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Consumer Standing in Antitrust Actions, Reiter v. Sonotone Corporation, 442 U.S. 330 (1979)

CONSUMER STANDING IN ANTITRUST ACTIONS
Reiter v. Sonotone Corporation, 442 U.S. 330 (1979)

The United States Supreme Court in *Reiter v. Sonotone Corporation*[1] broadened the class of plaintiffs who have standing[2] to sue under section 4 of the Clayton Act[3] to include retail consumers.[4]

The plaintiff[5] brought a class action suit on behalf of herself and all persons in the United States who purchased hearing aids,[6] seeking treble damages against five manufacturers[7] under section 4 of the Clayton Act.[8] Plaintiff alleged that the corporations violated sections 1 and 2 of the Sherman Act[9] by engaging in vertical and horizontal price-fixing,[10] which caused plaintiff to pay inflated prices for hearing aids and related services.[11] Defendants moved to dismiss, claiming that plaintiff lacked standing[12] to sue under section 4 because the allegedly anticompetitive acts had not injured plaintiff in her "business and

1. 442 U.S. 330 (1979). The district court decision on remand from the United States Supreme Court is cited at [1980-1] Trade Cas. (CCH) ¶ 63,212 (D. Minn. 1980).

2. *See* note 17 *infra* and accompanying text.

3. 15 U.S.C. § 15 (1976) provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

4. Consumers, however, will face substantial obstacles in order to successfully bring suit. *See* note 74 *infra* and accompanying text.

5. The plaintiff was a "classic consumer plaintiff." She was not in any business related to that of the defendant, and alleged no property interest other than that she had spent more money for a hearing aid than necessary because of defendant's misconduct. 442 U.S. at 335.

6. Plaintiff and members of the class did not purchase hearing aids directly from the defendant manufacturers, but rather from retailers. Reiter v. Sonotone Corp., 579 F.2d 1077, 1079 (8th Cir. 1978).

7. The Supreme Court held in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), that only direct purchasers may sue for treble damages under section 4 of the Clayton Act. *See* note 18 *infra*. The *Illinois Brick* issue was not before the Supreme Court in *Reiter* because the Court of Appeals did not decide whether the *Illinois Brick* rule barred the plaintiffs' claim. 442 U.S. at 337 n.3.

8. 15 U.S.C. § 15 (1976). For the complete text see note 3 *supra*.

9. 15 U.S.C. §§ 1, 2 (1976).

10. Plaintiff claimed that the corporations:

> 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.

11. *Id.* at 335.

12. The term "standing" in this comment does not refer to standing in the constitutional

property" within the meaning of the Act. The district court denied the motion;[13] the Eighth Circuit reversed.[14] The United States Supreme Court reversed the Eighth Circuit and *held*: Consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations are injured in their "property" within the meaning of section 4.[15]

Section 4 of the Clayton Act authorizes the award of treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[16] The federal courts have limited the reach of this clause by developing two prerequisites for standing.[17] A plaintiff must show, in addition to establishing an antitrust violation, that: (1) the violation caused the alleged injury;[18] and (2) the alleged injury in the plaintiffs' business or property was a

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sense, but rather to the statutory right to sue for damages, which was created under section 4 of the Clayton Act. For components of standing, see notes 18 & 19 *infra* and accompanying text.

13. Reiter v. Sonotone Corp., 435 F. Supp. 933, 934, 938 (D. Minn. 1977), *rev'd*, 579 F.2d 1077 (8th Cir. 1978), *rev'd*, 442 U.S. 330 (1979).

14. Reiter v. Sonotone Corp., 579 F.2d 1077 (8th Cir. 1978), *rev'd*, 442 U.S. 330 (1979).

15. 442 U.S. at 342-43.

16. *See* note 4 *supra*.

17. *See In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 129 n.11 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Ragar v. T.J. Raney & Sons, 388 F. Supp. 1184, 1186-87 (E.D. Ark.), *aff'd*, 521 F.2d 795 (8th Cir. 1975). *See generally* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

The courts have limited standing in this area because a grant of standing to any party would lead to a multiplicity of lawsuits. *See* Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). *See also* Sherman, *Antitrust Standing: From* Loeb *to* Malamud, 51 N.Y.U.L. REV. 374, 375-76 (1976).

18. The courts have interpreted the causal requirement to require a satisfaction of one of three tests: direct injury test, target area test, or zone of interest test.

The direct injury test provides that, in the limited area of consumer suits, the "first party to purchase a product that has been affected by a violation has standing to sue, and all others . . . are barred." Comment, Mangano *and Ultimate Consumer Standing: The Misuse of the* Hanover *Doctrine*, 72 COLUM. L. REV. 394, 400 (1972). The Third Circuit first used the direct injury test in Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910). *See generally* Bravman v. Basset Furniture Indus., 552 F.2d 90 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977); Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 939 (1973); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970).

The Supreme Court in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), affirmed the direct injury test. The court held that a purchaser, other than a direct purchaser from the manufacturer, who pays higher prices because of a manufacturer's antitrust violation may not sue under section 4. *See generally* Note, *Antitrust and the Consumer Interest: Can Section 4 of the Clayton Act Survive the Current Supreme Court*, 27 CATH. U.L. REV. 81, 109-12 (1978); Note, *Scaling the* Illinois Brick *Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 CORNELL L. REV. 309

type protected by section 4.[19]

The issue of standing based on injury to plaintiffs' business or property has long been disputed. The phrase "business or property," if interpreted conjunctively, causes the adjective "business"[20] to modify

(1978); Note, Illinois Brick: *The Death Knell of Ultimate Consumer Antitrust Suits*, 52 ST. JOHNS L. REV. 421 (1978).

The court in Conference of Studio Unions v. Loews, Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952), articulated the target area test. The target area test requires only that a plaintiff suffer injury from residing within a sector of the economy in which the illegal activity was directed rather than imposing a strict privity requirement.

> [I]n order to have "standing" to sue for treble damages under § 4 of the Clayton Act, a person must be within the "target area" of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationship with "targets" or with participants in an alleged antitrust conspiracy, rather than by being "targets" themselves.

Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). *See* Commerce Tankers Corp. v. National Maritime Union of America, 553 F.2d 793 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977); Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976); Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975); *In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); Lytle & Pardue, *Antitrust Target Area Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 581 (1964). *See also* Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 949 (1971); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955); Kemp Pontiac-Cadillac, Inc. v. Hartford Auto. Dealers' Ass'n, 380 F. Supp. 1382 (D. Conn. 1974); Fields Prods., Inc. v. United Artists Corp., 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 1010 (2d Cir. 1970) (per curiam), *cert. denied*, 401 U.S. 949 (1971). *See generally* Lytle & Pardue, *Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation*, 25 AM. U.L. REV. 795 (1976).

The zone of interest test, articulated in Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975), contains two requirements: (1) plaintiff must assert injury in fact caused by defendant, and (2) the protected interest must be within the zone of interests protected under the statute in question. 521 F.2d at 1151. *See also* Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679, 689 (8th Cir. 1966). Outside the Sixth Circuit, few courts have used the *Malamud* test. For a criticism of the standard, see Sherman, *Antitrust Standing: From* Loeb *to* Malamud, 51 N.Y.U.L. REV. 374 (1976). *See generally* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 813 (1977); Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 581 (1964).

19. *See* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972); Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390 (1906). *See also* notes 28-47 *infra* and accompanying text.

20. The court in Waldron v. British Petroleum Co., 231 F. Supp. 72 (S.D.N.Y. 1964), defined "business" under section 4 as follows:

> The word "business" is a conclusory term. It covers a broad spectrum of rights, powers and privileges which, singly or collectively, has conventionally been labeled "business" for the purpose of § 4 of the Clayton Act. There must be some modicum of existing economic power or control. To some extent, this may be circular logic inasmuch as the term "business" is a conclusion rather than a reason. It is a conclusion justified, however, by the analogous factual patterns of other decided cases.

"property."[21] This interpretation limits standing to commercial injuries. Conversely, the disjunctive interpretation of the phrase gives "property" an independent meaning so that an individual consumer who pays an inflated price[22] because of an antitrust violation is granted standing.[23] The legislative histories of the Sherman[24] and Clayton[25] Acts do not settle this issue,[26] and courts have drawn divergent conclu-

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Id. at 83. *See* Image & Sound Serv. Corp. v. Altec Serv. Corp., 148 F. Supp. 237, 239 (D. Mass. 1956). *See also* Blackford, *"Business or Property" Entitled to Protection Under Section 4 of the Clayton Act*, 26 MERCER L. REV. 737 (1975); Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964).

21. Property for the purposes of section 4 is defined very broadly to include every interest that the law protects.

> A determination whether plaintiff has "property" involves a value judgement as to whether that which plaintiff factually possesses should be legally protected. If it be decided that the rights, privileges and powers possessed by the plaintiff should receive judicial sanction, the conclusion would be expressed by declaring [that] plaintiff possesses "property."

Waldron v. British Petroleum Co., 231 F. Supp. 72, 86 (S.D.N.Y. 1964).

22. *See* note 35 *infra* and accompanying text.

23. *See* note 12 *supra*.

24. The legislative history of the Sherman Act is not conclusive on the question of standing. The bill originally introduced by Senator Sherman provided that "any person or corporation, injured or damnified by such arrangement, contract, agreement, trust, or combination may sue for and recover . . . the full consideration or sum paid by him for any goods, wares and merchandise . . . ." S.1, 51st Cong., 1st Sess. § 2 (1889), *reprinted in* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (E. Kintner ed. 1978). Congress rejected Senator Sherman's proposal, and enacted section 7 instead to provide that "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue . . . ." Ch. 647, § 7, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 15 (1976)). Although the reasons for the change are unclear, Congress evidently expressed some concern for limiting private actions because Senator Morgan warned that the "bill ought not to be a breeder of lawsuits. If there is any duty we have got higher than another in respect of the general judiciary of the United States, it is to suppress litigation and have justice done without litigation as far as we can." 21 CONG. REC. 3149 (1890). But Senator George expressed dissatisfaction with the enacted bill:

> [T]he poor man, the consumer, the laborer, the farmer, the mechanic, the country merchant, all that large class of American citizens who constitute 90 percent of our population and who are the real sufferers will have no opportunity of redress, and the bill, so far as they are concerned, will be a snare and a mere delusion.

21 CONG. REC. 3150 (1890). *See generally* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977); Comment, *Closing the Door on Consumer Antitrust Standing*, 54 N.Y.U.L. REV. 237, 249-54 (1979); Note, *Recent Developments in Antitrust Standing*, 31 VAND. L. REV. 1531, 1533-36 (1978).

25. Representative Taggart claimed that "[t]he bill is framed for the purpose of liberating business and not for the purpose of injuring or destroying any business. Its great purpose is to protect small business from big business . . . ." 51 CONG. REC. 9198 (1914). Nothing, however, in the legislative history indicates that proponents of the bill aimed exclusively at business. *See* Comment, *Closing the Door on Consumer Antitrust Standing*, 54 N.Y.U.L. REV. 237, 252 (1979).

26. *See generally* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RE-

sions to the proper interpretation.[27]

The United States Supreme Court provided a definition of section 4 property in *Chattanooga Foundry and Pipe Works v. City of Atlanta.*[28] The city of Atlanta owned and operated its own water works system and supplied itself and its inhabitants with water.[29] The city alleged that defendant foundry's anticompetitive conduct forced Atlanta to purchase water pipes[30] in excess of a fair market price. The defendant claimed that the city was not injured in its "business or property."[31] Although Justice Holmes could have concluded that defendant had injured the city in its business of supplying water, Holmes rather ruled that defendant's inflated prices injured the city's property.[32] Holmes' interpretation lends credence to the disjunctive interpretation. The Court held that an injury to property[33] will be found if plaintiff's

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LATED STATUTES 13-30 (E. Kintner ed. 1978); H. THORELLI, THE FEDERAL ANTITRUST POLICY 164-210 (1955).

27. The Supreme Court reached a typical conclusion in a footnote to Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977):

> 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. at 486 n.10 (citations omitted). Other courts have reached opposite conclusions based on the identical legislative history. *See* Reiter v. Sonotone Corp., 579 F.2d 1077, 1085 (8th Cir. 1978), *rev'd*, 442 U.S. 330 (1979). *See also* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW & ECON. 7 (1966).

28. 203 U.S. 390 (1906).

29. M. FORKOSCH, ANTITRUST AND THE CONSUMER 302-03 (1956) (Atlanta was both a consumer of its own water and a producer with a commercial injury).

30. 203 U.S. at 395.

31. *Id.* at 395-96.

32. *Id.* at 396-97.

33. The city of Atlanta distinguished between damage "to" and "in" one's property by claiming damage "in" its property. The latter injury is generally considered broader than injury "to" property.

> [A] consumer may sue for damages on the ground that he has been deprived "in" his

"property is diminished by a payment of money wrongfully induced."[34] Subsequent courts held that consumers who paid higher prices for goods or services as a result of antitrust violations were injured in their property and were entitled to standing.[35]

The Supreme Court in *Hawaii v. Standard Oil Co.*[36] further complicated the standing issue. The state of Hawaii brought an action on behalf of its citizens to recover overcharges on petroleum products resulting from antitrust violations by Standard Oil.[37] The Court, in dicta, stated that the term "business or property" referred to "commercial interests or enterprises,"[38] and denied standing[39] because Hawaii's al-

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property, although he has not had any particular piece of property per se injured. In other words, the differential between the exacted price and that of free competition involves an injury in the consumer's property. In the logical line of this argument a consumer may maintain a private suit for treble damages because he has actually suffered an injury to his property.

M. FORKOSCH, *supra* note 29, at 300 (footnote omitted).

34. 203 U.S. at 396. *See also* Thomsen v. Cayser, 243 U.S. 66 (1916) (excess over reasonable rate charged by carrier constitutes element of injury); Cleary v. Chalk, 488 F.2d 1315, 1319 n.17 (D.C. Cir. 1973) (a consumer of services who is illegally overcharged sustains a property injury within the ambit of § 4). *See generally* L. SULLIVAN, ANTITRUST 771 (1977); Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964).

35. Pfizer, Inc. v. Government of India, 434 U.S. 308, 313-14 (1978); Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977); Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 (1972); Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90, 99 n.23 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977); Theophil v. Sheller-Globe Corp., 446 F. Supp. 131 (E.D.N.Y. 1978); DeGregorio v. Segal, 443 F. Supp. 1257 (E.D. Pa. 1978); *In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, [1977-2] Trade Cas. (CCH) ¶ 61,639 (C.D. Cal. 1977); *In re* Ampicillin Antitrust Litigation, [1977-1] Trade Cas. (CCH) ¶ 61,434 (D.D.C. 1977). *Contra*, Weinberg v. Federated Dep't Stores Inc., 426 F. Supp. 880 (N.D. Cal. 1977), *rev'd without opinion*, 608 F.2d 1374 (9th Cir. 1979); Gutierrez v. E. & J. Gallo Winery Co., Inc., 425 F. Supp. 1221 (N.D. Cal. 1977), *aff'd in part* and *vacated in part*, 604 F.2d 645 (9th Cir. 1979); Smith v. Toyota Motor Sales, U.S.A., Inc., [1977-1] Trade Cas. (CCH) ¶ 61,251 (N.D. Cal. 1977).

36. 405 U.S. 251 (1972).

37. The principal issue in the case did not involve consumer standing directly, but whether section 4 authorized a state to sue for an injury to its general economy. 405 U.S. at 252-53. The injury allegedly stemmed from changes in revenues to, and taxes on, the general citizenry, lost business opportunities, prevention of full development of the state's resources, and frustration of the state's policy of promoting general progress and the welfare of its people. 405 U.S. at 255.

38. 405 U.S. at 264.

39. Although the Court denied Hawaii the right to recover for injury to the general economy of the state, the Court stated that Hawaii would have standing to sue if it sought recovery for injuries suffered in its capacity as a consumer of goods and services:

> Where the injury to the State occurs in its capacity as a consumer in the marketplace, through a "payment of money wrongfully induced," damages are established by the amount of the overcharge. . . . Measurement of an injury to the general economy, on the other hand, necessarily involves an examination of the impact of a restraint of trade upon every variable that affects the State's economic health—a task extremely difficult, "in the real economic world rather than an economist's hypothetical model."

leged injury did not affect the state in its role as a commercial entity.[40]

The lower courts are divided on the issue of section 4 consumer standing.[41] In *Weinberg v. Federated Department Stores, Inc.*,[42] a retail consumer alleged that a department store chain injured her property and committed an antitrust violation by overcharging for clothes she had purchased. A California district court concluded that the words "business or property" are conjunctive and require a competitive or commercial injury because Congress designed the antitrust laws to enhance competition among commercial enterprises.[43] The court denied plaintiff standing because she did not allege a commercial or competitive injury.[44] In *Theophil v. Sheller-Globe Corp.*,[45] however, a New York district court concluded that Congress intended the antitrust laws to benefit the consumer[46] and that if the consumer pays inflated prices because of an antitrust violation, an injury to property exists under the rule in *Chattanooga Foundry*.[47]

The Supreme Court in *Reiter v. Sonotone Corp.* faced the consumer

405 U.S. at 262 n.14 (quoting Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906), and Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 493 (1968)).

40. 405 U.S. at 262-65. In response to the ruling in *Hawaii*, Congress in 1976 enacted the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. §§ 15c-15h (1976), which amended the Clayton Act to permit "state attorneys general to recover monetary damages on behalf of state residents injured by violation of the antitrust laws," H.R. REP. No. 94-499, 94th Cong., 2d Sess. 3, *reprinted in* [1976] U.S. CODE CONG. & ADMIN. NEWS 2572.

41. Several recent district court decisions have denied consumer standing. *See, e.g.*, Weinberg v. Federated Dep't Stores, Inc., 426 F. Supp. 880 (N.D. Cal. 1977), *rev'd without opinion*, 608 F.2d 1374 (9th Cir. 1979); Gutierrez v. E. & J. Gallo Winery Co., 425 F. Supp. 1221 (N.D. Cal. 1977), *aff'd in part* and *vacated in part*, 604 F.2d 645 (9th Cir. 1979); Smith v. Toyota Motor Sales, U.S.A., Inc., [1977-1] Trade Cas. (CCH) ¶ 61,251 (N.D. Cal. 1977). Other courts, however, have reached the opposite conclusion. *See, e.g., In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, [1977-2] Trade Cas. (CCH) ¶ 61,639 (C.D. Cal. 1977); *In re* Ampicillin Antitrust Litigation, [1977-1] Trade Cas. (CCH) ¶ 61,434 (D.D.C. 1977); *In re* Master Key Antitrust Litigation, [1973-2] Trade Cas. (CCH) ¶ 74,680 (D. Conn. 1973); Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973); State of West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *cert. denied*, 404 U.S. 871 (1971); *See also* Note, *Standing to Sue for Treble Damage Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964).

42. 426 F. Supp. 880 (N.D. Cal. 1977), *rev'd without opinion*, 608 F.2d 1374 (9th Cir. 1979).

43. *Id.* at 884-85.

44. *Id.* at 882-85.

45. 446 F. Supp. 131 (E.D.N.Y. 1978).

46. *Id.* at 135.

47. 203 U.S. 390 (1906). *See* 446 F. Supp. at 135.

standing issue[48] for the first time.[49] Chief Justice Burger held that "business" does not modify "property" because[50] "terms connected by a disjunctive [should] be given separate meanings . . . ."[51] The Court relied on Justice Holmes' broad definition of "property" in *Chattanooga*[52] to find that plaintiff's payment of a slightly higher price was sufficient to establish standing under section 4.[53]

The Court in *Reiter* qualified language in *Hawaii v. Standard Oil Co.*[54] that referred to property as encompassing "commercial interests or enterprises."[55] Chief Justice Burger stated that "commercial interest" refers to any transaction in the marketplace, rather than an exclusively business related transaction.[56] He further noted that currency falls within the definition of property[57] and, thus, an overcharge paid by a consumer because of an antitrust violation is actionable under section 4.[58] The Court stated that the phrase "business or property" was sufficiently restrictive to exclude some injuries from section 4 protection.[59]

Chief Justice Burger found no specific reference to the interpretation of the phrase "business or property" in the legislative history.[60] He rejected the contention that substitution of "business or property" for broader language demonstrated a congressional intent to exclude retail consumers.[61] Chief Justice Burger stated that the floor debates reflected no intent[62] to exclude retail consumers and that proponents supported the legislation to protect the consumer.[63]

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48. In fact, Reiter was the first retail consumer standing case to reach a federal appellate court.

49. 442 U.S. 330 (1979).

50. Justice Burger stated that the Court must give effect to "every word Congress used" in construing a statute, and concluded that "canons of construction" dictated the result unless the context indicated otherwise. *Id.* at 2331.

51. *Id.*

52. *Id. See* note 34 *supra* and accompanying text.

53. 442 U.S. at 340.

54. 405 U.S. 251 (1972).

55. *See* text accompanying note 38 *supra.*

56. 442 U.S. at 341-42.

57. *Id.* at 338.

58. *Id.* at 339.

59. *Id. See also* Hamman v. United States, 267 F. Supp. 420, 432 (D. Mont. 1967).

60. 442 U.S. at 342-43.

61. *Id.*

62. *Id.*

63. *Id.* Justice Burger cited the footnote in Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) in support of his conclusion. *See* note 27 *supra.*

The Court rebutted critics who claimed that broadening standing would overburden the courts[64] by emphasizing the necessity of private suits for effective enforcement of the antitrust laws.[65] Chief Justice Burger placed the responsibility on Congress to modify the court system to accommodate any additional caseload.[66] He also suggested that judges employ their authority and discretion under Rule 23 of the Federal Rules of Civil Procedure[67] to prevent frivolous suits.[68]

The decision in *Reiter* is consistent with the policy of the Sherman and Clayton Acts to prevent restraints on trade and encourage free competition.[69] The private treble damage action under section 4 is an effective means to achieve those goals.[70] The private action not only compensates the injured party, but also deters violations[71] of the antitrust laws.

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64. In a concurring opinion, Justice Rehnquist expressed greater concern than the majority on this issue. 442 U.S. at 345-46.

65. *Id.* at 344.

66. *Id.*

67. The class representative must demonstrate compliance with the requirements of Rule 23 in order to maintain a class action. Subsection (a) requires that:

(1) joinder be impracticable because of the large number of class members;
(2) there be common questions of law or fact;
(3) the claims of the representative be typical of the claims of the class; and
(4) the class representative fairly and adequately represent the class.

FED. R. CIV. P. 23(a).

68. 442 U.S. at 345. Commentators have disagreed on whether broadened antitrust standing would flood the courts with baseless suits. *See generally* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977).

69. In Cleary v. Chalk, 488 F.2d 1315 (D.C. Cir. 1973), the court stated:

> The goal of the Federal antitrust laws is to safeguard the interplay of competitive forces in the far-flung commerce of the Nation. The Sherman Act . . . "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." Its "fundamental purpose . . . was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraints of trade." . . . "The Clayton Act . . . had these wholesome aims no less in view, but sought its contribution to them through a regulatory technique of its own."

Cleary v. Chalk, 488 F.2d 1315, 1319-20 (D.C. Cir. 1973) (citations omitted).

70. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968). *See* DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (I)*, 1976 AM. B. FOUNDATION RESEARCH J. 1023, 1026; Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 168-69 (1958); Wham, *Antitrust Treble-Damage Suits: The Government's Chief Aid in Enforcement*, 40 A.B.A.J. 1061 (1954); Note, *supra* note 25, at 259-266. *But see* Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble-Damages*, 17 J.L. & ECON. 329 (1974); Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy*, 3 N.M.L. REV. 286, 293 (1973); Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319 (1973).

71. *See* DuVal, *supra* note 68, at 1025-26.

Retail consumer standing is a potent deterrent because the consumer on many occasions is the only party interested in challenging an antitrust violation.[72] Neither retailers, who desire to maintain their distribution rights, nor competitors, who may be co-conspirators, are likely to file an antitrust action. Even competitors who do not participate in the scheme may be unwilling to sue under section 4 because they also profit from the imposition of uniformly high prices.[73] Although the government files most antitrust actions, the broader standing requirements may encourage prosecution of smaller price-fixing schemes that are beyond government inquiry.[74]

The additional burdens placed on the courts do not outweigh benefits derived from broader consumer standing. The number of consumer plaintiffs will remain limited by the causal requirements of standing and will be subject to the direct injury, target area, and protected zone of interest tests.[75] Moreover, the difficulty of proving damages, the substantial cost of litigation, and the range of defenses available to defendants will discourage speculative claims,[76] and will reduce any additional burden on the courts.

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72. *See* Comment, *Denial of Standing to Private Noncommercial Consumers Under Section 4 of the Clayton Act*, 31 VAND. L. REV. 1531,1545-46 (1978).

73. *Id.*

74. *See* Note, *supra* note 25, at 261-62.

75. *See* notes 17-19 *supra*. *See also* Loevinger, *supra* note 68, at 171; Tyler, *Private Antitrust Litigation: The Problem of Standing*, 49 U. COLO. L. REV. 269 (1978).

76. *See* Note, *supra* note 25, at 264.