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ANTITRUST LAW—AN ILLUSORY EXPANSION OF CONSUMER STANDING UNDER SECTION 4 OF THE CLAYTON ACT—Reiter v. Sonotone Corp., 442 U.S. 330 (1979)

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ANTITRUST LAW—AN ILLUSORY EXPANSION OF CONSUMER STANDING UNDER SECTION 4 OF THE CLAYTON ACT—*Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

I. INTRODUCTION

"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. . . ."[1] This section of the Clayton Act appears to grant a broad right of redress to those injured by violations of the antitrust laws. The courts have recognized, however, that although an antitrust violation injures many as it ripples through the economy, not all those who are injured have the right to seek redress. Consequently, the courts have used restrictive interpretations of the words found in section 4 to limit the standing of those seeking the treble damage remedy.

Before 1977, a consumer who paid an inflated price for a commodity because of the illegal actions of the manufacturer was able to seek redress under section 4. This remedy was available whether the consumer had purchased the commodity directly from the manufacturer or indirectly, through a retail outlet. This changed in 1977 when the United States Supreme Court decided *Illinois Brick Co. v. Illinois*.[2] That case defined the word "injured" in section 4 by holding that only persons who purchased directly from the antitrust violator were injured within the meaning of section 4.[3] Since most consumers make their purchases indirectly through intermediaries, the direct purchaser rule of *Illinois Brick* effectively bars consumer actions for the treble damage remedy.

In 1979, in *Reiter v. Sonotone Corp.*,[4] the Supreme Court was faced with the question of whether a consumer, injured by paying more than she would have in the absence of antitrust violations, was injured within the meaning of the section 4 term "business or property."[5] Ignoring the impact of the direct purchaser rule of *Illinois Brick*, the Court held that such consumer injuries were within the protection of section 4 and granted standing.[6] This note will ex-

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1. 15 U.S.C. § 15 (1976) [hereinafter referred to as § 4 of the Clayton Act]. *See also* note 28 *infra*.
2. 431 U.S. 720 (1977).
3. *Id.* at 746.
4. 442 U.S. 330 (1979).
5. *Id.* at 338.
6. *Id.* at 342.

amine the conflict between *Illinois Brick* and *Reiter*, the congressional intent regarding consumer standing under section 4, and the resulting practical significance of the *Reiter* holding.

II. THE CASE

On May 2, 1975, Kathleen Reiter sued Sonotone Corp.[7] and four other manufacturing firms[8] under section 4 of the Clayton Act.[9] Sonotone manufactured the hearing aid which Reiter purchased from a dealer representative.[10] She alleged that Sonotone had violated the antitrust laws[11] by controlling the price at which hearing aids could be sold to consumers.[12] Reiter sought redress for the injury she incurred by paying a higher price for the hearing aid than she would have paid in the absence of any alleged antitrust violation.[13] The defendants moved for dismissal of Reiter's suit claiming she lacked standing.[14]

The issue raised by Sonotone's motion for dismissal was whether section 4 of the Clayton Act, which requires an injury to business or property,[15] encompassed only injuries to commercial or business interests.[16] Sonotone argued that Reiter's injury, one suffered by a consumer who had been forced to pay a higher price for goods purchased for personal use, was outside the protection of section 4 since it was not of a commercial nature.[17]

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7. Reiter v. Sonotone Corp., 435 F. Supp. 933 (D. Minn. 1977), *rev'd*, 579 F.2d 1077 (8th Cir. 1978), *rev'd and remanded*, 442 U.S. 330 (1979). Reiter sought to represent the class of all persons who had purchased hearing aids manufactured by one of the five defendants. *Id.* at 934.

8. The other four firms were Beltone Electronics Corporation, Dahlberg Electronics, Inc., Textron Incorporated, and Radioear Corporation.

9. *See* note 28 *infra* and accompanying text.

10. 435 F. Supp. at 934.

11. Specifically, Reiter claimed the defendants had:

> restricted the territories, customers, and brands of hearing aids offered by their retail dealers, used the customer lists of their retail dealers for their own purposes, prohibited unauthorized retailers from dealing in or repairing their hearing aids, and conspired among themselves and with their retail dealers to fix the retail prices of the hearing aids.

442 U.S. at 335 n.1.

12. 435 F. Supp. at 934.

13. *Id.*

14. All defendants except Sonotone, who did not appear in any proceeding before the district court, moved for dismissal. *Id.*

15. *See* note 28 *infra* and accompanying text.

16. 435 F. Supp. at 935.

17. *Id.*

Judge Larson of the United States District Court for Minnesota granted standing to Reiter.[18] Judge Larson held that Reiter suffered injury to her business or property within the meaning of section 4.[19] The United States Court of Appeals for the Eighth Circuit reversed the lower court's holding and denied standing.[20] The Supreme Court, with Chief Justice Burger writing for the majority, held that Reiter's injury, that of a consumer who had paid an illegally higher price for goods purchased for personal use, was protected by section 4.[21] The Court then remanded the case to the district court for further proceedings.[22]

Reiter succeeded in bringing consumer interests within the business or property language of section 4 of the Clayton Act. During the appeal of the case, however, the Supreme Court decided *Illinois Brick*, which held that only a direct purchaser is injured within the meaning of section 4.[23] Reiter, an indirect purchaser since she bought her hearing aid from a retailer and not from the manufacturer,[24] will be denied standing on remand under the *Illinois Brick* rule. Because of the apparent conflict between *Illinois Brick* and *Reiter*, resort must be made to the congressional position on standing under section 4. This note will examine that position as well as explain its impact on the *Reiter* holding.

III. BACKGROUND

A. *The Sherman and Clayton Acts*

Congress passed the Sherman Act in 1890 to prohibit monopolies, attempts to monopolize, and all agreements in restraint of trade.[25]

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18. *Id.* at 938.
19. *Id.*
20. Reiter v. Sonotone Corp., 579 F.2d at 1087.
21. 442 U.S. at 339.
22. *Id.* at 345.
23. 431 U.S. at 746.
24. 435 F. Supp. at 934.
25. The Sherman Act, ch. 647, 26 Stat. 209 (1890), provided in part:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . , is hereby declared to be illegal. . . .

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . , shall be deemed guilty of a misdemeanor. . . .

SEC. 7. Any person who shall be injured in his business or property by

In response to the merger movement of 1897-1904,[26] and because the Sherman Act was ineffectual in reaching certain other anticompetitive forms of conduct,[27] the Clayton Act was passed in 1914 to amend the Sherman Act.[28]

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any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor . . . and shall recover three fold the damages. . . .

26. A. AUSTIN, ANTITRUST: LAW, ECONOMICS, POLICY 3-4 (1976).

27. The Sherman Act was ineffectual in reaching tying arrangements, exclusive dealings, price discrimination, and secret rebates. Lack of enforcement and prosecution as well as the unresponsiveness of the judicial system were also considered to be problems of the Sherman Act. *Id.*

28. The Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified in scattered sections of 15, 29 U.S.C.). The purpose of the Act, as stated by its sponsors, was to "make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the [Sherman Act]. . . ." S. REP. NO. 698, 63d Cong., 2d Sess. 1 (1914). The Clayton Act provides in part:

> SEC. 2. That it shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers . . . , where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce [or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination. . .].

(Bracketed portion contains language added by the Robinson-Patman Act, Pub. L. No. 74-692, ch. 592, 49 Stat. 1526 (1936)).

> SEC. 3. [I]t shall be unlawful for any person engaged in commerce . . . , to lease or make a sale or contract for sale of goods . . . , or fix a price charged therefor . . . , on the condition . . . that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor . . . of the lessor or seller, where the effect of such lease, sale, or contract . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Because § 7 of the Sherman Act limited the treble damage remedy to those injured by a violation of the Sherman Act alone, it was amended by the Clayton Act. The Clayton Act gives the remedy to those injured by any violation of the antitrust laws:

> SEC. 4. [A]ny 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. . . .
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> SEC. 7. That no corporation engaged in commerce shall acquire . . . any part of the stock or other share capital of another corporation [and no corporation . . . shall acquire the whole or any part of the assets of another corporation . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly].

(Bracketed portion contains language added by the Robinson-Patman Act, Pub. L. No. 74-692, ch. 592, 49 Stat. 1526 (1936)).

> SEC. 8. [This section prohibits any person from being a director in two

The primary purpose of the Sherman Act and its amendments was to prevent restraints of trade which lessen free and full competition.[29] Congress recognized the benefits of a free market[30] and intended only to regulate those acts which prevented the independent operation of the marketplace.[31] In effectuating the legislative aim of protecting free and full competition, Congress chose

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or more corporations, any one of which has a capital and surplus of more than one million dollars] if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors. . . .

29. The initial resolution adopted by the Senate, which started the legislative process, directed the Committee on Finance to inquire into and report:

> [S]uch measures as it may deem expedient to set aside, control, restrain or prohibit all arrangements, contracts, agreements, trusts, or combinations between persons or corporations, made with a view, or which tend to prevent free and full competition . . . , with such penalties and provisions . . . as will tend to preserve freedom of trade and production, the natural competition of increasing production, the lowering of prices by such competition. . . .

19 CONG. REC. 6041 (1888). *See generally* M. FORKOSCH, ANTITRUST AND THE CONSUMER (ENFORCEMENT) 32-170 (1956).

30. D. DEWEY, MONOPOLY IN ECONOMICS AND LAW 7-24 (1959). Economic analysis suggests that the benefits of a free market are decreased prices with increased supply, increased technology and innovation, efficient production and distribution, and efficient resource allocation.

Competition also tends toward desired social goals. Because the private decisions of individual buyers and sellers in the marketplace determine economic factors such as price, level of production, allocation of resources, distribution, and technology, there is less need for governmental intervention. Since the free market disperses private power, there is also less need for governmental regulation. To the extent that this lessens the impact of special interest groups on the legislative process, the democratic system is improved.

31. The combinations prohibited by the Act were those: "made with a view to prevent competition," 21 CONG. REC. 2462 (1890) (remarks of Sen. Sherman); which "control prices," *id.* at 2471 (remarks of Sen. Allison); made "to limit production" for "the purpose of destroying competition," *id.* at 2558 (remarks of Sen. Pugh); "that effect the price of commodities," *id.* at 2609 (remarks of Sen. Morgan).

Senator Platt, a critic, commented that the Act proceeds on the assumption that "competition is beneficient to the country." *Id.* at 3147.

See generally 21 CONG. REC. 2457-61 (1890) (remarks of Sen. Sherman); *id.* at 2729 (remarks of Sen. Platt); *id.* at 4089 (remarks of Rep. Culbertson).

When the Act was attacked as too expansive, supporters explained that mergers which would enable the new enterprise to compete more effectively with larger enterprises would not be impeded. The merger of two small competitors in an industry characterized by large competitors would not be barred. 95 CONG. REC. 11,486, 11,488, 11,506 (1949); 96 CONG. REC. 16,436 (1950); H.R. REP. NO. 1191, 81st Cong., 1st Sess. 6-8 (1949); S. REP. NO. 1775, 81st Cong., 2d Sess. 4 (1950). The merger of one bankrupt firm with a financially healthy one would not be prohibited. 96 CONG. REC. 16,435, 16,444 (1950); S. REP. NO. 1775, 81st Cong., 2d Sess. 7 (1950); H.R. REP. NO. 1191, 81st Cong., 1st Sess. 6 (1949).

The agreement by Congress concerning this purpose of the Act was noted by the Supreme Court. *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911).

language[32] which would allow enforcement of the law,[33] deterrence of antitrust violations,[34] and encouragement of suits by individuals.[35]

B. *Standing*

In considering the scope of standing, reference first must be made to the United States Constitution. The Constitution limits the federal courts' jurisdiction to cases and controversies.[36] This language has been interpreted to require that the dispute be adjudicated in an adversarial context and in a form historically viewed as capable of judicial resolution.[37] To meet the first requirement,

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32. Sherman Act, ch. 647, § 7, 26 Stat. 209 (1890) (*as amended by* the Clayton Act, ch. 323, § 4, 38 Stat. 731 (1914)). *See* notes 25 & 28 *supra* and accompanying text.

33. The House debates show such an intent. *See generally* 51 CONG. REC. 16,274-75 (1914) (remarks of Rep. Webb); *id.* at 16,317-19 (remarks of Rep. Floyd). Senate debates reflected no discussion of the enforcement value of the treble damage remedy. This was in spite of attacks on the Bill regarding its lack of meaningful sanctions. *See, e.g.*, 51 CONG. REC. 15,818-21 (1914) (remarks of Sen. Reed); *id.* at 16,042-46 (remarks of Sen. Norris). *See also* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 329 (1955); United States v. Borden Co., 347 U.S. 514, 518 (1954).

34. Treble damages of § 4 of the Clayton Act were provided in part for punitive purposes. 21 CONG. REC. 3147 (1914) (remarks of Sen. George). *See also* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969) (developer granted standing to sue for lost profits caused by construction of pre-fabricated homes which was a condition of financing provided by manufacturer's subsidiary); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968) (common law doctrine of *in pari delicto* held inapplicable as defense in suit by licensed operators against the corporation granting them the licenses for antitrust violations arising out of their agreement).

35. The treble damages of § 4 of the Clayton Act were provided to offset "the difficulty of maintaining a private suit against a combination such as is described" in the Act. 21 CONG. REC. 2456 (1914) (remarks of Sen. Sherman).

Debates accompanying § 7 of the Sherman Act, which first provided for the treble damage remedy, showed that the remedy was intended for "[t]he people of the United States as individuals." 21 CONG. REC. 1767-68 (1890) (remarks of Sen. George). *See also* 21 CONG. REC. 2612 (1890) (remarks of Sens. Teller and Reagan); *id.* at 2615 (remarks of Sen. Coke).

When amended by § 4 of the Clayton Act, debates showed that it was intended to "open the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and give the injured party ample damages for the wrong suffered." 51 CONG. REC. 9073 (1914) (remarks of Rep. Webb). *See, e.g.*, 51 CONG. REC. 9079 (1914) (remarks of Rep. Volstead); *id.* at 9270 (remarks of Rep. Carlin). *See also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977) (loss of anticipated earnings caused by acquisition of bankrupt competitor held not to be within protection of antitrust laws even though acquisition was a violation).

36. U.S. CONST. art. III, § 2.

37. Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 151-52 (1970) (association of data processors granted standing to seek judicial re-

that there be an adversarial context, the parties must allege an adverse interest in the cause of action or in the subject matter of the controversy.[38] The interest alleged may not be remote or incidental. Such an interest may be aesthetic, recreational, or conservational, as well as economic.[39]

The second requirement, that the case be capable of judicial resolution, is met by alleging that the granting of relief will result in a benefit to the party bringing the action.[40] As with the interest alleged in the cause of action, the benefit to be gained from bringing the cause of action may be aesthetic, conservational, or recreational, as well as economic.[41] By examining the requirements of an interest in the cause of action and a benefit to be gained, the courts are able to allocate scarce judicial resources to cases worthy of adjudication.

C. *Standing and Section 4*

Section 4 of the Clayton Act provides that any person injured in his business or property by reason of an antitrust violation may sue for treble damages.[42] The broad scope of section 4,[43] however, may allow the litigation of negligible, highly speculative, and remote claims.[44] Such claims may be brought by plaintiffs who alleged an injury in order to coerce settlement through a defendant's fear of the treble damage award allowed by the Clayton Act. This

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view of Comptroller of Currency's decision that national banks could provide data processing services).

38. Bosley v. McLaughlin, 236 U.S. 385, 395 (1915); Standard Stock Food Co. v. Wright, 225 U.S. 540, 550 (1912); Cronin v. Adams, 192 U.S. 108, 114 (1904).

39. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966) (responsible representative of listening public granted standing as party in interest in hearing before FCC); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 616 (2d Cir. 1965) (conservation group with interests in aesthetic, conservational, and recreational impact of FPC ruling granted standing to seek review).

40. Falvey v. Foreman-State Nat'l Bank, 101 F.2d 409, 416 (7th Cir. 1939) (shareholders of bank denied standing to sue on behalf of bank which had assigned cause of action to another bank).

41. *See* note 39 *supra* and accompanying text.

42. *See* note 28 *supra* and accompanying text.

43. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933) (exclusive selling agency created by coal producers to mitigate existing evils in industry and foster competition held not in derogation of antitrust laws although incidental effect on prices would result).

44. Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910) (shareholder of photographic supply house forced out of business by defendant's alleged illegal conduct held not to have standing since injury was to corporation).

concern has increased with development of multi-level distribution systems in business which are characterized by middlemen separating the manufacturers and ultimate consumers in the chain of distribution. The separation of the injured party from the antitrust violator aggravates the problem of proof of damages.[45]

To resolve these conflicts, the courts have used the standing doctrine to limit the suits capable of being brought under section 4. By restrictive interpretations of the words found in section 4, the courts have limited the interests protected by the statute and, consequently, the right to standing. This judicial activity has centered around the meaning of, and the interests protected by, the words "person," "injured," "business or property," and "by reason of."[46]

D. *Standing for Indirect Purchasers*

Before 1977, the Supreme Court had not directly addressed the question of the standing of consumers who were indirect purchasers, that is, persons who purchased goods from retailers instead of directly from the alleged antitrust violator. In 1977 the Court decided *Illinois Brick* and held that only direct purchasers, and not others in the chain of distribution, were injured within the meaning of section 4.[47] The case involved the State of Illinois, together with 700 governmental bodies, suing manufacturers of cement blocks for selling the blocks at higher prices due to an alleged price conspiracy.[48] The cement blocks had been sold by the manufacturers to contractors who, after successfully bidding on construction projects, had incorporated the blocks into buildings which then had been sold to the plaintiffs.[49] Consequently, the plaintiffs were indirect purchasers, and the success of their cause of action depended on proving that the contractors had passed on to them the Illinois Brick Company's illegal overcharges.

To properly understand the *Illinois Brick* ruling, consideration must first be given to *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[50] That case involved a section 4 action brought by a

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45. Beane, *Antitrust: Standing and Passing On*, 26 BAYLOR L. REV. 331, 332 (1974).

46. *See* Note, *Standing to Sue for Treble Damages Under Section Four of the Clayton Act*, 64 COLUM. L. REV. 570 (1964).

47. 431 U.S. at 746.

48. *Id.* at 726.

49. *Id.*

50. 392 U.S. 481 (1968).

manufacturer of shoes to recover illegal overcharges from the manufacturer of its shoe machinery.[51] In defense, the shoe machinery manufacturer sought to show that the plaintiff had not been injured in its business as required by section 4. The defendant claimed that the illegal overcharges had been passed on in the form of higher shoe prices to the plaintiff's customers.[52] Under the defendant's theory the illegal overcharge was absorbed by the plaintiff's customers, indirect purchasers of the defendant's shoe machinery, and that they were the actual injured party.[53]

The Court held that the direct purchaser alone, here the shoe manufacturer, was injured by the full amount of the illegal overcharge.[54] The Court was unwilling to complicate section 4 actions by tracing the effects of overcharges on prices, costs, sales, and profits.[55] Second, if antitrust violators were allowed to defend with the argument that overcharges were passed on to others in the chain of distribution, section 4 actions would devolve on consumers with minuscule damages and little interest in bringing suit. Defendants would, therefore, potentially be able to keep the fruits of their illegal actions.[56]

The *Illinois Brick* Court was trapped by the *Hanover Shoe* decision. The Justices saw their options as either overruling *Hanover Shoe* or applying the decision to both plaintiffs and defendants equally.[57] In deciding upon the latter course, they also adopted the *Hanover Shoe* reasoning that to do otherwise would overly complicate section 4 actions with convoluted theories of proof.[58] The *Illinois Brick* Court also reasoned that if indirect purchasers were allowed to establish their cases by attempts to prove that illegal overcharges had been passed on to them by direct purchasers, defendants would be exposed to multiple liability.[59] This would result since under *Hanover Shoe* the direct purchaser had standing to sue for treble damages as well.

Although *Illinois Brick* was decided before the *Reiter* appeal arrived before the Supreme Court, the direct purchaser rule,

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51. *Id.* at 484.
52. *Id.* at 487-88.
53. *Id.*
54. *Id.* at 489.
55. *Id.* at 492-93.
56. *Id.* at 494.
57. 431 U.S. at 729.
58. *Id.* at 737.
59. *Id.*

which would have denied Reiter standing, was not raised since the issue had not been addressed by the lower courts.[60] Any decision promulgated with regard to the business or property language of section 4 would therefore be subject to the direct purchaser rule of *Illinois Brick*.

IV. COURT'S ANALYSIS

In ruling on Sonotone's motion to dismiss for lack of standing, the Supreme Court had to resolve the question of whether Reiter's injury, that of paying a higher price for goods due to antitrust violations, was an injury to business or property.[61] The Court first found that canons of statutory construction mandated an interpretation of "business or property" that would give effect to the disjunctive "or."[62] Since the Clayton Act had been held to be comprehensive in its terms and coverage,[63] the Court gave "property" its naturally broad and inclusive meaning[64] and held that paying an illegally high price was an injury to property.[65]

The Court also relied on two cases to support its decision.[66] The first, *Chattanooga Foundry & Pipe Works v. Atlanta*,[67] held that an injury to property included the injury incurred by a city when it was led to pay higher prices in the marketplace for pipes used in its waterworks.[68] The *Chattanooga Foundry* Court reasoned that if the term "business or property" were restricted to commercial interests, the word "property" would become meaningless since business and commerce are identical.[69] The *Reiter* Court explained *Chattanooga Foundry* as being based solely on the city's position as a consumer in the marketplace.[70] Since the city had recourse to the courts for redress of the injury it incurred by paying

60. 442 U.S. at 337 n.3.
61. *Id.* at 334.
62. *Id.* at 338.
63. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) (California sugar refiners' agreement to pay uniform price for sugar beets held to be within proscription of Sherman Act since sugar was sold in interstate commerce).
64. "Property" was defined by the Court as comprehending anything of material value. 442 U.S. at 338. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1818 (1976).
65. 442 U.S. at 342.
66. *Id.* at 339-42.
67. 203 U.S. 390 (1906).
68. *Id.* at 396.
69. *Id.* at 397.
70. 442 U.S. at 342.

an illegally higher price for its pipes, it followed that Reiter had a similar right and that property must be found to include the consumer's interest.[71]

The second case relied on by the *Reiter* Court, *Hawaii v. Standard Oil Co. of California*,[72] involved alleged conspiracies in restraint of trade and attempts to monopolize the distribution of refined petroleum products in Hawaii.[73] The *Hawaii* Court held that Hawaii did not have standing to sue as *parens patriae* on behalf of its citizens for injuries to its general economy.[74] In the course of its decision, the Court stated that "business or property" referred only to commercial interests or enterprises.[75] The *Reiter* Court explained this language by reasoning that "commercial interests" was used only as a generic reference to the interests of Hawaii as a party to a commercial transaction.[76] The Court further explained that such a result was mandated by dicta in the case which stated that Hawaii would have a cause of action as a consumer in the marketplace if an injury was incurred through payment wrongfully induced.[77]

The Court concluded with a discussion of the legislative history of the Clayton Act. The Justices first pointed out that the discussions surrounding passage of the Act shed little light on the meaning of "business or property."[78] The Court, however, did recognize that the right of a consumer to bring such an action for damages was never questioned.[79] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[80] was also cited for its examination of the legislative history of the Act.[81] *Brunswick* found the Clayton Act to be a remedy for the people of the United States as individuals[82] and,

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71. *Id.* at 340.
72. 405 U.S. 251 (1972).
73. *Id.* at 265.
74. *Id.*
75. *Id.* at 264.
76. 442 U.S. at 341-42.
77. *Id.* at 342.
78. *Id.* at 342 n.4 (citing Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972)); Weinberg v. Federated Dept. Stores, Inc., 426 F. Supp. 880 (N.D. Cal. 1977) (retail purchasers of clothing sold at artificially high prices held not to have suffered an injury to "business or property"); I.P. AREEDA & D. TURNER, ANTITRUST LAW (1978); M. FORKOSCH, *supra* note 29; Note, *Closing the Door on Consumer Antitrust Standing*, 54 N.Y.U. L. REV. 237 (1979).
79. 442 U.S. at 343.
80. 429 U.S. 477 (1977).
81. 442 U.S. at 343.
82. 429 U.S. at 486. *See also* note 35 *supra* and accompanying text.

therefore, that the Act supported a broad reading of "business or property."[83]

Although an expansive reading of "business or property" would give standing to a larger group of potential litigants and therefore would increase the burden on the federal courts, the Court reasoned that this interpretation of the statute must be accepted.[84] Any increase in demand on judicial resources would be met by resources supplied by Congress.[85] The potentially ruinous effect on small business that might occur because of the costs associated with increased litigation was dismissed as more properly within the province of Congress to resolve.[86]

V. ANALYSIS

Although the Supreme Court has interpreted the meaning of "business or property" broadly to include Reiter's consumer injury, absent the overruling of *Illinois Brick*, Reiter will be defeated on remand. This result is mandated since Reiter was an indirect purchaser, having bought from a retailer,[87] and therefore falls squarely within the direct purchaser rule of *Illinois Brick*. The remaining question is whether such an outcome is consistent with the congressional interpretation of standing for indirect purchasers.

The congressional interpretation of standing for indirect purchasers is found in the Antitrust Improvements Act of 1976.[88] The Act created no new substantive liability for antitrust violators.[89] Instead, it created a new procedure whereby state attorneys general could sue antitrust violators on behalf of injured citizens.[90] Since the Act was only procedural in nature, Congress' view of liability under the Act was also its interpretation of liability under section 4 of the Clayton Act. Some commentators, quoting the Act,[91] suggest

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83. 442 U.S. at 344.
84. *Id.*
85. *Id.*
86. *Id.* at 344-45.
87. 435 F. Supp. at 934.
88. Pub. L. No. 94-435, tit. III, 90 Stat. 1394 (1976) (codified in scattered sections of 15 U.S.C.).
89. H.R. REP. NO. 499, 94th Cong., 2d Sess. 9, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2578.
90. *Id.*
91. S. REP. NO. 803, 94th Cong., 2d Sess. 42 (1976) provided in part:

> A direct cause of action is granted the States to avoid the inequities and inconsistencies of restrictive judicial interpretations. . . . [This Act] is intended to assure that consumers are not precluded from the opportunity of

that Congress' view was that the economic burden of most antitrust violations was borne by the consumer and that the consumer should have a remedy regardless of his remoteness from the antitrust violator.[92] Further support for this position can be found in the bills submitted before Congress which would overrule *Illinois Brick* and would grant standing to indirect purchasers.[93]

In passing the Antitrust Improvements Act, however, Congress cited several cases as correctly stating the law in this area.[94] These cases are reconcilable with *Illinois Brick* and suggest that Congress, like the Supreme Court, would generally deny indirect purchasers standing. The *In re Western Liquid Asphalt Cases*,[95] for example, involved suits brought by governmental agencies to recover damages for injuries incurred through purchases of asphalt from suppliers who allegedly engaged in price-fixing conspiracies.[96] Standing was granted although the plaintiffs were indirect purchasers, having purchased the asphalt as part of road projects completed by contractors through the bidding process.[97]

The *Liquid Asphalt* court granted standing for two reasons. First, proof of damages would not be an overly complex issue,[98]

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proving their damage and to avoid problems with respect to manageability [of class actions], standing, privity, target area, remoteness, and the like.

92. *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. at 757 (Brennan, J., dissenting); Note, *The Supreme Court 1976 Term*, 91 HARV. L. REV. 1, 230 (1977); Note, *Antitrust Law—Standing to Sue*—Illinois Brick Co. v. Illinois, 46 U. CIN. L. REV. 875, 881-82 (1977); Note, *Illinois Brick: An Abuse of Precedent to Circumvent Congressional Intent*, 1977 UTAH L. REV. 501, 517-18.

93. The initial efforts to overrule *Illinois Brick* attempted to do so by amending § 4 to read "any person who shall be injured *in fact, directly, or indirectly*, in his business or property by reason of anything forbidden in the antitrust laws may sue. . . ." H.R. 8359, 95th Cong., 1st Sess. (1977); S. 1874, 95th Cong., 1st Sess. (1977) (emphasis added).

Later efforts provided that "[a]ny purchaser or seller . . . shall, upon proof of payment . . . , be deemed injured . . . whether or not such purchaser or seller . . . dealt directly with the defendant." S. 300, 96th Cong., 1st Sess. (1979). S. 300 did provide for a defense based on the passing on of any overcharges to others further along the chain of distribution. The availability of such a defense was left to the discretion of the court. *Id.*

94. The Act was patterned "after such innovative decisions as *In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973); *In re* Master Key Litigation, [1973] TRADE CAS. (CCH) ¶ 74,680 and [1975] TRADE CAS. (CCH) ¶ 60,377 (D. Conn.); Illinois v. Ampress Brick Co., [1975] TRADE CAS. (CCH) ¶ 60,295 (D. Ill.) . . . ." S. REP. NO. 803, 94th Cong., 2d Sess. 42-43 (1976).

95. 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974).

96. *Id.* at 194.

97. *Id.* at 199.

98. *Id.* at 195.

despite the existence of intervening parties. This result was reached because the bid submitted by a contractor contained the supplier's price with an amount added for labor, overhead, and profit.[99] Damages could be ascertained readily, therefore, from an examination of the bid submitted.

Second, there was little chance of double recovery against the suppliers.[100] The possibility of double recovery was dismissed because the contractors would not, in all likelihood, bring suit. Suits would not be brought by the contractors since they were controlled by the suppliers either directly through stock ownership or indirectly through credit arrangements. The running of the statute of limitations and the probability that the contractors had earned a percentage profit on the suppliers' overcharges also would serve to lessen the chance of suit by the contractors.[101]

A second case, similar in facts to *Liquid Asphalt* and also cited by Congress for its decision on standing, was *In re Master Key Litigation*.[102] This suit involved an alleged price-fixing conspiracy associated with the distribution of building hardware such as locks, latches, and keys.[103] Contractors purchased overpriced building hardware from distributors and then resold it as part of finished buildings. Although the governmental entities which purchased the buildings were one level removed from the distributors who were the antitrust violators, the court granted standing.[104]

Like *Liquid Asphalt*, the *Master Key* court offered two reasons for its decision. First, damages could be ascertained readily since the bids submitted to the plaintiffs were computed solely on a percentage mark-up basis.[105] Under this method the profit earned by the contractor was a percentage of the total costs incurred. Once the percentage mark-up is known, the cost of any supplies can be determined. Then, given the cost, damages arising out of the alleged price-fixing conspiracy can be traced.

Secondly, unless the plaintiffs were allowed standing, no suits against these suppliers could be brought.[106] The court recognized that since the bids were based on a percentage mark-up, the con-

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99. *Id.*
100. *Id.* at 198.
101. *Id.*
102. [1973] TRADE CAS. (CCH) ¶ 74,680 at 94,977 (D. Conn.).
103. *Id.*
104. *Id.*
105. *Id.* at 94,981.
106. *Id.* at 94,978.

tractors suffered no harm because their profit margins were maintained. Also, the court stated that the statute of limitations barred suit by many of the contractors. The court recognized that for these same reasons the fear of double recoveries against the defendants was hypothetical.[107]

The third case cited by Congress, but in which standing was denied, was *Illinois v. Ampress Brick Co.*[108] This case is particularly important since on appeal to the Supreme Court, under the name of *Illinois Brick Co. v. Illinois*,[109] it was used by the Court to advance the direct purchaser rule. The *Illinois Brick* plaintiffs, the State of Illinois and 700 other governmental entities, were indirect purchasers.[110] The state purchased cement blocks in the form of buildings from its contractors. The contractors had in turn bought the blocks from manufacturers for an illegally higher price. The *Ampress Brick* court held that indirect purchasers of altered goods did not have standing to sue.[111] The cement blocks were altered since they had been included with other construction materials in the completed buildings.[112] Since altered goods were also involved in *Master Key*, yet standing was granted,[113] a closer examination of the facts underlying the decision is necessary.

Critical to the court's decision was proof that only seven percent of the 700 plaintiffs were able to state the cost of the cement blocks included in the buildings they bought.[114] None of the plaintiffs alleged that the contracts were computed on the cost-plus or percentage mark-up basis.[115] Of the 700 plaintiffs, only one offered evidence as to the price of the blocks. That price was less than one-half of the percent of the total bid submitted.[116] The court was undoubtedly affected by the uncertainty and complexity that would have attended any proof of damages. Such reasoning would bring *Ampress Brick* in line with the reasoning found in *Master Key* and *Liquid Asphalt*. In the latter cases since the existence of cost-plus or percentage mark-up contracts made damages readily ascertain-

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107. *Id.*

108. 67 F.R.D. 461 (D. Ill. 1975), *rev'd*, 536 F.2d 1163 (7th Cir.), *rev'd sub nom.* Illinois Brick Co. v. Illinois 431 U.S. at 720.

109. *See* notes 47-59 *supra* and accompanying text.

110. 67 F.R.D. at 463.

111. *Id.*

112. *Id.* at 468.

113. *See* text accompanying notes 102-05 *supra*.

114. 431 U.S. at 727 n.6.

115. 67 F.R.D. at 463.

116. 431 U.S. at 727.

able, standing was granted. In the former case, damages were indefinite and not susceptible to ready proof and standing was denied.

The preceding cases delineate Congress' position on the standing issue with regard to indirect purchasers. Where damages lend themselves to ready proof, because of a cost-plus contract as in *Liquid Asphalt* or a percentage mark-up contract as in *Master Key*, standing should be granted. Where damages are speculative and not readily ascertainable because costs cannot be traced through contractual agreements, standing should be denied, as it was in *Ampress Brick*. Congress also believes that since standing is a preliminary issue, consideration of the possibility of double recoveries against the defendant should not weigh heavily in the standing decision. Furthermore, the statute of limitations may render such a possibility moot as in *Liquid Asphalt* and *Master Key*. Lastly, Congress recognizes that unless indirect purchasers are granted standing to sue, many antitrust violations will go unchallenged because of the close relationship between violator and intermediary as in *Liquid Asphalt*. It follows that, in addition to the threshold matters of establishing an injury and an antitrust violation, Congress would require only that damages be easily computed, preferably through contractual agreements.

The position of the Supreme Court with respect to indirect purchasers was given in the appeal of the *Ampress Brick* case. The Court held that only direct purchasers were injured within the meaning of section 4 and that indirect purchasers lacked standing to sue.[117] Allowing indirect purchasers standing, the Court reasoned, would present insurmountable problems of proof, delaying litigation and undermining the effectiveness of the private enforcement mechanism.[118]

The Court recognized that the difficulties faced by indirect purchasers with regard to proof of damages would not always exist. In dicta, the Court expressed the opinion that where cost-plus contracts existed, allowing for ready determination of damages, the direct purchaser rule would not apply and indirect purchasers would have standing.[119] Consequently, where damages are specific and readily amenable to proof, the Court presumably would be willing to grant standing, as would Congress.

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117. *Id.* at 736.
118. *Id. See also* notes 47-59 *supra* and accompanying text.
119. 431 U.S. at 732 n.12.

Although the positions of Congress and the Supreme Court are reconcilable, they are not in complete agreement. Both positions would grant standing to indirect purchasers where damages are specific and susceptible to ready proof because of contractual agreements. The Supreme Court, though, finds that this situation exists only where a cost-plus contract is present.[120] Congress' position is that a percentage mark-up contract as well as a cost-plus contract makes damages readily provable. It should be recognized, moreover, that these positions unduly restrict the standing of indirect purchasers. Since consumers usually make purchases through intermediaries, not directly from antitrust violators, and without the benefit of cost-plus or percentage mark-up contracts, it is upon them that this rule impacts.

The *Reiter* decision, that consumer injuries are within the business or property language of section 4 of the Clayton Act,[121] will be subject to the direct purchaser rule of *Illinois Brick* upon remand of the case.[122] With Congress and the Supreme Court in agreement that indirect purchasers should be denied standing, Reiter's cause of action will be lost. This result shows that the Supreme Court granted nothing to the consumer through its ruling in *Reiter*. Anything granted through the broad interpretation of business or property is lost through the indirect purchaser rule of *Illinois Brick*.

VI. Conclusion

Standing was developed by the courts in an attempt to restrict the availability of the judicial system to only meritorious claims. As applied to section 4 of the Clayton Act, standing was developed to avoid the strain on judicial resources resulting from antitrust suits involving remote injuries with their negligible, speculative, and unascertainable damages.

The Supreme Court apparently expanded consumer standing under section 4 of the Clayton Act in *Reiter v. Sonotone Corp.*[123] The Court held that a consumer who pays more for goods because of antitrust violations is injured within the business or property language of section 4. This broad grant of standing, however, is severely limited by *Illinois Brick Co. v. Illinois.*[124] *Illinois Brick* held

120. *Id.* at 736.
121. 442 U.S. at 342.
122. *See* note 24 *supra* and accompanying text.
123. 442 U.S. at 330.
124. 431 U.S. at 720.

that a direct purchaser alone may be injured within the meaning of section 4. Consumers, usually indirect purchasers since they make their purchases from intermediary retailers, are foreclosed from the section 4 remedy. Until the *Illinois Brick* case is overruled, the decision in *Reiter* grants nothing to consumers. With Congress' position on standing in line with *Illinois Brick*, this overruling of *Illinois Brick* cannot be expected.

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