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ILLINOIS BRICK AND
ITS LEGISLATIVE AFTERMATH

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I will attempt to avoid taking a position on Illinois Brick Co. v. Illinois,\(^1\) if only because I am supposed to be an impartial commentator. Whether some tone comes through in my remarks I will leave for you to decide.

When I was in law school, I read one of the best-selling unpublished books of all time, the 1958 tentative edition of Hart and Sacks' The Legal Process.\(^2\) In the section on the legislature it suggested, as a clearly ludicrous response to an unpopular court decision, that a bill be enacted stating that the decision "is hereby disapproved."\(^3\)

Shortly after the Supreme Court handed down its decision in Illinois Brick, a close approximation of that bill was being circulated by a coalition of state attorneys-general. The "sole purpose" of that bill, according to an accompanying statement, was "to overrule Illinois Brick directly and nothing else."\(^4\)

The Court's decision in Illinois Brick was viewed by some members of Congress as a direct rebuff of the congressional efforts the previous year.\(^5\) Typical of this sentiment was the statement of former Senator Hugh Scott, the lead-off witness in the Senate hearings. He said the Court had "flouted the will and purpose of Congress in a most crass fashion."\(^6\) "[T]he Court," he said, "forgets that it was not present at the creation of the Antitrust

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\(^1\)431 U.S. 720 (1977).
\(^3\)Id. at 800.
\(^5\)Senator Allen suggested that the speed of congressional response was the result of the 94th Congress's pride of authorship.
\(^6\)Fair and Effective Enforcement of the Antitrust Laws, S. 1874: Hearings on S. 1874 before the Subcomm. on Antitrust and Monopoly of the Senate Subcomm. on the Judiciary, 95th Cong., 1st Sess. 17 (1977) (statement of Hugh Scott) [hereinafter cited as Senate Hearings].
Improvements Act of 1976 . . . . I was present . . . . We viewed the remedy as a consumer remedy, not a middleman windfall."7

Note that Senator Scott mentioned two points. The first was that consumers might not have an adequate remedy. The second point, which was given equal prominence, was his objection to a "windfall" for a "middleman." Is it any wonder that there was prompt congressional reaction to a Supreme Court decision that came down four-square against the consumer and for the middleman?

Today is the fourteen-month anniversary of the *Illinois Brick* decision, and Congress still is attempting to pass a bill that eloquently says *Illinois Brick* is overruled.8 The delay has been long enough that the Supreme Court had time to decide the *Pfizer* case,9 and the overruling of that case has been added to the two bills.10 However, the delay may have been too long. Although both Committees finally have reported out *Illinois Brick* bills,11 neither bill has yet been scheduled for consideration.

I tried long and hard to determine whether I should be talking today about the opinion or about legislation, and I regret that I have been unsuccessful. As you probably know, Senator Hatch has submitted at least 95 amendments to the bill, apparently in the newly popular effort to filibuster by amendment.12 From conversations with numerous Committee staff members, I am convinced that Senator Hatch's opposition can be overcome if the congressional leadership decides the bills are priority items. It also seems probable that if the two Houses voted on the bills they would be passed. The major question, of course, is whether votes on the bills will be scheduled. Time is running out, and even the Committee staff members are saying that this is too close to call.

Regardless of the outcome, it is interesting that these bills, which were introduced with a great flurry of excitement quite a long time ago, have not yet been passed and may well not be passed. This failure promptly to pass relatively short bills reflects the fact that both the *Illinois Brick* case and the *Illinois Brick* bills are more complex than they appear.

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7Id. at 15.
8Cf. *Effective Enforcement of the Antitrust Laws: Hearings on H.R. 8359 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 95th Cong., 1st Sess.* 17 (1977) (testimony of John H. Shenefield) ("If it were possible for this committee to approve a piece of legislation that said no more than, 'The rule in *Illinois Brick* is reversed,' that would be ideal.") [hereinafter cited as *House Hearings*].
12*Filibuster May Be Brewing Over Illinois Brick Measure*, 873 ANTITRUST & TRADE REG. REP. (BNA) at A-7 (July 20, 1978).
In an attempt to make some sense out of the case and the bills, I will first discuss the two relevant Supreme Court decisions. Then I will talk about the complex problems that confronted Congress in its efforts to do something about them, and a little about what they have done. Perhaps the greatest complexity, which I will discuss last, is that nobody really knows just what the effect of Illinois Brick will be. Finally, if time does not run out, I will be bold enough to venture my own solution to the problem of the "middleman windfall."

I. HANOVER SHOE AND ILLINOIS BRICK

To understand the Illinois Brick decision, it is best to begin at the very end. In a two-page dissent, Justice Blackmun suggested that the plaintiffs were "the victims of an unhappy chronology." He said he was confident—and I think he is right—that if the Illinois Brick case had been decided before Hanover Shoe, the Court would have upheld the right of indirect purchasers to recover. Section 4 of the Clayton Act, after all, could not be phrased more broadly: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" can recover treble damages. The Illinois Brick plaintiffs claimed they had been injured because the alleged price fixing of concrete block had increased the cost of buildings they had purchased. Invoking the time-worn canon of statutory construction that the starting point is the language of the statute, the plaintiffs demanded justice.

The problem, of course, was Hanover Shoe. In Hanover Shoe the Supreme Court had held that persons overcharged directly normally will be deemed to have been injured by the full amount of the overcharge. In other words, they get the whole pie. The dilemma confronting the Court in Illinois Brick was that if the direct purchasers get the whole pie, how can there be any pieces left over for indirect purchasers?

The Hanover Shoe decision had been based on two largely policy-oriented considerations. The first reason was deterrence. Justice White said that if passing-on is a defense it is possible that only ultimate consumers will

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13431 U.S. at 765 (Blackmun, J., dissenting).
15"Accord, House Hearings at 83 (testimony of Phillip Areeda).
18See 392 U.S. at 489.
19In addition to the policy considerations, the Court said that as a general matter the buyer is injured the moment he pays an illegal overcharge, and subsequent events do not change this. 392 U.S. at 489–90. This is a conclusion, however, and not a reason. See 2 P. AREEDA & D. TURNER, ANTITRUST LAW § 337c, at 185 (1978).
be allowed to recover damages. Because of the difficulty of doing this and because each consumer's injury may be very small, they might not sue, and the wrongdoers then would retain "the fruits of their illegality."²⁰

The second reason was a concern that allowing lawyers to argue about passing-on would greatly complicate litigation. Justice White explained that it would be insuperably difficult for a defendant to show that a plaintiff had raised his prices in response to higher costs or, if that could be shown, that the plaintiff would not have raised his prices anyway.²¹

Nine years after Hanover Shoe was decided, Justice White again considered these factors, and applied them to the facts in Illinois Brick. Again the Court held that a direct purchaser normally will be deemed to be injured by the entire amount of the overcharge.

In the Illinois Brick opinion, however, the concern about deterrence is deemphasized. Instead, the Court first said that allowing the offensive but not the defensive use of passing-on would create unacceptably serious risks of multiple liability.²² Most important to the result, however, was the same concern about the complications presented by passing-on issues that had been evidenced in Justice White's opinion in Hanover Shoe. As in that case, the Court expressed great concern about the complexity inherent in deciding passing-on issues and the burden that this would place on the judiciary.²³ Because of the preeminence of this aspect, the Illinois Brick case probably can best be understood as part of a more general concern of the Court about the burdens on the judicial system and the problems presented by complex litigation.²⁴

II. CONGRESSIONAL RESPONSE

Congress was confronted with a decision in which the Court almost explicitly recognized that it was reaching a result contrary to the interpretation

²⁰392 U.S. at 494.
²¹Id. at 492–93.
²²431 U.S. at 730. Although the Court said that vigorous private antitrust enforcement is likely to be encouraged by adherence to a firm application of the Hanover Shoe rule, it is clear from the opinion that this discussion was largely supplemental support for the Court's conclusion and a rebuttal to contrary arguments.
²³Justice White stated that this was the "principal basis" for his opinion in Hanover Shoe. Id. at 731–32. The Court in Illinois Brick said that allowing indirect purchasers to employ passing-on theories to recover "would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." Id. at 740.
of Section 4 that Congress had assumed and approved of when it passed the Hart-Scott-Rodino Antitrust Improvements Act less than a year earlier. Not too surprisingly, almost before the bills were drafted Illinois Brick legislation appeared certain to be enacted.

Looking back on it, perhaps this was more of a curse than a blessing for the proponents of the legislation. They were sprinting towards home before anyone had decided where home was.

A. CONSIDERATIONS SUPPORTING LEGISLATION

The considerations that support the legislative reversal of Illinois Brick are quite simple. I will spend relatively little time on them not because they are not valid, but rather because they are self-evident.

Perhaps the strongest argument is illustrated by the reaction my laymen friends would have when I would tell them about these remarks. I would explain that under Illinois Brick they probably could not recover overcharges caused by manufacturer price fixing. They would express disbelief.

It generally is conceded that direct purchasers commonly will pass on some or possibly most of an improper overcharge. Of course, the amount that can be expected to be passed on will depend upon the various elasticities. But it has been observed that price fixing may be most likely to take place where demand is relatively inelastic and, accordingly, where the overcharge is likely to be passed on. Indeed, Professor Posner, who spoke yesterday, said in his statement before the House Subcommittee that under "plausible assumptions" the level of the chain of distribution most likely to incur injury is that of the ultimate consumer. Since the person injured normally should be the person compensated, there thus is a rather persuasive argument for allowing the ultimate consumer to recover.

A second reason supporting reversal is that indirect purchasers arguably can be effective enforcers of the antitrust laws, and some direct purchasers may refrain from bringing suit out of fear of disrupting relations with suppli-

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26This is clear in the dissenting opinions, of course. See 431 U.S. at 756-58 (Brennan, J., dissenting); 431 U.S. at 766 (Blackmun, J., dissenting). More importantly, the majority opinion rebuts this argument not by disputing it, but rather by narrowly pointing out that Congress had not amended the applicable statutory language, and therefore the views of individual legislators could not change the appropriate interpretation of the (preexisting) language. See id. at 733-34 n.14.


29House Hearings at 193 (statement of Richard A. Posner). Professor Posner said that injury also would most likely be incurred by the suppliers of certain intermediate sellers. Id.
ers. The frequency with which this will occur was debated vigorously in the hearings, but even Justice White recognized that it will happen on occasion.

B. PROBLEMS THAT CONFRONTED CONGRESS

Despite the legitimacy of these reasons, Congress found itself confronting some problems. Their seriousness is illustrated by the fact that there was opposition expressed in the hearings both by defense and by plaintiffs' lawyers.

The problems can be divided into four categories. First, there was the problem of possible duplicate recoveries. Second, there was concern about deterrence. Third, it was unclear whether it really is possible to compensate consumers for antitrust injuries (an issue that was mentioned but not dwelled on in the Illinois Brick opinion). And fourth, there was the problem of the complexity created by passing-on issues, and the corresponding burden on the judiciary, that appeared to be preeminent in the opinion of the Court. I will discuss these issues, and the responses by the Committees, in order.

1. Duplicate Recoveries

The possibility of duplicate recoveries was taken seriously by the two Committees. Although there was vigorous debate as to the extent to which this had been a problem as a practical matter prior to Illinois Brick, both Committees decided it would be unfair to overrule Illinois Brick without also overruling Hanover Shoe.

31431 U.S. at 746.
32On April 21, 1978, after several days of testimony by defense witnesses opposed to the legislation, the Senate Judiciary Committee heard the testimony of Beverly C. Moore, director of Citizens for Class Action Lawsuits, and of Perry Goldberg and James Sloan for an ad hoc group of plaintiffs' lawyers. They raised serious questions about the proposed legislation, and, on balance, opposed it. See 861 Antitrust & Trade Reg. Rep. (BNA) at A-18 (April 27, 1978).
33It was recognized that because of the procedural mechanisms allowing consolidation of trials, the length of antitrust cases, and the four year statute of limitations, conflicting litigated results probably would not be common. See Illinois Brick, 431 U.S. at 761-64 (Brennan, J., dissenting); Brief for the United States as Amicus Curiae in Illinois Brick v. Illinois, reprinted in House Hearings at 411, 433-38; House Hearings at 113 (statement of Maxwell M. Blecher) ("The prospect of double recoveries . . . is essentially a theoretical bugaboo."); House Hearings at 172 (statement of Josef B. Cooper) ("I personally believe this theoretical prospect has been exaggerated and made into a judicial scapegoat."); cf. Illinois Brick, 431 U.S. at 731 n.11. The same authorities also recognized, however, that duplicative litigated recoveries were possible. And, although this point was not emphasized, it also was possible (as in fact happened in Illinois Brick) that a defendant could settle a lawsuit with one level of purchasers only to risk liability for the complete overcharge to another level. See Illinois Brick, 431 U.S. at 731 n.11.
34The Senate Report rejected the suggestion by a number of plaintiffs' lawyers that only Illinois Brick should be reversed. Senate Report at 6. The House Report quoted (with emphasis added) Professor Phillip Areeda: "'On the issue of duplicative recoveries, it's very clear to me that if one overruled Illinois Brick one has to overrule Hanover Shoe at the same time. That seems to be the clearest point.'" House Report at 28.
The Senate and the House Reports each expressly approved the defensive use of passing-on in certain instances. Let me hasten to add, however, that both the Senate and the House bills would allow a defendant to invoke the passing-on defense only at the risk of proving some other plaintiff's case. Thus, the Senate bill provides that the fact that a person has not dealt directly with a defendant shall not bar recovery, and it allows passing-on as a defense—but only if it can be shown that the plaintiff passed on the overcharge to "others, who are themselves entitled to recover."35

The Committee Report explains that a defendant could invoke this defense only by showing that the overcharge was passed on to persons who are not barred by "considerations of standing, the applicable statute of limitations, or other limitations."36

This is a remarkable provision indeed. If an overcharge is passed on through several potential plaintiffs, would the defendant have to prove the allocation of the injury? Would the defendant have to name the potential plaintiff who is entitled to the recovery? For that matter, would he have to guarantee the competence of the other plaintiffs' lawyers?

The reference to the statute of limitations is especially confusing. Since the potential plaintiffs presumably will not have filed a complaint at the same time the direct purchaser had, at least part of their damage claim regularly will be barred by the statute of limitations. In these situations, could the defendant prove passing-on only for the recent overcharges?

The House bill would create a similar but less extreme dilemma for defendants. It provides that an indirect purchaser may recover upon proof of payment of an overcharge so long as he had been "in the chain of manufacture, production, or distribution."37 Conversely, it would be a defense to a damage claim to prove that the overcharge had been passed on to another purchaser "in such chain."38

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36 Senate Report at 25.
38 Id. The bill also provides that a damage award in a final judgment against a defendant is admissible in a subsequent action as "conclusive evidence against such defendant" regarding the amount of pass-on, and it is admissible as "prima facie evidence" regarding pass-on against a plaintiff suing that defendant. Id.

In addition, the bill addresses the so-called multiplier problem. According to some witnesses, if a price fixer illegally raised his price one dollar, and this was passed on through several levels of distribution each of which marked it up by a standard 10 percent, the defendant potentially could be responsible for three times the original one dollar overcharge and each 10 percent increase on that overcharge. See Senate Hearings April 17, 1978 (statement of Betty Bock at 12-18); Senate Hearings April 17, 1978 (statement of Peter D. Standish at 6-7); cf. House Hearings at 137 (remarks of Maxwell M. Blecher) ("I know of no case which addresses that issue, but I would see no reason why he would be precluded from asserting that he
Both bills attempt to create a closed system in which every penny of injury would be recoverable by somebody. In the process, however, both bills would raise confusing new issues. The House bill introduces the concept of the "chain." I am told that it is a sister of standing, but not quite the same.\textsuperscript{39} And although the Senate bill reserves questions of standing to the courts "except as made necessary" by the bill,\textsuperscript{40} it probably would take years before we knew to what extent the blessing of indirect plaintiffs would change these rules.

2. Deterrence

The second problem confronting Congress was the question of deterrence. Perhaps better than any other collection of people, this group knows that direct purchasers bring lawsuits.\textsuperscript{41} The lure of treble damages can make a plaintiff out of the most conservative businessman.\textsuperscript{42}

Any attempt to overrule \textit{Hanover Shoe} even in part runs the risk of reducing private antitrust enforcement by lessening the incentive for direct purchasers to sue. This is inevitable even if Congress succeeds in creating a closed system in which the entire overcharge can be recovered either by one or by several plaintiffs. The reason, of course, is that lawsuits may become more complicated and expensive, and the potential rewards for each plaintiff usually would be reduced because the recovery may have to be shared.\textsuperscript{43} Needless

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\textsuperscript{40}S. 1874, 95th Cong., 2d Sess. § 2(b) (6) (1978).

\textsuperscript{41}See, \textit{e.g.}, \textit{Senate Hearings} April 7, 1978 (statement of Milton Handler and Michael D. Blechman); \textit{Senate Hearings} April 24, 1978 (statement of Francis R. Kirkham); \textit{Senate Hearings} at 131 (statement of Earl E. Pollock) ("[T]he overwhelming bulk of private antitrust enforcement . . . has been through actions brought by direct purchasers.").

\textsuperscript{42}Although there is concern that some direct purchasers may fail to sue out of fear of jeopardizing a relationship with a supplier, (\textit{see Senate Hearings} at 10 n.2, n.3) on occasion dealers have been known to file lawsuits in order to prevent termination. Also, it has been noted that there can be an effective lawsuit when only one or two disgruntled dealers are willing to file on behalf of a larger class. \textit{See House Hearings} at 135 (remarks of David L. Foster).

to say, the potential rewards for lawyers representing direct purchasers also would be lessened.\textsuperscript{44}

Both Committees recognized that much of private antitrust enforcement has been by direct purchasers.\textsuperscript{45} The principal response in the two Reports was to note that numerous indirect purchasers also have filed antitrust suits.\textsuperscript{46} The House Judiciary Committee further responded to the concern about deterrence by providing that a court in its discretion may allow the fact of injury and the amount of damage sustained or passed on to be proven on a class-wide basis, and it may allow the class to seek average damages.\textsuperscript{47} This provision raises issues that have been debated before, and I will not go into them here.\textsuperscript{48} Moreover, since this authority is only discretionary it will not necessarily solve the problem.\textsuperscript{49}

3. Difficulty of Compensating Consumers

It also may not solve the third problem that confronted Congress, namely, the likelihood that as a practical matter it often may not be possible to compensate ultimate consumers. Because of manageability problems and the expense of litigating class action lawsuits, it frequently is observed that much of a recovery can be consumed by the cost of determining it, and, even if it is not, many consumers will not claim their small share.\textsuperscript{50}

\textsuperscript{44}Enforcement actions by private plaintiffs also could be jeopardized because the additional factual issues that would have to be explored with regard to each plaintiff's passing-on could prevent certification of a class. See House Report at 65 (minority views); House Hearings at 120-21 (statement of David L. Foster); cf. 2 P. Areeda & D. Turner, Antitrust Law § 332c, at 157 n.18 (1978), wherein the authors state:

The need to establish individual damage claims is most likely to prevent the certification of a class action in those cases where there is a question whether some members suffer any damage at all. The issue is presented most frequently in cases involving indirect purchasers. The court may then hold that the dominant question is whether damages were passed on to individual consumers and that such a question is not conducive to class-wide determination.

Compare Russo & Dubin v. Allied Maintenance Corp., 1978-2 Trade Cas. ¶ 62,146 (N.Y. Sup. Ct.) (common questions do not predominate because each indirectly injured class member would have to prove an overcharge) with In re Independent Gasoline Antitrust Litigation, 1978-1 Trade Cas. ¶ 62,085, at 74,729 (D. Md.) (class certified in part because under plaintiff's theory proof of overcharge would be sufficient); Shelter Realty Corp. v. Allied Maintenance Corp., 75 F.R.D. 34 (S.D.N.Y. 1977), appeal dismissed, 574 F.2d 656 (2d Cir. 1978) (class of direct purchasers certified).

\textsuperscript{45}Cf. Senate Report at 20 (about 25 percent of the total antitrust private damage action since 1960 reportedly involved only indirect purchasers); House Report at 9.


\textsuperscript{49}See House Report at 65 (minority views).

\textsuperscript{50}See Illinois Brick, wherein the Court states:

[W]e question the extent to which such an attempt would make individual victims whole for actual injuries suffered rather than simply depleting the overall recovery...
As I mentioned, the House bill contains some controversial provisions that are designed to facilitate class actions. In addition, it is possible that the courts would employ innovative procedures to allow indirect purchasers to recover. It also is possible, however, that this problem and the other problems that troubled the Supreme Court in *Illinois Brick* simply would result in the dismissing of suits by indirect purchasers on grounds of standing or impossibility of proof of damages.51

4. Complexity

The fundamental concern of the Supreme Court, the concern about complexity and the burden on the judicial system, remains largely unsolved. The majority of the Senate Judiciary Committee in its Report recognized that proof of passing-on "may well be difficult," but said that this difficulty does not justify sacrificing important rights.52 And although the House bill contains some procedural changes, the House Report responds to the Court's concern basically by stating that the complexity is not as great as one might think.53

5. Effective Date

One additional specific issue that troubled the Committees was what the effective date of the legislation should be. The House bill would apply only to actions that are pending on the date of the bill's enactment, or are commenced that date or thereafter.54 This raises some policy questions and possibly some constitutional problems, but generally it is regarded by defense lawyers as more acceptable than the Senate language. The Senate bill would

in litigation over pass-on issues. Many of the indirect purchasers barred from asserting pass-on claims under the *Hanover Shoe* rule have such a small stake in lawsuit that even if they were to recover as part of a class, only a small fraction would be likely to come forward to collect their damages.

431 U.S. at 747 (footnote omitted); *House Hearings* at 114 (statement of Maxwell M. Blecher) ("The antitrust class action . . . has been a failure in terms of providing meaningful compensation to victims . . . ."). Class action problems may have been increased further by other Court decisions. See cases cited at note 24 supra.

51Cf. *House Hearings* at 118 (statement of David L. Foster) ("The Supreme Court did not deny standing to the *Illinois Brick* plaintiffs because they were indirect purchasers. The Court rested not on indirectness but on the difficulties of tracing damages and of avoiding duplicate recoveries."); *Senate Hearings* at 140 (statement of Earl E. Pollock) ("Even before *Illinois Brick* suits by indirect purchasers (e.g., *Plumbing Fixtures*) have frequently been unsuccessful either because of limitations of the cause of action or the difficulties . . . of tracing impact through successive distribution levels.").

52*Senate Report* at 6-7. In addition, the *Senate Report* states that numerous court decisions have awarded damages to indirect purchasers without being overwhelmed by complications, and it quotes the Assistant Attorney General for the Justice Department's Office for Improvements in the Administration of Justice, who said that procedural and judicial management problems can be solved either by the courts themselves or through legislation that is being prepared. Id.


apply to actions that were pending on the date of the Illinois Brick decision or filed thereafter. There are serious questions both as to whether this is proper and constitutional, and as to what it means.

The Senate Report recognizes that it might be unfair to apply the legislation to cases that have been finally disposed of prior to the date of enactment. In a conversation yesterday with Tom Sussman of Senator Kennedy's Subcommittee, I learned that despite the bill's language he does not think it would apply to a case finally disposed of prior to the bill's effective date, regardless whether the case was pending on the date of the Illinois Brick decision. Even if Tom's interpretation is not correct, as a practical matter it may mean that if there is legislation this part of it will be modeled after the House bill.

III. EFFECT OF ILLINOIS BRICK

Perhaps the greatest problem that confronted Congress was that no one really knows what the effect of Illinois Brick will be. There are two reasons for this. First, it is too early to tell whether the various exceptions to the Illinois Brick rule will provide significant relief. Second, we don't know to what extent indirect purchasers can avoid Illinois Brick barriers by filing claims based on something other than Section 4 of the Clayton Act.

A. ILLINOIS BRICK EXCEPTIONS

To be sure, there have been indirect purchasers that have, as sometimes is said, been "Illinois Bricked." Just one month after the Court issued the Illinois Brick decision, for instance, the definition of the class certified in the Folding Carton Litigation was amended to include only direct purchasers.

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56The Senate Judiciary Committee minority contends that it would be unfair and possibly unconstitutional to apply the bills to conduct occurring before enactment. Senate Report, pt. II, at 75-78 (minority views).
57Senate Report at 28.
59See Beckers v. International Snowmobile Industry Ass'n, 1978-2 Trade Cas. ¶ 62,191 (8th Cir.); In re Sugar Industry Antitrust Litigation, 1978-1 Trade Cas. (CCH) ¶ 61,934 at 73,951 (3d Cir. 1978) (plaintiff appealed only with regard to direct purchases from defendants; in light of Illinois Brick "plaintiff has no hope of success on the purchases from nondefendants."); In re Anthracite Coal Antitrust Litigation, 1978-1 Trade Cas. ¶ 62,059, at 74,587 (M.D. Pa.) (because most purchasers were indirect and thus might be barred, class was not sufficiently numerous); In re Beef Industry Antitrust Litigation, 1977-2 Trade Cas. ¶ 61,794 (N.D. Tex.); Russo & Dubin v. Allied Maintenance Corp., 1978-2 Trade Cas. ¶ 62,146 (N.Y. Sup. Ct.).
60In re Folding Carton Antitrust Litigation, 75 F.R.D. 727 (N.D. Ill. 1977). However, the efforts of the plaintiffs in the Folding Carton Litigation to avoid discovery of financial information allegedly made irrelevant by the Illinois Brick decision were unsuccessful. In re Folding Carton Antitrust Litigation, 76 F.R.D. 420 (N.D. Ill. 1977).
On the other hand, defendants have not all been so successful. In the *Arizona Cement and Concrete Litigation*, Judge Muecke denied the defendants' motion for summary judgment against indirect purchasers because, he said, there were material facts in issue.61 Judge Muecke listed a series of questions that went to the scope of several exceptions to the *Illinois Brick* rule.

1. Cost-Plus Contracts

One exception mentioned by Judge Muecke was the exception for pre-existing cost-plus contracts.62 The Supreme Court in the *Hanover Shoe* opinion had recognized that there may be situations in which it would be easy to prove that a plaintiff had not been injured, and gave as an example the situation where there was a "pre-existing 'cost-plus' contract."63 Because the *Hanover Shoe* and *Illinois Brick* rules dovetail, indirect purchasers with pre-existing cost-plus contracts should be allowed to show that they have been injured.

The *Illinois Brick* Court attempted to make clear that the "cost-plus" exception is a very limited one and is not satisfied merely by an industry practice of cost-plus pricing.64 Nonetheless, it has been suggested by at least one commentator that courts should allow recoveries by indirect purchasers where there is the "functional equivalent" of a pre-existing cost-plus contract,65 and this language was used by Judge Muecke in one of his questions of fact.66 It also is possible that some creative plaintiff will claim that even though he had neither a cost-plus contract nor its functional equivalent, there is some other reason that it is easy to prove passing-on and therefore, under the rationale of the *Hanover Shoe-Illinois Brick* exception, he should be entitled to prove that he had been injured.67

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61 *In re Cement and Concrete Antitrust Litigation*, 1978-1 Trade Cas. ¶ 62,069 (D. Ariz.).
62 *Id.* at 74,640.
63 392 U.S. at 494.
64 See 431 U.S. at 735-36, 744. See also Shelter Realty Corp. v. Allied Maintenance Corp., 75 F.R.D. 34, 39 n.1 (S.D.N.Y. 1977) ("The escalation clauses allegedly contained in some of the leases between the named plaintiffs and their tenants do not satisfy the standards enunciated in *Hanover Shoe* for a valid invocation of the 'passing on' defense.").
66 1978-1 Trade Cas. at 74,640.
67 See *Scaling the Illinois Brick Wall*, supra note 65, at 333 n.100; cf. Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187, 1188 (3d Cir. 1971) ("[A]bsent a showing by the plaintiffs that their purchases were made 'pursuant to a pre-existing cost-plus contract or analogous fixed markup type of arrangement,' dismissal is appropriate); *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶ 74,680, at 94,981 (D. Conn.) (quoting affidavit of economist testifying that overcharges will be fully passed on when demand is very inelastic). A number of instances in which it allegedly would be easy to prove pass-on are discussed in Schaefer, supra note 28, at 915-25. But see *Illinois Brick*, 431 U.S. at 743-45, where the Court specifically rejected the classifying of situations in which passing-on is likely to occur.
2. Ownership or Control

A second exception to Illinois Brick that Judge Muecke referred to is the now famous footnote 16 exception for situations where "the direct purchaser is owned or controlled by its customer."68 The language of that footnote applies clearly only to situations in which the plaintiff indirect purchaser owns or controls the direct purchaser. An example of such a relationship is provided by the Toilet Seat litigation, where the direct purchaser had acted more or less as the plaintiff’s agent.69

However, some commentators have argued that policy reasons and the cases cited by the Court suggest that the exception also should include instances in which the direct purchaser is owned or controlled by the alleged price fixer.70 Judge Muecke phrased his question of fact this way,71 and the Third Circuit in the Sugar Antitrust Litigation held that sale to a subsidiary will not insulate an alleged price-fixer.72

The meaning of ownership is fairly clear. As you can well imagine, however, the meaning of "control" should be a fertile subject for litigation. For instance, one of the cases mentioned by the Supreme Court in footnote 16 involved control possibly through credit relations.73 It also has been suggested by a commentator that the exception might apply in the franchising area.74

The exception may not even be limited to instances in which there is "ownership or control." Although this phrase is employed as a shorthand reference, footnote 16 actually says, "Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer." It is possible that market forces also could be found to have been superseded in the regulatory context or some other situation not involving ownership or control.

68431 U.S. at 736 n.16.
69In re Toilet Seat Antitrust Litigation, 1977-2 Trade Cas. ¶ 61,601 (E.D. Mich.).
711978-1 Trade Cas. at 74,640.
72In re Sugar Industry Antitrust Litigation, 1978-1 Trade Cas. ¶ 61,934 (3d Cir.). The court ruled that the purchaser of candy from a subsidiary of a company that allegedly had fixed the price of sugar used in that candy was not barred by Illinois Brick.
73In re Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974).
74Scaling the Illinois Brick Wall, supra note 65, at 328 n.84.
3. Co-Conspirators

Judge Muecke listed the question of whether the plaintiffs had purchased from a company that had combined and conspired with a defendant. Although this "co-conspirator exception" was not specifically mentioned in the Illinois Brick opinion, two other courts already have indicated that that case should not bar recovery when the direct purchaser was part of the conspiracy.

This question also arose in the Sugar litigation. In a petition for rehearing, the Third Circuit was confronted with the claim that one of the defendants had not used its own sugar in manufacturing the candy purchased by the plaintiff. In denying the petition, the court said it had assumed that the defendants' sugar had been used in the defendants' candy. It implied that the plaintiff could not recover if the sugar had been purchased from a company not involved in the lawsuit, but it reserved judgment on the sticky question of whether the plaintiff could recover if the sugar had been purchased from an alleged co-conspirator.

In any event, it can be expected that plaintiffs regularly will name intervening links in chains of distribution as defendants or co-conspirators.

B. Illinois Brick Alternatives

We have been discussing a number of ways that plaintiffs may, so to speak, try to go through holes in the Illinois Brick wall. There are also a number of ways they might attempt to go around that wall.

One possible vehicle for avoiding Illinois Brick is the use of suits for injunctions under Clayton Act Section 16. The Court of Appeals for the Fourth Circuit has held that state attorneys general have standing to sue as parens patriae for injunctive relief under Section 16. Since Section 16 has a less exacting requirement of a showing of injury than Section 4 does, and since many of the problems that troubled the Court in Illinois Brick are not present in an action for an injunction, it has been suggested that one of the results

\[In re Cement & Concrete Antitrust Litigation, 1978-1 Trade Cas. ¶ 62,069, at 74,639 (D. Ariz.).\]

\[See In re Anthracite Coal Antitrust Litigation, 1978-1 Trade Cas. ¶ 62,059, at 74,590 (M.D. Pa.); Florida Power Corp. v. Granlund, 1978-1 Trade Cas. ¶ 62,048, at 74,526 (M.D. Fla.).\]

\[In re Sugar Industry Antitrust Litigation, 1978-2 Trade Cas. ¶ 62,139 (3d Cir.).\]


\[15 U.S.C. § 26 (1976). Section 16 was made significantly more attractive by the 1976 amendment that authorized a court to award attorneys' fees to plaintiffs that substantially prevailed.\]

\[Burch v. Goodyear Tire & Rubber Co., 554 F.2d 633 (4th Cir. 1977).\]

\[House Hearings at 82 (remarks of Phillip Areeda). See cases cited in L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 247, at 772 n.6 (1977).\]
of the *Illinois Brick* decision may be that this "sleeping giant" will become a major factor in the antitrust world.\textsuperscript{82}

State attorneys general already have sought to avoid *Illinois Brick* by use of Section 16.\textsuperscript{83} They also have attempted to do so by filing complaints under state antitrust laws.\textsuperscript{84} It can be expected (and in fact already it has happened) that creative state attorneys general will combine these two methods of avoiding *Illinois Brick* by filing injunction suits in federal court and then invoking the doctrine of pendant jurisdiction in an attempt to obtain restitution under state law.\textsuperscript{85}

A third possible method of avoiding *Illinois Brick* questions is for states in their role as purchasers to insist that suppliers assign their rights to recover for overcharges. If this can be done, it could solve *Illinois Brick* problems at least where there is a relatively short chain of distribution.\textsuperscript{86}

Finally, it is possible that state attorneys general may be able to avoid *Illinois Brick* issues by use of the *parens patriae* authority.\textsuperscript{87} This would be particularly ironic because the belief that *Illinois Brick* had "gutted" that authority was one of the chief factors behind the drive toward legislation.\textsuperscript{88}

Of course, it is by no means clear that *Illinois Brick* does not apply to *parens patriae* actions. There was testimony in the hearings from distinguished lawyers that because *parens patriae* allows a state to sue only on behalf of a consumer who otherwise has an independent cause of action, *Illinois Brick* is directly applicable to *parens patriae* suits.\textsuperscript{89} Indeed, one district court ap-

\textsuperscript{82}Analysis, Illegal Overcharges and Inquiry—Equal Application of the Pass-On Rule, 822 Antitrust & Trade Reg. Rep. (BNA) at B-1, B-6 (July 14, 1977).


\textsuperscript{84}E.g., Illinois v. Leviton Mfg. Co., No. 78L 9412 (Ill. at D-5 (June 1, 1978). However, state courts may find the problems that troubled the Supreme Court in *Illinois Brick* even more persuasive at the state level and follow that Court's lead. See *Scaling the Illinois Brick Wall*, supra note 65, at 324. Indeed, Judge Schwartz of the New York Supreme Court recently did so. Russo & Dubin v. Allied Maintenance Corp., 1978-2, Trade Cas. ¶ 62,146 (N.Y. Sup Ct.).


\textsuperscript{86}However, it has been suggested that it may be difficult to obtain assignments, despite the theoretical possibility. See Recent Developments in Antitrust Standing, 852 Antitrust & Trade Reg. Rep. (BNA) at A-4, A-6 (Feb. 23, 1978).


\textsuperscript{89}See *House Hearings* at 81 (remarks of Phillip Areeda); *House Hearings* at 139 (remarks of Maxwell M. Blecher).
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parently has assumed that Illinois Brick questions are at issue in parens patriae cases.90

Nonetheless, such distinguished commentators as Judge Tyler in his testimony on the Illinois Brick bills, the Harvard Law Review in its case note, and Irv Scher in an extensive law review article have argued to the contrary.91 In the parens patriae legislation Congress made a deliberate response to the kinds of problems that troubled the Court in Illinois Brick. If that response is sufficient, Illinois Brick may not prevent recovery on behalf of indirect purchasers.

The answers to these questions will take some time to develop. But it is interesting to observe that the probable principal beneficiaries of Illinois Brick legislation, namely, the states in their capacities as indirect purchasers and as parens patriae representatives of consumers,92 may be able to achieve most of the benefit of such legislation if their right to sue as parens patriae for indirect purchasers is upheld and if they can succeed in requiring suppliers to assign rights to sue.

C. ANOTHER BARRIER TO CONSUMER SUITS

I've discussed a number of the uncertainties that, depending on how they are resolved, may make Illinois Brick legislation at least partially unnecessary. There is one other uncertainty deserving of mention that may make the bills insufficient.

The Eighth Circuit recently held that "consumers are not injured in their 'business or property' for purposes of Section 4."93 This would bar suits even by direct purchasing consumers, and thus probably would not be affected by the proposed bills. There is authority going the other way.94 If the view of the Eighth Circuit is upheld, however, and if Congress decides it wants consumers to be able to sue in their own name, then even if the

92See, e.g., House Hearings at 142 (remarks of Maxwell M. Blecher).
Illinois Brick bills are passed some speaker may be here next year discussing another Congressional initiative.

IV. FUTURE LEGISLATIVE EFFORTS

If the bills are not voted on this year, the staffs of the Committees expect to try again. They concede, however, that it may be difficult to move the bills forward next year when passions will have cooled and pending cases may have been dismissed.95

If these issues are considered again next year, I would urge that the congressional focus not be so narrow. In their legislative efforts to date, the Committees have vigorously debated who should be entitled to the automatic treble damage bonanza. If there is a next time, I would hope that they would debate whether there should be an automatic bonanza at all. If a corporation’s executives are all in jail, and the corporate treasury has paid a million dollar fine for each count, I fail to see how society benefits from awarding treble damages to a plaintiff that merely follows in the government’s footsteps.96

It is not a sufficient response to say that a wrongdoer deserves whatever he gets. Automatic trebling imposes costs on society. It tends to trivialize antitrust by inducing every plaintiff to color claims in antitrust terms, it encourages the filing of unfounded suits, and it chills the creative development of the antitrust laws.97 Moreover, it does all this at a substantial price in terms of judicial resources and legal talent.

This price may be worth paying to reward a plaintiff that has risked a great deal in litigating. It does not seem justified in the usual price fixing case that follows a government action.98 Therefore, Congress should consider adopting the recommendation of the 1955 Attorney General’s Committee on the Antitrust Laws and make doubling or trebling discretionary.99

95One senior staff member told me he expected that the next Congress would modify the Illinois Brick result only with regard to parens patriae actions (if the case is found to be applicable to them).

96Violation of the Sherman Act was made a felony and the maximum fine for each violation by a corporation was increased from $50,000 to $1 million by the Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974), amending 15 U.S.C. § 1 (1970).


98Compare House Hearings at 114 (statement of Maxwell M. Blecher) (“Moreover, in light of 28 U.S.C. § 1407, Congress should question whether there is a need for antitrust class actions of any type in cases where there has been an earlier government complaint or indictment.”) In the Illinois Brick oral argument, Assistant Attorney General Baker observed that although there is substantial independent private antitrust litigation, that is not the case with pricing fixing actions. 807 ANTITRUST & TRADE REG. REP. (BNA) at A-7, A-12 (March 29, 1977).

It can be argued in rebuttal that the injury inflicted on purchasers is only a portion of the total harm caused by a violation of the antitrust laws, or that additional recovery is needed for deterrence purposes. If society generally is injured, however, it should be society that recovers. To some extent this may occur with parens patriae actions, with government fines, and with civil penalties under the Magnuson-Moss Act if the Federal Trade Commission (FTC) is successful in extending that remedy to unfair methods of competition. If that is not sufficient, however, the proper response is to enact legislation allowing society, through the government, to recover for injuries caused by violations.

If there is a next time, I would urge that Congress consider this approach. The problem of the middleman windfall could be solved very simply, in part, by doing away with it.

MR. MILLSTEIN: The interesting part of the *Illinois Brick* discussion to me is that as much as the Bar, all parts of it, tried to explain to Congress what the problems were, the courts are undoubtedly going to be left with all the problems. The litigation will be interminable and expensive. There is not any question but the recoveries will be eaten up by attorneys’ fees and litigation costs. And again, I predict that next year, someone will come and address the Bar Association and accuse the legal profession of over-complicating the situation.

There is no way that I have been able to discover to make everybody happy. I think the best thing the Section can do is to continue to point out the problems and to point out that simply leaving them to the courts to work out is creating the very type of litigation which people are complaining about—long, complex, and expensive.

The next subject on the agenda is an international law—antitrust problem, the act of state doctrine. Our problem here is one that revolves around the fact that the U.S. courts and the United States itself has now officially discovered that there are a lot of countries around the world that do not


101 15 U.S.C. § 45(m) (1976). In an interview in which he stated his intention to explore seeking civil penalties and consumer redress, an FTC official noted that this could solve much of the *Illinois Brick* problem. 855 ANTITRUST & TRADE REG. REP. (BNA) at A-13, A-14 (March 16, 1978).

102 See *House Hearings* at 114 (statement of Maxwell M. Blecher) ("Congress should consider ways of ensuring that violators do not get to keep profits generated by antitrust violations. One possibility is the institution of civil penalties equal to the damage caused—a sort of parens patriae for the federal government."). Compare Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach*, 85 YALE L.J. 626, 675-76 (1976) (U.S. attorney general should be able to sue on behalf of consumers).
have antitrust laws and who run their businesses and their business-government relationships differently than we do. The United States and its business enterprises are now in competition vigorously with those businesses who headquarter in countries with those sets of laws. An apparent head-on collision has now occurred—namely that where a U.S. company or companies finds itself in competition with a foreign company or companies here and abroad, the relationship between the foreign company or companies and its government may now become an issue in an antitrust court in the United States. This is no longer an isolated situation.

No one is better equipped to deal with this emerging and fascinating problem than Barry Hawk, Professor of Law at Fordham Law School, who is an expert in the area of international trade and antitrust. He is the chairman of our ABA Antitrust Section on International Trade, and he is now in the process of completing a textbook on international antitrust. The text is to be published towards the end of 1978, if we leave Barry alone long enough to polish it up.

Barry Hawk.