In the

Supreme Court of the United States

ILLINOIS BRICK COMPANY, EL AL.,
PETITIONERS,
V.
STATE OF ILLINOIS, ET AL.,
RESPONDENTS.

No. 76-404

Washington, D. C.
March 23, 1977

Pages 1 thru 61

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IN THE SUPREME COURT OF THE UNITED STATES

ILLINOIS BRICK COMPANY, et al., Petitioners, v. STATE OF ILLINOIS, et al., Respondents.	No. 76-404

Washington, D. C.,

Wednesday, March 23, 1977.

The above-entitled matter came on for argument at 11:24 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

EDWARD H. HATTON, ESQ., JENNER & BLOCK, One IBM Plaza, Chicago, Illinois 60611; on behalf of the Petitioners.

LEE A. FREEMAN, JR., ESQ., Freeman, Rothe, Freeman & Salzman, One IBM Plaza, Suite 3200, Chicago, Illinois 60611, Special Assistant Attorney General for the State of Illinois; on behalf of the Respondents.

DONALD I. BAKER, ESQ., Assistant Attorney General, Antitrust Division, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae.

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C O N T E N T S

[Afternoon Session - pg. 27]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-404, Illinois Brick Company against Illinois.

Mr. Hatton, I think you may proceed.

ORAL ARGUMENT OF EDWARD H. HATTON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HATTON: Mr. Chief Justice, and may it please the Court:

This is a case that's before the Court on the granting of a petition for certiorari to the Seventh Circuit Court of Appeals. The Seventh Circuit Court of Appeals had reversed a summary judgment granted by the district court in favor of the defendants in an indirect purchaser case.

The issue thus posited before this Court, as we view it, is the application of Hanover Shoe to the indirect purchaser pass-on theories that have been much discussed in the bar and before the lower courts, in the context of the facts of this proceeding.

I would like now, with the Court's permission, to turn to a description of the proceedings below. That is, in the district court.

This particular case, the State of Illinois case, is not a class action case, as you know. The State of Illinois case was one of a series of cases filed in the Federal District Court in the Northern District of Illinois, Chicago

of course.

These cases were commenced by, or stimulated, if you will, by the filing by the Antitrust Division of indictments and a civil injunction complaint alleging that the defendant manufacturers have conspired illegally under section 1 of the Sherman Act to increase the price of concrete block.

That proceeded to stimulate a series of other cases, including the State of Illinois case. The other cases included class action and other direct action cases seeking treble damages by masonry contractors, by owner-builders, and by general contractors, and by the State of Illinois.

The indictments -- nolo contendere pleas disposed of the indictments. The antitrust consent decree disposed of the Antitrust Division civil case. And the other civil cases, treble-damage suits, class actions, were all settled except for the State of Illinois case.

Thus we turn to the State of Illinois case, the amended complaint filed by the State of Illinois in the district court. The amended complaint filed by the State of Illinois was for and on behalf of itself, and other State and local entities, so-called governmental entities. These entities were listed and enumerated on Appendix A of the amended complaint filed by the State of Illinois. There are some 700 of them.

As I wish to indicate, this is not a class action case.

The amended complaint alleged a price-fixing conspiracy by the defendant manufacturers of concrete block, and alleged that the plaintiff and the Appendix A plaintiffs had either purchased or directly or indirectly paid for concrete block.

I would now, with the Court's permission, describe the industry.

The conspiracy charge is in the Chicago urban area. The defendants are manufacturers of concrete block located in that area and distributing in that area.

Concrete block is used as a minor component in building structures, such as commercial office buildings, industrial and public buildings. Here, of course, we are dealing with a public building of the State of Illinois and the alleged Appendix A entities. However, the owners of public buildings in this instance do not buy concrete block. They buy a completed building, which is a package of materials, goods and services.

The bidding process may be briefly described as follows: The awarding authority for the construction of a public building will necessarily send out plans and specifications and seek bids from general contractors. The general contractors, in preparing their bids, usually seek quotations from various kinds and types of subcontractors, including masonry subcontractors.

The masonry subcontractors quote not only concrete block in contemplation of the specifications for the masonry package, but also necessarily are bidding on a package, a masonry subcontract package, if you will, consisting of goods and services and the components, whatever they may be.

The general contractors in the State of Illinois case then proceed to submit their bids, competitive bids, their sealed bids under State statutory requirements for competitive bidding, and of course the awarding authority then awards, if he elects to do so, then elects to award the contract to the lowest responsible bidder. And the general contractor thus is the successful bidder providing the package of goods and services, namely a building, in which a component of that building may be concrete block and which may in turn have been under subcontract from a masonry subcontractor.

I would now like to turn to -- having the industry background in mind and the nature of the proceeding, to turn to the procedures below, particularly as relates to the collection of evidence in support of the summary judgment motion which we made on behalf of our defendants, and which the district court granted.

At the onset of the case, we were of course concerned with disposing of the criminal case and the other civil litigation other than the State of Illinois case.

After the protracted negotiations that took place in

connection with the settling of the other cases, we then served upon the State of Illinois interrogatories. The purposes of the interrogatories inter alia were to support a motion for summary judgment on behalf of the defendants, on the grounds that the plaintiff and the Appendix A entities did not purchase concrete block. They were indirect purchasers, and, under Hanover Shoe, could not state a claim for relief.

Thus the intention of our original interrogatories, which appear in the Appendix, was to determine whether the plaintiffs did -- that the plaintiffs did not purchase concrete block, they purchased through competitive bid a complete building, that the buildings were not awarded on the basis of a pre-existing cost-plus-price contract or similar pricing arrangement, but rather were on the basis of competitive bids.

During the course of our negotiations, as necessarily required by the district court to reach agreement on objections to interrogatories, we reached an understanding with counsel for plaintiff, Mr. Lee Freeman, Sr., that instead of -- a more expeditious and more efficient way of obtaining this information was through questionnaires. And, accordingly, questionnaires were prepared and circulated to each one of the 700-odd Schedule A plaintiffs, Appendix A plaintiffs.

Mr. Freeman, in the Appendix, by letter, at page 208 of the Appendix, explains the purposes. The purpose was simply to provide a method to obtain the information desired by our

interrogatories through the questionnaire process, and thus to elicit from those responding to the questionnaire the facts that we believed necessary to have this case fall into what we believe to be the Hanover doctrine as contained in the Hanover decision of this Court, and the rationale of the Hanover case.

The results of the questionnaire may be summarized as follows: Of the somewhat in excess of 700 Appendix A Entities, 253 responded. Only four plaintiffs bought concrete block directly. Of the remaining 249, none bought concrete block directly, but bought buildings, which were competitively bid, with no pre-existing cost-plus contract or similar pricing arrangement involved.

The results were quoted by Judge Kirkland, who is the district judge who wrote the opinion sustaining our motion for summary judgment, as follows:

Approximately one-third of the more than 700 plaintiffs represented by the State have responded to interrogatories propounded by defendants. The responses reveal that only four of the plaintiffs purchased concrete block directly from a defendant. One plaintiff disclosed it had made direct purchases from a non-defendant. The remaining responding plaintiffs did not purchase concrete block directly from any defendant, nor did they purchase concrete block indirectly pursuant to a cost-plus contract.

During the process, the parties, as appears at

Appendix 202 and 203, in contemplation of our motion for summary judgment which was to be filed and which we had discussed with the court -- who was then Judge Power, before he went on, was elevated to the Court of Appeals -- along with the briefing schedule. And it was agreed by stipulation of the parties that until our motion for summary judgment on the indirect purchaser Hanover Shoe doctrine had been determined, as well as several other then pending motions, that discovery -- that all other discovery would be stayed until a disposition by the district court of principally our motion for a summary judgment on the indirect purchaser theory.

And that is contained in the Appendix, our printed Appendix, at page -- stipulation and motion at pages 202 and 203.

I note this in passing because some of the intervening briefs have seemingly indicated that the court cut off discovery. It was not in fact that way. Discovery was, by agreement, stayed until the district court had reached a decision on our motion for partial summary judgment.

QUESTION: I am having some difficulty, Mr. Hatton, tracking just how this is relevant to the central issue.

MR. HATTON: Well, the problem is that there has been -- Mr. Freeman, in his brief on behalf of the State of Illinois, along with some of the amicus curiae, has stated that there are not facts sufficient in this record to permit

this Court to reach the issue which, I agree, is decisive.

That was the reason for my -- I will turn now to the issue before this Court.

It is our view of Hanover, and we believe this to be the issue before this Court, that Hanover holds, and I confess, Mr. Chief Justice, I have some temerity in this, having in mind that Mr. Justice White wrote the opinion in Hanover, and Mr. Justice Stewart dissented, but on another issue.

QUESTION: It was a Court opinion.

MR. HATTON: Yes, I know, sir.

[Laughter.]

QUESTION: You're not obliged to agree with us, if you don't want to.

MR. HATTON: I thought I might agree with that one, Your Honor.

In our view, Hanover holds: one, that the first purchaser of an illegaly price-fixed article has been injured; No. 2, his injury is the amount of illegal overcharge exacted; No. 3, the defendant is precluded from claiming that the buyer, first purchaser in this instance, passed on the illegal overcharge in whole or in part to his customer, the next buyer. Unless the buyer resold the article pursuant to a pre-existing cost-plus contract or similar arrangement.

That's what we believe Hanover held, is that the first purchaser --

QUESTION: Mr. Hatton, part 3 of your interpretation of Hanover, then, would interpret it as a rule of law that certain elements in mitigation of damages are simply not admissible, --

MR. HATTON: That is correct.

QUESTION: -- regardless of what might or might not be their probative value.

MR. HATTON: That's correct, Your Honor.

QUESTION: We can assume in this case that the settlement that your client made with the first purchasers was made in the light of Hanover Shoe; is that correct? Hanover Shoe had been decided at the time of the settlement, right?

MR. HATTON: Hanover Shoe had been decided. However, our settlement, if Your Honor please, was not with the treble-damage claimants, the treble-damage class action cases was not in contemplation of Hanover Shoe. It was simply an effort to settle these cases very simply on as reasonable a basis as possible.

QUESTION: Well, they were settled, weren't they?

MR. HATTON: Oh, yes, they were, Your Honor.

QUESTION: And therefore the --

MR. HATTON: Claim forms were sent out pursuant to the normal Rule 23 procedure.

QUESTION: And with the first purchasers.

MR. HATTON: Pardon?

QUESTION: And the plaintiffs were the first purchasers, weren't they? With whom you settled.

MR. HATTON: No, the treble-damage suits which we settled, the class action in other cases were included, a class of masonry contractors, --

QUESTION: Yes.

MR. HATTON: -- a class of general contractors and a class of owner-builders. And so thus we were settling with all tiers in this process.

QUESTION: Well, I would think it would be helpful for you to point out that your settlement with the first purchasers was made in the light of Hanover Shoe, and that therefore they were satisfied, that was in complete satisfaction of your claim for damages, a claim against you for damages --

MR. HATTON: Yes, that's correct.

QUESTION: -- under the antitrust laws.

MR. HATTON: Right.

QUESTION: But there's nothing left.

MR. HATTON: Well, we had a pragmatic problem, --

QUESTION: Of course you did.

MR. HATTON: -- as Your Honor knows, --

QUESTION: You always do when you settle a lawsuit.

MR. HATTON: -- when you settle these mass class action cases.

QUESTION: Well, I don't see why you're resisting

the inference contained in my question.

QUESTION: Your theory, I suppose, Mr. Hatton, is that you settled for the second and third tiers on a nuisance value basis, and the first tier were paid 100 cents on the dollar. That would be --

MR. HATTON: Our theory was to get out of the cases as inexpensively as we could.

[Laughter.]

QUESTION: That's always what occurs when you settle a lawsuit.

MR. HATTON: Yes. Right.

QUESTION: But it was made on the understanding that you could not assert the defense of passing-on against the first purchaser.

MR. HATTON: I would suppose that's right, Your Honor; yes.

QUESTION: I would think so.

MR. HATTON: Yes. Right.

But, however, there's the other side to my description of Hanover. Because if my reading of Hanover is correct, primarily that the defendant is precluded from claiming other than a cost-plus contract, that the buyer, the first purchaser, passed on the illegal overcharge, which is certainly the holding in Hanover. Then, of necessity, no succeeding purchaser from the first buyer is entitled to show that all or

a part of the illegal overcharge has been passed-on to him by the first buyer, and seek a recovery in the amount of the passed-on overcharge.

Thus, as we would view it, the issues before this Court, very humbly stated, would be whether this Court should confirm the applicability and the rationale of Hanover as applied to this fact situation, or to overrule Hanover, or to modify Hanover in some manner which would permit -- because, the basic difficulty, as we see it, is that under Hanover the first purchaser, the defendant may not claim that the first purchaser passed on a part of that overcharge to the next buyer.

Therefore, we say that that being so this Court is now faced with the problem of either having to overrule Hanover or to so construe it as to permit a defendant, if this Court agrees to permit passing-on as a method of recovery through the various elements of a distribution process, to permit the defendants to have the opportunity, if you will, of showing that a part of that overcharge was passed on by the first buyer.

That is, we believe that -- we are getting kind of caught in between, if you will. So, thus, it is our position, may the Court please, that under Hanover, as we interpret it, the first purchaser has the right to recover the full measure of the overcharge and the defendant may not claim that a part of that overcharge was passed on.

And thusly we say that if that be true, then Hanover should control this case, and that, in this instance, the summary judgment granted by the district court in Chicago should be sustained, and the Seventh Circuit Court of Appeals should be reversed.

I will not attempt to burden the Court with a recitation of the facts in Hanover, they are of course well known.

I would, however, desire now --

QUESTION: Hanover was not a price-fixing agreement, was it? It was a --

MR. HATTON: No, it was not.

QUESTION: -- monopoly case.

MR. HATTON: Yes, it was.

QUESTION: But I doubt that that makes any difference to you.

MR. HATTON: No, it doesn't.

I would like now to analyze Hanover as it applies -- as we believe it applies to the proceeding before this Court.

At page -- in Hanover, this Court undertook to analyze various kinds and types of hypothetical fact situations in reaching its conclusion that the first purchaser is the person damaged, has the right to the overcharge, the overcharge that he recovers -- the amount that he recovers is the amount of the overcharge, and the defendant may not argue that he passed

on that overcharge in whole or in part to a succeeding buyer.

This Court said: If, in the face of the overcharge, the buyer does nothing and absorbs the loss, he's entitled to treble damages.

The second illustration is: It is also clear that if the buyer responding to the illegal price maintains his own price but takes steps to increase his volume or so decrease other costs, his right to damages is not destroyed. That is also, I think, self-evident.

However, I now wish to address myself to the third area, I am now at 392 U.S., page 490. Since this third illustration is, I think, important here:

We hold that the buyer is equally entitled to damages if he raises the price for his own product. We hold that the buyer is equally entitled to damages if he raises the price for his own product.

The Court then continues: As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows.

And this is repeated, or I guess concurred in, if that is the appropriate description, by the Solicitor General at page 16 of his brief, footnote 13, where he says: "The fact that a direct purchaser may recover, from its own customers, the overcharge it paid does not necessarily mean that it suffered no damage."

The Court continues this illustration at 392, page 493, by saying -- this is in response to an argument made by United Shoe: The rule, United argues, should be subject to the defense that economic circumstances were such that the overcharged buyer could only charge his customers a higher price, because the price to him was higher. It is argued that in such circumstances, the buyer suffers no loss from the overcharge.

The Court continues: This situation might be present, it is said, where the overcharge is imposed equally on all the buyer's competitors and where the demand for the buyer's product is so inelastic that the buyer and his competitors all increase their prices by the amount of the cost increase without suffering a consequent decline in sales. We are not impressed with the argument that sound law of economics require recognizing this defense.

The Court then goes on to explain, which I will not reiterate, the wide range of factors influencing a company's pricing policies.

I emphasize, may the Court please, the several excerpts from the Court's opinion and, as well as what I believe the appropriate description from the Solicitor General's brief, because I understand the State of Illinois to argue that if an overcharge occurs, say, of five cents at the manufacturer's level, and thus the cost of the block goes from,

say, one dollar to one dollar and ten cents, and that while the block is then sold to the masonry contractor with the only variations that the price of the block being the percentage markup which the masonry contractor may wish to take on his total package, and the general contractor, whatever his bid may be.

Thus, the State of Illinois is arguing that this block for one dollar and ten cents chugs along through the process at a dollar and ten cents, or certainly no less than that. That, as I understand, is one of their basic arguments and that is the reason why I have sought to point out that that argument is rejected in Hanover Shoe, and concurred in, if I may, by the Solicitor General.

I would like to next turn to why we believe, as we have indicated, the rule of Hanover should be applied to this case.

As we have indicated in our previous discussion and in our brief, we believe that the facts of our case fit the rationale of Hanover. We believe that by simply holding, as in Hanover and in this case, that the original purchaser has the right of action, that the original purchaser has the right of recovery, and that the right of recovery is the amount of the overcharge, and that the defendant may not argue or seek to argue or prove that the first buyer passed on the overcharge in whole or in part, provides the judicial system and this

Court with substantial reasons for maintaining Hanover, and applying it to situations such as presented in the instant case.

No. 1 is the troublesome problem of avoiding duplicative recoveries, where you have multiple chances of recovery of the distribution process, it is readily apparent that if the Hanover doctrine is applied and the rationale applied to cases in the nature of this case, then there will be an absolute avoidance of duplicative recoveries. This is so because the first purchaser has the right of recovery and obtains the entire recovery.

It also avoids insurmountable evidentiary problems in terms of complex judicial and legal proceedings noted by this Court in Hanover.

Much has been made by both the State of Illinois and by the Solicitor General on the need of the deterrent factor -- the deterrence factor, if you will, in private treble-damage suits, such as these suits before this Court. However, the Solicitor General and counsel for the State of Illinois make too much of that argument, because it seems to us that deterrence -- if the Hanover rationale is applied here, the deterrence is at the first level, and if the first level, the direct buyer, has that right of action and that right of total recovery, he has his incentive and that is your deterrence.

And I think it is also very clear that the Solicitor

General, for example, and to an extent the State of Illinois indicates that maybe not all of the first buyers will sue. The answer, of course, is that the first buyer in these instances, in practically all of these instances, are probably going to be class action suits, which would be brought by one first buyer for and on behalf of himself and all others similarly situated.

It is thus for those reasons, we believe, administrative, judicial savings, the deterrence factor, and the reasoning which we have indicated both in our brief and argument, that we believe that Hanover should control here.

Thank you, Your Honor.

QUESTION: Mr. Hatton, before you sit down --

MR. HATTON: Yes.

QUESTION: What would you do with the case where the ultimate consumer sues, either individually or as a class, and that the first buyers do not sue, and the statute of limitations runs. So it's very clear that the first buyers can never sue.

MR. HATTON: That's the vacant class, yes. That would be a vacant class.

QUESTION: And the ultimate consumers have sued within the limitations period, but now the statute of limitations has run and the first purchasers haven't sued, and it's clear now they cannot sue. Would you allow that --recovery

in that case?

MR. HATTON: The answer is: No, I would not. And I will explain why.

We quoted Bangor Punta in our brief as an example of --

QUESTION: Which Bangor Punta? We have a lot of them. The one involving the railroad?

MR. HATTON: Yes.

QUESTION: Bangor & Aroostook, or whatever it was.

MR. HATTON: Correct.

I think the answer to the question is, the practical answer to your question, Mr. Justice Stewart, is that that is a very unlikely situation.

QUESTION: Well, let's hypothesize the existence of it, unlikely as it may be.

MR. HATTON: My answer to your question, Your Honor, I would say no, they would not have the opportunity of suing. That is the right, under Hanover Shoe, of the first purchaser.

The first purchaser does not exercise that right under your illustration, the statute of limitations runs against the indirect and ultimate consumer, who has filed suit, I would say, in my judgment --

QUESTION: No, no, no. The statute of limitations has not run.

MR. HATTON: I see.

QUESTION: Against the ultimate consumers. They filed their suit --

MR. HATTON: Right.

QUESTION: -- before the statute had run, within the limitations.

MR. HATTON: All right, I've got the reverse, then.

QUESTION: And now, subsequently, the statute of limitations has run and would bar any suit by anybody else.

MR. HATTON: By any direct purchaser.

QUESTION: Correct.

MR. HATTON: I would say, applying our view of Hanover, Your Honor, that the indirect purchasers would not have a claim. I think that has to be the inevitable logic of it.

What I was going to say, I think, however, that would be very, as a practical matter, very unlikely.

QUESTION: I don't think so.

MR. HATTON: Because if the first purchaser has the right of action, as we believe he has under Hanover, to obtain the full overcharge, I can assure you there are quite a few first purchasers around, and their counsel would be very --

QUESTION: Yes, but you can at least --

MR. HATTON: Yes.

QUESTION: -- one can imagine --

MR. HATTON: Yes, you can speculate.

QUESTION: --for business or other reasons.

MR. HATTON: That is very correct, Your Honor.

QUESTION: Mr. Hatton, if we decide the case the way you ask us to, why, probably those ultimate consumers wouldn't even bother filing that lawsuit.

MR. HATTON: I would think that is right.

QUESTION: Of course, Mr. Hatton, it isn't necessarily imperative. The buyers in several tiers have the same period of limitations. Is that not so?

So that the period for the first purchaser might have expired, and then someone down the line would sue and still be within his statute of limitations.

MR. HATTON: That might be conceivable, Your Honor. Of course we have the four-year statute of limitations. And it is taking a rough rule of thumb that before your statute -- fraudulent concealment is of course normally, as in this case, alleged. Extending the statute backwards, you are talking about when the statute expires going forwards, and a rough rule of thumb is when a government, an antitrust indictment comes out brought by the government, that normally relates to the starting of the statute of limitations, having in mind fraudulent concealment.

I would think it might be possible, but it would be doubtful. Because it seems to me it would cut -- the statute of limitations would pertain to everybody in terms of --

unless there were differences of knowledge, of course.

QUESTION: If you read Hanover as establishing a rule of law against any indirect purchaser having a cause of action, how do you -- how would you explain the cost-plus situation which Hanover nevertheless seems to have recognized as extending a cause of action?

MR. HATTON: Yes, very understandably, Your Honor. Because, having in mind the Court's opinion in Hanover, as I read the Court's opinion, it was the question of the difficulties described by the Court of well nigh insuperable proof as to the pricing decisions made after the first purchase. And, of course, as this Court well knows, this Court in Hanover went through a large number of hypothetical illustrations about what would affect the pricing decision of the first buyer when he re-sells, of the further process of re-selling, labor, price fluctuations, competitive considerations.

And thus the cost-plus exception is an easily identifiable exception because that price is traced right through, if I make myself clear.

QUESTION: Well, how about in bidding?

How about in bids, submitting bids to a public authority?

MR. HATTON: Submitting bids to a public authority. There are two types of submitting bids to public authorities, Mr. Justice White, one, of course, is the building itself,

which, under the competitive bidding under sealed bid with, I think, three or four bidders. In terms of bidding to public authorities on a cost-plus contract? Very seldom.

QUESTION: Well, most bidders when they submit a bid have some papers of their own that they have -- by means of which they have calculated their bid, and if you look at those papers it might be very easy to tell at what price they put in brick or what price they put in this, that, or the other thing.

QUESTION: Perhaps Justice White is referring to a difference between submitting bids in Cook County and in other counties.

[Laughter.]

MR. HATTON: Mr. Justice Stevens and I will arise for that one.

[Laughter.]

QUESTION: You can answer my question in either context, in either way, within or without Cook County.

[Laughter.]

QUESTION: Well, in these cases --

MR. HATTON: The problem of tracing the concrete blocks is to what you're referring. Concrete block is of course sold by the concrete block manufacturer to the -- in most instances -- to the masonry subcontractor. The reason the masonry subcontractor is buying concrete block is because

he, in turn, is submitting a quotation to a general contractor on a masonry subcontract. It may include concrete block, probably undoubtedly would include brick, and plaster and mortar and labor and the whole ball of wax. Yes, you can trace the price that the subcontractor, the masonry subcontractor paid to the concrete block manufacturer.

However, when the masonry subcontractor submits his quotation to the general, he's got a package of brick and block and whatnot, and --

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock.

MR. HATTON: Thank you.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Hatton.

ORAL ARGUMENT OF EDWARD H. HATTON, ESQ.,

ON BEHALF OF THE PETITIONERS -- Resumed

MR. HATTON: May the Chief Justice please, may the Court please:

I was in medias res, I think, in answering a question of Mr. Justice White.

MR. CHIEF JUSTICE BURGER: Would you raise your voice a little, Mr. Hatton?

MR. HATTON: Yes.

I was in the process of, in the middle of responding to a question of Mr. Justice White.

MR. CHIEF JUSTICE BURGER: All right, you can go ahead and finish it.

MR. HATTON: Thank you, Your Honor.

If I understand the question, Mr. Justice White, it is in terms of whether, regardless of what county it may be, the -- whether there is a line item for concrete block that follows through.

My answer to that is contained, I think, in the understanding, of course, that at the masonry contractor level, the masonry contractor is bidding or submitting a quotation to the general for the entire masonry contract. The general, in

turn, uses that quotation in the formulation of his over-all bid for the entire building. And thus you have two free and unrestrained markets with which we are here involved, both subject --

QUESTION: Well, what about the general contractor, could he sue?

MR. HATTON: No, he could not, on our theory of Hanover Shoe.

QUESTION: So you don't need to go any further?

MR. HATTON: That's correct.

QUESTION: But you don't think there is even an identifiable line item in the bid of the general contractor?

MR. HATTON: I am not sure, Your Honor. It would --

QUESTION: Well, maybe you shouldn't say no that he couldn't sue, should you?

MR. HATTON: Well, because you're talking -- because the theory, if we understand Hanover, and we have an example at page 10 of our brief --

QUESTION: Your reply brief or your main brief?

MR. HATTON: It is our reply brief, Your Honor. It is in the second paragraph, Your Honor.

QUESTION: Yes.

MR. HATTON: "If block costs $1.10, he may conclude that he can only mark the job up 5 percent, whereas he might have been able to mark the job up 8 percent if block had been

only $1.00. If the masonry contractor reduces his markup because block costs more, he is injured by the overcharge and there has been no pass-on."

What we're saying is, Your Honor, this is entirely different from the cost-plus exception, the pre-existing cost-plus exception to Hanover, and in no way relates to that type of cost-plus exception or other similar pricing arrangement by which I take to mean similar to cost-plus which really guarantees a buyer that he will get that product at cost-plus a previously agreed upon percentage.

May the Chief Justice please, I would like to reserve the balance remaining, if any, for rebuttal, if necessary.

MR. CHIEF JUSTICE BURGER: Very well.

MR. HATTON: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Freeman.

ORAL ARGUMENT OF LEE A. FREEMAN, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. FREEMAN: Mr. Chief Justice, and may it please the Court:

As Justice Rehnquist noted, this case comes here on a strictly legal issue. The case was decided in the district court on the question of standing. It's been argued by the defendants throughout, other proceedings, as a matter of law. The concrete block defendants make the assertion that as a matter of law the State of Illinois is precluded from showing

that it's been damaged.

QUESTION: Let me ask you this, Mr. Freeman, if I may.

MR. FREEMAN: Sure.

QUESTION: One thing that at least tentatively troubles me about the Seventh Circuit's opinion is that it seems to me they have not said that sauce for the goose is sauce for the gander, which may not be a Black's Dictionary phrase, but is at least a concept of equity.

It seems to me what they have said is that although Hanover Shoe says as a matter of law, this type of evidence is inadmissible to mitigate damages on the part of an antitrust defendant, when you're talking about an antitrust plaintiff it's admissible and it just goes to a question of how much, how convincing it is to the trier of fact.

Now, do you understand the Seventh Circuit's opinion that way, or do you understand it differently?

MR. FREEMAN: Well, I would understand it differently. I would say that this case is distinguishable from Hanover Shoe, and whereas in a situation of Hanover Shoe, where you have the purchase of a capital item and you have all of these problems attendent upon determining unit cost and output and price, that in those situations the direct purchaser has the cause of action.

And that that's what the Seventh Circuit held in Commonwealth Edison vs. Allis-Chalmers. It had a decision to

that effect which was right on point with Hanover Shoe.

In the Hanover Shoe situation, indeed, the indirect or individual consumers of shoes may be too remote, you may have to draw the line there. I think what the Seventh Circuit was saying is that this case is one of those clear exceptions to Hanover Shoe which was envisioned by this Court when it pointed to the cost-plus situation. It recited to the facts in the record, the allegations of the complaint, which are accepted as true, that the defendants sat down in the hotel room, they fixed the price of concrete block at a dollar a block, and that the plaintiffs, the State of Illinois, when it built its schools, was damaged by the fact that the defendants fixed the price of the block at a certain figure.

QUESTION: Then you view Hanover Shoe not as a general ruling on admissibility of evidence, but more or less as a ruling on the facts of that case that certain types of evidence were just so remote that they shouldn't have been allowed in?

MR. FREEMAN: In essence, I think the concern of the court was that under the facts of Hanover, the only person who would sue was the person who leased the machine. I don't know of any reported cases in that sort of situation where the ultimate consumers have sued, and therefore it would be -- that would be the only person who could effectively enforce the laws.

In our situation, the ultimate plaintiff is the only person who can effectively enforce the laws, the ultimate or indirect purchaser.

I think there is authority that in certain instances a rule of evidence can apply against a defendant and not a plaintiff, for instance, on profit-and-loss data. Defendants can't put in profit-and-loss data, but there are cases holding that plaintiffs can show exorbitant profits to demonstrate conspiracy.

But I don't think you have to go that far to rule in favor of the State of Illinois in this case.

I think you have a spectrum of cases, one is the cost-plus on one side, and the other is what we would call the overhead or capital equipment type case, where Hanover Shoe may have been subject to paying too much rent as a result of a conspiracy among landlords in the town where it operated.

Clearly, the purchaser of the shoe is too remote from that sort of injury. But we contend that this situation, the construction industry situation is at the clear end of the cost-plus spectrum. And the cases so held both before and after Hanover Shoe.

QUESTION: Mr. Freeman, is it then your view, just so I have it clear, that if you are at the cost-plus end of the spectrum, you say you're close to it here, close enough to be in that part of Hanover Shoe, does that mean that the direct

purchaser -- if the direct purchaser were the plaintiff, that the defendants then would have that passing-on defense available?

MR. FREEMAN: Yes. And the Tenth Circuit has so held in a case we cited, Standard Industries vs. Mobil Oil. That defense was submitted to the jury.

Clearly, if there is going to be an allocation among plaintiffs in different levels of the chain of distribution, the defendant is going to have the opportunity to show who actually was damaged.

QUESTION: So that it isn't a question -- there would never be a problem of multiple recovery under your view, then, it's always just a problem of how far along the spectrum is the particular industry situation?

MR. FREEMAN: Yes, there would not be -- there certainly can't be a question of multiple recovery in this case, because everybody in the chain of distribution sued the defendants, and the defendants settled not only with the contractors but they settled with the private builders, who stood in exactly the same position as the State of Illinois. So they were all in together --

QUESTION: They made a foolhardy settlement under your view of the law with the direct purchasers, because they had a complete pass-on defense as to them.

MR. FREEMAN: I don't even -- as Mr. Hatton candidly

conceded, I don't even think they were thinking about Hanover Shoe when they made their settlement, --

QUESTION: No.

MR. FREEMAN: -- because the law as it existed when this settlement was made was clearly that the State of Illinois had standing to bring its action. You had the State of Illinois vs. Bristol-Myers in the D. C. Circuit, you had the Western Liquid Asphalt case in the Ninth Circuit, you had Master Key in the Second Circuit, you had Armco Steel in the Eighth Circuit, you had Standard Industries in the Tenth Circuit.

QUESTION: Well, I don't mean to interrupt your litany, but what your point is, as I understand it, is that if one knew in advance, in a particular treble-damage followup on a government case, whether or not it's of the capital item variety or the cost-plus variety, then one would know which tier of purchasers could sue and no one else could sue? So that then one would be advised to settle only with the potential plaintiffs and would know they had complete defense as to the other.

MR. FREEMAN: Well, they know in the capital equipment situation, I think, that they have a complete defense.

QUESTION: As the consumers. And, conversely here, if you're correct, --

MR. FREEMAN: Yes.

QUESTION: -- they would know they have a complete

defense as to the direct purchaser.

MR. FREEMAN: Well, they may or may not have a complete defense. In this situation I think it's a matter of proof. In this situation I think they cannot rely on a decision saying that the general contractor always passes on the overcharge; in this situation I think it would be a matter of proof and something to be determined by a jury.

QUESTION: I see. But at least they would have the right to offer the proof in this situation.

MR. FREEMAN: They have the right to offer the proof. And I think that that would answer Justice Stewart's question, too. There are many situations in which direct purchasers don't sue. You asked if there were some examples. Master Key was an example. Western Liquid Asphalt was an example. Armco Steel, in the Eighth Circuit, was an example.

Direct purchasers did not sue, and the people who recovered were the State of North Dakota, the State of California, the State of Illinois.

The type of settlement that's made in this case was exactly the type of settlement which the courts have condemned in the plumbing fixtures cases. In the plumbing fixtures cases, the defendant settled with the contractors for a million dollars. They made a nuisance settlement with their direct purchasers, and when someone appealed to the Third Circuit, trying to upset that settlement, the Third Circuit, which had

ruled in Mangano that only direct purchasers have standing to sue, affirmed the settlement, saying that it's obvious the contractors passed on most of their damages, so a million dollars in plumbing fixtures was plenty for the contractors, since they were clearly passing on their damages.

QUESTION: When would the indirect purchaser not be able to sue, or not be able -- when would the indirect purchaser not have the opportunity to offer his proof?

MR. FREEMAN: Well, I would draw the line at Hanover and in the electrical equipment cases, where you have -- or Lucy Webb Hospitals, Judge Gesell's opinion -- where you have something happening to someone who produces another product, that is, the manufacturer of a product may be paying excessive rent, may be paying excessive interest on a loan, may be purchasing something which goes into the manufacturing process, and then the product which he produces is something completely different from what he has, himself, purchased.

I would distinguish that situation from the purchase and resale of a discreet item which moved through the hands of wholesalers, retailers, and other middlemen.

QUESTION: And then you would at least always offer the opportunity to prove damages, and also you would also offer the defendant the chance to prove the pass-on defense if he is sued by the direct purchaser?

MR. FREEMAN: In a situation where it's simply a

purchase and resale of the same item.

QUESTION: Yes, you would always give him the opportunity to prove it?

MR. FREEMAN: Yes. And it's been done. Damages have been apportioned as between direct and indirect purchasers in a number of cases. The drug cases are an example. People buy ampicillin or tetracyclin because they're sick. The manufacturer sets the price, the retailer puts a percentage markup on that price, and the consumer pays not only the overcharge fixed by the manufacturer but the percentage markup.

And in those cases, people at different levels have sued, and an attempt has been made to determine who was actually injured.

It's not and it hasn't proved a difficult exercise. And in most instances, in answer to Justice Stevens' question, the contractor turns out usually not to have absorbed any overcharge. He's in court and he can try to establish it, but in Armco Steel in the Eighth Circuit it was held that the contractor, under those circumstances of competitive bid, clearly passed on all of the damages.

We have cited --

QUESTION: You mean if you have a complete pass-on, either by raising the price or by adding a percentage, cost-plus, you know, a percentage for labor and overhead and profit and the like, is it your view that the ultimate purchaser has

the right to recover damages including the percentage of markup or the labor percentage added onto the cost of the block item?

MR. FREEMAN: To that extent -- to the amount of the overcharge, the percentage added to the amount of overcharge, yes. To the extent he can prove it.

QUESTION: So, in other words, if it is a fixed practice of always adding 15 percent to cover labor overhead and the like, the damages then that your client would recover would not be just the amount the defendants marked up the price, but that amount plus 15 percent?

MR. FREEMAN: Yes.

QUESTION: Yes.

MR. FREEMAN: For instance, turning to the defendants' example of a brick that cost -- that the contractor pays a dollar for, let's assume that the brick cost 50 cents and the conspiracy raised the price from 50 cents to a dollar, we would contend we're entitled to the 50 cents of overcharge imposed by the manufacturer plus the percentage markup on that 50 cents that the contractor would put on that amount.

As a matter of fact, this case was tried in the Fifth [sic] Circuit, in Southern General Industries vs. Maule. The plaintiffs alleged price-fixing of concrete block, and they prevailed, and subsequent to the jury verdict in the plaintiff's favor, the defendants sought to dismiss the action because the

plaintiffs were indirect purchasers, and the district court refused, and the Fifth Circuit refused to hear the case.

It's been proved, it's easy to prove, it's easier to prove than a violation and easier to prove than damages flowing from the violation, the pass-on issue itself.

In response to the argument that there is an inherent incapability of proving the pass-on, we've cited to the trial transcripts in the Master Key antitrust litigation where the same argument was made, and the trial testimony in that case clearly shows, from the defendant's own witnesses, the defendant's own contractor, they used the word "pass-on", they do it, everyone understand that when a contractor prepares his bid, he takes his material cost, he adds them up, he adds a percentage for overhead and profit. That percentage for overhead and profit may vary, according to a number of other factors; but the only thing that affects the price of the block is the cost of the block. He puts a percentage on that cost of the block. He doesn't do it any other way.

I think that is what the facts would show, and that is what we think we are entitled to show to the jury.

QUESTION: What is your response, Mr. Freeman, to Mr. Hatton's argument that, yes, that's true, but if the price of the block gets too high, the masonry contractor may shave the percentage markup? Instead of normally marking up ten percent, because the price went up he's only going to make it

seven percent.

MR. FREEMAN: Well, first of all, that's three answers, at least. He doesn't purchase the block until he's awarded the contract. It's almost an instantaneous thing. A general contractor gets a firm quotation, he doesn't purchase the block until he gets the contract.

Second of all, if there is a conspiracy, as we allege, it raised the cost of the block to all of the general contractors who were bidding, all of the manufacturers give quotations to all general contractors, so all general contractors are subject to the same cost considerations when setting their price.

If, in fact, he marks it up a little bit less, then he would -- if that would ever happen in the real economic world, I think his markup and overhead is determined by all these other competitive factors; but if the price of brick should somehow affect his markup, it may happen in elevator equipment or something that's more important to the over-all building, that amount is still over and above the overcharge imposed by the manufacturer.

What we're talking about basically is the overcharge imposed by the manufacturer. In that situation, indeed, the plaintiff may have difficulty proving the full amount of the damages that flow from the overcharge or from the markup that the contractor put on, but it still doesn't disturb the fact

that there is a overcharge placed by the manufacturer which is carried through completely.

In fact, I think in the Western Liquid Asphalt case, that argument was made that there are a number of -- that there are different markups. I mean, they could show, as the facts allege, as the facts were developed in the district court, they could show that the markups differed as between contractors. But it doesn't affect the price being carried forward.

And I think it's the reason that direct purchasers don't sue. I would distinguish Hanover Shoe on its particular factual context. The issue here is not how much, not a price rise; the issue isn't, does the plaintiff in response to a price increase to him raise his price? Nobody raises the price of block, you put a markup on the price of block.

In Hanover Shoe, we're talking about shoes, where you have a situation where hundreds of different factors can affect the retail price of the shoes, and therefore, to try to determine how much Hanover Shoe would have raised the price of its retail shoes would involve you in an inquiry which isn't present in this case.

This case is very simple in terms of how contractors operate. That's the kind of evidence we intend to show, that's the kind of evidence that will be shown when we get an opportunity to conduct discovery and when we do ascertain -- obtain contractor pay-out affidavits, contractor records,

distributor records, showing the markup that they put on these blocks.

QUESTION: Mr. Freeman, just on that point of additional discovery, Mr. Hatton spent a good deal of time this morning pointing out that you had stipulated, in effect, that the record was adequate to present the legal issue squarely.

Do you say the record is adequate or not adequate, for us to decide the legal issue?

MR. FREEMAN: I think the record is adequate. The question was a legal issue. The only thing established by the interrogatories that were filed was the fact that the State of Illinois was an indirect purchaser. Nothing else was established.

The factual issue here is whether or not the allegations of the complaint, that the State of Illinois was injured by a pass-on of these overcharges, is true or not true. There was no discovery on that issue. And, indeed, you would think that if the defendants, having settled with the contractor, could have produced some evidence that there was no pass-on, it can't be done. It's been tried and it can't be done.

It was tried in Master Key, it was tried in Western Liquid Asphalt, and I think the value of all those cases, especially Armco Steel, is the fact that they arose on a full factual record. Armco Steel, in the Eighth Circuit, was an appeal from a jury verdict, where all of this was developed.

And the argument was made that the plaintiffs can't recover because they were too remote. And the Court of Appeals said, But they have, they can show it; and they did show it.

I think it would be a mistake to decide a legal question as posed in this case on speculation regarding what the facts will show, and I think that's what the Seventh Circuit was saying, that the plaintiff should be given the opportunity to demonstrate what the facts will show; and if they don't demonstrate it, they lose.

QUESTION: I think, though, Mr. Freeman, the Seventh Circuit's theory was different from yours. As I read the opinion, they assumed that both the direct purchaser and the consumer, the ultimate or indirect purchaser could recover and there would be some kind of allocation.

I think your view is that either one or the other group recovers.

MR. FREEMAN: No, no. What I'm saying is, depending on the facts, they may both have a chance to recover.

QUESTION: Well, but if the facts are as you allege, that there is a clear pass-on right down the line, then only your clients could recover, and the direct purchasers could not.

Which I think is not really the way the Seventh Circuit analyzed the case.

MR. FREEMAN: Well, the Seventh Circuit analyzed it,

I believe, more in terms of target area, more in terms of foreseeable injury, toward concepts of proximate cost, who was in the zone of interest. Clearly, the State of Illinois was in the zone of interest.

My response to your question goes more to the factual proof at trial. There will be situations -- the Master Key antitrust litigation is a clear situation where the evidence showed complete pass-on.

In other cases, the Gypsum Wallboard antitrust litigation in the Ninth Circuit, there was an allocation among the purchasers at different levels. The evidence may show an allocation between -- the evidence may show that direct purchasers suffer some damage.

QUESTION: But your view of the facts, as I understand it, is this is a complete pass-on case.

MR. FREEMAN: My view of the facts is that in the construction field, where the general contract is awarded after the general contractor has secured firm commitments for the price at which he's going to buy, it's a clear pass-on case, and we will be able to prove that.

QUESTION: And therefore there's no problem of double recovery, because the direct purchasers simply couldn't recover. They could also prove the pass-on.

MR. FREEMAN: Exactly. There would be no problem of double recovery here. There wouldn't be any -- I think the

only instance in which a problem of double recovery might arise is if you try to dream up a situation in which a direct purchaser sues in one jurisdiction, and an indirect purchaser sues many years later in a far distant jurisdiction, and somehow or other the cases aren't consolidated or aren't put together as cases --

QUESTION: Well, what about the case of a partial pass-on, where it might be proved that a portion of the markup had been passed on, but a portion had been absorbed by the direct purchaser? How would you resolve that case?

MR. FREEMAN: That's an apportionment case. You mean only one person is suing at one time?

QUESTION: Well, yes, either they could both be suing or one could be suing and the defense is raised, the pass-on, and it's a partial pass-on. They didn't pass it all on, but they mitigate damages rather than --

MR. FREEMAN: Well then, I think it's a question of division as between the plaintiffs. There should not be a double recovery. The end user is going to get a portion of those damages, and the direct purchaser will get a portion of those damages.

QUESTION: So then in your view Hanover Shoe would be limited to the situation where nothing has been passed on?

MR. FREEMAN: Well, where it would be two --

QUESTION: Or is it just too difficult to prove?

MR. FREEMAN: Too difficult to prove. I mean, it is like the target area cases, where you're trying to draw the line somewhere between where you are going to allow someone to have standing under Section 4, and in Hanover Shoe it is so clear, seemingly, that you draw the line there. The same way with the electrical equipment cases.

QUESTION: Mr. Freeman, why do you concede that there should be no double recovery?

If there is some spillover, why shouldn't it fall on the wrongdoer?

MR. FREEMAN: Well, perhaps I shouldn't have made that concession.

The law is clear that in many instances the wrongdoer is liable for much more than his own overcharge.

QUESTION: You're certainly getting triple damages to begin with, --

MR. FREEMAN: Well, you're getting treble damages to begin with, he's also liable for co-conspirators.

QUESTION: Let me ask another question. Armco was decided before Hanover Shoe.

MR. FREEMAN: Yes.

QUESTION: Is chronology important here? Do you think Armco would have gone the same way had Hanover Shoe been on the books?

MR. FREEMAN: Well, yes, because, not only was Armco

decided, but Stupp Brothers vs. State of Missouri, State of Washington vs. American Pipe, and then, subsequent to Hanover, this Court itself in Perkins and in Standard Oil vs. State of Hawaii, made no distinction between indirect and direct purchasers. In Perkins --

QUESTION: This has to be your position, I take it.

MR. FREEMAN: Well, and then, subsequent to Hanover, you have four Circuits following, in essence, the decision in Armco, and saying that Hanover could not have meant to change this substantial body of law when no mention was made of it in Hanover. All those cases were on the books, there were only two or three years -- decided two or three years prior to Hanover, and no mention was made of them. I believe it's clear that when the Court decided Hanover, it was not giving any thought to those kind of cases.

And I think that the law, as it was developing prior to Hanover, made the same distinction. When the State of Washington bought electric generators through a contractor for insulation in a dam, the State of Washington was held to have standing to sue.

The same judge, Judge Boldt, said that the -- in the other context, said that the indirect purchasers of electricity, the consumers of electricity were too remote. So, therefore, the distinction was made there, the line was drawn between the product which is purchased and resold and the product which is

simply purchased by a manufacturer, goes into the manufacturing process, therefore its direct cost in relation to the individual consumer's product can't be measured.

QUESTION: Mr. Freeman, what if in this case a masonry contractor suing Illinois Brick Company, instead of settling, had gone to trial and Illinois Brick had offered in evidence as mitigating the damages suffered by the masonry contractor the fact that he had completely passed on to the general and to the ultimate purchaser the raised price? Should Judge Kirkland have allowed that evidence in, under Hanover Shoe?

MR. FREEMAN: Yes. Yes.

That's what the defendants should have done, if they were worried about multiple recovery. All parties were before the court, it could have been resolved in one proceeding; by making a settlement with one person, they admit that they do not at all diminish the claim of the State of Illinois.

Yes, and I think there are two or three other cases that have so held, have so given the defendant the opportunity to present a passing-on defense to suit, where the case came within an exception to Hanover Shoe.

So I don't think there's any double standard or unfairness to the defendants in that situation.

I'd like to say one word in closing about this spectre of burden on the judiciary, multiple recoveries, that

has been raised as a reason to deprive plaintiffs of the right to sue. The multiple recovery situation hasn't occurred, and it's very hard to imagine any situation in which it will ever occur.

The burden on the judiciary would be the same whether direct purchasers or indirect purchasers sue. It's simply a question, we believe, of a rule of law which allows the party who was hurt, the party who was actually hurt, the party who has the incentive to sue, the incentive to enforce the antitrust laws, who has the burden to the taxpayers to recover illegal overcharges for those taxpayers when the money is spent for public buildings, public construction and other public purposes.

And it's his right to assert, and we contend that the State of Illinois, as the protector of that public interest, should have its day in court.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Freeman.

Mr. Baker.

ORAL ARGUMENT OF DONALD I. BAKER, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. BAKER: Mr. Chief Justice, and may it please the Court:

I am Donald Baker, Assistant Attorney General for Antitrust.

I am here because an effective damage remedy is important to our national enforcement program as a deterrent to price-fixing. And because, also, the United States is a major indirect purchaser of goods.

I have two points to make.

First, the offensive use of passing-on here is entirely consistent with Hanover Shoe and with sound antitrust policies.

Secondly, most of the multiple recovery feared by the defendants can be avoided by sound judicial administration.

I want to start by looking broadly at Hanover Shoe, in terms of the needs for effective antitrust enforcement.

My starting point is that the treble-damage remedy against price-fixers serves two distinct but related purposes.

The first purpose is to deprive the wrongdoer of the fruits of his wrong, and to do it on such a scale as to deter others from following such a course. The unique trebling feature emphasizes this point. It is a bounty designed to encourage private parties to right public wrongs.

The second purpose of the treble-damage remedy is to compensate the victims of a price fix for their injury. The analogy here to tort law is clear and obvious.

If you keep these two purposes distinctly in mind, it is easy to see why Hanover Shoe is different from the case at bar. Hanover involved defensive use of the passing-on defense.

The defendants simply argued that the plaintiff shoe manufacturer had not been truly injured because it had passed on the overcharge on shoe machinery to the ultimate buyers of shoes. The court responded, quite rightly, that the first purchaser, the shoe manufacturer, had been wronged in the sense of being overcharged and that the defendant could not be allowed to defeat this claim by raising highly speculative chains of causation on behalf of the massive purchasers who were not before the court.

The court was saying, at least in part, that the defendant should be deprived of the fruits of his wrongdoing. And that the plaintiff, having been wronged, was entitled to recovery.

I note with interest Hanover's discussion of the 1918 Darnell-Taenzer Lumber case, where the Court quoted this language, in footnote 8 on page 491: The carrier ought not to be allowed to retain his profit, and the only one who can take it from him is the one who stood any relationship to him.

If this Court had not done what it did in Hanover, the value of the treble-damage remedy would have been substantially reduced as a deterrent against price-fixing and similar crimes. Undoubtedly guilty defendants would have been able to escape substantial liability on the basis of hard to defeat claims that somebody else must have been injured.

This logic, the logic of Hanover Shoe, does not

control the type of offensive passing-on that we have in the case at bar. Here the first purchaser is not alone before the Court, claiming injuries, but the State of Illinois is here claiming direct and proximate injury flowing from the price fix.

Hanover does not hold that the first purchaser recovers and pockets the whole overcharge, even where there are subsequent purchasers who can show that all or part of the overcharge was passed on to them and they suffered proximate injury.

We're talking here about the second purpose of the treble-damage remedy, the purpose of compensating the victim for his injury. This is where the tort analogy stands up.

Stated another way, Hanover secures the general --

QUESTION: Do you think Hanover holds that the first purchaser may always recover the entire overcharge?

MR. BAKER: No, to the contrary, I think that if -- that Hanover holds, if the first purchaser is the only person before the court, as with the analogy in Darnell-Taenzer, he can recover the whole overcharge. If, on the other hand, there is --

QUESTION: You mean he won't be -- and the defendant can't be heard to say that --

MR. BAKER: That's correct.

QUESTION: So you disagree with Mr. Freeman?

MR. BAKER: I respectfully do.

QUESTION: Yes.

MR. BAKER: I think that what happens in the Hanover -- the way Hanover Shoe should work, is that if you have a multiplicity of claims coming out of a single chain, then you consolidate the cases -- and I am prepared to discuss how you can do that --

QUESTION: Yes, but --

MR. BAKER: -- and that the defendant --

QUESTION: -- but if only the direct purchaser is there, he recovers it all?

MR. BAKER: He recovers it all.

QUESTION: And you will not listen to a pass-on defense?

MR. BAKER: If there are no other claims pending. This is the reverse of Mr. Justice Stewart's.

QUESTION: But Mr. Freeman suggests that, in this very situation here, the single plaintiff, if he's a direct purchaser, would have to meet a pass-on defense.

MR. BAKER: Well, I disagree with that.

QUESTION: Yes.

MR. BAKER: I think it's very important, from the standpoint of antitrust enforcement, Mr. Justice White, that we not have the fruits of the wrong, the treble-damage remedy for that cut back by these other claims.

QUESTION: Well, what if the direct purchaser's case

is going to trial before the statute of limitations has run on perhaps your ultimate purchaser's case, how do you handle that?

MR. BAKER: Where the first purchaser's case is going to trial before the --?

QUESTION: In other words, you don't know yet, and the trial judge doesn't know at this stage, whether ultimate purchasers may later come in.

MR. BAKER: I think, Mr. Justice Rehnquist, that that is, in fact, a situation that is not likely to occur very often.

QUESTION: Well, when -- in the rare cases when it does occur, what do you do with it?

MR. BAKER: Well, in the rare case when it does occur, and the first purchaser's suit goes forward to judgment, there are no other cases yet filed, and a recovery judgment is entered, I am prepared to argue that the defendant, if he reasonably fears other claims coming in, could at least use statutory interpleader and treat that judgment as a fund.

If the ultimate -- there are a variety of other devices. If the subsequent purchaser is who he fears are not in the same -- are in the same district, he may be able to bring them in as an involuntary party under Rule 19.

I think the more real situation, which is really the second part of my argument, the more real situation is where

you have cases that are filed by subsequent purchasers in different districts or in different, separate actions.

Now, the reason I say I think it's a rare case, Mr. Justice Rehnquist, is that the indirect purchaser has no incentive to lay back, particularly if he thinks he's going to lose out in any way. Our experience is that when the government files one of these cases, everybody who thinks he's got a right comes charging in.

QUESTION: Well, a lot of private antitrust litigation arises out of situations where the government hasn't first obtained a nolo or consent decree, doesn't it?

MR. BAKER: A lot of private litigation does, but nearly all the price-fixing litigation tends to follow government cases, I believe.

But I may be wrong on that, because I may be more conscious of the follow-on from government cases, because I see it from a peculiar perspective.

QUESTION: Mr. Baker, you referred to something in the nature of a fund, following up on Justice Rehnquist's hypothetical. Is it your view that the amount that the direct purchaser can recover would be the maximum amount of the total recovery for everyone injured, or do you go along with Mr. Freeman's view of the percentage markup?

MR. BAKER: No, I agree with Mr. Freeman on his markup.

QUESTION: But then your fund would be inadequate by definition, then?

MR. BAKER: The fund -- the situation in this, I mean the fund would be pretty close. And what we have here, I mean, is you've got four kinds of situations, Mr. Justice Stevens.

One situation is where direct and indirect purchasers file in the same court, and you can consolidate under Rule 42.

When the direct and indirect purchasers file in different districts, and then I believe that you can use the 1404, 1407 procedure, first of all consolidate for pre-trial, and then the assigned judge can rule on the 1404 motion.

The third situation is where people haven't filed, and they're in the same district, which would be true in this case; and I think you can bring them in under Rule 19.

QUESTION: And there you say the defendant should go out and say, "Please sue me" to those who haven't sued him yet.

MR. BAKER: Well, --

QUESTION: It's sort of like yesterday, we had a case where the defendant was going to go around and ask to be indicted. It's the same kind of situation, I suppose.

[Laughter.]

MR. BAKER: Well, I realize that this is a somewhat

unusual situation, but the defendant who is screaming to the rooftops that he's going to be rendered a hapless victim of huge and multiple, you know, recovery, has some incentive to go chase people up, and I just -- I keep on coming back to you, that that is the rare case, when people haven't filed; and what concerns me is that we're going to -- we might allow the rare case, which is indeed hard for the judicial process, to --

QUESTION: Why is it Mr. Freeman's rule is more workable, that you do it on kind of a situation-by-situation basis, and you only have one recovery or perhaps a shared recovery if there is a partial pass-on. Why do you have to run the risk of the double recovery, that you seem to be finding acceptable?

You do, in your view, as I understand it, there would be cases where you could have a total recovery by one level of distribution and if there was someone that wasn't known or something like that, you could prove that he had also been damaged, they could recover, even though it's the same amount.

MR. BAKER: The reason --

QUESTION: But Mr. Freeman's view would say it depends on the fact, you know, what kind of an industry is it, cost-plus or a capital item, and they are one or the other level of distribution to recover, but not all of them.

And his theory, I guess, is that those with the greatest incentive to sue, you can rely on, will probably sue.

MR. BAKER: That's right. In his view, and I agree with that, his view is that if the secondary level is in fact the one that is feeling it, the State of Illinois, they are the ones that are most likely to sue. And from the standpoint of antitrust enforcement, it is important that they sue, because a truly injured plaintiff is much more likely to press his claims hard than a windfall plaintiff.

But the only point I was making, and it really was following on from your earlier set of questions, was the possibility that some of it was passed on and some of it wasn't, and that there is some possibility of double -- some double recovery. But, as Mr. Justice Blackmun said, the -- surely that is not intolerable, per se, if it isn't a major problem, a little slopover on the shoulders of the wrongdoers, you know, is acceptable.

Although we would, as the judicial system, would try to avoid it.

QUESTION: You don't think treble-damage is enough?

MR. BAKER: Treble-damage is a very strong remedy, Mr. Chief Justice, but the point that the defendants are arguing here is the possibility that some double recovery in some unusual case means that we ought to cast out of court people who would be normally compensated under any theory of

tort liability. And that was why I was -- the only purpose I was speaking to this rare case for.

I just, you know, I just want to come back to the point that, to me, the issue here, as in tort, is one of proximate cause, and I agree that that can be a difficult situation in certain cases, it isn't a difficult situation in this case, and this Court need not use this occasion to try to draw that perfect line of how far out is too remote.

And I do think that it's terribly important that in fact we have opportunity for these truly injured public bodies to come in and prove the wrong that's been done to them.

Because, otherwise, we lose it in a number of ways. First of all, as public governments, we lose the value to the taxpayers; and secondly, we lose, as I was saying to Mr. Justice Stevens, the full value of having the most injured, the most -- the plaintiff with the strongest incentive to sue, to come into the situation.

I don't think I have any further comment.

QUESTION: Mr. Baker, may I just ask you a question?

MR. BAKER: Sure.

QUESTION: You have argued that the likelihood of public recovery is very slight, double recovery, your principal argument on behalf of the government is based on policy. You do not suggest there are policy considerations

that favor double recovery, do you?

MR. BAKER: Of course not. What I -- my point on double recovery was simply that I did not feel that an incidental risk of double recovery in an unusual case was a reason to deprive an important wronged body of purchasers a legal remedy. And it was nothing more than that.

And the thrust of my argument and the thrust of our brief is, in fact, as I said, that there are sound judicial devices available to assure that double recovery is not likely to occur on a big scale.

QUESTION: Mr. Baker, let me just be sure I have -- I have one more thought in mind. Would you agree with Mr. Freeman that if this is a case in which the plaintiffs -- assuming everybody is before the court, both direct and indirect purchasers, so we don't have the problem of not knowing whether someone will sue -- would you agree that on the facts of this case, the direct purchaser defendants should be permitted to offer pass-on evidence in mitigation of damages?

MR. BAKER: Yes, --

QUESTION: If they were direct purchasers --

MR. BAKER: -- in defending against the first purchaser, in a case like this, --

QUESTION: Yes.

MR. BAKER: -- yes, they should. And, in essence,

what you're likely to have in a pass-on situation is a damage theory for the first purchaser, a damage theory based on overcharge not on lost profits and so forth, and in that circumstance the defendant could show that part of it was passed on.

But what is important to me, from the standpoint of antitrust enforcement of Hanover, is this: that somebody -- that total overcharge be recovered and that -- so it's perfectly fine to allow pass-on defense to sort of allocate as between victims, but not to allow it as a way of thwarting the over-all process.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Hatton?

MR. HATTON: I have concluded I have no rebuttal, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:48 o'clock, p.m., the case in the above-entitled matter was submitted.]

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