

Consumer Standing Under Section 4 of the Clayton Act: *Reiter v. Sonotone Corp.*¹—Section 4 of the Clayton Act² provides that “any person . . . injured in his business or property” by an antitrust violation may bring an action for treble damages. Until the decision of the United States Court of Appeals for the Eighth Circuit in *Reiter v. Sonotone Corp.*,³ there was a general assumption, reflected in judicial opinions⁴ and learned commentary,⁵ that section 4 pro-

¹ 579 F.2d 1077 (8th Cir. 1978), *rehearing en banc denied*, 579 F.2d 1077, *cert. granted*, 47 U.S.L.W. 3449 (Jan. 9, 1979).

² 15 U.S.C. § 15 (1976).

³ 579 F.2d 1077 (8th Cir. 1978), *rehearing en banc denied*, 579 F.2d 1077, *cert. granted*, 47 U.S.L.W. 3449 (Jan. 9, 1979).

⁴ *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 313-14 (1978) (“Clearly, therefore, Congress did not intend to make the treble-damages remedy available only to consumers in our own country.” (footnote omitted)); *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977) (“The discussions of this section on the floor of the Senate indicate that it was conceived of primarily as a remedy for ‘[t]he people of the United States as individuals,’ especially consumers.”); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972) (“A large and ultimately undeterminable part of the injury to the ‘general economy’ . . . is no more than a reflection of injuries to the ‘business or property’ of consumers, for which they may recover themselves under § 4.”); *Bravman v. Bassett Furniture Indus., Inc.*, 552 F.2d 90, 99 n.23 (3d Cir.), *rehearing denied*, 552 F.2d 90, *cert. denied*, 434 U.S. 823 (1977) (“The right of consumers to challenge price fixing conspiracies is well established.”); *Theophil v. Sheller-Globe Corp.*, 446 F. Supp. 131 (E.D.N.Y. 1978) (retail purchasers of motor homes allowed to sue manufacturers); *DeGregorio v. Segal*, 443 F. Supp. 1257 (E.D. Pa. 1978) (persons denied admission to nursing homes because of alleged conspiracy among nursing home owners to fix prices for care of indigents could sue under § 4 for loss of social security income exemptions); *In re Consolidated Pretiral Proceedings in Petroleum Products Antitrust Litigation*, 1977-2 Trade Cas. ¶ 61,639 (C.D. Cal. 1977) (consumers of gasoline products could sue for overcharges); *In re Ampicillin Antitrust Litigation*, 1977-1 Trade Cas. ¶ 61,434 (D.D.C. 1977) (consumers could sue drug manufacturers for overcharges). See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968) (the Court suggests that “ultimate consumers” have a cause of action under § 4); *Link v. Mercedes-Benz of N. America, Inc.*, 550 F.2d 860 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977) (class action involving consumers as plaintiffs currently going forward in the Eastern District of Pennsylvania as a result of the Third Circuit ruling); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) (class of all odd-lot purchasers of stock certified as a class of proper plaintiffs); *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970) (consumers allowed to share in settlement of price fixing case). *Contra Weinberg v. Federated Dep’t Stores, Inc.*, 426 F. Supp. 880 (N.D. Cal. 1977); *Gutierrez v. E. & J. Gallo Winery Co., Inc.*, 425 F. Supp. 1221 (N.D. Cal. 1977); *Smith v. Toyota Motor Sales*, 1977-1 Trade Cas. ¶ 61,251 (N.D. Cal. 1977), *appeals docketed*, Nos. 77-1845, 77-1724, 77-1725, 77-1850, 77-1851, 77-1852 (9th Cir. 1977) (consumers not allowed to sue because they lacked injury to “business or commercial interest”).

⁵ L. SULLIVAN, ANTITRUST 771 (1977) (“By and large, any injury to financial interests, including those to a consumer which must pay more for a product because of a violation, have been held to be compensable.” (footnote omitted)); H. P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 337a, at 183 (1978) (“Whether or not engaged in ‘business’ in any layman’s sense, the ultimate consumer victimized by an antitrust violation is ‘injured in his business or property’ within the meaning of Clayton Act § 4 and therefore has standing to recover treble damages.”).

vided consumers⁶ as well as businesses with a right to recover damages resulting from antitrust violations. The court in *Reiter*, however, held that to be "injured in his business or property" within the meaning of section 4, a plaintiff must suffer injury "of a commercial or competitive nature,"⁷ and that an overcharge for a nonbusiness purchase does not constitute such an injury.⁸

The plaintiffs in *Reiter*, the class of all purchasers of hearing aids for personal use in the United States, sued five manufacturers of hearing aids for treble damages. The plaintiffs alleged that the manufacturers had engaged in resale price maintenance by conspiring illegally to control the prices at which independent dealers sold hearing aids.⁹ The defendants moved for dismissal or summary judgment,¹⁰ arguing that as consumers the plaintiffs were not injured in their "business or property," and thus lacked standing¹¹ to sue for treble damages under section 4.¹² The federal district court denied the defendants' motions, holding that the plaintiffs did have standing. The court nevertheless agreed to certify the issue of consumer standing for interlocutory review.¹³

A two judge panel¹⁴ of the Eighth Circuit reversed the district court, agreeing with the defendants that the plaintiffs had not been injured in their "business or property."¹⁵ The court held that injury in one's "property," within the meaning of section 4, requires "injury of a commercial or competitive nature."¹⁶ Thus, because the plaintiffs could allege no commercial or

⁶ The word "consumer," as used hereafter in this article, refers to purchasers at the final link in the chain of distribution who purchase items for personal, nonbusiness use.

⁷ 579 F.2d at 1087.

⁸ *Id.* at 1079.

⁹ *Id.* at 1078. Resale price maintenance is an agreement between a seller and its buyer fixing the price at which the buyer may resell the product and is a *per se* violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

¹⁰ 579 F.2d at 1078. The plaintiffs' standing to sue for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26 (1976), was not at issue. Section 16 provides that any person threatened with loss or damage by reason of a violation of the antitrust laws may obtain injunctive relief.

¹¹ "Standing" as used herein refers not to standing as that term is used in connection with Article III of the United States Constitution, but to the right to sue for damages which was created by Congress in enacting § 4 of the Clayton Act. To have § 4 "standing," a plaintiff must meet several requirements: (1) he must suffer injury to his business or property, *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 396 (1906); (2) he must suffer an injury of the type the antitrust laws were intended to prevent, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); (3) there must be a direct causal connection between the defendant's violation and the plaintiff's injury, *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910); and (4) the injury must flow from that which makes the defendant's conduct unlawful, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, *supra*, 11 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 334 (1978); L. SULLIVAN, ANTITRUST 770-74 (1977).

¹² 579 F.2d at 1078.

¹³ *Reiter v. Sonotone Corp.*, 435 F. Supp. 933, 938 (D. Minn. 1977).

¹⁴ The case was decided by Judges Bright and Henley. Judge Webster participated in oral argument, but not in the disposition of the case. 579 F.2d at 1078 n.*.

¹⁵ 579 F.2d at 1079.

¹⁶ *Id.* at 1087.

competitive injury, they could not claim an injury in their property. Furthermore, because the plaintiffs were not in business, they clearly could allege no injury in their business. Accordingly, the court of appeals dismissed their complaint.

The court of appeals based its holding that consumers should not be allowed to sue under section 4 on its interpretation of the legislative history of that section, on prior decisions construing the phrase "business or property," on its conclusion that denial of standing to consumers was not inconsistent with the purposes of the Antitrust Improvements Act of 1976,¹⁷ and on its prediction of the effect consumer suits would have on competition. The court looked first to the legislative history of section 4. Although it recognized that the Supreme Court has characterized the legislative history as "not very instructive"¹⁸ regarding the purpose of the "business or property" requirement, the court gave considerable weight to the legislative history. In particular, the court relied on the change which occurred in the language of section 4 during the course of legislative drafting. As originally proposed, section 4 allowed "any person or corporation injured or damnified" to sue.¹⁹ The version of section 4 which was finally adopted, by contrast, allowed "[a]ny person injured in his business or property to sue."²⁰ The addition of the "business or property" language, the *Reiter* court concluded, showed a congressional intent to limit the class permitted to sue, with the result that consumers were excluded.²¹

The court found further evidence of a legislative intent to exclude consumers in the remarks of congressmen who emphasized their desire to protect small business from the predatory practices of large businesses, but who did not mention consumers.²² The court focused on Senator George's remark that the provision would be of little practical help to "the poor man, the consumer, the laborer, the farmer, the mechanic, the country merchant. . . ." ²³ The court in *Reiter* presumably concluded that the legislators' discussion of the statute's benefits to small businessmen, but not the benefits to consumers, demonstrated that they did not intend to provide consumers with a right to sue for damages.

After considering the legislative history, the court turned to judicial decisions construing the phrase "business or property." While no other court of appeals had considered the question whether consumers are injured in their property, the court examined opinions discussing the meaning of "business or property" in other contexts. The court interpreted these cases to require that a plaintiff sustain a "commercial or competitive injury" in order to sue under section 4 of the Clayton Act.²⁴

¹⁷ Pub. L. No. 94-435, 90 Stat. 1383 (1976).

¹⁸ 579 F.2d at 1080.

¹⁹ S. 1, 51st Cong., 1st Sess. § 2 (1889).

²⁰ 15 U.S.C. § 15 (1976); 579 F.2d at 1079-80.

²¹ *Id.* at 1080.

²² *Id.* at 1080-81.

²³ *Id.* at 1080.

²⁴ *Id.* at 1084.

The court then examined the Antitrust Improvements Act of 1976,²⁵ which allows state attorneys general to sue for damages suffered by state residents because of antitrust violations. The court noted that the legislative history of the 1976 Act indicated that the legislators believed that consumers had standing under section 4 of the Clayton Act.²⁶ But, the court also observed that the opinions of legislators in 1976 could shed no light on the meaning of "business or property" as used by their predecessors in 1890.²⁷ Since Congress did not intend to "create new substantive liability"²⁸ by enacting the 1976 Improvements Act, its desire to provide consumers with a *parens patriae* remedy could not, in the court's view, alter the fact that section 4 does not provide a consumer remedy.

Finally, the court turned to the practical impact of consumer suits under section 4 of the Clayton Act. The court conjectured that allowing consumers to sue might "preserve an oligopolistic economic climate."²⁹ If consumers were allowed to sue, businesses would have to settle consumer class actions. The expense of settling these claims, the court concluded, might cause small firms, but not large ones, to go out of business.³⁰ This latter part of the opinion shows that the court was concerned with the effect its decision would have on competition. Nevertheless, the court's denial of standing to consumers means that antitrust violators who sell to consumers, rather than to businesses, can pursue their anticompetitive practices undeterred by the threat of treble damage suits.

Suits under section 4 by private parties, such as the plaintiffs in *Reiter*, are vital to the effective enforcement of the antitrust laws.³¹ The Justice Department and the Federal Trade Commission, the two federal agencies charged with the primary responsibility for enforcing these laws, lack the resources for comprehensive prosecution of antitrust violations. Furthermore, the sanctions imposed by successful government suits—jail sentences, fines, and injunctions—are often insufficient to deter violations.³² By contrast, the

²⁵ Pub. L. No. 94-435, 90 Stat. 1383 (1976).

²⁶ 579 F.2d at 1085.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 1086.

³⁰ *Id.*

³¹ See, e.g., *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977). Cf. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968) (private suits a "bulwark" of antitrust enforcement).

³² As the Senate Majority Report for the Antitrust Enforcement Act of 1978 noted:

The task of enforcement of this Nation's antitrust laws is of course shared between private damage actions, and public enforcement actions by the Justice Department and the Federal Trade Commission. The Antitrust Division can bring a civil or criminal action. Sanctions in these type of cases include jail sentences, fines, and injunctions. However, fines and jail sentences, even the substantially increased ones now in effect, are simply not enough to deter conduct which can potentially reap millions upon millions of dollars. As one businessman said:

risk of a substantial treble damage recovery by a private party suing under section 4 is a powerful deterrent.³³ By foreclosing the possibility of a consumer action under section 4, *Reiter* weakens this deterrent and precludes consumers from recovering damages for illegal overcharges. Thus, the primary impact of the *Reiter* decision is anticompetitive.

This casenote will analyze consumers' standing to sue for damages when they are overcharged due to antitrust violations. First, the language of section 4 and the pre-*Reiter* case law construing it will be examined to see if they support the *Reiter* court's conclusion that consumers are not injured "in their property." The casenote then will consider three Supreme Court opinions, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,³⁴ *Illinois Brick Co. v. Illinois*,³⁵ and *Hawaii v. Standard Oil Co. of California*,³⁶ in which the Court was called on to decide what kinds of plaintiffs can recover treble damages under section 4. The policy considerations which motivated the Court in these decisions will be isolated and these considerations will be applied to the question whether consumers should be allowed to sue. Finally, the impact of *Reiter* on the Antitrust Improvements Act of 1976³⁷ will be considered. It will be submitted that the court in *Reiter* misconstrued existing case law in holding that the plaintiffs had not been injured "in their property," that the policies underlying the Supreme Court's decisions in *Hanover Shoe*, *Illinois Brick*, and *Hawaii* are best served by allowing consumers to recover damages for violations of the antitrust laws, and that *Reiter* effectively nullifies the Antitrust Improvements Act of 1976.

When you're doing \$30 million a year and stand to gain \$3 million by fixing prices, a \$30,000 fine doesn't mean much. Face it, most of us would be willing to spend 30 days in jail to make a few extra million dollars. [Business Week, June 2, 1976].

S. REP. NO. 934, 95th Cong., 2d Sess. 18 (1978) (quoting from the testimony of John Shenefield, Assistant Attorney General for Antitrust before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary), reprinted in CCH Trade Regulation Reports No. 339, Part II, at 18 (June 6, 1978).

³³ The Senate Majority Report referred to in note 32 *supra*, also indicated that:

A successful damage action, on the other hand, can result in a trebling of the actual damage. The risk of such substantial liability and its direct relationship to the illegal profits of the wrongful conduct makes a businessman think long and hard before initiating or participating in a course of conduct possibly violative of the antitrust laws. The head of the Antitrust Division, John Shenefield, testified that:

As a former private antitrust lawyer, I am personally familiar with the fact that private treble damage liability is taken very seriously indeed by businesses—sometimes more seriously even than the possibility of prosecution. [Hearings at 18.]

S. REP. NO. 934, 95th Cong., 2d Sess. 18 (1978), reprinted in CCH Trade Regulation Reports No. 339, Part II, at 18 (June 6, 1978).

³⁴ 392 U.S. 481 (1968).

³⁵ 431 U.S. 720 (1977).

³⁶ 405 U.S. 251 (1972).

³⁷ Pub. L. No. 94-435, 90 Stat. 1383 (1976).

I. CONSTRUCTION OF "BUSINESS OR PROPERTY" REQUIREMENT

In construing statutes, courts normally look to legislative history to discover what meaning the drafters attached to the words they used. If the drafters' meaning is unclear, courts must infer their meaning from the purpose of the statute. The Supreme Court has said that the legislative history is inconclusive as to the meaning of the "business or property" requirement in section 4.³⁸ However, the Court has found the legislative history instructive as to the primary purpose of section 4. As the Court has stated, "[t]he discussions of this section on the floor of the Senate indicate that it was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers."³⁹

Despite this finding by the Supreme Court that section 4 was intended to help consumers, the court in *Reiter* interpreted the words "in his business or property" as excluding consumers from the class permitted to sue. There are several problems with this interpretation. First, the only support the court cites for this theory is the comment of one senator that the bill ought not to be a litigation breeder.⁴⁰ The court produced no evidence, however, that Congress intended the "business or property" restriction to serve a purpose other than to exclude those injuries unrelated to the purchase and sale of goods and services. Second, the court in *Reiter* thought that the legislators'

³⁸ *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 261 (1972).

³⁹ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977) (quoting 21 CONG. REC. 1767-68 (1890)). The quotation above was taken from an interesting footnote which reads as follows:

Treble-damages antitrust actions were first authorized by § 7 of the Sherman Act, 26 Stat. 210 (1890). The discussions of this section on the floor of the Senate indicate that it was conceived of primarily as a remedy for "[t]he people of the United States as individuals," especially consumers. Treble damages were provided in part for punitive purposes, but also to make the remedy meaningful by counterbalancing "the difficulty of maintaining a private suit against a combination such as is described" in the Act.

When Congress enacted the Clayton Act in 1914, it "extend[ed] the remedy under section 7 of the Sherman Act" to persons injured by virtue of any antitrust violation. The initial House debates concerning provisions related to private damages actions reveal that these actions were conceived primarily as "open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered." The House debates following the conference committee report, however, indicate that the sponsors of the bill also saw treble-damages suits as an important means of enforcing the law. In the Senate there was virtually no discussion of the enforcement value of private actions, even though the bill was attacked as lacking meaningful sanctions . . .

Id. (citations omitted). See also Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW & ECON. 7, 10 (1966) ("The legislative history, in fact, contains no colorable support for application by courts of any value premise or policy other than the maximization of consumer welfare.").

⁴⁰ 579 F.2d at 1080.

recognition that the bill might help businesses more than individuals implied that Congress did not intend to allow consumers to sue.⁴¹ Yet, as the court itself recognized, the legislators' remarks were directed at "practical rather than theoretical" obstacles to consumer suits.⁴² Consumers, at the time the act was passed, were unlikely to sue because their individual damages usually were too small to justify a lawsuit. Since the act was passed before the advent of the class action, individual damage suits were the only available remedy for overcharged consumers.⁴³ The court's reasoning that, since the drafters of section 4 realized consumers probably could not sue, they did not intend to allow consumers to sue, is perplexing. The words the legislators chose, "injured in his business or property," certainly indicate a desire to include a broader class than those injured in their business. Moreover, as the Supreme Court has already found, the legislative history indicates that section 4 was intended "as a remedy for [t]he people of the United States as individuals,' especially consumers."⁴⁴

Perhaps the most serious objections to the court's decision in *Reiter* is its misunderstanding of other cases interpreting the phrase "business or property." The pre-*Reiter* case law strongly supports the proposition that consumers have standing to sue under section 4. The courts that have considered the meaning of this phrase have agreed that "property," as used in section 4, refers to something separate and distinct from business interests.

The first and most significant in the line of cases interpreting the "business or property" requirement, *Chattanooga Foundry and Pipe Works v. City of Atlanta*,⁴⁵ provides clear support for the proposition that overcharged consumers are injured "in their property." In *Chattanooga*, the city of Atlanta alleged that it had been overcharged in its purchases of pipe for the city waterworks by a trust which misled the city into paying "a price much above what was reasonable or the pipe was worth."⁴⁶ Justice Holmes, writing for the majority of the Supreme Court, stated that regardless whether the city

⁴¹ *Id.* at 1081.

⁴² *Id.* at 1080 n.6.

⁴³ Judge Larson, writing the district court opinion in *Reiter*, attributed the lack of extensive discussion of consumers in the legislative history to the context in which the debates took place:

Regardless of the conclusions one draws from a literal reading of the legislative history, the debates must be read in light of the knowledge and assumptions held by society in that period. In 1914, when the Clayton Act was passed to incorporate and extend the Sherman Act, "consumers" were not identifiable as a constituency, and protection of their economic interests was an unknown concept. If they were not discussed at any great length during congressional consideration of the antitrust statutes, it is at least as probable that they did not exist in the minds of Congressmen as that they were deliberately ignored.

Reiter v. Sonotone Corp., 435 F. Supp. 933, 937 (D. Minn. 1977) (citation omitted).

⁴⁴ See note 39 *supra*.

⁴⁵ 203 U.S. 390 (1906). See L. SULLIVAN, ANTITRUST 771 n.3 (1977), for a discussion of Justice Holmes' interpretation of "business or property" in *Chattanooga*.

⁴⁶ 203 U.S. at 395.

had been injured in its business of furnishing water, it had been injured in its property.⁴⁷ Justice Holmes observed that "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property The damage complained of must almost or quite always be damage in property, that is, in the money of the plaintiff"⁴⁸ "Business" and "property," then, were separate and distinct interests. The Court did not decide whether the city was "in business," and if so, whether it had been injured in its business, because the Court concluded that the city's property injury was sufficient to enable it to sue under section 4.

In *Reiter*, the Eighth Circuit briefly considered *Chattanooga*.⁴⁹ The court observed that "the city's claim [in *Chattanooga*] arguably sought recovery for a business injury."⁵⁰ This observation ignores, however, Justice Holmes' statement that the city could recover solely for injury in its property, without any reference to its business. The *Reiter* court thus missed the essential thrust of *Chattanooga*, and this misapprehension contributed to its ultimate holding that consumers are not injured in their property.

Other decisions have followed the *Chattanooga* interpretation of "business or property"—that overcharged consumers may suffer a property injury even though they are not in business. In *Waldron v. British Petroleum Co.*,⁵¹ the plaintiff, who had contracted for the importation and sale of Iranian oil,⁵² alleged that the defendants had conspired to prevent the sales from taking place.⁵³ The United States District Court for the Southern District of New York held that the plaintiff had not established a business injury because he had been deprived of future, rather than current sales; in other words, his "business" had not begun at the time of the injury.⁵⁴ Nevertheless, the district court held that his contract for future sales was "property," within the meaning of section 4, which was injured by the defendants' alleged conspiracy.⁵⁵ In explaining its holding, the court stated:

The statute explicitly uses the words "business or property" in the disjunctive. Congress intended this distinction to be meaningful. The word "property" has wider scope and is more extensive than the word "business." Less is required to prove "property" than to prove "business."⁵⁶

Thus, *Waldron* lends support to the theory that one need not be in business to suffer a section 4 property injury.

In another case supporting this theory, *Cleary v. Chalk*,⁵⁷ the United States Court of Appeals for the District of Columbia Circuit found that passengers

⁴⁷ *Id.* at 396.

⁴⁸ *Id.* at 396-97.

⁴⁹ 579 F.2d at 1082.

⁵⁰ *Id.*

⁵¹ 231 F. Supp. 72 (S.D.N.Y. 1964).

⁵² *Id.* at 78.

⁵³ *Id.* at 75.

⁵⁴ *Id.* at 83.

⁵⁵ *Id.* at 86.

⁵⁶ *Id.* at 86 (footnote omitted).

⁵⁷ 488 F.2d 1315 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974).

of a transit company whose fares were increased due to alleged antitrust violations were injured in their "property."⁵⁸ Citing *Chattanooga*, the court stated that "[o]ne who in a business transaction purchases an article is 'injured in [his] property' when he is 'led to pay more than the worth of the' article."⁵⁹ The court noted that the plaintiffs, regular fare-paying riders,⁶⁰ stated a sufficient allegation of injury to business or property.⁶¹ In the view of the *Cleary* court, one who pays for goods or services participates in a "business transaction,"⁶² even if he is not "in business," and is injured in his property when overcharged.

Chattanooga, *Waldron*, and *Cleary* suggest that one need not be in business to sue under section 4 of the Clayton Act.⁶³ In contrast, the Eighth Circuit, which decided *Reiter*, requires that a plaintiff be in business to maintain an action for damages under section 4. The Eighth Circuit apparently so held in *Ragar v. T.J. Raney & Sons*,⁶⁴ although there were alternative grounds for the decision.⁶⁵ In *Ragar*, a group of property owners contended that an alleged conspiracy by investment banking firms to fix municipal bond interest rates injured them by raising their real estate taxes.⁶⁶ The court held that the plaintiffs lacked a significant causal connection to the defendants' offense because the municipality, rather than the property owners, had been directly injured.⁶⁷ The court also held that the plaintiffs lacked a "business or prop-

⁵⁸ 488 F.2d at 1319 n.17.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1318.

⁶¹ *Id.* at 1319 n.17.

⁶² *Id.*

⁶³ See *Congress Building Corp. v. Loew's, Inc.*, 246 F.2d 587, 594, *rehearing denied*, 246 F.2d 587, 598 (7th Cir. 1957) ("The defendants herein contend that, 'Once the lease had been executed, plaintiff's 'business' of leasing ceased.' We do not think it necessary to consider this 'argument,' for we think it clear that plaintiff was injured in its property. 'A man is injured in his property when his property is diminished.'"); *State of Minnesota v. United States Steel Corp.*, 299 F. Supp. 596, 604 (D. Minn. 1969) ("Yet, as a practical matter, a suit by a governmental claimant who is a purchaser not engaged in business for profit is probably limited to the increased costs theory of damages. . . . Mr. Justice Holmes established the foregoing principle by stating that 'a person whose property is diminished by a payment of money wrongfully induced is injured in its property.'"); *Utah Gas Pipelines Corp. v. El Paso Natural Gas Co.*, 233 F. Supp. 955, 964 (D. Utah 1964) ("Even though there were no 'business' subject to injury, injury to plaintiff's property would be actionable if otherwise a basis of liability existed.");

⁶⁴ 388 F. Supp. 1184, 1187 (E.D. Ark. 1975), *aff'd per curiam*, 521 F.2d 795 (8th Cir. 1975).

⁶⁵ 388 F. Supp. at 1187.

⁶⁶ *Id.* at 1185.

⁶⁷ *Id.* at 1187. Some courts have required that a plaintiff be "directly injured" by an antitrust violation to have § 4 standing. *E.g.*, *Bravman v. Bassett Furniture Indus., Inc.*, 552 F.2d 90, 97, *rehearing denied*, 552 F.2d 90 (3d Cir. 1977); *Reibert v. Atlantic Richfield Co.*, 421 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910).

Other courts have required that the plaintiff be within the target area of the defendant's violation, that is, "within that area of the economy which is endangered by a

erty" injury. The court said that to have been injured in their business or property, the plaintiffs must have suffered a "competitive injury to their businesses due to the activities of the defendants."⁶⁸

The court in *Reiter* relied on *Ragar* in formulating its requirement of "commercial or competitive injury." Yet, the *Ragar* court never explained what it meant by "competitive injury." *Cleary*, *Waldron*, and *Chattanooga* suggest, however, that a plaintiff need not be in business in order to sue under section 4. It is also well established that a plaintiff alleging a property injury need not suffer a diminished ability to compete in order to have section 4 standing. In *Chattanooga*, the city was not competing with businesses to supply water to its citizens, yet the Court held that it was injured in its property. The bus passengers in *Cleary* were not competing, yet they, too, were held to have alleged an injury in their property. In ruling that only business injuries are compensable under section 4, the Eighth Circuit in *Reiter* lost sight of the principle Justice Holmes enunciated in *Chattanooga*: "A person whose property is diminished by a payment of money wrongfully induced is injured in his property."⁶⁹ *Chattanooga* and the decisions which rely on it compel the conclusion that consumers such as the plaintiffs in *Reiter* are injured in their property when they are overcharged due to antitrust violations. Since neither the language of section 4 nor the judicial opinions construing this language bar consumer suits,⁷⁰ the question becomes whether there is any valid policy reason for denying standing to consumers.

II. POLICY CONSIDERATIONS

In deciding which persons should recover damages under section 4, the Supreme Court has attempted to promote effective private enforcement of

breakdown of competitive conditions in a particular industry." *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

⁶⁸ 388 F. Supp. at 1187.

⁶⁹ 203 U.S. at 396.

⁷⁰ In construing the language of § 4, the Supreme Court has been guided by the broad purposes of that section, *i.e.*, compensation of persons injured by antitrust violations and deterrence of further violations. Thus, when the Court was asked to decide whether foreign governments were "persons" within the meaning of § 4, Justice Stewart observed that, "[i]n light of the law's expansive remedial purpose, the Court has not taken a technical or semantic approach in determining who is a 'person' entitled to sue for treble damages." *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 313 (1978). This suggests that the Court would also disapprove of a technical or semantic approach in determining who is injured in his property within the meaning of § 4 and would look to the broad purposes of the section in determining whether consumers are injured in their property.

The *Pfizer* opinion is also noteworthy for its comment that "[t]reble-damages suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers." 434 U.S. at 314. The anomaly of denying standing to American consumers becomes apparent when it is deemed necessary to protect them indirectly by allowing foreign governments standing to sue for treble damages. It is ironic that the *Pfizer* Court affirmed the Eighth Circuit's en banc holding which allowed standing to foreign governments, 550 F.2d 396, and then this same circuit denied standing to American consumers when it decided *Reiter*.

the antitrust laws while avoiding duplicative recoveries and undue complexities of proof. The opinions in *Hanover Shoe, Inc. v. United Shoe Machinery*,⁷¹ *Illinois Brick Co. v. Illinois*,⁷² and *Hawaii v. Standard Oil Co. of California*⁷³ illustrate the Court's use of these criteria.

In *Hanover Shoe*, a shoe machinery supplier argued that it was not liable for overcharging shoe manufacturers because the shoe manufacturers had passed the overcharges on to their customers and thus had not been injured.⁷⁴ The Court held that the machinery supplier could not avoid liability by showing that the shoe manufacturers had offset their damages by charging higher prices for shoes.⁷⁵ The Court's decision allowed the shoe manufacturers to recover damages which they in fact may not have suffered. In rejecting the machinery suppliers' "passing on" defense, the Court reasoned that allowing the defense would hinder antitrust enforcement for two reasons. First, the "passing on" defense would involve lengthy and complicated trials and almost insurmountable obstacles for plaintiffs who purchase directly from price-fixers.⁷⁶ If the "passing on" defense is not permitted, the plaintiff's damages are simply the amount he was overcharged; however, if the "passing on" defense is permitted, the plaintiff's damages are the difference between his prices, sales, and profits with the overcharge, and his prices, sales, and profits if there had been no overcharge. Calculation of what the plaintiff's prices, sales, and profits would have been without the overcharge depends on the elasticity of demand for his goods.⁷⁷ Proof of elasticity of demand is difficult and time-consuming.⁷⁸ Therefore, if the "passing on" defense is allowed and the issue of elasticity of demand enters into the calculation of damages, the length and complexity of trials would increase significantly. Recognizing this, the *Hanover Shoe* Court refused to allow a defendant to reduce his liability by proving that the plaintiff passed on the defendant's overcharges to his customers.⁷⁹

The Court's second reason for rejecting the "passing on" defense was the fear that "those who violate the antitrust laws by price-fixing or monopolizing

⁷¹ 392 U.S. 481 (1968).

⁷² 431 U.S. 720 (1977).

⁷³ 405 U.S. 251 (1972).

⁷⁴ 392 U.S. at 488.

⁷⁵ *Id.* at 494. In disallowing the passing on defense, the Court cited *Chattanooga* and stated that, "[a]s long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows." *Id.* at 489.

⁷⁶ *Id.* at 493.

⁷⁷ If the elasticity of demand for a good is high, a small increase in its price will cause consumers to decrease their purchases of the good significantly. Thus, if the seller of such goods has been forced to increase his price because his seller overcharged him, he may be damaged by a severe decline in his sales, and thus his profits, despite the fact that he is "passing on" the overcharge. Conversely, if demand for the seller's product is relatively inelastic, his sales volume would remain stable despite a price increase, and thus he would not be damaged as much by his supplier's overcharges. See L. SULLIVAN, ANTITRUST 787 (1977).

⁷⁸ *Id.*

⁷⁹ 392 U.S. at 493.

would retain the fruits of their illegality because no one was available who would bring suit against them.”⁸⁰ The Court reasoned that if the “passing on” defense were used throughout the chain of distribution, the cause of action would rest finally with the ultimate consumers, whose interest in a lawsuit is minimal due to the small amounts of their individual damages.⁸¹ Thus, the Court wanted to promote private enforcement by allowing the parties with the largest stake in the outcome to sue.

The same considerations that motivated the Court in *Hanover Shoe* to reject the “passing on” defense—the desire to avoid lengthy, complicated trials and to ensure defendants could not retain the fruits of their illegality—also arose in *Illinois Brick Co. v. Illinois*. The issue in *Illinois Brick* was whether a plaintiff could use “passing on” as an offensive theory of recovery. The plaintiffs, the state of Illinois and 700 local governmental entities, sued the manufacturers of concrete blocks, alleging that they had overcharged masonry contractors who in turn had passed their overcharges on to general construction contractors who then had passed their overcharges on to the plaintiffs.⁸² Thus, in *Illinois Brick* the plaintiffs used “passing on” to create their damages, whereas in *Hanover Shoe* the defendants attempted to use “passing on” to reduce the plaintiffs’ damages.

The Court in *Illinois Brick* again disapproved the use of the “passing on” theory,⁸³ holding that the indirect purchasers would not be permitted to sue. Like the Court in *Hanover Shoe*, the Court in *Illinois Brick* was concerned with the difficulty of proving a “passing on” theory of damages.⁸⁴ The trial of a case like *Illinois Brick* would be even more lengthy and complex than a case like *Hanover Shoe* because a plaintiff who purchased the product several steps down the chain of distribution would have to prove how much of the overcharge was passed on at each step in the chain. In contrast, a defendant using “passing on” as a defense would only need to show how much of the overcharge the plaintiff who purchased from him had passed on; thus, only one step in the chain would be involved.⁸⁵

In *Illinois Brick*, the Court also wanted to ensure that the antitrust laws would be effectively enforced by private damage actions.⁸⁶ It reasoned that allowing direct purchasers to recover the full amount of an overcharge would motivate these purchasers to sue. In contrast, if indirect purchasers, as well as direct purchasers, were allowed to sue, the potential recovery for each would be smaller and the probability that anyone would sue would be correspondingly reduced.⁸⁷ Another factor in the *Illinois Brick* decision was the possibil-

⁸⁰ *Id.* at 494.

⁸¹ *Id.* The Court was referring to the lack of incentive for consumers to sue because their damages are relatively small, not to any lack of standing on the part of consumers. *Id.*

⁸² 431 U.S. at 726.

⁸³ *Id.* at 736.

⁸⁴ *Id.* at 732.

⁸⁵ *Id.* at 732-33.

⁸⁶ *Id.* at 745.

⁸⁷ *Id.* at 745-46. Like the *Hanover Shoe* Court, the *Illinois Brick* Court based this conclusion “on the judgment that the antitrust laws will be more effectively enforced

ity that defendants would incur multiple liability if the Court permitted offensive but not defensive, use of the "passing on" theory.⁸⁸ An indirect purchaser could recover for all or part of an overcharge that was passed on to it, and a direct purchaser could recover from the same defendant the full amount of the overcharge.⁸⁹

Thus, the considerations underlying the *Illinois Brick* decision were the promotion of private enforcement, the avoidance of complexities of proof, and the prevention of duplicative recoveries. These same considerations were also present in a case decided prior to *Illinois Brick*, *Hawaii v. Standard Oil Co. of California*.⁹⁰ In *Hawaii*, the Court denied *parens patriae* standing to the state of Hawaii suing on behalf of its citizens who allegedly were overcharged because of price-fixing.⁹¹ Allowing the state to recover damages on behalf of its citizens, the Court reasoned, could lead to duplicative recoveries since the citizens also could recover individually for injuries to their business or property.⁹² Thus, a defendant might have to pay twice for the same offense—once to the state and once to the individual citizen.⁹³ Although the state claimed that its "general economy" was injured, the Court held that some of this injury was indistinguishable from injury to individual "business or property." The Court reasoned that "[a] large and ultimately indeterminable part of the injury to the 'general economy,' as it is measured by economists, is no more than a reflection of injuries to the 'business or property' of consumers for which they may recover themselves under § 4."⁹⁴

Like the Court in *Hanover Shoe* and *Illinois Brick*, the Court in *Hawaii* recognized the importance of private suits in preventing antitrust violators from retaining the fruits of their illegality. The state argued that "denying Hawaii the right to sue for injury to her quasi-sovereign interests will allow antitrust violations to go virtually unremedied."⁹⁵ The Court, however, re-

by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Id.* at 735.

The court in *Reiter* correctly declined to base its decision on *Illinois Brick*. 579 F.2d at 1079 n.3. While *Illinois Brick* held that, where overcharges are alleged to have been passed on, only the direct purchaser may sue the violator, and the plaintiffs in *Reiter* were not direct purchasers from the violators, *Reiter* is distinguishable because it involved resale price maintenance. Thus, no "passing on" of overcharges was alleged, but rather it was claimed that the retailers who sold to the plaintiffs were selling at higher prices determined by the manufacturers. The Court in *Illinois Brick* explained that indirect purchasers could sue in situations "in which market forces have been superseded [as when] the direct purchaser is owned or controlled by its customer." 431 U.S. at 736 n.16.

⁸⁸ 431 U.S. at 730.

⁸⁹ *Id.*

⁹⁰ 405 U.S. 251 (1972).

⁹¹ *Id.* at 252-53.

⁹² *Id.* at 265.

⁹³ *Id.* at 263. "[Section 4] gives the same right to every citizen of Hawaii with respect to any damage to business or property." *Id.*

⁹⁴ *Id.* at 264.

⁹⁵ *Id.* at 265.

jected this argument and emphasized the enforcement potential of class actions by private citizens.⁹⁶ Since these actions were available, the Court was unpersuaded that its barring of *parens patriae* suits would seriously hinder enforcement of the antitrust laws.⁹⁷

The Supreme Court in *Hanover Shoe*, *Illinois Brick*, and *Hawaii* demonstrated its concern for the availability of private antitrust enforcers. Its primary goal was to ensure that private plaintiffs can and do sue antitrust violators. In *Hanover Shoe*, the Court refused to allow the "passing on" defense because use of the defense would preclude all but remote purchasers, who were unlikely to sue, from prosecuting the violator. In *Illinois Brick*, the Court prohibited the offensive use of "passing on" because this would divide the damages among direct and indirect purchasers, thus reducing the incentive of any of these parties to sue. In *Hawaii*, the Court recognized the importance of private enforcement and stated that this goal was adequately served by class actions and thus *parens patriae* suits would be superfluous. Because of the Court's overriding concern with promoting private enforcement of the antitrust laws,⁹⁸ the Court has barred suits only where they would have serious

⁹⁶ *Id.* at 266. Despite the fact that the issue of consumer standing was not before the Court in *Hawaii*, the *Reiter* court placed a great deal of emphasis on the comment in *Hawaii* that the words "business or property" refer to "commercial interests or enterprises." 579 F.2d at 1083 (citing 405 U.S. at 264). This reliance is misplaced because a consumer's interest in paying a reasonable price is a "commercial interest." Professor Sullivan writes:

The [*Hawaii*] Court was not contrasting business with consumer interests, but was contrasting matters of commerce generally with the interest of a state in vindicating injuries to its general economy. In context, the phrase "commercial interests," used by the Court, is broad enough to include any injury to a consumer who, making a purchase in commerce, suffers an injury "in his *** property." This conclusion is reinforced by other parts of the opinion in *Hawaii*. For one thing, the Court makes clear that a state can recover for any injury affecting property held by it in a proprietary capacity, not just for injuries relating to property held by it in a business capacity. For another, the Court suggests both that "private citizens" can combine their interests in a class action and that, subject to the requirements of Rule 23 of the Federal Rules of Civil Procedure, a state may bring a class action on behalf of "some or all of its consumer citizens."

L. SULLIVAN, ANTITRUST 771 n.3 (1977) (citations omitted).

For a view that the *Hawaii* Court used "commercial interests" merely to distinguish economic values from noneconomic values, see Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U. L. REV. 374 (1976):

Whereas injury to such noneconomic values as aesthetics, conservation and recreation has been held sufficient to support standing in a nonantitrust context [footnote omitted], the Supreme Court [in *Hawaii*] has squarely held that Section 4 is concerned exclusively with "commercial" injury.

Id. at 397.

⁹⁷ As noted in note 96 *supra*, this statement by the Supreme Court that class actions by consumer-citizens were available reflects an implicit assumption by the Court that consumers have standing under § 4.

⁹⁸ The Court recently reiterated this concern in *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978):

The Court has noted that § 4 has two purposes: to deter violators and deprive them of "the fruits of their illegality," and to "compensate vic-

negative consequences, such as duplicative recoveries or unduly complicated and lengthy trials. Even where these factors have been present, as in *Illinois Brick* and *Hawaii*, the Court has emphasized that other parties could prosecute the violators, so its denial of the plaintiffs' standing would not weaken enforcement.

The policy considerations in *Hanover Shoe*, *Illinois Brick*, and *Hawaii* strongly support the notion that consumers should be allowed to recover damages resulting from overcharges on nonbusiness purchases. Limiting the right to recover damages to business purchasers seriously weakens the enforcement potential of section 4. If a price-fixer sells directly to a consumer, and the consumer is not allowed to sue, no one will be able to sue and the wrongdoer will retain the fruits of his illegality.⁹⁹ If a price-fixer sells to businesses, however, he will be subject to treble damage suits. Thus, *Reiter* produces an anomalous result: it immunizes price-fixers from liability for damages to the extent they sell to consumers, but it does not protect price-fixers from liability for damages to the extent they sell to businesses. This result is inconsistent with the policy of enforcing the antitrust laws against all violators.

Furthermore, the negative factors identified by the Supreme Court, duplicative recoveries and complexity of proof, are not present in consumer suits. The target of resale price maintenance¹⁰⁰ is the pocketbook of the ultimate consumer. No one except the ultimate consumer can recover the amount of the overcharge. Allowing consumers to sue would not lead to double recovery of a single overcharge. Moreover, proof of damages in consumer suits challenging resale price maintenance schemes is no more theoretically complex than proof of damages in suits brought by businesses. In both cases, it is necessary only to compare prices before and after the alleged conspiracy, with adjustments for changes in any other price-influencing conditions.¹⁰¹ Thus, allowing overcharged consumers to sue for damages under section 4 of the Clayton Act would promote enforcement of the antitrust laws and yet would not involve complex trials or duplicative recoveries.

III. ANTITRUST IMPROVEMENTS ACT OF 1976

Not only is the holding in *Reiter*—that overcharged consumers are not injured in their property and thus lack section 4 standing—unsupported by judicial authority and policy, but it also virtually nullifies the Antitrust Im-

tims of antitrust violations for their injuries." [citations omitted.] To deny a foreign plaintiff injured by an antitrust violation the right to sue would defeat these purposes. It would permit a price fixer or a monopolist to escape full liability for his illegal actions and would deny compensation to certain of his victims, merely because he happens to deal with foreign customers.

Id. at 314-15.

⁹⁹ Even if a private suit for an injunction under § 16 of the Clayton Act forces a violator to discontinue price-fixing, he still will have profited from his past illegal activity.

¹⁰⁰ See note 9 *supra*.

¹⁰¹ See L. SULLIVAN, ANTITRUST 786 (1977).

provements Act of 1976.¹⁰² This legislation amended the Clayton Act to allow state attorneys general to bring actions on behalf of natural persons injured by antitrust violations. Congress specifically intended it to aid consumers.¹⁰³ If an overcharge for nonbusiness purchases is not an injury in one's property, as the court held in *Reiter*, then the 1976 Act is useless. The state as *parens patriae* cannot sue on behalf of citizens who have not suffered a compensable injury.¹⁰⁴ Since the 1976 Act does not allow the state to sue on behalf of a "business entity,"¹⁰⁵ the effectiveness of the Act under *Reiter* is limited to individuals who make business-related purchases.¹⁰⁶

¹⁰² Pub. L. No. 94-435, 90 Stat. 1383 (1976). The Act was a response to the *Hawaii* decision which denied *parens patriae* standing to the state of Hawaii to sue for damages on behalf of its overcharged citizens.

¹⁰³ H.R. REP. NO. 499, 94th Cong., 2d Sess. 8-9 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572, 2578.

¹⁰⁴ Although there is no case support for the proposition that a state may not sue as *parens patriae* on behalf of citizens who lack standing as individuals, this proposition is presumed to be valid by both the Senate Judiciary Committee in its Majority Report on S. 1874 (The Antitrust Enforcement Act of 1978), S. REP. NO. 934, 95th Cong., 2d Sess. (1978), reprinted in CCH Trade Regulation Reports No. 339, Part II, at 16 (June 26, 1978), and by the Justice Department in an amicus memorandum submitted in support of the plaintiff's position in *Reiter*, Memorandum for the United States as Amicus Curiae in Support of a Petition for Rehearing with a Suggestion for Rehearing En Banc, John H. Shenefield, Assistant Attorney General, Barry Grossman, Bruce E. Fein, Attorneys, Department of Justice, at 9.

In his dissent to the denial of a rehearing in *Reiter*, Judge Lay expressed the view that "[t]he denial of standing to an individual consumer reduces to a nullity the *parens patriae* provisions of the Antitrust Improvements Act of 1976 . . ." 579 F.2d at 1087.

¹⁰⁵ 15 U.S.C. § 15c(a)(1)(B)(ii) (1976).

¹⁰⁶ Both the Senate and House Judiciary Committees have drafted bills (S. 1874, "The Antitrust Enforcement Act of 1978," and H.R. 11942, "Clayton Act Amendments of 1978"), which would "permit consumers, businesses, and governments injured by antitrust violations to recover [treble damages] whether or not they have dealt directly with the antitrust violator." S. REP. NO. 934, 95th Cong., 2d Sess. 1 (1978), reprinted in CCH Trade Regulations Reports No. 339, part II, at 1 (June 26, 1978); H.R. REP. NO. 1397, 95th Cong., 2d Sess. (1978), reprinted in CCH Trade Regulation Reports No. 345, Part II, at 1 (August 8, 1978). The Senate Committee Report noted that the *Illinois Brick* rule has led to a virtual nullification of the Antitrust Improvements Act of 1976 because "*parens patriae* suits could not be brought in the vast majority of the cases (i.e. where consumers are indirect purchasers from a violator) contemplated by Congress." CCH Trade Regulations Reports No. 339, Part II, at 16 (June 26, 1978). If the sponsors of S. 1874 and H.R. 11942 intend to protect consumers who make nonbusiness purchases, their legislation, if passed, will meet a similar fate under *Reiter*, since these purchasers, direct or indirect, have been deemed not to suffer a property injury.

The House Judiciary Committee was aware of the *Reiter* problem and commented:

It does not matter whether the purchaser is a consumer or a business entity. When a consumer pays more by reason of an antitrust violation, he is injured in his "property," and may prove his injury as an indirect purchaser under this bill or as a direct purchaser under section 4, 4A, or 4C. The committee thus disapproves *Weinberg v. Federated Department Stores*, 426 F. Supp. 880 (N.D. Calif. 1977) and more recently *Reiter v. Sonotone Corp.*, Civ. No. 77-1474 (8th Cir. 1978), both holding that even direct purchasing

In enacting the Antitrust Improvements Act of 1976, some legislators indicated that they believed consumers had section 4 standing, but that the consumers' individual claims were too small to make lawsuits worthwhile.¹⁰⁷ Congress provided specially in the 1976 Act for individual suits by consumers who wish to bring them by allowing these individuals to "opt out" of the *parens patriae* suit.¹⁰⁸ Thus, the drafters of the 1976 Act thought that, in theory, consumers could sue prior to the 1976 Act, but that, in practice, they could not afford to. Although Congress intended the 1976 Act to remove the practical obstacles to consumer suits, the *Reiter* decision creates a theoretical obstacle unknown to the legislators, and thus defeats the purpose of the 1976 Act.

CONCLUSION

While the courts must place reasonable boundaries on the class of persons who may sue for treble damages under section 4 of the Clayton Act, in the absence of controlling statutory language, courts should base their limitations on policy grounds.¹⁰⁹ As a policy matter, the Supreme Court has limited the class permitted to sue to avoid duplicative recoveries and undue complexities of proof. Permitting consumers to sue under section 4 would not involve either of these problems and, therefore, would not undercut the Court's policy goals. Moreover, consumer suits would promote the paramount policy behind section 4—private antitrust enforcement. In cases of resale price maintenance in consumer goods, the injured class probably consists mainly of non-business purchasers such as the plaintiffs in *Reiter*. If they cannot sue for damages, a large proportion of the damages inflicted will remain in the hands of the defendants. In the language of *Hanover Shoe*, antitrust violators will "retain the fruits of their illegality."

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consumers are unable to sue for injury to their property by reason of violations of the antitrust laws.

CCH Trade Regulation Reports No. 345, 15 (August 8, 1978).

¹⁰⁷ See S. REP. NO. 803, 94th Cong., 2d Sess. 5-7 (1976); H.R. REP. NO. 499, 94th Cong., 2d Sess. 3-10 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572, 2573.

¹⁰⁸ 15 U.S.C. § 15c(b)(2) (1976).

¹⁰⁹ For a comprehensive policy approach to antitrust standing, see Berger and Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977). While advocating a frank balancing of relevant policies and interest in § 4 standing decisions, *id.* at 844, the authors make a distinction between antitrust standing and the scope of protection under the antitrust laws, *id.* at 835, two concepts that have become blurred in the case law. The policy against duplicative recoveries, a major concern of the *Hawaii* Court, is, in the authors' opinion, "a sound policy consideration, but denial of standing is too blunt an instrument to promote this interest sensitively." *Id.* at 851. Apportionment of damages after a trial on the merits is suggested as an alternative. *Id.* at 862. The authors also express misgivings about judicial denial of standing to avoid burdening the courts with typically long and complex antitrust litigation. *Id.* at 854.