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Antitrust Law: Independent Retailers under Section 4 of the Clayton Act

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CASENOTE

ANTITRUST LAW: INDEPENDENT RETAILERS UNDER SECTION 4 OF THE CLAYTON ACT—*Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1278 (1984).

I. INTRODUCTION

The Clayton Act is addressed to the matter of standing under the antitrust laws, among other matters. In this evolving field, the recent *Merican, Inc. v. Caterpillar Tractor Co.*[1] expanded the limitations imposed by the *Illinois Brick* rule[2] on liability for treble damages under section 4 of the Clayton Act.[3] The appellees in this case, Merican, Inc., Merican Curtis, Inc., and Merican Curtis, Ltd., were independent retailers of Caterpillar products.[4] They alleged that Caterpillar had violated section 1 of the Sherman Act[5] when it changed its policy concerning service fees, thereby imposing an illegal penalty on its authorized dealers as a means of eliminating the source of supply to the appellees and other independent retailers.[6] The Third Circuit Court of Appeals held that under the *Illinois Brick* rule, an unaffiliated retailer was barred from bringing an action attacking an alleged vertical conspiracy between Caterpillar and one of its authorized dealers[7] because the

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1. 713 F.2d 958 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1278 (1984).

2. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). The Court there held that if a pass-on theory cannot be used defensively by an antitrust violator-defendant against a direct purchaser-plaintiff, the pass-on theory may not be used offensively by an indirect purchaser-plaintiff against an alleged antitrust violator-defendant. *Id.* at 729–30.

In offensive pass-on theory, the plaintiff-indirect purchaser alleges injury from overcharges passed on by intermediate purchasers in the chain of distribution. Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883, 884 (1975).

In defensive pass-on theory, the defendant raises, as an affirmative defense, the allegation that the direct purchaser did not suffer a § 4 injury because it passed on the overcharge to its customers. *E.g.*, Hanover Shoe, Inc. v. United States Mach. Corp., 392 U.S. 481 (1968).

3. 15 U.S.C. § 15 (1982). *See infra* text accompanying notes 32–40.

4. 713 F.2d at 961.

5. Section 1 of the Sherman Act states in part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1982).

6. 713 F.2d at 960.

7. The named authorized Caterpillar dealer was Zahid Tractor and Heavy Machinery Company. *Id.* at 961. The appellees also alleged "that other unnamed corporations, firms and individuals also participated as co-conspirators." *Id.* at 961 n.3.

"[a]ppellees are not persons injured in their business or property by reason of a violation of the antitrust laws within the meaning of section 4."[8] This casenote will explore the court's decision in *Merican*, which effectively leaves an entire class of prospective plaintiffs without legal recourse under section 4 of the Clayton Act when they suffer injury due to a violation of the antitrust laws within the distributive chain.

II. FACTS AND HOLDING

The appellees in this case, Merican, Inc., Merican Curtis, Inc., and Merican Curtis, Ltd., are international corporations that in the mid-1970's began marketing Caterpillar electrical generators.[9] Appellees purchased generator sets from an authorized dealer in the United States[10] and resold them on the international market.[11] Caterpillar had established a worldwide network of these authorized dealers, each of which was required to enter into a standardized distribution agreement.[12] The distribution agreement required that each dealer provide free delivery, inspection, and warranty services on all Caterpillar products which received initial substantial use within the dealer's territory, regardless of whether the product was sold by that or another dealer.[13]

Originally, under this agreement, the dealer purchased the generator sets at a 25% discount off the list price, with 5% of the discount being allocated to the dealer as reasonable compensation for the required service functions.[14] If a dealer sold a generator which was to receive its initial substantial use outside the selling dealer's territory, the dealer was entitled to retain only a 20% discount.[15] The dealer who actually performed the service function was entitled to receive the 5% service fee, provided an appropriate claim was filed within one year.[16]

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8. *Id.* at 969.

9. *Id.* at 961.

10. Primarily, the appellees purchased generator sets from Ohio Machinery Company, an authorized Caterpillar dealer in Cleveland, Ohio. *Id.*

11. *Id.*

12. *Id.* at 960.

13. The distribution agreement provided that each dealer would provide for the promotion, distribution, installation, and servicing of the products. It assigned each dealer a service territory in which he or she agreed to maintain one or more suitable places of business and service facilities, as well as to employ trained mechanics and render diagnostic and mechanical services to all users of Caterpillar products within the service area. *Id.*

14. *Id.*

15. *Id.*

16. Prior to 1978, many dealers—after selling a generator set which would receive its initial substantial use outside their service area—simply transferred the 5% service fee directly to the appropriate service dealer, bypassing Caterpillar completely. After July, 1978, however, Caterpillar demanded strict compliance with the distribution agreement, meaning that as soon as a dealer knew a generator set would receive its initial substantial use outside its service area, the dealer was to remit the 5% service fee to Caterpillar. *Id.* at 960 n.2. If an appropriate claim was not filed

This allowed dealers to sell at a greater discount to an independent retailer located outside of their territory as long as the independent retailer agreed to perform the service function required by the distribution agreement.[17]

In 1978 Caterpillar changed its procedures so that when a product was sold to a buyer located outside the dealer's territory, the dealer was required to immediately return the 5% service fee to Caterpillar.[18] This fee was never returned to the selling dealer. If an appropriate claim was not filed by a servicing dealer, Caterpillar retained the fee as miscellaneous income.[19] Thus, as a result of the change, an authorized dealer could no longer offer the full price reduction to unaffiliated retailers located outside the dealer's territory.[20]

Merican alleged that this change in the service-fee system was the result of a combination and conspiracy between Caterpillar and at least one of its authorized dealers.[21] They claimed that the new system actually imposed an automatic penalty on Caterpillar's authorized dealers in violation of section 1 of the Sherman Act,[22] and sought both monetary damages and an injunction under sections 4[23] and 16[24] of the Clayton Act, respectively.[25]

Caterpillar filed a motion to dismiss Merican's claim,[26] which the district court denied.[27] On interlocutory appeal, the Third Circuit Court of Appeals reversed, holding that the district court had misconstrued the question to be resolved under the *Illinois Brick* rule.[28] The

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within one year, it was Caterpillar's practice to return the 5% service fee to the selling dealer. *Id.* at 960.

17. This is true because when a product is sold to an independent retailer there will be no appropriate claim filed with Caterpillar. *Id.* at 961.

18. *Id.* at 960 n.2.

19. *Id.* at 961.

20. *Id.* Of course, the authorized dealer could maintain the same level of price reduction by choosing to reduce his or her own profit margin, but there is no mention of this in the case.

21. *Id. See supra* note 7. The appellees alleged that the purpose of the conspiracy was to allocate territories and customers among authorized dealers and to prevent independent retailers from competing with the authorized dealers. 713 F.2d at 961.

22. *Id. See supra* note 5.

23. 15 U.S.C. § 15 (1982). *See infra* note 32 and accompanying text.

24. 15 U.S.C. § 26 (1982). In its motion to dismiss, Caterpillar conceded that the *Illinois Brick* rule would not bar the appellees from seeking injunctive relief under § 16 of the Clayton Act. 713 F.2d at 962 n.6.

25. 713 F.2d at 961.

26. The motion to dismiss was based on the *Illinois Brick* rule, which bars indirect purchasers from suing for passed-on damages under § 4 of the Clayton Act. *Id.* at 962.

27. *Id.*

28. *Id.* at 966. The district court originally denied Caterpillar's motion, stating that it was improper "to just mechanically apply the *Illinois Brick* doctrine and thereby exclude in every case anybody who was not a direct purchaser from the original seller or manufacturer." *Id.* at 962. The district court later entered an amended order to dismiss, and, pursuant to 28 U.S.C. §

Third Circuit concluded that due to the possibility of duplicative recovery and the potential for complex theories of damage recovery,[29] the appellees were not persons injured within the meaning of section 4.[30] Moreover, by operation of the *Illinois Brick* rule, the appellees were barred from seeking treble damages under section 4 of the Clayton Act.[31]

III. BACKGROUND

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . ."[32] On its face, this language contains few restrictions and appears to provide a remedy to any person who sustains the required injury,[33] directly or indirectly, as a result of a violation of the antitrust laws.[34] The lack of restrictive language evinces the broad congressional purpose in enacting section 4: the creation of a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, while providing ample compensation to the victims of antitrust violations.[35]

The courts, while mindful of the broad remedial policy and the sweeping language of section 4, have acknowledged two types of limitations on the availability of the section 4 treble-damages remedy.[36] The first limitation recognizes that there are certain classes of plaintiffs who, although able to trace an injury to an antitrust violation, are not generally within the group of "private attorneys general" Congress created to enforce the antitrust laws under section 4.[37] The second limita-

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1292(b), certified the following as the controlling question of law for the intermediate appeal:

> When an alleged conspiracy between an electrical generator manufacturer and one of its authorized foreign dealers is formed to hinder and/or exclude intra-brand competition in the foreign market by an independent, non-factory authorized dealer who purchases from other authorized dealers for resale in the foreign market, whereby the manufacturer imposes a non-refundable "5% warranty service fee" on all sales by authorized dealers when the generators are to be installed for initial use outside of the authorized dealer's assigned geographical service territory, is the "target-victim" of the conspiracy (the independent non-factory authorized dealer) precluded from maintaining a private damage action against the manufacturer under Section 4 of the Clayton Act (15 U.S.C. § 15) by operation of the rule of *Illinois Brick Co. v. Illinois* . . . ?

Quoted in 713 F.2d at 962 n.7 (citation omitted).

29. *Id.* at 969.
30. *Id.*
31. *Id.*
32. 15 U.S.C. § 15(a) (1982).
33. The required injury is one to his or her business or property. *Id.*
34. 713 F.2d at 962.
35. Blue Shield v. McCready, 457 U.S. 465, 472 (1982).
36. *Id.*
37. *Illinois Brick*, 431 U.S. at 746. This limitation is drawn from Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), and *Illinois Brick*. *Standard Oil* involved a suit brought by the state of

tion is concerned with "persons [who] have sustained injuries too remote to give them standing to sue for damages under section 4."[38]

In applying the first limitation, concerning plaintiffs who are not within the group of "private attorneys general," the courts have relied on two policy considerations to determine if a section 4 remedy is available to a prospective plaintiff: first, the risk of duplicative recovery, and second, the need to avoid overly extensive evidence and complicated damage theories which would discourage vigorous enforcement of the antitrust laws by private suits.[39] In applying the second limitation, which concerns the concept of section 4 standing, the courts have examined the physical and economic nexus between the alleged violation and the claimed harm to the plaintiff, as well as the relationship between the specific injury alleged and those forms of injury with which Congress was concerned when it made the conduct unlawful and provided the section 4 punitive remedy.[40]

IV. ANALYSIS

The Third Circuit stated that under the *Illinois Brick* rule, the question was whether Merican, Inc., Merican Curtis, Inc., and Merican Curtis, Ltd. were within the class of persons considered to be injured in their business and property by an antitrust violation under section 4 of

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Hawaii against several petroleum companies. The state alleged that the companies had entered into illegal contracts, conspired to restrain trade, and attempted to monopolize the market. The state sought to recover damages in three capacities: 1) in its proprietary capacity for overcharges incurred by the state; 2) in its *parens patriae* capacity for overcharges incurred by the state's citizens; and 3) as a class representative of all the overcharged purchasers in Hawaii. *Id.* at 253. The Court held that the injury asserted by Hawaii in its *parens patriae* capacity was not an injury to its "business or property" under § 4. *Id.* at 264–65.

Illinois Brick involved an action brought by the state of Illinois against manufacturers and distributors of concrete block in the Chicago area. The manufacturers sold the concrete blocks to masonry contractors, who, after incorporating the blocks into masonry structures, sold them to general contractors for use in buildings which were sold to the state. The state alleged that the manufacturers violated § 1 of the Sherman Act by engaging in a combination and conspiracy to fix the price of concrete block. 431 U.S. at 726–27. The Court held that the state, as an indirect purchaser of the concrete block, was not an "injured person" within § 4 of the Clayton Act. *Id.* at 746.

The *Illinois Brick* Court based its decision on Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968). In *Hanover Shoe*, the Court held that an antitrust violator could not, as a matter of law, escape treble-damages liability by raising the defense that the direct purchaser had passed on the illegal overcharge to its customers and, therefore, was not actually injured. *Id.* at 494. Thus, *Hanover Shoe* dealt with defensive pass-on theory while *Illinois Brick* dealt with offensive pass-on theory. *See supra* note 2. The Supreme Court upheld *Hanover Shoe* in its *Illinois Brick* decision, holding that the offensive use of pass-on theory is barred as a recovery theory for indirect purchasers. 431 U.S. at 736.

38. 431 U.S. at 728 n.7.

39. 713 F.2d at 963–64. *See Blue Shield*, 457 U.S. at 475 & n.11.

40. *Blue Shield*, 457 U.S. at 478.

the Clayton Act.[41] To answer this question, courts consider the potential for overly extensive, complex evidence and damage recovery theories, and the possibility of duplicative recovery if the suit is allowed.[42]

The Merican appellees advanced two arguments to explain why the *Illinois Brick* rule should not have barred their claim. Their first argument was based upon the language of footnote forty-seven[43] from the Third Circuit's opinion in *Mid-West Paper Products Co. v. Continental Group, Inc.*[44] Their second argument was that even if their claim fell within the scope of the *Illinois Brick* rule, they should not have been barred from seeking treble damages merely because an affidavit[45] offered by Caterpillar in support of its motion to dismiss indicated that the authorized dealer who supplied the appellees with electric generators[46] suffered no damage as a result of the change in Caterpillar's service-fee system.[47]

In making their first argument, the appellees interpreted the language of footnote forty-seven to mean that claims of below-market price-fixing, boycotts, vertical restrictions, and monopolization were outside the scope of the *Illinois Brick* rule.[48] They characterized their claim as "a challenge to Caterpillar's 'effort to boycott and to eliminate [appellees'] class of competitors from competing in the market . . . through the innovative mechanism of a vertically-imposed economic

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41. 713 F.2d at 966. The Third Circuit held that the district court misconstrued the relevant inquiry concerning standing. The Third Circuit recognized that standing is a legitimate limitation on the availability of a § 4 remedy, but in this case, because Caterpillar had conceded that the appellees had standing, if *Illinois Brick* did not bar their claim, the other limitation was more relevant. *Id.* at 966 n.19.

42. *Id.* at 966. *See Blue Shield*, 457 U.S. at 474; *Illinois Brick*, 431 U.S. at 731 n.11.

43. Footnote 47 states:

> A different problem is presented where prices are fixed below the competitive market price or where defendants engage in other forms of anticompetitive conduct, such as group boycotts, vertical restrictions, or monopolization, since defendants' benefits in those instances are not so readily ascertainable, and may not be sufficient to compensate "those individuals whose protection is the primary purpose of the antitrust laws." In such circumstances courts have awarded damages based upon the amount of injury suffered by the plaintiff rather than the benefits derived by the defendants.

Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 585 n.47 (3d Cir. 1979).

44. 713 F.2d at 966.

45. The affidavit was executed by the president of Ohio Machinery Company and stated in part that "[n]either the existence of the 5% [service fee] nor any changes in Caterpillar's administration thereof, including the 1978 or 1980 changes, has had any apparent effect on Ohio Machinery's incentive or ability to sell Caterpillar electric generators [sic] sets outside its service territory generally or in Saudi Arabia specifically." *Id.* at 968.

46. *Id.*

47. *Id.*

48. *Id.* at 966–67. Appellees argued that the rule of *Illinois Brick* should be limited to the facts of the case—an allegation of horizontal price-fixing brought by indirect purchasers. *Id.* at 966.

penalty,' . . . [and] conclude[d] that this case [was] outside the rule of *Illinois Brick*."[49]

The Third Circuit disagreed with the interpretation of footnote forty-seven proposed by Merican. The court found the language to mean only that in certain situations the benefits gained by defendants through practices such as below-market price-fixing, boycotts, vertical restrictions, and monopolization are not readily ascertainable and that the damages, therefore, must be measured by the extent of the plaintiff's injury.[50]

The Third Circuit's refusal to limit the rule of *Illinois Brick* to claims involving certain horizontal price restraints is consistent with its prior decisions,[51] as well as with those of other circuits.[52] The court concluded that the availability of a section 4 remedy is not dependent upon the plaintiff's characterization of the illegal activity, but rather upon a determination of whether the problems of duplicative recovery, massive evidence, and complicated recovery theories identified in *Illinois Brick* could be avoided if the relief was allowed.[53]

While it is true that mere semantics cannot resolve the issues raised in the present case by the *Illinois Brick* rule, it is important to recognize that *Illinois Brick* dealt with horizontal price-fixing above the market price, while the present case dealt with an alleged vertical price-fixing conspiracy.[54] When an antitrust defendant has fixed the price above the competitive market level and the benefit derived therefrom is easily ascertainable, the objectives of section 4 are fulfilled by requiring the defendant to pay treble damages to the direct purchaser.[55] In the classic *Illinois Brick* fact pattern, the price-fixer's benefit is equivalent to the purchaser's injury; therefore, if both the direct and indirect purchasers were allowed to seek treble damages, the possibility of duplicative recovery would be very great.[56] This is not always true, however, when the alleged violation does not occur in a classic *Illinois Brick* overcharge situation, but rather through a boycott, vertical conspiracy, or one of the other methods identified in footnote forty-

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49. *Id.* at 967 (quoting Brief for Appellees at 25, *Merican*).

50. 713 F.2d at 967.

51. *E.g.*, Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

52. *See, e.g.*, Stein v. United Artists Corp., 691 F.2d 885 (9th Cir. 1982); Zinser v. Continental Grain Co., 660 F.2d 754 (10th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982); *In re* Beef Indust. Antitrust Litig., 600 F.2d 1148 (5th Cir. 1979).

53. 713 F.2d at 968 & n.21.

54. *Id.* at 970 (Higginbotham, J., dissenting).

55. *Id.* (Higginbotham, J., dissenting).

56. *Id.* at 971 (Higginbotham, J., dissenting).

seven.[57]

If an indirect purchaser has suffered an injury other than the increased cost of the passed-on overcharge,[58] neither of the purposes underlying section 4 can be satisfied unless the indirect purchaser is allowed to bring an action against the violator.[59] By placing treble-damage recovery beyond the reach of such indirect purchasers, the Third Circuit has effectively declared that the appellees can never be made whole, and that the antitrust violator will not be made to relinquish the illegally obtained benefits.[60] Thus, in *Merican*, the appellees have no effective means of recovering their losses and Caterpillar cannot be made to forfeit its illegal gains.

This result clearly conflicts with the Third Circuit's statement in *Mid-West Paper Products*:

> [W]e should be mindful not only of the twin concerns behind the *Illinois Brick* rule, but also of the overarching policy favoring "compensating victims of antitrust violations for their injuries and deterring violators by depriving them threefold of the 'fruits of their illegality,' while at the same time furthering the overriding goal of the antitrust laws—preserving competition."[61]

Similarly, in his dissent in *Illinois Brick*, Justice Brennan reminded the Court that it had previously held that the protective provisions of section 4 of the Clayton Act are not confined to any one group, but are comprehensive and protect all who become victims of antitrust violations.[62] In reaching its decision in *Merican*, the Third Circuit either failed to recall or chose to ignore this lesson.

In presenting their second argument, that even if the claim fell within the scope of the *Illinois Brick* rule they should not be barred from seeking treble damages,[63] the appellees did not rely on any of the recognized exceptions to the *Illinois Brick* rule.[64] Instead, they based

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57. *Id.* (Higginbotham, J., dissenting).

58. The appellees alleged loss of sales and profits, reduction in the value of goodwill, and the destruction of a significant portion of their business. Many of these alleged violations were unique to the appellees and could not be recovered by an intermediary who brought a suit in this situation. *Id.* at 971 (Higginbotham, J., dissenting).

59. *Id.* (Higginbotham, J., dissenting).

60. *Id.* (Higginbotham, J., dissenting).

61. *Id.* (Higginbotham, J., dissenting) (quoting *Mid-West Paper Prods.*, 596 F.2d at 583).

62. 431 U.S. at 748 (Brennan, J., dissenting) (quoting Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948)).

63. 713 F.2d at 968.

64. In *Illinois Brick* the Court noted two exceptions to the rule. The first exists when there is a fixed-quantity cost, plus a contract between the direct purchaser and its customers. The second exists when the direct purchaser is owned or controlled by the manufacturer from whom it purchases. 431 U.S. at 735–36 & n.16. For further explanation of the exceptions, see 60 WASH. U.L.Q. 716 (1982).

their argument upon an affidavit[65] offered by Caterpillar in support of its motion to dismiss the complaint.[66] Based upon the language of the affidavit, the Merican appellees contended that Ohio Machinery Company (hereinafter OMCO) had denied that it had suffered any damage as a result of the change made in the Caterpillar service-fee system.[67] Therefore, the appellees believed that OMCO had waived any opportunity it might have had to successfully bring a treble-damages claim against Caterpillar.[68] Obviously, if the appellees' position was correct, there was no chance of duplicative recovery of the alleged penalty, and that facet of the *Illinois Brick* rule[69] could not serve as a bar to the appellees' claim.[70]

The Third Circuit held that under the facts alleged, OMCO still possessed the right to bring a cause of action, and therefore found the appellees' argument unpersuasive.[71] The Third Circuit relied on the Supreme Court's holding in *Illinois Brick* to the effect that the legislative purpose underlying the creation of "a group of 'private attorneys general' to enforce the antitrust laws under § 4" was better served by holding that the direct purchaser had been injured to the full extent of the overcharge, than by attempting to apportion the overcharge among all the parties who may have paid a portion of it.[72] The court reached this decision despite its recognition of the fact that in some cases the direct purchaser might choose not to bring a section 4 claim.[73] In the present case, it was unclear if OMCO would bring an action against Caterpillar, but the possibility did exist.[74] In the event that OMCO did choose to bring an action against Caterpillar, the possibility of duplicative re-

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Some courts have recognized a vertical-conspiracy exception to the *Illinois Brick* rule. *See, e.g., In re* Mid-Atlantic Toyota Antitrust Litig., 516 F. Supp. 1287, 1294–96 (D. Md. 1981). The appellees disavowed reliance on such an exception, so the Third Circuit did not reach the issue of whether they would recognize it. 713 F.2d at 968 n.22.

65. *See supra* note 45.

66. 713 F.2d at 968.

67. *Id.*

68. *Id.*

69. The *Illinois Brick* rule is concerned with two possible problems, one of which is the possibility of duplicative recovery. *See Blue Shield*, 457 U.S. at 474.

70. 713 F.2d at 968.

71. The appellees did not allege that OMCO would not sue in this case, but rather alleged that Caterpillar and its coconspirators had imposed an unlawful penalty upon OMCO through the change in its service-fee system and had thereby prevented OMCO from distributing generator sets in territories and to customers of its own choosing. *Id.* The Third Circuit noted that under these facts, even in the face of the affidavit, it was possible that OMCO could bring an action for damages. *Id.* at 969.

72. *Id.* (quoting *Illinois Brick*, 431 U.S. at 746).

73. *Id.* at 969.

74. *Id.*

covery was present[75]—one of the dangers that the *Illinois Brick* Court sought to avoid.[76]

In his dissent in *Merican*, Judge Higginbotham made a valid and often-overlooked point when he noted that many of the damages alleged by the Merican appellees[77] were unique to them, so that even if OMCO did bring a treble-damages action, it would not be able to recover these specific damages.[78] There was no possibility of duplicative recovery in regard to these damages, so that under the *Illinois Brick* rule, there was no reason to dismiss the appellees' claim on this ground.[79]

The concerns with the complexity of the damage recovery theory and the potential for massive evidence involved in the appellees' claim still remained. The *Merican* appellees argued that their damage claim did "not present a problem of 'massive evidence and complicated theories' "[80] that both the *Illinois Brick* and *Hanover Shoe* Courts sought to avoid. Nonetheless, the Third Circuit held that the calculation required in *Merican* was of the very complex type[81] that the Supreme Court sought to avoid.[82] Although the Supreme Court expressed great concern with the problems of massive evidence and complicated recovery theories in both *Illinois Brick* and *Hanover Shoe*, it is clear that the presence or absence of these problems will not dictate the outcome of every case in which the issues arise. In *Blue Shield* the Court stated:

> [I]f there is a subordinate theme to our opinions in [*Hawaii v. Standard Oil Co.*, . . .] and *Illinois Brick*, it is that the feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4. Where consistent with the broader remedial purposes of the antitrust laws, we have sought to avoid burdening § 4 actions with damages issues giving rise to the need for "massive evidence and complicated theories," where the consequences would be to discourage vigorous enforcement of the antitrust laws by private suits.[83]

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75. *Id.*
76. *Id.*
77. *See supra* note 58.
78. 713 F.2d at 971 (Higginbotham, J., dissenting).
79. *Id.* (Higginbotham, J., dissenting).
80. *Id.* at 969 (quoting *Hanover Shoe*, 392 U.S. at 493).
81. To prove the alleged damages the appellees would have to calculate the service fee assignable to each generator set purchased by OMCO, determine the effect of the service fee and market forces on the price paid by the appellees, and estimate how any price increase affected their products and sales in view of the active competitive market forces in Saudi Arabia. 713 F.2d at 969 & n.24.
82. *Id.* at 969.
83. 457 U.S. at 475 n.11 (citation omitted) (quoting *Hanover Shoe*, 392 U.S. at 493).

Thus, the Supreme Court has taken the position that the twin concerns of the *Illinois Brick* rule do not comprise an absolute test to be mechanically enforced, but rather must be construed in light of the broad policy favoring compensating victims of antitrust violations and depriving violators of the fruits of their illegal activities.[84]

The position taken by the *Blue Shield* Court is the same one previously taken by Justice Brennan in his *Illinois Brick* dissent. In that dissent, Justice Brennan stated that the majority had simply ignored the congressional purpose in enacting section 4, and that by doing so the majority had severely hampered the effectiveness of the private treble-damages action which section 4 created to serve as an instrument of antitrust enforcement.[85] He felt that the Court misused the underlying rationale of *Hanover Shoe* when it held that because the defensive use of the pass-on theory had been rejected, the offensive use of the theory must also be rejected.[86]

In *Merican* it was clear that even if the suit would have given rise to massive evidence and complicated damage recovery theories, these problems would not have served to discourage the vigorous enforcement of the antitrust laws by private claims. In fact, it appears that it was the Third Circuit's concern with the problems of complicated damage theories and duplicative recovery that served to deter the vigorous enforcement of the antitrust laws by private claims. Congress has reiterated its intention by passing the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[87] The Senate report for this bill makes it clear that the states are given the right to bring a direct cause of action on behalf of residents who have been injured by an antitrust violation to avoid the inequities and inconsistencies of restrictive judicial interpretations. Thus, the Hart-Scott-Rodino Act was specifically intended to ensure that consumers were not precluded from the opportunity to prove the amount by which they were damaged by the antitrust violation[88]—the exact result reached in *Merican.*

V. CONCLUSION

The courts are faced with a great challenge in their attempt to ensure that the antitrust laws are effectively enforced. It has come to be realized that the problems of overly extensive evidence and complicated recovery theories can discourage the enforcement of the antitrust

84. *See, e.g., Mid-West Paper Prods.*, 596 F.2d at 583.
85. 431 U.S. at 749 (Brennan, J., dissenting).
86. *Id.* at 753–54 (Brennan, J., dissenting).
87. Pub. L. No. 94-435, 90 Stat. 1383 (codified in scattered sections of tits. 15, 18 & 28 U.S.C.).
88. *Illinois Brick*, 431 U.S. at 757 (Brennan, J., dissenting).

laws by private suits. This potential must, of course, be balanced against the possibility that an unfair burden could be placed upon an antitrust violator when a duplicative recovery is permitted.

The Third Circuit's decision in *Merican, Inc. v. Caterpillar Tractor Co.* fails to accommodate these competing interests. It does protect the antitrust violator from all possibility of paying a duplicative recovery, but it does not allow private individuals to prove that they were injured by an antitrust violation and, thereby, to recover treble damages. The decision follows from the Supreme Court's holding in *Illinois Brick*, but it is not compelled by it. The expressed intention of Congress favoring the compensation of victims of antitrust violations and the deterrence of antitrust violators by depriving them of their illegally obtained gains has been recognized by both the Supreme Court[89] and the Third Circuit.[90] Despite this fact, the Third Circuit has chosen not to comply with the express intention of Congress. By allowing its concern with the problems of duplicative recovery and complicated recovery theories to dictate its decision, the Third Circuit has ignored not only the express intention of Congress, but also the position taken by the Supreme Court in *Blue Shield*.[91] In doing so, the court has inappropriately made the express intention of Congress the poor stepchild of its own concerns with the problems of duplicative recovery and complicated damage recovery theories.

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89. *See Blue Shield*, 457 U.S. at 474.

90. The broad remedial purpose of § 4 is to compensate victims of antitrust violations and to deter violators by depriving them of the fruits of their illegality. *Mid-West Paper Prods.*, 596 F.2d at 583.

91. *See supra* note 83 and accompanying text.