Parens Patriae Actions on Behalf of Indirect Purchasers: Do They Survive Illinois Brick

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Parens Patriae Actions on Behalf of Indirect Purchasers: Do They Survive *Illinois Brick*?

In 1914, Congress enacted section 4 of the Clayton Act, which granted a private cause of action to any person injured in his business or property by a violation of the antitrust laws. Section 4 mandates that a successful plaintiff shall recover treble damages and the cost of suit, including reasonable attorney's fees.

Section 4 was designed to insure enforcement of the antitrust laws. There were two principal purposes behind the act: to deter violators by depriving them of the benefits of their illegal acts, and to compensate victims of antitrust violations for their injuries.

By the 1970's, problems with private enforcement of antitrust violations were evident. Although the cost of antitrust violations to ultimate consumers had been estimated to exceed 150 billion dollars per year, each individual consumer was injured in relatively small amounts and therefore had little incentive to sue. The stringent requirements governing class action suits in federal courts made the class action an ineffective device for antitrust violations. In California, the state attorney general was thwarted in his attempt to sue on behalf of consumers within the state for antitrust violations under section 4 of the Clayton Act.

Congress sought to remedy these problems by passing the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Title III of the

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1. Clayton Act, Pub. L. No. 94-435, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15 (1976)). Section 4 provides: “Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.”
2. Id.
3. Id.
7. See infra notes 39-42 & accompanying text.
Act empowers state attorneys general to sue as parens patriae on behalf of citizens of their state in order to obtain monetary relief under section 4 of the Clayton Act for Sherman Act violations. The purpose of the Hart-Scott-Rodino Act was to create "an effective mechanism to permit consumers to recover damages for conduct which is prohibited by the Sherman Act, by giving State attorneys general a cause of action against antitrust violators."

Before the success of the Antitrust Improvements Act could be tested, the Supreme Court's decision in Illinois Brick Co. v. Illinois seemingly emasculated title III. The Court held that an indirect purchaser injured by a violation of the antitrust laws could not recover damages under section 4 of the Clayton Act. Most courts have assumed that the Illinois Brick decision restricts the Hart-Scott-Rodino Act by allowing the state attorney general to represent only direct purchasers when suing as parens patriae for antitrust violations.

This Comment begins by tracing the history of parens patriae actions leading up to the passage of the Antitrust Improvements Act. By tracing briefly the history of parens patriae actions in this country, giving particular attention to antitrust actions, the legislative intent behind the Hart-Scott-Rodino Act can be discerned. The provisions of the Act and policy considerations underlying the Act are analyzed as well. The next section of the Comment explores the history of the Illinois Brick decision and examines the scope of its holding. The last section examines the effect Illinois Brick has had on the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

This Comment concludes that the policy considerations underlying Illinois Brick were recognized by Congress in its enactment of the parens patriae action. Because the policy concerns which preoccupied the Illinois Brick Court are dealt with in the Hart-Scott-Rodino

10. This Comment deals with only title III of the Antitrust Improvements Act. For a discussion of title I (Antitrust Civil Process Act Amendments) and title II (requiring that significant proposed acquisitions and mergers be reported to the Justice Department and to the FTC), see Scher, Emerging Issues Under the Antitrust Improvements Act of 1976, 77 COLUM. L. REV. 679 (1977).
11. See infra notes 20-26 & accompanying text.
13. SENATE REPORT, supra note 6, at 39.
15. An indirect purchaser is frequently the ultimate consumer in the chain of distribution. The Senate Report argued that the economic burden of most antitrust violations falls upon the consumer who is charged higher prices for goods and services. SENATE REPORT, supra note 6, at 39.
17. See infra note 98.
18. See infra notes 112-29 & accompanying text.
Act, parens patriae actions should be an exception to the *Illinois Brick* rule.

This Comment also argues that the legislative history of the Hart-Scott-Rodino Act, which so clearly evinced a desire to compensate the ultimate consumer for injury caused by antitrust violations, is dispositive in interpreting the provisions of the Act.¹⁹ Therefore, *Illinois Brick* should not at all control parens patriae actions.

**History of Parens Patriae**

Parens patriae is a concept rooted in the English constitutional system.²⁰ The literal translation, "father of the country," refers to the English system that empowered the king to act as guardian for persons legally unable to act for themselves.²¹ The people represented were generally "infants, idiots and lunatics."²² This form of parens patriae is now served by the concept of guardian ad litem.²³

In the United States the parens patriae role of the king passed to the states, and the concept was greatly altered.²⁴ It evolved into a means by which a state could sue in its quasi-sovereign capacity. Early cases involved one state suing another pursuant to article III, section 2 of the Constitution²⁵ on behalf of its citizens, alleging interference with the flow of goods or natural resources into the state or acts of pollution.²⁶

**Parens Patriae Actions for Antitrust Violations**

In *Georgia v. Pennsylvania Railroad*,²⁷ the first Supreme Court decision permitting a state to sue as parens patriae for violation of the antitrust laws, the Court found that Georgia had parens patriae standing to sue for injunctive relief where injury to the state's general economy was alleged.²⁸

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¹⁹. *See infra* notes 53-54, 134-36 & accompanying text.
²¹. *Id.*
²³. *Id.*
²⁵. *Id.* at 258-59. The relevant portion of art. III, § 2 states that "[t]he judicial Power shall extend to... Controversies between two or more States; [and] between a State and Citizens of another State..." U.S. CONST. art III, § 2.
²⁷. 324 U.S. 439 (1945). In *Pennsylvania Railroad*, the Court held that the state of Georgia could seek injunctive relief against 20 railroads that allegedly conspired to set discriminatory railroad freight rates.
²⁸. *Id.* at 447.
An attempt to extend the Pennsylvania Railroad holding to actions for damages was rejected in Hawaii v. Standard Oil Co. 29 Hawaii alleged that the defendants had violated section 1 of the Sherman Act and sued for damages for injury to its general economy. 30 The Supreme Court held that Hawaii did not have standing because its allegation of injury did not constitute injury to its "business or property" as required by section 4 of the Clayton Act. 31 Although the decision in Standard Oil Co. prohibited a state from recovering for injury to its general economy, it left open the question whether a state could sue as parens patriae to recover damages on behalf of its citizens.

This issue was raised in California v. Frito-Lay, Inc. 32 Frito-Lay also was an attempt on the part of a state to bring a parens patriae damages action to remedy an alleged violation of the Sherman Act. 33 California brought suit, however, not on its own behalf but on behalf of its citizens who were injured by the alleged illegal conduct of the defendants. 34

The Ninth Circuit described the action as more typical of an action by a guardian ad litem for the disabled members of the class it represents than of a parens patriae suit. 35 Although the court held that California lacked standing to bring this parens patriae action on behalf of its consumers, it encouraged Congress to overrule its decision. The court viewed actions of the type attempted by California as essential to the effective deterrence of antitrust violations. The court, however, felt that the authorization for such actions "must come not through judicial improvisation but by legislation and rule making . . . ." 36 Title III of

30. Id. at 253-56. Hawaii charged four defendants with violating § 1 of the Sherman Act "by entering into unlawful contracts; by conspiring and combining to restrain trade and commerce in the sale, marketing and distribution of refined petroleum products; and by attempting to monopolize and actually monopolizing the trade and commerce." Id. at 253 (footnote omitted).
31. Id. at 264. The Court also noted the practical difficulties of placing a dollar value on such an amorphous injury and further observed that to allow such an action to proceed might well result in duplicative recovery against antitrust defendants. Id. at 263-64. The latter concern was also at issue in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), and Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
32. 474 F.2d 774 (9th Cir.), cert. denied, 412 U.S. 908 (1973).
33. In Frito-Lay, the state of California alleged that twelve manufacturers of snack foods had conspired to fix and maintain prices in violation of § 1 of the Sherman Act. Id. at 775.
34. Id.
35. Id. at 776. According to the Ninth Circuit, California was using the parens patriae concept as it had been used historically in England. See supra notes 20-23 & accompanying text.
36. 474 F.2d at 777. The persuasive language of the Ninth Circuit is worthy of quotation: "The state most persuasively argues that it is essential that this sort of proceeding be made available if antitrust violations of the sort here alleged are to be rendered unprofitable
the Hart-Scott-Rodino Antitrust Improvements Act is a direct response\textsuperscript{37} to the invitation issued by the Ninth Circuit to Congress.\textsuperscript{38}

Private Enforcement of the Sherman Act

Congress, by passing the Hart-Scott-Rodino Act, attempted to alleviate the problems encountered in bringing class actions to enforce antitrust violations.\textsuperscript{39} Under Rule 23 of the Federal Rules of Civil Procedure, large consumer classes predicated upon small individual claims face insurmountable problems of manageability. These problems include the expense of "proper notice," the complexity of evidentiary issues, and the distribution of any recovery. In \textit{Eisen v. Carlisle & Jacquelin},\textsuperscript{40} the Supreme Court interpreted Rule 23 to require that class action plaintiffs provide individual prelitigation notice to all identifiable members of the class regardless of the cost of providing such notice.\textsuperscript{41} The Court's decision coupled with the existing problems under Rule 23 made consumer class actions for antitrust violations virtually impossible.\textsuperscript{42}

Even though individual consumers are injured in relatively small amounts by an antitrust violation, they ultimately bear the cost of the and deterred. It would indeed appear that the state is on the track of a suitable answer (perhaps the most suitable yet proposed) to problems bearing on antitrust deterrence and the class action as a means of consumer protection. We disclaim any intent to discourage the state in its search for a solution.

"However, if the state is to be empowered to act in the fashion here sought we feel the authority must come not through judicial improvisation but by legislation and rule making, where careful consideration can be given to the conditions and procedures that will suffice to meet the many problems posed by one's assertion of power to deal with another's property and to commit him to actions taken in his behalf."

\textit{Id.}

\textsuperscript{37} H.R. \textit{Rept.} No. 94-499, 94th Cong., 1st Sess. 8 (1975) [hereinafter cited as \textit{House Report}]. The House Report on H.R. 4532 (the bill that became Pub. L. No. 94-435) stated, "H.R. 4532 is a response to the judicial invitation extended in \textit{Frito-Lay}. The thrust of the bill is to overturn \textit{Frito-Lay} by allowing state attorneys general to act as consumer advocates in the enforcement process. . . ." \textit{Id.}

\textsuperscript{38} \textit{Frito-Lay}, 474 F.2d at 777.

\textsuperscript{39} House Report, \textit{supra} note 37, at 6-7.

\textsuperscript{40} 417 U.S. 156 (1974).

\textsuperscript{41} \textit{Id.} at 175-76.

\textsuperscript{42} Although stringent proof of injury is required under Rule 23 of the Federal Rules of Civil Procedure, class action suits are still used to enforce the antitrust laws, as demonstrated by the case of \textit{Reiter v. Sonotone Corp.}, 442 U.S. 330 (1979). In \textit{Reiter}, the petitioner brought a class action on behalf of herself and all persons in the United States who had purchased hearing aids manufactured by the five respondent corporations. The complaint alleged that petitioner and the class she represented were forced to pay illegally fixed higher prices for their hearing aids and related services. \textit{Id.} at 335. The Supreme Court held that consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations sustain an injury in their property within the meaning of section 4 of the Clayton Act. The Court reversed the judgment of the court of appeals, which had granted respondents' summary judgment motion, and remanded the case. \textit{Id.} at 334-37.
violation through higher prices. Such relatively small injuries to an individual consumer may still add up to a huge profit margin for an antitrust violator. An antitrust violation resulting in an overcharge of only ten cents on a consumer item brings a staggering fifty million dollars in illegal profits, if 500 million such items are sold. Yet, individual section 4 damage actions are unrealistic because the anticipated time and expense needed to establish antitrust liability often exceeds any prospective recovery. Thus, the decisions in Frito-Lay and Eisen and the impracticality of an individual consumer’s bringing a Clayton section 4 action left the consumer with no effective means by which to enforce the Sherman Act. It was this deficiency that Congress sought to remedy with the passage of title III of the Hart-Scott-Rodino Act.

The Hart-Scott-Rodino Antitrust Improvements Act

The Hart-Scott-Rodino Act was designed to fill a procedural vacuum in the antitrust laws and redress violations which continually injure thousands or even millions of consumers. The legislation was directed particularly to everyday consumer purchasers. Its purposes were “to compensate the victims of antitrust offenses, to prevent antitrust violators from being unjustly enriched, and to deter future antitrust violations.”

The heart of the Act provides:

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, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of [the Sherman Act].

Congress chose the state attorney general as a “stand-in” to manage the litigation for the individuals who could not afford to pursue their Sherman Act rights. Congress gave two reasons for granting standing to the attorneys general: the states bear an obligation to protect their citizens, and the states possess a quasi-sovereign interest in safeguarding the health of their economies. Thus, even though the states allege no in-

43. House Report, supra note 37, at 3-4; Senate Report, supra note 6, at 39.
44. Senate Report, supra note 6, at 39-40.
45. House Report, supra note 37, at 4-5.
46. Senate Report, supra note 6, at 39.
47. Id.
50. House Report, supra note 37, at 5; Senate Report, supra note 6, at 40. The concept of parens patriae as Congress here employs it combines both types of parens patriae actions: that which was used in England and was replaced by the guardian ad litem in the United States, and the expanded concept of parens patriae that evolved in the United States. See supra notes 20-26 & accompanying text.
jury to themselves, they can establish standing as representatives of their residents who in fact have been injured and could have brought suit in their own right.\textsuperscript{51}

The action is brought "on behalf of natural persons residing in such State."\textsuperscript{52} Title III does not specifically dictate that the natural person be a direct or an indirect purchaser. However, the legislative history of the bill indicates that it was intended to facilitate the assertion of section 4 rights, which Congress believed to include those of indirect purchasers.\textsuperscript{53} Representative Rodino, one of the bill's sponsors, expressed this intention in his remarks on the House floor:

[Re]coveries are authorized by the compromise bill whether or not the consumers purchased directly from the price fixer, or indirectly, from intermediaries, retailers, or middlemen. The technical and procedural argument that consumers have no "standing" whenever they are not "in privity" with the price fixer, and have not purchased directly from him, is rejected by the compromise bill.\textsuperscript{54}

The parens patriae act includes a provision for individual plaintiffs who wish to opt out of the action by the state.\textsuperscript{55} The final judgment in a parens patriae action is res judicata as to those who fail to opt out in a timely fashion.\textsuperscript{56} Congress by this provision anticipated the Court's concern with the possibility of double recovery in antitrust actions.\textsuperscript{57}

The "opt out" provision also cloaks the state attorney general's action with consumer approval. Because the state speaks only for those consumers who decline to opt out of the suit, a court can be confident that representation by the state attorney general is both acquiesced in and necessary for the enforcement of the consumers' Sherman Act rights.

The problem of notice requirements under Rule 23 of the Rules of Civil Procedure, which hampered consumer class action suits for antitrust violations,\textsuperscript{58} was dealt with directly in the Hart-Scott-Rodino Act. Section (b)(1) of the Act allows notice to be given by publication. \textquotedblleft If

\textsuperscript{51} In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 1978-1 Trade Cas. (CCH) ¶ 61,839, at 73,496 (C.D. Cal. 1978).

\textsuperscript{52} 15 U.S.C. § 15c(a)(1) (1976). The limitation to "natural persons" does not exist in § 4 of the Clayton Act, which applies to "any person." \textit{See supra} note 1. Thus, with parens patriae actions the state attorney general may represent only natural persons and not business entities. Congress felt that business entities, such as corporations, partnerships, and sole proprietorships, were capable of protecting themselves. By limiting the parens patriae provision to "natural persons," Congress intended that actions be brought on behalf of those most in need of representation. \textit{House Report, supra} note 37, at 9-10.

\textsuperscript{53} \textit{House Report, supra} note 37, at 7-8; \textit{Senate Report, supra} note 6, at 40-41.


\textsuperscript{56} \textit{Id.} § 15c(b)(3).

\textsuperscript{57} \textit{See infra} note 82 & accompanying text.

\textsuperscript{58} \textit{See supra} notes 39-42 & accompanying text.
the court finds that notice given solely by publication would deny due process of law to any person . . . , the court may direct further notice to such person . . . according to the circumstances of the case."  \(^{59}\) 

The stringent "proof of injury" requirement under Rule 23 in consumer class actions\(^{60}\) also was eliminated under the Hart-Scott-Rodino Act. Congress provided for the calculation of monetary relief in price-fixing cases using aggregate techniques to compute damages.\(^{61}\) Utilizing these techniques, a state attorney general does not have to prove the actual damages suffered by each individual but needs only to make a reasonable estimate of his or her aggregate damages through the use of statistical or sampling methods.\(^{62}\) The legislative history makes it clear that more than mere speculation is required in computing the amount of aggregate damages.\(^{63}\) The aggregate damages technique is applied only to price-fixing cases; traditional methods of proving actual individual damages must be used for other Sherman Act violations.\(^{64}\) 

The aggregate damages provisions of section 15d ensure that anti-trust violators will not be unjustly enriched.\(^{65}\) They also make it possible for a state attorney general to represent thousands, or even millions, of consumers in a single lawsuit, thus eliminating the need for countless suits in which consumers would have to prove their claims and damages individually.\(^{66}\) However, the Act also "recognizes that rarely, if ever, will all potential claimants actually come forward to secure their share of the recovery" and that "the undistributed portion of the fund . . . will often be substantial . . . ."\(^{67}\) Therefore, if these individual consumers fail to exhaust the fund, the remainder may be considered a civil penalty and ordered deposited with the state as general revenues\(^{68}\) or distributed for other appropriate purposes.\(^{69}\) Thus, the unclaimed damages may be used as a fluid recovery "for some public purposes

\(^{59}\) See supra note 42. 
\(^{60}\) See supra note 42. 
\(^{62}\) Id. 
\(^{63}\) HOUSE REPORT, supra note 37, at 15. For example, if an attorney general proved that a group of bakers had conspired to raise the price of bread two cents per loaf, he could estimate damages by multiplying that amount by the number of loaves sold to consumers in the state, or determine damages using records kept by the defendants or other entities in the chain of distribution. Kintner, Griffin & Goldston, supra note 26, at 25-26. 
\(^{64}\) Thus, in cases involving violations other than price-fixing, the consumers must have records, receipts, or other supporting indications of their purchases in order to prove injury. 
\(^{65}\) HOUSE REPORT, supra note 37, at 14. 
\(^{66}\) Id. at 15. Once the total amount of the overcharge has been computed and assessed against the defendants, their real interest in the case is at an end. The issue of how the assessed damages should be distributed under 15 U.S.C. § 15e is determined without any participation by the defendant. SENATE REPORT, supra note 6, at 48. 
\(^{67}\) HOUSE REPORT, supra note 37, at 16. 
\(^{69}\) Id. § 15e(1).
benefitting, as closely as possible, the class of injured persons.\(^{70}\)

By enacting the aggregate damages and fluid recovery provisions, Congress attempted to ensure the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. The viability of the Hart-Scott-Rodino Antitrust Improvements Act was seemingly undermined, however, by the Supreme Court's decision in *Illinois Brick Co. v. Illinois*.\(^{71}\) Before discussing whether Congress succeeded in its attempt to ensure antitrust enforcement, this Comment will trace the history of the *Illinois Brick* decision and examine the scope of its holding.

**Illinois Brick Co. v. Illinois**

The Court in *Illinois Brick* held that an indirect purchaser from a person who violates the antitrust laws may not recover damages under section 4 of the Clayton Act. To understand the policy considerations that form the basis of the Court's decision, it is necessary first to consider an earlier Supreme Court case, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*\(^{72}\) In *Hanover Shoe*, the plaintiff, a shoe manufacturer, sued the defendant shoe machinery manufacturer, claiming that United's practice of leasing rather than selling its machinery had monopolized the shoe machinery industry in violation of section 2 of the Sherman Act. The plaintiff alleged injury to his business resulting from the leasing practice, because his costs were higher than they would have been if United had been willing to sell the machinery outright.\(^{73}\)

The defendant asserted the defense of "passing-on,"\(^{74}\) alleging that the plaintiff was not injured by the overcharge because it was passed on to its customers further down the chain of distribution in the form of higher prices. The Supreme Court soundly rejected this defense and held that "when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4."\(^{75}\)

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73. *Id.* at 483-84.

74. The doctrine of passing-on refers to the process in which a firm in the distributive chain that has been overcharged adjusts its prices to reflect that overcharge. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1153 n.2 (5th Cir. 1979).

75. *Hanover Shoe*, 392 U.S. at 489.
The *Hanover Shoe* Court advanced two policy considerations as bases for its holding. First, the Court was concerned with the "insurmountable" difficulties of proof in tracing the impact of an overcharge through the chain of distribution. Because of the subjective nature of pricing policies and the fluctuation of consumer demand, it would be nearly impossible to determine whether a plaintiff would have raised its prices even without the overcharge. 76 Second, the Court believed that deterrence of antitrust violations could best be achieved by vesting the power to sue in the direct purchaser. The Court reasoned that indirect purchasers suffer relatively insignificant monetary injury compared to the direct purchaser and hence have less incentive to litigate. In the *Hanover Shoe* situation, the indirect purchaser, the buyer of a pair of shoes, would have so little at stake that he or she would have little interest in attempting a class action. 77 If direct purchasers were not allowed to sue for the portion of the overcharge passed on to indirect purchasers, antitrust violators would profit by their illegal acts because no one would bring suit against them. 78

Although *Hanover Shoe* prohibited the defensive use of the pass-on doctrine, it left unanswered the question whether indirect purchasers could use the passing-on theory offensively against remote sellers. This question was answered in the negative in *Illinois Brick v. Illinois*. 79

The plaintiffs in *Illinois Brick* were the State of Illinois and 700 local governmental entities that brought suit against the defendant concrete block manufacturers, charging them with price-fixing in violation of section 1 of the Sherman Act. These manufacturers allegedly fixed the price of concrete blocks that they sold to masonry contractors. The masonry contractors, acting as subcontractors for the masonry portions of construction projects, in turn sold to general contractors. The general contractors sold the buildings to the plaintiffs. The plaintiffs were thus at least two steps removed from the defendants in the chain of distribution. The complaint alleged that the amount the plaintiffs paid for concrete block was more than three million dollars higher because of the defendants' price-fixing conspiracy. Money damages were sought in an amount equal to the overcharge exacted by the manufacturers and passed on by their customers to the indirect purchasers. 80

The Supreme Court in *Illinois Brick* based its decision rejecting offensive use of the pass-on theory on policy considerations. The Court, seeking symmetry with its earlier holding in *Hanover Shoe*,

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76. Id. at 492-93.
77. Id. at 494.
78. Id.
80. Id. at 726-27.
stated that “whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants.”

Thus, if a defendant manufacturer or supplier is not permitted to employ a passing-on defense under *Hanover Shoe*, an indirect purchaser plaintiff should not be allowed to recover passed-on damages from that same constrained manufacturer or supplier.

The Court gave two reasons for its decision requiring symmetry. First, allowing offensive but not defensive use of passing-on would create a substantial risk of multiple liability for defendants. The second reason for the symmetrical approach related to the complications of proving damages that had been articulated in *Hanover Shoe*. The Court feared that allowing the offensive use of the pass-on theory would create enormous evidentiary uncertainties that would add “whole new dimensions of complexity to treble-damages suits.”

Of the two policy reasons given for the symmetrical approach, the Court considered the tracing-of-damages argument the more significant. The Court acknowledged that the risk of multiple liability could be alleviated by bringing all potential plaintiffs, whether direct or indirect purchasers, into one action. However, it still maintained that indirect purchasers should not be permitted to sue under section 4, arguing that if all potential plaintiffs were brought together in one huge action, the treble-damage proceedings would become too complex.

The Supreme Court also advanced the deterrence rationale given in *Hanover Shoe* as a basis for its holding. Permitting use of the pass-on theory would give both direct and indirect purchasers inadequate incentive to sue since neither could recover the full amount of the overcharge. The Court believed that the policy of encouraging vigorous private enforcement of the antitrust laws would be best supported if the

81. *Id.* at 728.

82. *Id.* at 730. This contention can be easily illustrated by the *Illinois Brick* facts. The cement block manufacturers would be prevented from raising the defense of pass-on by *Hanover Shoe* in a suit brought by the masonry contractors. Therefore, the contractors could recover all of the proven overcharge from the manufacturers. If the ultimate building purchaser also were allowed to sue the manufacturer for the passed-on overcharge, the manufacturer could be held liable in two treble-damage actions, paying six times the actual damage. See Beane, *supra* note 4, at 353. Even the *Illinois Brick* Court, however, acknowledged that this risk could be avoided through the use of various procedural devices bringing all potential plaintiffs together in one action. See infra note 85 & accompanying text.

83. *See supra* note 76 & accompanying text.

84. *Illinois Brick*, 431 U.S. at 737. The Court stated: “The evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution. The demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff.” *Id.* at 732-33.

85. *Id.* at 731 n.11.

86. *See supra* notes 77-78 & accompanying text.
direct purchasers were spared the burdens and complexities of litigating the pass-on defense but still were allowed to recover the full amount of the overcharge.87

The rule denying indirect purchasers the right to bring a treble-damages action was not totally inflexible. Where the underlying policy considerations do not exist, there is no reason to apply the rule. The Supreme Court in Illinois Brick acknowledged that the reasons for its holding would not apply when an overcharged buyer had a pre-existing "cost-plus" contract with the direct purchaser.88 This was the only exception recognized by the Court in Hanover Shoe.89 The complexities of determining damages in an offensive pass-on situation are not involved, because the purchaser is committed to buying a fixed quantity regardless of price. Because the effect of the overcharge essentially is determined in advance, the problem of proving damages that complicates the determination in the usual case would not be present.90 In a footnote to this discussion, the Court suggested a second exception, which permits the pass-on defense "where the direct purchaser is owned or controlled by its customer."91 The exceptions to the rule barring indirect purchasers from bringing damage actions for antitrust violations that have been recognized by the Supreme Court strongly suggest that where the policy concerns are met, there is no reason to apply the rule.92

It is significant that the Illinois Brick holding is grounded on policy considerations. The case simply defines which injury the law will recognize in order for a person to bring suit under the Clayton Act. There are no constitutional implications in the holding. Indeed, the Court states:

Because we find Hanover Shoe dispositive here, we do not address the [constitutional] standing issue, except to note . . . that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to

88. Id. at 736. With a cost-plus contract the indirect purchaser contracts with the direct purchaser for a fixed quantity of goods to be priced at cost plus a specific markup.
89. 392 U.S. at 494.
90. Illinois Brick, 431 U.S. at 736.
91. Id. at 736 n.16. This second exception has been expanded by the courts since Illinois Brick. The exception now applies in two situations. The first is where the direct purchaser is owned or controlled by its customer, and the second is where it is owned or controlled by its supplier. The second situation has been labelled the "co-conspirator" exception. See, e.g., Jewish Hosp. Ass'n v. Stewart Mechanical Enter., 628 F.2d 971 (6th Cir. 1980); In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1160 (5th Cir. 1979); Gas-A-Tron v. American Oil Co., 1977-2 Trade Cas. (CCH) ¶ 61,789, at 73,245 (D. Ariz. 1977).
92. See infra note 112 & accompanying text.
sue for damages under § 4.93
Because the results in Hanover Shoe and Illinois Brick have been dictated by policy considerations, where those policy concerns are not present, offensive use of the passing-on theory should not be prohibited.

The Hart-Scott-Rodino Antitrust Improvements Act After Illinois Brick

Response to Illinois Brick

There was an immediate and widespread reaction to the Illinois Brick decision. Justice Brennan expressed the feelings of the supporters of the Hart-Scott-Rodino Act when he wrote in dissent, “Today’s decision flouts Congress’ purpose and severely undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement.”94 The Association of State Attorneys General, most of whom had filed as amici curiae in support of the losing side in Illinois Brick, assumed that the decision crippled the parens patriae provision in the Hart-Scott-Rodino Act.95

Congressional reaction to the Court’s decision was immediate although ineffective. Five days after the decision, legislation was introduced in the House of Representatives to overrule the result.96 One month later Senator Kennedy and Representative Rodino introduced identical bills to amend section 4 of the Clayton Act and overrule Illinois Brick.97

Congress and the Association of State Attorneys General both made it clear by their remarks and responses that they believed the Illinois Brick holding affected Title III of the Antitrust Improvements Act. This belief appears to be shared by the courts.98

93. 431 U.S. at 728 n.7.
94. Id. at 749 (Brennan, J., dissenting).
96. Beane, supra note 4, at 362.
97. Id. To date none of these bills has passed either in the House or in the Senate, and with the more conservative bent in Congress, it appears highly unlikely that Illinois Brick will be overruled legislatively.
In *Vermont v. Densmore Brick Co., Inc.*, the Vermont state attorney general brought suit as parens patriae on behalf of all Vermont residents who purchased Jotul brand woodburning stoves from defendant's Vermont retailers on or after September 30, 1976 (the date the Antitrust Improvements Act became effective). The plaintiff sought treble damages and injunctive relief arising from defendant's alleged violation of section 1 of the Sherman Act. Vermont alleged that Densmore fixed prices at which Jotul stoves were advertised and offered for retail sale, that it coerced its Vermont retailers to advertise and sell the stoves at its established or suggested retail prices and that Densmore terminated a Vermont retailer who did not comply or who was suspected of not complying with the price restrictions. Defendant Densmore moved for summary judgment, arguing that the state represented indirect purchasers and therefore had no cause of action under *Illinois Brick*.

The district court, while denying the motion for summary judgment, assumed that *Illinois Brick* prevented the state from suing on behalf of indirect purchasers. The court asserted, however, that the restriction imposed in *Illinois Brick* applies only where a plaintiff in a price-fixing conspiracy is removed from the conspiracy by one or more stages of distribution. The court reasoned that under *Illinois Brick*, if plaintiff's purchases were made directly from the alleged price-fixing conspiracy between Densmore and its Vermont Jotul dealers, the plaintiff would have the right to sue. Because the plaintiff alleged from the outset that it had made direct purchases, *Illinois Brick* did not mandate summary disposition.

Essentially, the district court in *Densmore Brick* believed that the state attorney general must represent either direct purchasers or purchasers who fit a recognized exception to *Illinois Brick* in order to bring suit for antitrust violations. Thus, the court sought an exception that avoided the policy considerations articulated by the Supreme Court in *Illinois Brick*.

This sentiment was echoed in *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*. Various states brought actions against several major oil companies, alleging violations of federal and state antitrust laws. The cases were consolidated for pretrial proceedings. The defendants moved to dismiss, claiming, inter alia, that the plaintiff states represented indirect purchasers and were

100. *Id.* at 75,776-78.
101. *Id.* at 75,778.
102. *Id.*
103. *Id.*
104. *See supra* notes 88-92 & accompanying text.
barred by *Illinois Brick* from bringing suit. The court, using the same approach as that employed by the district court in *Densmore Brick*, held that:

with respect to the plaintiffs' claims that the defendants conspired to fix prices either at the wholesale or retail level, the plaintiffs will be allowed to seek recovery only as to direct purchases from a defendant, a co-conspirator, sellers with whom the plaintiffs had pre-existing, fixed-quantity, cost-plus contracts, or an entity controlled by a conspirator.1

The court in *Petroleum Products*, as in *Densmore Brick*, was willing to allow exceptions meeting the policy concerns of *Illinois Brick*.

A third federal district court took an even more sympathetic stance toward parens patriae actions, though it refused to hold outwardly that a state attorney general can sue on behalf of indirect purchasers. In *In re Mid-Atlanta Toyota Antitrust Litigation*,107 a lawsuit consolidating four parens patriae actions, the plaintiffs sought treble damages on behalf of state residents who purchased Toyota automobiles bearing a protective finish called polyglycoat. Plaintiffs alleged that defendants conspired to fix an artificially high price for this polyglycoat finish in violation of section 1 of the Sherman Act. Defendants moved to dismiss the parens patriae actions seeking monetary relief on the ground that they were brought by or on behalf of indirect purchasers barred from financial recovery under *Illinois Brick*.108

The *Toyota* court held that, in order to bring suit, the plaintiff states must fit into an exception to *Illinois Brick*. The court stated that it would be inappropriate to apply a rule when the reasons for applying it do not exist.109 Therefore, if the principal policy considerations underlying *Illinois Brick* are not present, an indirect purchaser should be able to bring a treble-damages action.

The court allowed plaintiffs to prove the existence of a voluntary conspiracy between the regional Toyota distributor and the various Toyota dealers in order to remove from themselves the stigma of "indirect purchasers." However, the court made it clear that the states would not be able to sue on behalf of their indirect purchasers unless the involvement of the direct purchasers in the conspiracy was proved.110 Because the court believed the plaintiffs would have difficulty proving the conspiracy, it denied the defendants' motion to dismiss with leave for them to renew the motion later in the proceedings.111

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106. *Id.* at 227.
108. *Id.* at 1289.
109. *Id.* at 1293.
110. *Id.* at 1296-97.
111. *Id.* at 1296. The court stated: "T]he plaintiffs have a long and tortuous road ahead in seeking to prove the existence of the voluntary conspiracy which they allege. The
The courts' refusal to allow parens patriae actions on behalf of indirect purchasers under the Hart-Scott-Rodino Act stems from their interpretation of *Illinois Brick*. The courts continue to require that the state attorneys general find an exception to *Illinois Brick* in order to bring parens patriae actions for state residents who are indirect purchasers.


The courts have seemingly overlooked the fact that the Hart-Scott-Rodino Act addresses the policy considerations discussed in *Illinois Brick* and thus should qualify as an exception to that decision. As the district court of Maryland stated in the *Toyota* litigation, "Take away the principal policy consideration, the foundation so to speak, underlying *Illinois Brick*, and the reasons for applying the rule disappear. And when the reasons for the rule do not apply, application of the rule would be plainly inappropriate."\(^{112}\) The major policy considerations underlying *Illinois Brick* were risk of duplicative recovery,\(^ {113}\) tracing-of-damages difficulties,\(^ {114}\) and deterrence.\(^ {115}\) The Hart-Scott-Rodino Act dealt with each of these considerations.

First, the Act deals directly with the risk of multiple liability. Because the state attorney general brings the action on behalf of all state residents injured by the antitrust violation, direct and indirect purchasers may be joined in one suit.\(^ {116}\) The Act contains an "opt out" provision, and the final judgment will be res judicata as to those who fail to opt out in a timely fashion as the Act provides.\(^ {117}\) The *Illinois Brick* Court further recognizes that discovery, once completed, might reveal that the distributor and dealers did not combine or conspire in restraint of trade. For these reasons, the Court will permit any or all of the defendants to renew their *Illinois Brick* Motions at a later time when the Court will be presented with additional facts from which an informed judgment can be made." *Id.* at 1296-97.

112. *Id.* at 1293.
113. *See supra* note 82 & accompanying text.
114. *See supra* notes 83-85 & accompanying text.
115. *See supra* notes 86-87 & accompanying text.
116. Some risk of double recovery will still remain because the state attorney general can only represent natural persons. *See supra* note 52 & accompanying text. If the direct purchasers are corporations or small businesses, they will not be joined in the parens patriae action. This remaining risk of double recovery may be unacceptable in light of the concerns of the Supreme Court in *Illinois Brick*. Congress, however, viewed deterrence as its overriding concern. *See infra* note 144 & accompanying text. Perhaps some overlap is inevitable if deterrence is to be achieved.

It is important to reiterate that *Illinois Brick* was based on policy considerations and not on constitutional grounds. *See supra* note 43 & accompanying text. Because it is the function of Congress to formulate policy in this country, its views should take precedence over those of the Supreme Court.

117. *See supra* notes 55-57 & accompanying text.
Brick. Court itself acknowledged that the risk of multiple liability would be alleviated if all potential plaintiffs were brought together in one action. However, because of the primacy given the tracing-of-damages consideration, the Court essentially stated that reducing the risk of multiple liability alone would not warrant abandoning the Hanover Shoe rule.  

Second, and more importantly as far as the Supreme Court was concerned, the Hart-Scott-Rodino Antitrust Improvements Act contains a provision that deals specifically with calculation of monetary relief in price-fixing cases. The provision allows for damages to be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by some other reasonable system of estimating aggregate damages. The relief recovered in a title III suit is initially offered to those on whose behalf the suit was brought. Because it is expected that these consumers will fail to exhaust the fund, the remainder may be considered a civil penalty and ordered deposited with the state as general revenues or distributed for other appropriate purposes.

Thus, direct purchasers could step forward and collect their share of a parens patriae recovery first. Obviously, fewer proof-of-damages difficulties exist with a direct purchaser, so that initially a title III suit would meet Illinois Brick requirements. The relief, calculated in the aggregate and collected on behalf of indirect purchasers, may be deposited with the state or used to benefit the indirect purchasers who suffered injury. In this way, both the spirit of Illinois Brick and the provisions of the Act will be complied with. By using the aggregate damages techniques provided for in the Act, some of the tracing-of-damages problems noted by the Supreme Court will be avoided.

Defendants in pending cases have attacked the aggregate damages provisions of title III as being unconstitutional. The defendants allege that these provisions violate the due process clause, the just compensation clause of the fifth amendment, and the appointments clause. The courts to date have found it too early in the litigation process to address these issues. They have recognized, however, that a constitu-

118. See supra note 85 & accompanying text.
119. See id.
121. See supra notes 61-70 & accompanying text.
122. Congress anticipated that indirect and direct purchasers would pose different problems in calculating damages and that, therefore, each group must be dealt with separately in determining questions of causation and fact of injury. House Report, supra note 37, at 14.
tional problem may exist. The House Committee on the Judiciary also considered the possible constitutional defenses the Act's damages provisions would encounter and "squarely rejected arguments that this method of applying damage recoveries to the general benefit of the injured class is unconstitutional." The committee firmly believed that "once it is acknowledged that the antitrust violator has no constitutional right to retain the profits of his illegal activity, it becomes clear that he has no constitutionally protected interest in how those profits are distributed for the benefit of those whom he has injured."

Third, the Court in *Illinois Brick* believed that deterrence of Sherman Act violations could best be achieved by giving only the direct purchaser the right to sue. The parens patriae legislation also promotes deterrence because it does not deprive the direct purchaser of his or her suit. Thus, under parens patriae, direct purchasers who are natural persons and could have brought a suit in their own right will be represented. However, another entire class of plaintiffs will also be represented: the indirect purchasers. Therefore, deterrence, one of the primary purposes of section 4 private treble-damage actions, will be strengthened under the Hart-Scott-Rodino Act.

Because the Act deals directly with the problems of possible duplicative recovery and tracing-of-damages and serves further to deter antitrust violators, it embodies the policy considerations that concerned the Supreme Court in *Illinois Brick*. Therefore, there is no need to apply the rule laid down by *Illinois Brick* that bars damage actions by indirect purchasers. The Supreme Court itself in its decision has recognized that its rule will not always be necessary and has enumerated exceptions. The Hart-Scott-Rodino Act is analogous to those excep-

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125. *Toyota*, 525 F. Supp. at 1286; *Petroleum Products*, 1978-1 Trade Cas. (CCH) at 73,497. The courts have soundly rejected other constitutional attacks: (1) that the State has no standing to bring a parens patriae action, see e.g., *New Mexico v. Scott & Fetzer Co.*, 1981-2 Trade Cas. (CCH) § 64,439 (D. N.M. 1981); *In re Montgomery County Real Estate Antitrust Litigation*, 452 F. Supp. 54 (D. Md. 1978); (2) that the grant of authority to the state attorney general violates the tenth amendment, see, e.g., *New Mexico v. Scott & Fetzer Co.*, 1981-2 Trade Cas. (CCH) § 64,439 (D. N.M. 1981); and (3) that the statute violates article II because the granting of standing is an appointment of a federal officer, see, e.g., id.

126. *House Report*, supra note 37, at 16. The fluid recovery device, which is also used under California's antitrust law, the Cartwright Act, recently sustained a challenge. In *Bruno v. Superior Court*, 127 Cal. App. 3d 120, 179 Cal. Rptr. 342 (1981), the California Court of Appeal held that a fluid recovery could be used to distribute damages in a Cartwright Act suit. The court disagreed with the contention that fluid recovery causes a denial of due process of law, reasoning that "[a] class action which affords due process of law to the defendant through the time when the amount of his liability is calculated cannot suddenly deprive him of his constitutional rights because of the way the damages are distributed." *Id.* at 128-29, 179 Cal. Rptr. at 346.


128. *See supra* note 87 & accompanying text.

129. *See supra* notes 88-93 & accompanying text.
tions, and courts should feel free to allow state attorneys general to represent all natural persons in their states when bringing damage actions for Sherman Act violations.

It may not be necessary to bring the Hart-Scott-Rodino Act within the framework of *Illinois Brick* because the Supreme Court may never have intended that *Illinois Brick* be used to bar indirect purchaser suits brought by the state attorneys general. The Court did not ignore the Hart-Scott-Rodino Act in deciding *Illinois Brick*. Instead, it simply did not find the legislative intent, so clearly articulated by supporters of title III, to be dispositive of the issue whether the offensive use of the "passing-on" doctrine should be permitted in *Illinois Brick*. The Court recognized that Representative Rodino clearly assumed that the Supreme Court would allow the use of offensive pass-on under section 4. However, the Court pointed out that the parens patriae legislation "did not alter the definition of which overcharged persons were injured within the meaning of § 4. It simply created a new procedural device . . . to enforce existing rights of recovery under § 4." The Court quoted the House Report, stating that the parens patriae provision "creates no new substantive liability."

Because the Court felt that the Hart-Scott-Rodino Act did not create a new right of recovery for consumers, it then rejected the parens patriae legislation as not "dispositive as to the interpretation of § 4 of the Clayton Act, enacted in 1914, or the predecessor section of the Sherman Act, enacted in 1890." A cursory reading of this statement by the Supreme Court could lead to the conclusion that the Court did not believe that state attorneys general are authorized to sue on behalf of indirect purchasers, i.e., on behalf of those who allege offensive pass-on to prove injury within the meaning of section 4 of the Clayton Act. Yet, is that what the Court really said? The Court firmly determined that the legislative history of the Antitrust Improvements Act of 1976 did not govern interpretation of section 4 of the Clayton Act. The legislative history of the Antitrust Improvements Act of 1976, however, may govern the interpretation of its own provisions. Furthermore, Congress made it clear that the Act was intended to give everyday consumers a remedy against antitrust violations. As Justice Brennan declared in his dissent, "It is difficult to see how Congress could have expressed itself more clearly." If the Hart-Scott-Rodino Act's legislative history governs the interpretation

131. *Id.* at 734 n.14.
132. *Id.*
133. *Id.*
134. This apparently was the conclusion reached by the courts in *Densmore Brick, Petroleum Products*, and *Toyota*. See supra notes 99-111 & accompanying text.
of the Act's own provisions, then a state attorney general should be able to bring suit for antitrust violations on behalf of residents in his or her state regardless of whether the resident is a direct or an indirect purchaser.136

The Supreme Court's interpretation of who is "injured" within the meaning of section 4 of the Clayton Act should not apply equally to parens patriae actions and to actions brought by the purchasers themselves, because there are differences between the two actions. First, in parens patriae actions the state attorney general may represent only "natural persons" and not corporations or small businesses.137 Second, these natural persons must be injured in their "property."138 The Clayton Act's section 4 injury can be in either the "business or property" of "any person."

Conclusion

Although most courts have assumed that a state attorney general is barred by Illinois Brick from bringing a parens patriae action on behalf of indirect purchasers,139 a careful scrutiny of Illinois Brick indicates that this may not be true.

First, some district courts have interpreted Illinois Brick as applying only when the policy considerations that underlay the holding are present.140 In enacting the parens patriae legislation, Congress was concerned with the same policy considerations that motivated the Supreme Court in Illinois Brick. It enacted specific provisions to address the problems of duplicative recovery141 and proof-of-damages difficulties.142 The House Committee on the Judiciary believed that its aggregate damages provision would serve a dual purpose: manageability of large consumer classes and deterrence.143 Congress strongly articulated its concern that antitrust violators be deterred in stating:

The antitrust laws should, at a minimum, provide an effective means whereby a plaintiff class can force a guilty defendant to part with all measurable fruits of his illegal activity . . . multiplied three-fold to

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136. Under this reasoning indirect purchasers suing individually will still be barred by Illinois Brick, but as congressional studies have indicated, few indirect purchasers have enough at stake in a lawsuit to sue for antitrust violations. See supra notes 43-45 & accompanying text.


138. The Supreme Court has held that consumers who pay a higher price for goods purchased for personal use because of an antitrust violation have sustained an injury in their "property." Reiter v. Sonotone, 442 U.S. 330, 334-35 (1979). See supra note 42. This type of injury is more likely to affect an indirect purchaser than a direct purchaser.

139. See supra note 98.

140. See supra note 112 & accompanying text.


142. Id. § 15d.

reflect the factor Congress has determined is necessary as a punishment, as a deterrent, and as an incentive.\textsuperscript{144}

Second, the Court held only that the legislative history of the Hart-Scott-Rodino Act would not be dispositive as to the proper interpretation of section 4 of the Clayton Act. This, however, does not prevent the legislative intent of the Hart-Scott-Rodino Act from being dispositive as to the interpretation of its own provisions.\textsuperscript{145}

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 strongly and effectively anticipated the Supreme Court's policy concerns. The courts thus can satisfy the policy considerations of the Supreme Court and implement congressional policy by recognizing the viability of the parens patriae legislation as an exception to \textit{Illinois Brick} and according the state attorney general the right to sue for antitrust violations on behalf of all consumers in his or her state—direct or indirect.

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\begin{flushleft}
\textsuperscript{144} Id.  \\
\textsuperscript{145} See supra notes 133-36 & accompanying text.  \\
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