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ANTITRUST DAMAGES FOR CONSUMER WELFARE LOSS

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CHANNING D. STROTHER, JR., ESQ.**

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I. INTRODUCTION

Section 4 of the Clayton Act provides that any person who is injured in his business or property by reason of anything forbidden in the antitrust laws "shall recover threefold the damages by him sustained."¹ The current private enforcement model usually permits plaintiffs to recover damages based upon the excessive prices charged to consumers.² However, economists see the real loss to society from an antitrust violation to be the consumer welfare loss which results from reduced output.³ The authors have been unable to locate any antitrust case which has permitted recovery of damages for this consumer welfare loss.⁴ This article addresses the following issues: if consumer welfare loss is the true measure of the damage to society from an antitrust violation, should it be included in a damage recovery; if consumer welfare loss is recoverable, who is the

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¹ 15 U.S.C. § 15 (1988).

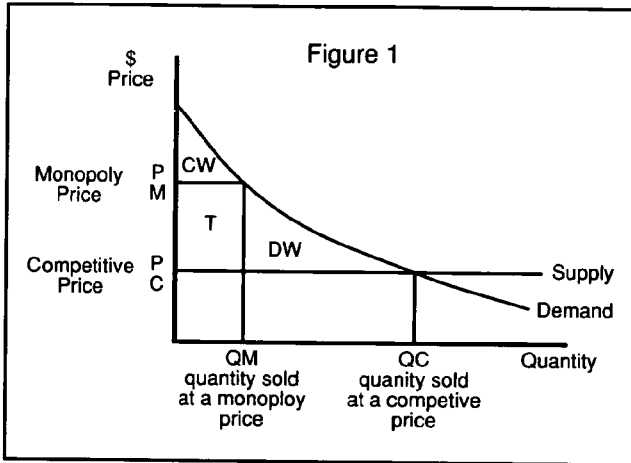
² HOUSE COMM. ON THE JUDICIARY, 98TH CONG., 2D SESS., STUDY OF THE ANTITRUST TREBLE DAMAGE REMEDY REPORT 20 (1984) [hereinafter Report].

³ *Id.*

⁴ In an unreported decision, the U.S. District Court for the Central District of California granted defendant's motion to exclude any reference before the jury to damages based on the loss of consumer welfare. The court held that on the facts before it, the proposed damage calculations were speculative. Additionally, the court held that the plaintiff, which was not the ultimate consumer, had not sustained the loss and therefore did not have standing to recover for it. *City of Vernon v. Southern California Edison Co.*, No. 83-8137 (C.D. Cal. May 23, 1989). *Cf. In Re Western Liquid Asphalt Cases*, 487 F.2d 191, 200 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974) ("[T]he amount of the overcharge is not necessarily the total amount of harm to plaintiffs. Purchasers may also have been damaged by being forced to turn to substitute goods, or to discontinue purchasing the price-fixed product.").

proper party to recover for the loss; and what difficulties are there in measuring such a loss for purposes of awarding damages?

Consumer welfare is the value to consumers of a good above the price paid for it. This value exists because consumers collectively would be willing to pay more than the market price for every unit of a good purchased except the last unit. The graph appearing in Figure 1 illustrates these concepts.



In a competitive market, the price is found on the price axis at the point at which the supply and demand curves intersect. At that point, the marginal cost of producing a unit of the good equals the price the consumer is willing to pay for a unit of the good. In Figure 1, QC is the quantity sold at price that would be established in a competitive market. It is readily apparent that if supply were restricted so that the quantity offered were any amount less than QC, consumers would be willing to pay a price greater than the competitive market price because the demand curve at any such quantity in Figure 1 is necessarily above the competitive market price. The areas in Figure 1 denoted CW, T, and DW represent the monetary amount purchasers would be willing to pay but do not have to pay if the price is established by a competitive market. This area represents the consumer surplus.⁵

However, if the market is subject to a monopoly price, shown as PM, the quantity purchased drops to QM. The box in Figure 1 designated T is the amount of consumer surplus that is transferred from consumers to the monopolist as a result of the monopoly price. It is this amount that is generally recovered as overcharge damages by successful antitrust plaintiffs. The area CW is the amount of consumer surplus that remains even with monopoly pricing. DW is the area of interest for present pur-

⁵ Melanie W. Havens, Michael F. Koehn & Michael A. Williams, *Consumer Welfare Loss: The Unawarded Damages in Antitrust Suits*, 15 U. DAYTON L. REV. 457, 459-60 (1990) [hereinafter Havens].

poses. This area represents the consumer surplus that is lost because consumers are unwilling to pay the monopoly price for a certain quantity of goods, but would have paid the competitive market price for that quantity.⁶ Economists refer to this loss of consumer surplus, which is a loss of consumer welfare or benefit, as a "deadweight" loss.⁷ The loss is deadweight because it is a pure loss to society as a whole and is not a transfer of wealth from the consumers to the monopolist. Deadweight losses result from inefficiencies in the market that cause wealth or societal benefit not to be created in the first instance. Therefore, total societal wealth is not maximized. Rather, there is a misallocation of resources.

As previously noted, although the courts have not recognized deadweight loss as an element of antitrust damages, economists view deadweight loss to be the major harm of monopolistic acts to society because such harm reflects a misallocation of resources.⁸ Conversely, the transfer of wealth generally used to measure antitrust damages is not considered a harm to society overall by most economists.⁹ Accordingly, the current measure of antitrust damages which calculates damages in terms of measures of excessive prices or overcharges does not address the real harm caused by monopolies.¹⁰

Moreover, even treble damages may actually fail to fully compensate antitrust victims for the amount of their actual damages.¹¹ One mathematical model predicts that, at commonly encountered inflation rates, treble damages provide insufficient deterrence even if detection and successful prosecution is assumed to be certain.¹²

On the other hand, a system which permitted recovery of only the deadweight consumer welfare loss would also be inadequate. As noted by Judge Posner in a class action suit by consumers injured by monopoly pricing, limiting recovery to the deadweight loss would be insufficient since such loss would only account for the damage to those who stopped purchasing due to the monopoly price.¹³ Such a limitation on recovery

⁶ *Id.*

⁷ *Id.* at 458 n. 6 (citing R. POSNER, ANTITRUST LAW; AN ECONOMIC PERSPECTIVE 237-43 (1976)).

⁸ Report, *supra* note 2, at 20; Ball Memorial Hosp. v. Mutual Hosp. Ins., 784 F.2d 1325, 1334 (7th Cir. 1986) (injury from lower output is one of the principal vices proscribed by the antitrust laws).

⁹ Report, *supra* note 2, at 20. Wealth transfers are not deemed to be a loss to society because the well-being of the buyer is not accorded a value greater than the well-being of the monopolist. Thus the welfare transfer effect is societally neutral because society as a whole retains the same total amount of wealth. *Id.* However, Judge Posner has argued that the dollar value of the wealth transfer may equate to a societal loss because firms expend resources in the rivalry to become a monopolist and those resources are clearly lost to society as a whole and are misallocated. Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. & ECON. 807 (1975).

¹⁰ Report, *supra* note 2, at 20.

¹¹ ABA ANTITRUST SECTION MONOGRAPH NO. 13, *Treble-Damages Remedy*, 46-47 (1986) [hereinafter *Monograph*].

¹² *Id.* at 43.

¹³ RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 293. See also Steven C. Salop & Lawrence J. White, *Treble Damages Reform: Implications of the Georgetown Project*, 55 ANTITRUST L.J. 73, 87 (1986).

would fail to account for the loss to consumers who continue purchasing at the monopoly price. Obviously, those consumers would experience greater consumer welfare at the lower competitive market price. Moreover, sufficient deterrence is not provided by this limitation if potential gains to a monopolist through wealth transfers exceed the dollar value of inefficiencies caused by such monopolistic behavior. However, if antitrust remedies are to be limited to total economic inefficiency, the allocative inefficiencies relating to acquisition of monopoly power noted by Posner¹⁴ should also be a part of those damages.

II. THE PURPOSE OF ANTITRUST DAMAGES

The statutory provisions for the award of antitrust damages were enacted to accomplish several objectives. Among them are punishment of the violator, deterrence of misconduct, and compensation of victims of anticompetitive acts.¹⁵ Determining the purpose of antitrust damages is complicated by the trebling provision. Some argue that because such damages are trebled, antitrust damages are primarily punitive. However, there is no clear judicial analysis identifying the treble damages portion of an antitrust damage award to be primarily punitive rather than compensatory.¹⁶

Instead, the Supreme Court has held that the purpose of the trebling provision is intentionally a mixed one.¹⁷ In addition to penalizing and deterring wrongdoers, other purposes of treble damages include compensating plaintiffs for the difficulty of bringing successful private actions, encouraging enforcement of the law, and assuring proper compensation for losses incurred as a result of an antitrust injury.¹⁸ Congress had an "expansive remedial purpose" in enacting the treble damage provision and sought to create a private enforcement system that would deter violators and deprive them of the fruits of their illegal actions, while at the same time providing adequate compensation to the victims of antitrust violations.¹⁹

¹⁴ See *supra* note 9.

¹⁵ Report, *supra* note 2, at 1; *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) "§ 4 has another purpose in addition to deterring violators and depriving them of the 'fruits of their illegality,' it is also designed to compensate victims of antitrust violations for their injuries." *Id.* (citation omitted).

¹⁶ *Ethicon, Inc. v. Aetna Casualty and Surety Co.*, 737 F. Supp. 1320 (S.D.N.Y. 1990).

¹⁷ *American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575-76 (1982).

¹⁸ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977). "Treble damages 'make the remedy meaningful by counterbalancing' the difficulty of maintaining a private suit under the antitrust laws." *American Society of Mechanical Engineers*, at 575 (citation omitted).

¹⁹ *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982).

Economists offer an alternative justification for the trebling provision. They generally agree that the optimal measure of antitrust damages should equal the cost imposed by the illegal conduct on society multiplied by a factor which will account for the less than 100 percent risk of detection and prosecution.²⁰ As previously noted, for economists, the cost to society includes the deadweight consumer welfare loss. Deadweight loss is a loss of allocative efficiency. "For those who believe that efficiency is the exclusive goal of the antitrust laws, the wealth transfer is not a policy problem, for it represents no efficiency loss. For them, the antitrust problem is the deadweight loss triangle."²¹

There is no basis for assuming that recovery of the deadweight loss is subsumed within treble damages. As indicated previously, while trebling of damages is intended to accomplish several purposes, recovery of deadweight consumer welfare loss is not one of them. On the other hand, recovery of deadweight loss fits the economists' ideal that trebled damages should equal, at a minimum, societal costs. Recovery for deadweight loss is fully consistent with the statutory purpose of antitrust damages of assuring proper compensation for losses incurred²² and would help to achieve Congress' "expansive remedial purpose" in enacting the treble damage provision.²³

It has been argued that popular support for the antitrust laws would evaporate if consumers did not perceive a benefit from their enforcement.²⁴ Yet, a refusal to permit the recapture of lost consumer surplus by those consumers forced out of the market by monopoly pricing denies would-be consumers the benefits of antitrust enforcement.²⁵ Moreover, public policy dictates a heavy reliance on private litigants to act as private attorney generals to enforce the antitrust laws.²⁶ If private attorney generals are denied the right to recover the deadweight loss, they have no incentive to vindicate the rights of consumers frozen out of the market.

²⁰ Report, *supra* note 2 at 2. Of course, no one knows what is the precise risk of detection multiplier. Clearly it will vary depending upon the nature of the violation and the factual context. For example, the risk of detection of a publicly announced merger is probably zero, while the appropriate factor for a bid rigging or price fixing violation may be much greater than three.

²¹ Herbert Hovenkamp, *Antitrust's Protected Class*, 88 MICH. L. REV. 1, 14 (1989) [hereinafter Hovenkamp].

²² *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977). There is a contrary view that an antitrust defendant should not be charged with damages that may have flowed from the illegal act, but did not, however, profit the defendant. See *Mid-West Paper Products Co. v. Continental Group*, 596 F.2d 573 (3rd Cir. 1979); Cf. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979) cert. denied, 449 U.S. 905 (1980); *In re Uranium Antitrust Litigation*, 552 F. Supp. 518 (N.D. Ill. 1982); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust*, 530 F. Supp. 36 (W.D. Wash. 1981).

²³ *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982).

²⁴ Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1035 (1987).

²⁵ Havens, *supra* note 5, at 461.

²⁶ *Id.* at 461-62.

While achieving optimal antitrust deterrence requires fines or damages which include recovery for deadweight loss,²⁷ a recovery of only deadweight loss would have an insufficient deterrent effect because the monopolist would profit from the wealth transfer.²⁸ Since, as illustrated in Figure 1, the wealth transfer is approximately twice the amount of the deadweight loss, without a very high threat of detection, treble damages based on deadweight loss would not deter violators.

Thus, recovery for deadweight loss alone would not be sufficient. One cannot conclude that the Supreme Court has adopted the Chicago school concept of allocative efficiency as the sole standard in antitrust cases.²⁹ The Supreme Court has recognized that the proper antitrust outcome may not reflect the optimum efficiency:

[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress anticipated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.³⁰

III. CAN DAMAGES FOR CONSUMER WELFARE LOSS BE REASONABLY CALCULATED?

One argument raised against permitting recovery for consumer welfare loss is the difficulty of calculating the magnitude of the loss.³¹ However, commentators have argued that calculating consumer welfare loss is no more difficult than many other routinely-made damage calculations.³² They argue that the consumer welfare loss calculation requires only determining the just and fair market price and estimating the demand elasticity.³³ Courts routinely estimate the just and fair market price in calculating damages based on a monopoly overcharge³⁴ and have recog-

²⁷ William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983).

²⁸ Hovenkamp, *supra* note 21, at 6.

²⁹ William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury and Evidentiary Sufficiency*, 75 VA. L. REV. 1221 (1989); Eleanor M. Fox, *The Modernization of Antitrust, a New Equilibrium*, 66 CORNELL L. REV. 1140, 1153 (1981) ("Rather than standing for efficiency, the American antitrust laws stand against private power").

³⁰ *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

³¹ See, for example, *supra* note 4. 2 PHILIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 190 n. 22 (1978); Gregory Werden & Marius Schwartz, *Illinois Brick and the Deterrence of Antitrust Violations An Economic Analysis*, 35 HASTINGS L.J. 629, 632 n. 18 (1984).

³² Havens, *supra* note 5, at 462-63.

³³ *Id.*

³⁴ ABA ANTITRUST SECTION, *Antitrust Law Developments* 409-11 (2d ed. 1984).

nized a number of methods which are acceptable for determining a just and fair market price.³⁵ It is even permissible for experts to study pricing data during the critical period and then calculate the prices that would have prevailed in a competitive market.³⁶

The other factor needed to calculate the consumer welfare loss is an estimate of demand elasticity.³⁷ For this factor, a "before and after" approach may be used if a competitive market price was observed prior to a period of monopoly or collusive pricing. In those circumstances, the quantity demanded at the "before price" is readily ascertainable and the price elasticity is easily calculated.³⁸ Where there is no "before" period, the demand elasticity must be calculated statistically.³⁹ Other potential sources of demand elasticity figures are elasticity studies which may have been performed previously by defendants for marketing or corporate planning purposes, which may be obtained through discovery. In *Zenith v. Hazeltine Research*,⁴⁰ the U.S. Supreme Court undertook the difficult task of determining how large the plaintiff's percentage share of the markets would have been absent the defendant's anticompetitive acts.⁴¹ Based upon that determination, lost profits would be calculated. Calculations for market share growth obviously involved many more assumptions than does estimating demand elasticity.

³⁵ The "before and after" theory determines the just and fair market price by reference to the price paid prior to the violation. The "yardstick theory" compares the prices charged for a similar product in a similar, but competitive, market with the prices charged by the defendant. JULIANE O. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 115.04[3] (1988). The "before and after" method should not be used when the before-period is a period in which demand was inflated by predatory pricing and the after-period is a period of monopoly pricing in order to recoup profits lost through earlier predatory pricing.

³⁶ *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985); *Greene v. Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976) (court permitted recovery for lost profits for the wrongful termination of a distributorship when the expert witness for the plaintiff had made an extensive examination of the plaintiff's financial records and analyzed statistics about the general economic climate in the relevant area, and had made an estimate which, though imprecise, was found reasonable).

³⁷ Havens, *supra* note 5, at 463. There is not complete agreement regarding the ease of determining demand elasticities. For a contrary view see William M. Landes & Richard A. Posner, *Should Antitrust Purchasers Have Standing To Sue Under The Antitrust Laws? An Economic Analysis Of the Rule Of Illinois Brick*, 46 U. CHI. L. REV. 602, 619-20 (1979); Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717 (1990).

³⁸ Havens, *supra* note 5, at 463.

³⁹ *Id.* Professor Salop agrees that the consumer welfare loss can be readily calculated. *A Reassessment of Antitrust Remedies; Panel Discussion*, 55 ANTITRUST L.J. 123, 126-27 (1986). Judge Easterbrook, on the other hand, suggests that it will be difficult in litigation to identify the lost demand. However, under a strict simplifying assumption, the consumer welfare loss is equal to one-half of the overcharge. *Id.* at 126. See also David Sheffmen & Pablo T. Spiller, *Geographic Market Definition Under U.S. Dept. of Justice Merger Guidelines*, 30 J. LAW & ECON. 123 (1987) (use of residual demand elasticities in merger analysis).

⁴⁰ 395 U.S. 100 (1969). See also *Rangen Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851, 855-56 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966) (award of lost profits for lost sales due to anticompetitive acts upheld).

⁴¹ 395 U.S. at 116 n. 11.

Elasticity studies are frequently used and relied upon by the courts for other purposes. In *Shannon v. Crowley*,⁴² the plaintiffs were criticized by a federal district court in California for their failure to account for demand elasticities in their damage study. The Ninth Circuit has likewise indicated that the failure to provide evidence of price elasticity for demand prevented the plaintiffs from establishing damages.⁴³ Administrative agencies utilize elasticity estimates for many purposes in litigated proceedings involving electric utilities, particularly in rate proceedings.⁴⁴ Setting utility rates to recover costs is analogous to calculating damages to recover losses. Since elasticity estimates are used to set financial recoveries by utilities through rates, there seems to be no justification for refusing to recognize them for the calculation of damages. Elasticity studies can be buttressed by sampling techniques in which individual customers are questioned to determine their demand elasticity.

So long as reasonable estimates of demand elasticity can be made, there is no reason to deny recovery of consumer welfare loss as too speculative. An antitrust damage award may be based upon a reasonable estimate even if the result is an approximation.⁴⁵ A plaintiff need only put forth the "best available evidence." The defendant must bear the risk of uncertainty and imprecision in computing damages.⁴⁶

Professor Sullivan argues that the "essential thing is that the available data be used in rational ways which warrant confidence that the damage figure reached is, in fact, a reasonable if imprecise estimate, rather than a speculative guess."⁴⁷ An antitrust plaintiff, who has been excluded from the relevant market by anticompetitive activity, is entitled to recover his lost profits.⁴⁸ Surely such a lost profits calculation is no more precise than

⁴² 538 F. Supp. 476, 480-81 (N.D. Cal. 1981).

⁴³ *Dunn v. Phoenix Newspapers, Inc.*, 735 F.2d 1184 (9th Cir. 1984).

⁴⁴ *Central Hudson Gas & Electric Corp.*, 76 Pub. Util. Rep. 4th 530, 567-68 (N.Y.P.U.C. 1986) (revenue forecast adjusted to reflect greater sales due to lower rates resulting from lower oil costs).

⁴⁵ JULIANE O. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 115.03[2][b] (1988).

⁴⁶ *Id.*

⁴⁷ LAWRENCE A. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* (1977).

⁴⁸ *Dolphin Tours, Inc. v. Pacifico Creative Service Inc.*, 773 F.2d 1506 (9th Cir. 1985); *Pierce v. Ramsey Winch Co.*, 753 F.2d 416 (5th Cir. 1985) is a resale price maintenance case in which the terminated distributor began selling another brand of winches. Damages were awarded for lost profits based on the differences between the number of substitute winches that were sold and the number of Ramsey winches that would have been sold.; *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 663-64 (5th Cir. 1974) *cert. denied*, 420 U.S. 929 (1975); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982). (A prior purchaser who ceased to purchase from cartel could recover lost profits but prior non-purchaser who claimed to be a would-be cartel purchaser could not recover because damages were too speculative.).

a calculation of consumer welfare loss. In determining the lost profit damage award to the excluded plaintiff, the jury is allowed to act on probable, inferential proof in determining the amount of damages even though such an award is an approximation. The defendant, whose conduct operates to exclude others from the relevant market, should not benefit because its wrongful actions make it more difficult for the plaintiff to establish the precise amount of its injury.⁴⁹ It is sometimes necessary to admit proof of damages bordering on the speculative in order to implement the policies of the antitrust laws. This is especially true when the acts of the defendant make a precise damage calculation impossible.⁵⁰ A lost profit calculation will be accepted if it is estimated in any reasonable way, and the underlying assumptions are not without support in the record.⁵¹ The Supreme Court has said:

[W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the results be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.⁵²

Figure 2 also demonstrates that deadweight loss can be calculated. It is similar to Figure 1, but adds a level of wholesaler to the vertical chain of distribution, and assumes that the monopoly price has been imposed by the producer on the wholesaler. For simplicity, it has been assumed that the wholesale purchaser is able to match his purchase quantity exactly with his retail sale quantity. It also is assumed that there is a direct pass through of the monopoly price. It can readily be observed that the wholesale purchaser suffers a deadweight loss in similar amount to the deadweight loss suffered by the nonpurchasing consumer.

In a suit by the wholesale purchaser for lost profits, the wholesaler would be allowed to recover, *inter alia*, the amount represented in Figure 2 by the rectangle BCEF upon proper proof of the quantity which would

⁴⁹ *Id.*

⁵⁰ *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894 (5th Cir. 1973), *cert. denied*, 412 U.S. 923 (1973).

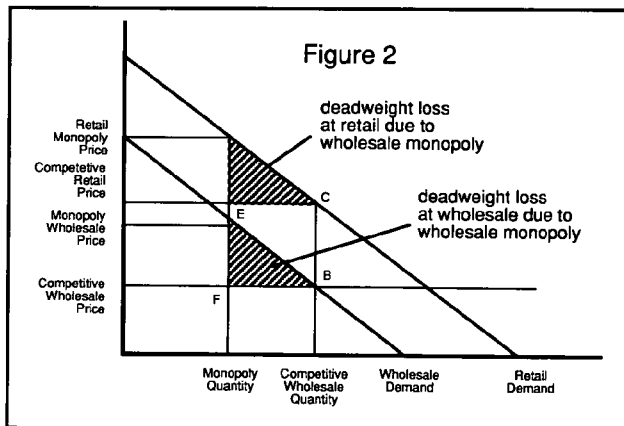
⁵¹ *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1158 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *Park v. El Paso Board of Realtors*, 764 F.2d 1053 (5th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986) (evidence must show a rational basis for each assumption in damage study); *Handgards v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985) (plaintiff must provide evidence to support a just and reasonable estimate of damages); *International Distribution Centers v. Walsh Trucking Co.*, 618 F. Supp. 98 (S.D.N.Y. 1985).

⁵² *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

have been sold but for the anticompetitive acts.⁵³ This includes the wholesale deadweight loss. Calculating the amount the wholesaler would have sold under competitive pricing should not be any easier than calculating the amount consumers would have purchased. This provides additional support for the position that the consumer deadweight loss can be calculated. Indeed, if the simplifying assumptions used in Figure 2 approximate market realities, the calculation of the additional quantity which the wholesaler would have purchased is also the quantity to be utilized for calculating consumer deadweight loss.

There is nothing inherently speculative about the computation of damages based on deadweight loss. If the calculation is carefully performed with adequate record support for its assumptions, such a damage study should not be rejected on grounds that damages cannot be calculated. Questions remain, however, as to when deadweight loss damages should be awarded and, if so, who is a proper party to recover them.

In the situation represented by Figure 2, only the wholesale purchaser, the direct purchaser from the monopolist, would be permitted to recover damages.⁵⁴ Should the wholesale purchaser be allowed to recover both the lost profit on lost sales plus the consumer deadweight loss? The injury to society represented by consumer deadweight loss is the misallocation of resources.⁵⁵ The misallocation of resources is derived from the fact that too few items are produced and sold. When the wholesale purchaser recovers lost profits for items not sold, the damages already reflect the proper allocation of resources. Nevertheless, even after the wholesale purchaser had recovered lost profits under an assumption of allocative efficiency, there remains a deadweight loss to consumers which is unrecovered. If the direct purchaser is not allowed to recover for the consumer deadweight loss, a portion of the injury caused by the anticompetitive acts cannot be recovered by anyone.



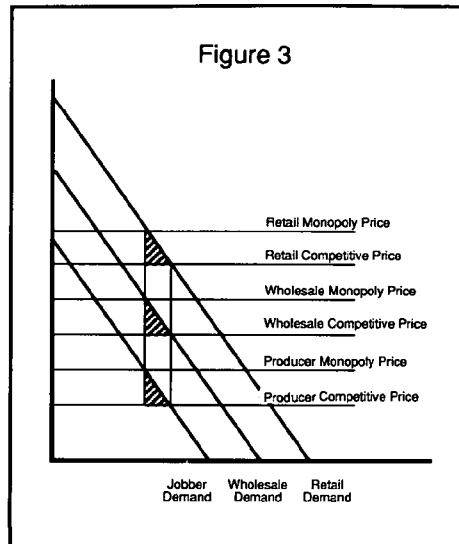
⁵³ *Illinois ex rel. Hartigan v. Panhandle Eastern Pipeline Co.*, 852 F.2d 891, 896 (7th Cir. 1988) (en banc), *cert. denied*, 488 U.S. 986 (1988); *Arnott v. American Oil Co.*, 609 F.2d 873 (8th Cir. 1979), *cert. denied*, 466 U.S. 918 (1980); *Lehrman v. Gulf Oil Co.*, 500 F.2d 659, 667 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

⁵⁴ *Kansas v. Utilicorp United, Inc.*, 497 U.S. —, 110 S. Ct. 2807 (1990).

⁵⁵ See *supra* Report, note 2, at 20.

The situation is different if the wholesale purchaser absorbs the entire monopoly price increase. In that instance, the retail price remains at a competitive level. Presumably, the retail demand at the competitive price is met and there is no consumer deadweight loss. On the other hand, in some but not all of the cases where the monopoly price is passed through, there will be some consumer deadweight loss that under the present law would not be recovered in a suit by a direct purchaser.

Figure 3 is similar to Figure 2, with the addition of a third party, a jobber, in the distribution chain. Again, the monopoly price is imposed by the producer. Only the jobber, as the direct purchaser, can recover for lost profits. Since the deadweight loss to the jobber and the wholesale purchaser are both subsumed within a lost profits recovery, there should be no separate deadweight loss for the wholesale purchaser's loss. However, as Figure 2 indicates, the deadweight loss at the consumer level remains and should be recoverable.



IV. WHO SHOULD BE PERMITTED TO RECOVER DAMAGES FOR CONSUMER WELFARE LOSS?

In identifying the appropriate parties to recover damages for consumer deadweight loss, the easiest example involves a suit by consumers. For instance, in a consumer class action against a price fixer or monopolist, it would be entirely appropriate for the class to include those who would have purchased, but did not because of the higher than competitive cost.⁵⁶

⁵⁶ See *Hovenkamp*, *supra* note 21, at 31. "The immediate burden of the traditional social cost of monopoly is borne by consumers who would have purchased the product at a competitive price, but who refuse to buy at the monopoly price. The efficiency loss results from the fact that these consumers must make a substitute choice that gives them a lower consumer surplus than the surplus they would have enjoyed had the market been competitive." *Id.*

The measure of damages to those would-be buyers is their loss of consumer welfare. If the loss of consumer welfare is not recoverable, the collusive firms are not being charged for the true cost of their illegal behavior and the purpose of antitrust damages are frustrated.⁵⁷

The more difficult problem arises when the consumer is an indirect purchaser. The U.S. Supreme Court, while not yet forbidding all antitrust claims by indirect purchasers, has placed strict and narrow limits on indirect purchaser claims.⁵⁸ In *Illinois Brick v. State of Illinois*,⁵⁹ the Court held that an indirect purchaser is not injured within the meaning of Section 4 of the Clayton Act.⁶⁰ This same holding, was reiterated in *Kansas and Missouri v. Utilicorp United, Inc.*⁶¹

However, none of the rationale given by the Court in these two cases supports the conclusion that an indirect purchaser is not an injured party. Significantly, neither case involved a claim for damages for deadweight loss. A more reasonable conclusion would have been that indirect purchasers are too remote from the injury to be permitted to recover.⁶² If, in fact, indirect purchasers have not suffered an antitrust injury under Section 4, it makes no sense to say that in some instances an indirect purchaser may sue. However, the Court seems to be saying just that. Thus, in *Kansas and Missouri*, the Court said "we might allow indirect purchasers to sue only when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury."⁶³

In *Illinois Brick*, the state of Illinois sued to recover the increased costs it incurred when it purchased buildings built, in part, of concrete blocks, the price of which had been fixed by a conspiracy of block manufacturers. The concrete blocks passed through several hands before being purchased as part of the buildings. The Court denied the state the right to recover for three reasons. First, there was a possibility of duplicative recoveries if both direct and indirect purchasers could sue. Second, the Court emphasized the uncertainty and difficulty inherent in any attempt to apportion the damages between direct and indirect purchasers. Third, the Court was concerned that permitting various levels of direct and indirect purchasers to recover damages would dilute the potential recovery of each plaintiff to such a low level that there would be little incentive for private enforcement of the antitrust laws.

None of the three rationale given in *Illinois Brick* are applicable to indirect purchaser suits for loss of consumer surplus. Unless direct purchasers are to be given the right to recover for consumer surplus loss,

⁵⁷ Havens, *supra* note 5, at 465.

⁵⁸ DAVID C. HJELMFELT, ANTITRUST AND REGULATED INDUSTRIES 168-69 (1985).

⁵⁹ 431 U.S. 720 (1977).

⁶⁰ 15 U.S.C. § 15 (1988).

⁶¹ *Supra* note 54.

⁶² *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (applying a proximate cause test in part to determine antitrust standing).

⁶³ 110 S. Ct. at 2818. *See also*, *California v. ARC America Corp.*, 490 U.S. 93 (1989).

there is no problem of duplicate recoveries. Regardless, the normal measure of damages recoverable by a direct purchaser does not include deadweight loss. Similarly, there should be no problem with apportioning damages because while the amount of consumer deadweight loss might change depending upon flow through of the overcharge, the deadweight loss remains an easily identifiable, if not easily calculated, amount. There is no concern with dilution of damages because permitting indirect consumers to recover for deadweight loss would not reduce the amount of damages recoverable by the direct purchaser.

Accordingly, the *Illinois Brick* doctrine should not be extended to preclude indirect suits by consumers for deadweight loss. This does not necessarily mean that consumers, as indirect purchasers, should be allowed to recover deadweight loss. There are a number of reasons for preferring recovery for deadweight loss by the direct purchaser. For example, it may be difficult to identify the would-be consumers. This is particularly true for supposed customer-plaintiffs who had no prior history of purchases before the overcharge. Moreover, for many of these would-be consumers, the amount in issue will be too small to merit the expense of an antitrust suit. Also, such would-be consumers are probably in the weakest position to detect an antitrust violation. For these reasons, the direct purchaser, rather than the would-be consumer, is the preferable choice to recover damages for consumer deadweight loss.⁶⁴ Additionally, it is more efficient to permit the direct purchaser to recover for all losses caused by the violation.⁶⁵

States are another class of potential plaintiffs for the recovery of consumer deadweight loss damages. States may sue under the antitrust laws for injuries to the state's economy.⁶⁶ However, the general right of a state to sue for injury to its economy has been limited to suits for injunctive relief.⁶⁷ Since the threatened antitrust injury giving cause for injunctive relief would almost certainly cause additional injuries, adding a claim based on consumer deadweight loss would be of only marginal benefit, and would add unnecessary burdens. Additionally, Section 4c of the Clayton Act⁶⁸ does provide specifically for *parens patriae* actions by states for antitrust injuries to natural persons. However, the statute was not intended to remove the prohibition on recovering damages for injury to the state's general economy.⁶⁹ Moreover, under Section 4c, states cannot sue to recover damages incurred by indirect purchasers.⁷⁰ Section 4c does not establish any new substantive rights. Rather, it simply "created a new

⁶⁴ *Supra* note 62.

⁶⁵ Page, *supra* note 29, at 1271.

⁶⁶ *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945).

⁶⁷ *Hawaii v. Standard Oil Co.*, 431 F.2d 1282 (9th Cir. 1970).

⁶⁸ 15 U.S.C. § 15c (1988).

⁶⁹ However, at least one commentator argues that Section 4c was passed as a legislative response to cases like *Hawaii v. Standard Oil Co.*, 431 F.2d 1282 (9th Cir. 1970), which disallowed *parens patriae* suits for damages to the state's economy. JULIANE O. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 101.11 (1969).

⁷⁰ *Supra* note 54.

procedural device . . . to enforce existing rights of recovery under § 4."⁷¹ Accordingly, it is unlikely that states will emerge as the proper parties to assert claims for deadweight losses.

One objection that may be raised in suits by direct purchasers for deadweight loss incurred by indirect purchasers is that this is not an injury sustained by the direct purchaser. This criticism is, of course, true. However, in opting for suits by direct purchasers rather than indirect purchasers, even in cases where all or almost all of the overcharge was passed on to indirect purchasers, the Supreme Court has already approved recovery by direct purchasers of damages not incurred by them.⁷² The ruling in *Illinois Brick* has played havoc with the language of Section 4.⁷³ There is no justification for holding that direct purchasers may recover for some damages sustained only by the indirect purchasers, but not other damages.

V. CONSTITUTIONAL STANDING

One of the objections raised to allowing a direct purchaser to recover for the deadweight loss to the ultimate consumer is the lack of constitutional standing.⁷⁴ However, constitutional standing to bring an action is much more expansive than is the concept of antitrust standing. The Supreme Court observed in *Associated General Contractors v. California State Council of Carpenters* that "[h]arm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury on fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action."⁷⁵ Given that the Supreme Court has already determined in *Illinois Brick*⁷⁶ that the direct purchaser is the injured party, it would be improper to then say the direct purchaser lacks constitutional standing to maintain the action.⁷⁷

Moreover, following the logic of *Illinois Brick*, the direct purchaser should also satisfy the three requirements for constitutional standing of (1) personal injury; (2) fairly traceable to the defendant's allegedly unlawful conduct; and (3) likely to be redressed by the requested relief.⁷⁸ Under *Illinois Brick*, the direct purchaser has suffered the personal injury even for passed-on damages. The injury is clearly traceable to the de-

⁷¹ *Illinois Brick*, 431 U.S. at 734 n.14.

⁷² *Id.* at 746.

⁷³ Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717, 1725-26 (1990).

⁷⁴ See *City of Vernon v. Southern Cal. Edison Co.*, No. 83-8137 (C.D. Cal. May 23, 1989).

⁷⁵ 459 U.S. 519, 535 n.31.

⁷⁶ 431 U.S. 720.

⁷⁷ *Accord* *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918); *Adams v. Mills*, 286 U.S. 397 (1932); *Bacchus Imports v. Dias*, 468 U.S. 263 (1984); *County of Oakland v. City of Detroit*, 866 F.2d 839 (6th Cir. 1989).

⁷⁸ *Allen v. Wright*, 468 U.S. 737, 751 (1984); *American West Airlines, Inc. v. Burnley*, 838 F.2d 1343 (D.C. Cir. 1988).

fendant's unlawful conduct and is likely to be redressed by an award of damages. Therefore, the direct purchaser has constitutional standing to recover deadweight loss.

VI. RECOVERY OF DAMAGES FOR CONSUMER WELFARE LOSS IN STATE COURT PROCEEDINGS

In *California v. ARC America Corp.*,⁷⁹ the Supreme Court held that the rule of *Illinois Brick* does not preempt state statutes permitting indirect purchasers to sue under state law for antitrust damages. A number of states have specific statutory provisions permitting suits by indirect purchasers.⁸⁰

Many of these state statutes specifically prohibit the award of duplicative damages. Where a state statute permits suits by indirect purchasers as well as direct purchasers, the indirect purchaser should be permitted to recover deadweight loss damages. The argument in favor of permitting the indirect purchaser to recover deadweight loss damages is marginally stronger in those states which expressly prohibit duplicative damages. However, in any event, there are sufficient procedural devices such as interpleader, joinder of necessary parties, and case consolidation, already in place which empower state courts to avoid awards of duplicative damages.⁸¹ Moreover, in a case predating *Illinois Brick*, the Ninth Circuit found no insurmountable problem in apportioning damages:

Problems of the apportionment of damages as between an intermediary and an ultimate consumer may be treated after liability is established, unless it is clear that no ultimate consumer was damaged. If an intermediary is shown to have been damaged by payment of an illegal overcharge which was not passed on to the ultimate consumer, [defendant's] liability to ultimate consumers, to that extent, may be decreased.⁸²

The deadweight loss portion of damages need not be apportioned, but could be assigned directly to the indirect purchasers. Another alternative would be to permit the direct purchaser to recover deadweight loss dam-

⁷⁹ 490 U.S. 93 (1989).

⁸⁰ See, e.g., CAL. BUS. & PROF. CODE (West 1990) § 16750(a); D. C. CODE ANN., § 28-4509 (1990); HAW. REV. STAT., § 480-13 (1990); ILL. ANTITRUST ACT § 7(2) (1990); ME. REV. STAT. ANN., Title 10, § 1104 (West 1990); MD. COM. LAW I CODE ANN., § 11-209 (1990) (limited to suits by the United States, Maryland, or any political subdivision); Mich. Antitrust Reform Act, Section 8 (1990); Minn. Antitrust Law of 1971, Section 325D.57; MISS. CODE ANN., § 75-21-9 (1972); N.D. CENT. CODE, § 51-08.1-08 (1990).

⁸¹ *In Re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974).

⁸² *Id.* at 200.

ages on behalf of the indirect purchasers in the nature of a class action suit tacked on to the main suit. Surely, the American legal system is sufficiently adaptable to fashion a remedy for the deadweight loss harm to society.

VII. CONCLUSION

Economists argue that consumer deadweight loss is an injury to society from anticompetitive overcharges reflecting underproduction and misallocation of resources. Although this element of damages is not currently being recovered by antitrust plaintiffs, it is a calculable amount that should be sought in overcharge cases. Permitting recovery of damages for consumer deadweight loss is consistent with Congress' intent in enacting Section 4 of the Clayton Act where it sought to ensure that victims of anticompetitive conduct receive compensation.⁸³ Direct purchasers are the best situated plaintiffs to prosecute claims for damages for deadweight loss to consumers.

⁸³ *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982).