. at 758-59 (Brennan, J., dissenting). In addition to its concern with difficulty of proof, the Court attributes to \textit{Hanover Shoe} the magical quality of stare decisis, stating that this legal principle is so important that the \textit{Illinois Brick} decision would stand on that basis alone, until explicitly
It is submitted that the Court further sacrificed the compensatory goal of the antitrust laws by creating a windfall for direct purchasers who do sue, and depriving the admittedly injured party of even the opportunity to seek compensation. Faced with clear evidence of the concern of Congress for indirect purchasers, particularly consumers, the Court's conclusion that limited relief is sufficient is difficult to understand.

Although the Court's concern with the risks of multiple liability is theoretically sound, as a practical matter, the occurrence of such jeopardy is unlikely unless additional suits are filed after one class of plaintiffs has obtained a judgment. Given the four-year statute of limitations and the slow progress of antitrust cases in the court system, such a subsequent suit is highly unlikely. Even if potential multiple liability arose, the district courts involved would be able to fashion appropriate solutions.

Notwithstanding the fact that the Court negated the possibility that the question before it was one of standing and stated that the issue involved was the analytically distinct question of actual injury, it is submitted that the issue was in reality standing. Questions of injury are factual ones requiring a decision in each individual case as to whether injury would in fact be beyond proof. Unlike standing issues, questions of injury cannot be resolved by any absolute exclusion of litigation on the issue. Assuming that this decision is truly a question of standing, the Court's disregard of Congress's intent is more serious, since Congress, in enacting the Parens Patriae legislation, specifically addressed the problem of claimants being barred by issues of standing.

If Congress had contemplated that the rule of Hanover Shoe should apply to offensive use of passing-on, the recent Parens Patriae legislation would have little of the significance or effect that Congress intended it to have. It is, as interpreted by the Court, procedural legislation, conferring no new substantive rights on antitrust plaintiffs. Yet, why would Congress create a procedure enabling consumers, the ultimate indirect purchasers, to recover, if, as held by Illinois Brick, such plaintiffs have no substantive right to do so? As noted by Justice Brennan's dissent, there is abundant authority for deference to this type of expression of congressional intent.

overruled by Congress. Id. at 733–34 & n.14. It should be noted, however, that until the instant decision, Hanover Shoe had not been applied by the Supreme Court to bar offensive use of the passing-on doctrine.

100. See notes 10–17 and accompanying text supra.
101. See notes 54–56 and accompanying text supra.
102. See 431 U.S. at 762 (Brennan, J., dissenting).
103. See note 75 and accompanying text supra.
104. See 431 U.S. at 761–63 (Brennan, J., dissenting). See also notes 49 & 75 supra.
105. 431 U.S. at 728 n.7.
106. See Handler & Blechman, supra note 39, at 645 n.95. See also note 44 supra.
107. See note 17 supra.
109. Id. at 765 n.24 (Brennan, J., dissenting). As authority for the proposition that the Court may look to subsequent legislation to determine congressional intent in earlier enactments, Justice Brennan cited NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969); FHA v. The
It is submitted that this decision provides creative price fixers with the potential to circumvent the antitrust laws. If the violator only sells its price-fixed items to a controlled corporation, the violator can be assured that this controlled direct purchaser will not bring suit. In this manner no direct purchaser will be available to bring suit unless an exception is created to the *Illinois Brick* rule. It is further submitted that the *Illinois Brick* Court is subject to criticism for pronouncing such a significant rule in the context of a summary judgment motion; rules of this broad a scope more appropriately emanate from a full development of the facts.

The impact of *Illinois Brick* is potentially grave, since it precludes many parties injured by antitrust violations from obtaining any judicial relief. Even assuming congressional amendment of section 4, many antitrust violators may escape liability unless the new law is given retroactive effect. Further, this decision may be relied upon in other areas for the proposition that plaintiffs who rely on economic tracing to establish a right to recover should be barred by difficulties of proof. *Illinois Brick* cannot help but to serve as a catalyst for future disagreements over the proper objectives and functions of antitrust legislation and may create unnecessary tension between Congress and the court over the deference courts should pay to expressions of congressional policy.

Karen Lee Turner


110. The Court stated that it might create an exception to the *Hanover Shoe* bar on defensive use of passing-on if the defendant can show that the direct purchaser was controlled by its customer. 431 U.S. at 736 n.16. Given the Court’s concern with symmetrical application of the passing-on doctrine, it is possible that an exception will be created to prevent defendants from escaping liability by selling only to controlled corporations.

