ORIGINAL

In the

Supreme Court of the United States

KATHLEEN R. REITER, Petitioner,	)	
v.	)	No. 78-690
SONOTONE CORPORATION, ET AL., Respondents.	)	

Washington, D. C.
April 25, 1979

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SONOTONE CORPORATION, ET AL.,

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Wednesday, April 25, 1979

The above-entitled matter came on for argument at 10:02 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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:

JOHN E. THOMAS, ESQ., 360 Wabasha Street, St. Paul, Minnesota 55102, on behalf of the Petitioner.

JOHN H. SHENEFIELD, ESQ., Assistant Attorney General, Antitrust Division, Department of Justice, Washington, D.C. 20530, on behalf of United States as amicus curiae

WARREN SPANNAUS, ESQ., Attorney General, State of Minnesota, 720 American Center Building, St. Paul, Minnesota 55101, on behalf of State of Alabama et al., as amici curiae.

APPEARANCES (Cont'd):

JULIAN R. WILHEIM, ESQ., 180 North LaSalle Street, Suite 1901, Chicago, Illinois 60601, on behalf of Respondents.

ELIOT S. KAPLAN, ESQ., 33 South Fifth Street, Minneapolis, Minnesota 55402, on behalf of Respondents.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 78-690, Reiter against Sonotone Corporation, et al.

Mr. Thomas, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN E. THOMAS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. THOMAS: Mr. Chief Justice, may it please this Honorable Court:

My name is John Thomas. I am a sole practicioner from St. Paul, Minnesota. I have ceded ten minutes of my argument time to the Federal Government, so I have twenty minutes. I intend to try and keep possibly five for rebuttal.

And what I would like to do is -- First of all, the issue this morning that we are faced with is whether or not consumers in the United States may recover overcharges paid for price-fixed goods as injury occurred, under Section 4 of the Clayton Act, in their property.

I will quickly outline my argument points, if I may, please.

First of all, I would like to classify the Eighth Circuit opinion as one of policy, contrary to the warnings of this Court in antitrust decisions.

Secondly, we will look at the statute language, exactly what it does say, which I say is in the disjunctive.

Then, I would like to go to the opinions of this Court, starting with Mr. Justice Holmes in Chattanooga Foundry, through Mr. Justice Marshall in Hawaii v. Standard Oil, and then through each one of the Justices here, what they said in Pfizer v. Government of India.

Lastly, I would then like to describe, if I may, for the Court, what I see the result of the Eighth Circuit's opinion being, which is a severely added complication to the Antitrust Laws, the destruction of the parens patriae legislation, both for the states and the private opt-out provision in that legislation, and finally the elevation of foreign governments to a preferred position over American citizens.

First of all, policy. I think if we look at the Eighth Circuit opinion, it concludes, "We think it is sensible as a matter of policy." To me, this is in direct conflict with this Court's warning in U.S. v. Cooper Corp., where this Court said, "It is not for the courts to indulge in the business of policy-making in the field of antitrust legislation."

This Court has said many times, St. Paul Fire and Marine case and Blue Shield of Texas, and so forth, that the starting point in any case involving statute language is the statute language itself.

Let's look at that. Section IV of the Clayton Act reads, "Any person who shall be injured in his business or property, by reason of anything forbidden in the Antitrust Laws,

shall recover." It is the business or property --

QUESTION: Why didn't Congress simply say, "Any person injured," rather than "injured in his business or property"?

MR. THOMAS: Well, Your Honor, that's Senator Orr's Section 7 Amendment, I guess, to Senator Sherman's initial proposal, which I believe did basically read that way. Senator Orr said, "There is no change. It is well understood" -- his amendment, his change to "business or property." So, I would say that it reads the same way.

The dictionary, Black's Law Dictionary, of course, says "or" is in the disjunctive, and Mr. Justice Rehnquist, I will touch back on that a little more directly. I am coming to it.

Legal scholars. All of them who have touched on this, who have considered this question, all of them through Professor Sullivan, Professor Bork, all of them say that it is in the disjunctive, "business or property," and the consumers have standing to recover for money paid for price-fixed goods.

Professor Sullivan says that Mr. Justice Holmes noted it was in the disjunctive. Judge Wyzanski, in referring to this Court, said that Congress and the courts have frequently shown they regard the Sherman Act as an economic charter of freedom of hardly less than constitutional dimensions. It deserves ungrudging and as sometimes said liberal reading to accomplish its purposes.

Now, this Court, in Pfizer v. India, where Mr. Justice Stewart wrote the majority opinion with Justices Brennan, White, Marshall and Stevens, said this, "The Petitioners argue that the Antitrust Laws were intended to protect only American consumers." And those Justices, who are here this morning, concluded, "Clearly, therefore, Congress did not intend to make the treble-damage remedy" -- and I am going to hammer on that term "remedy" -- "available only to consumers in our country."

That was what the majority said.

The dissent, written by Mr. Chief Justice Burger, with Justices Powell and Rehnquist, said this: "As this Court observed last term, the legislative history of the treble-damage remedy which does exist" -- quoting from Brunswick now -- "indicates that it was conceived of primarily as a remedy for the people of the United States as individuals, especially consumers."

And then, this is the language of the three judges, "What we so recently saw as primarily a remedy for American consumers, is now extended to all nations of the world," and that was the cause for the dissent.

Mr. Justice Powell, who wrote a separate dissent, noted the all-important case of Georgia v. Evans, where the State of Georgia bought asphalt for its roads, was a consumer. And Mr. Justice Powell apparently saw no direct legislative history, but he said this in Georgia v. Evans, "A clear policy

to protect the States of the Union was reflected in the Antitrust Laws and in the legislative history."

The Court could perceive no reason for believing that Congress wanted to deprive a state, substitute consumer here, as purchaser of commodities shipped in interstate commerce, of the civil remedy -- there's that term "remedy" again -- of treble damages which is available to other purchasers who suffer through violation of the Act.

Those are the words of all the Justices here, those three.

Now, remedy -- we come back to that term "remedy"-- legislative history. We can go right back to Senator Hoar, where he, in 1890, raised this question. He said to Senator Sherman, he asked Sherman if the purpose was to give private citizens a civil remedy in the courts.

Senator Sherman replied, "Certainly. The second section gives a private remedy to every person injured."

Now, this Court in U.S. v. Cooper Corp., cited and relied on that and said in U.S. v. Cooper, "Private purchaser is given a remedy under the Antitrust Laws."

In Footnote 10, of the Brunswick Corporation v. Pueblo Bowl-O-Mat, this Court again considered what legislative history there is and concluded, "It is a remedy, especially for consumers and it is opening the door of justice to every man."

And that's why we are here this morning.

The result of the Eighth Circuit is this, as I see it. And that's why I ask this Court to reverse.

Defendants define property. They say this: "This Court should now hold that property is this," they say, "a commercial pursuit or interest unconnected with one's business or primary livelihood."

We have heard Judge Wyzanski say what this Court has said over the years, that the Sherman Act is of constitutional proportions. This type of definition belongs in the Internal Revenue Code, as we all know, from that code. This is the type of thing you get there, where we would fight over "Is it connected, is it unconnected with one's business? What is the primary livelihood?"

Their definition -- as a private antitrust practicioner -- it would turn it into a three-ring circus. And I used to be a tax lawyer many years ago.

QUESTION: Mr. Thomas, you suggest that the words "business or property" are used in the disjunctive. Do you suggest they have different meanings?

MR. THOMAS: Yes, Your Honor, in my brief, I believe, and I know it was repeated in the amicus. I am not sure if it is in my petition or my brief, but the labor exemption, under the Sherman Act, defined -- That's the only place where we see "property" and "business" defined separately. Property, basically, equals dominion over something. Business really equals

what your time is spent on in the game.

QUESTION: Well, if this is property, isn't property always business? Could you ever be injured in your business without also being injured in your property?

MR. THOMAS: Yes, I would say it does have to be a commercial transaction in our market place, in our free enterprise, competitive society.

Where it is just general destruction to trees, for example, from pollution, no. Aesthetics, recreation type of activities --

QUESTION: You mean, a conspiracy, somehow or other, by slowing down scientific progress, or something like that, cause damage to a lot of trees, that wouldn't be injury to property?

MR. THOMAS: Yes, but not --

QUESTION: Not to business?

MR. THOMAS: Yes, exactly.

QUESTION: But what if you are a lumber company, wouldn't that be an injury to your business then?

MR. THOMAS: Then we get into the target area question, Your Honor, which Judge Larson did describe and did find here. If it is caused by oil companies fixing the price of gasoline, driving down the highway --

QUESTION: Well, maybe it isn't that important, but I just didn't quite understand how one could have an injury to

his business that was not also an injury to property.

MR. THOMAS: Oh, an injury to business, not an injury to property?

QUESTION: That was not also, under your theory, clearly also an injury to property, and so I wonder how significant the disjunctive is.

MR. THOMAS: Oh, Your Honor, I guess what you are saying is that if it affects you on the balance sheet it is money and it causes a decrease. I was thinking of that yesterday, Your Honor, again and generally, I guess, everything goes to the bottom line in our business society, and that is a tough one. So long as you are in business, I guess that would be a property damage.

QUESTION: Mr. Thomas, suppose that in the course of an antitrust conspiracy, someone like your client sho is not in business is slandered. Do you think that would be an injury to her property?

MR. THOMAS: No, absolutely not. You have to be in business. There are many antitrust cases that do hold that -- In fact, I have one file, myself, "business slander" -- is compensible under the Antitrust Laws. But not for an individual consumer, no. They would have to be involved in a business pursuit, yes, sir.

The result, as I see it --

Oh, and the trilogy of cases decided by Judge Williams

out in California-- If you read those, you will see one in particular -- This is a further complication that will come up. He anguished. He felt he might be creating a Frankinstein monster here, because he said, "Suppose a woman goes and buys two dresses, one to use in putting on an opera for profit, the second one to go out to an anniversary dinner with her husband. The first one is subject to compensation under the Antitrust Laws, the second one, apparently, not. And he was in anguish over that and saying, in effect, "What am I doing? Help me out, Ninth Circuit. Help me out, Supreme Court." And Judge Nickerson said in the Theophil case, in New York -- He said what he hoped this Court would hold, "The Ninth Circuit has reserved opinion."

The Eighth Circuit has destroyed the parens patriae legislation because it is derivative for the states as to the actions of consumers. They are representing consumers.

Secondly -- here is an interesting point -- the parens patriae legislation has an opt out provision, an opt out provision for private parties. Now, that would be if this Court doesn't reverse the Eighth Circuit, that would be like a pilot announcing at thirty thousand feet, "This plane is in trouble, ladies and gentlemen. You all, of course, are free to bail out, but obviously we have no parachutes."

Do you see what I am saying? The opt out provision is opting out into nothing, under the parens patriae, unless there is a private right of action for that person.

Foreign governments, as they now stand, combining this decision by the Eighth Circuit with the decision in Pfizer v. Government of India, foreign governments are not preferred over American citizens, in that foreign governments buy price-fixed goods from Defendants, supply them to their citizens. Let's say it is antibiotics, let's say it's hearing aids. Turn around and American citizens buy those same fixed-price goods from the Defendant, the foreign governments can come in and have standing before this Court, because the Eighth Circuit, in their opinion to get around Mr. Justice Holmes in Chattanooga Foundry, the Eighth Circuit said that that was a business injury, arguably a business injury.

And you'd better believe that foreign governments will be in here arguing, obviously, that in every instance it's a business injury for them, supplying water, supplying hearing aids, supplying antibiotics. But what about American citizens? Surely they may come before this Court.

That was the only way the Eighth Circuit really got around Mr. Justice Holmes. I see no way of getting around him. He really saw this and defined it.

These are my main points that I wish to touch on, to hit on. And I am keenly interested if the Court has any particular area --

QUESTION: The only question I have, Mr. Thomas: Do you think the Illinois Brick case has anything to do with this

case?

MR. THOMAS: The question here this morning, Your Honor, no. I am the counsel in Beckers -- You may or may not know that -- the case that was just denied cert. It has nothing here, but of course the first thing I am going to be hit with when we go back is an Illinois Brick motion, and I think that this Court if it saw fit in its wisdom -- there is a footnote. That is to me purely a question of law that could be decided, in that pass on is not in this case. It is a retail price-fixing question. And, therefore, as a matter of law Illinois Brick does not apply. But the Defendants have said in their brief that they are going to bring an Illinois Brick motion as soon as we get back down, anticipating reversal by this Court.

So, yes, it does, Your Honor, but not here this morning, directly.

Is there any other area that anybody --

MR. CHIEF JUSTICE BURGER: Apparently no questions at this stage, Mr. Thomas.

MR. THOMAS: Thank you, very much.

MR. CHIEF JUSTICE BURGER: Mr. Shenefield.

ORAL ARGUMENT OF JOHN H. SHENEFIELD, ESQ.,

ON BEHALF OF UNITED STATES AS AMICUS CURIAE

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

In deciding, as it did, that the consumer has

insufficient standing, that it has not been injured in its property, the Eighth Circuit, at least as to the retail trades in this country, created an antitrust exemption, except for the Government.

One point three trillion dollars of commerce, nearly 50% of the gross national product of this country, would be removed from the effects of private treble damage actions. And that facts remains in spite of the thrust of the legislative history, in spite of the clear meaning of the language, in my view, in spite of the language used by this Court in many recently decided cases, and in spite of the obvious policy purposes of the treble damage remedy.

For commerce at the retail level, the Court of Appeals simply deprives antitrust enforcement altogether of the benefit and assistance of private policing and the private attorneys general. And in so doing, the Court of Appeals, I think, does violence to the twin policy purposes that this Court has ascribed to private antitrust enforcement, compensation and deterrence.

Compensation, because the only victims of the antitrust violation, at the retail level, are unable to sue. Deterrence, because the violations and the violators of the antitrust laws simply do not have to be concerned about the threat of private suits. Indeed, it could be argued that antitrust violations would be encouraged by this ruling if it were generalized, because a violator, rather than having to anticipate that

he would be deprived of the fruits of the illegality, in fact, could count on garnering, storing up, retention of the fruits of antitrust violation.

Now, analysis begins with the language of the statute. Injury alone, Mr. Justice Rehnquist, would not be enough. That is the standard under Section 16 of the Clayton Act for anticipatory injunctive relief. But the legislative history makes clear, I believe, that in formulating a remedy and requiring a proof of standing in order to achieve right of damages, there had to have been some kind of injury to business or property, that is injury to a commercial interest, not a business interest.

QUESTION: What does business or property exclude that would not have been excluded if it simply used the word "injured"?

MR. SHENEFIELD: Physical injury, injury to reputation, injury of a non-commercial nature that did not implicate the parties commercial interests. And we strongly believe that a consumer who makes a purchase in the open market has a commercial interest.

Now, Mr. Justice Stevens, you can injure business, in my view, without injuring property. You can injure business by denying business opportunity. An exclusive dealing arrangement, for instance, in violation of the Antitrust Laws, might not injure a plaintiff in his property, but could conceivably injure his business by a denial of business opportunity.

QUESTION: If such a violation occurred, wouldn't it

make business less valuable and, therefore, hurt his property?

I don't know that this is crucial, but it does --

MR. SHENFIELD: I agree. You would not have to prove it, in my view, in order to have standing to sue against the anti-trust violation.

QUESTION: Presumably, if you are suing under Section 4, you are trying to get some money. You have to prove actual damages in order to have something to treble.

MR. SHENFIELD: You have to have a foregone business opportunity that was calculable, that's correct.

QUESTION: I gather that you can be injured in your property without being injured in your business?

MR. SHENFIELD: That's the essence --

QUESTION: That's this case.

MR. SHENFIELD: That's this case and that's the essence of this Court's decision in the Chattanooga case in 1906. It is the essence of the decision in Pfizer, where the foreign government was not in any business, as such.

QUESTION: And the property interest here is being deprived of too much money?

MR. SHENFIELD: The property interest is in being overcharged, having money diminished as the result of violation of the Antitrust Laws, as the Court described in the Chattanooga case.

The disjunctive, in my view, was put there with a

purpose to offer alternative grounds for plaintiffs to reach the courthouse door. This Plaintiff reaches the courthouse door because she had her property diminished as the result of an overcharge.

The legislative history, I think -- There are bits and pieces of it that the Court of Appeals has cited. There are bits and pieces of it in all of the briefs. I think the fairest thing to be said about the legislative history is that many of the legislators believed that the Sherman Act and the Clayton Act were enacted to assist consumers in the fight, as they put it, against the monopoly profits of the trusts of the day. Many, of course, also were concerned about the small business competitors. No one suggested in the debates that consumers were ousted, that consumers would be unable to apply to the Court for remedy. The sole debate in the legislature, as nearly as anyone can tell, was about the degree of effectiveness of those remedies, whether or not they went far enough. But no one suggested that there was not an antitrust consumer remedy there.

QUESTION: When you say "consumer" you mean ultimate purchaser?

MR. SHENEFIELD: In this case, an ultimate purchaser, a direct purchaser in this case. Illinois Brick is not implicated in this case because you have a direct purchaser. But a consumer, it seems to me, in common parlance, most often means direct purchaser.

QUESTION: Well, the Illinois Brick issue is not here, is it?

MR. SHENFIELD: That's correct. It's not here because the Court of Appeals didn't decide it.

QUESTION: There is a difference of opinion as to its applicability, as you know.

MR. SHENFIELD: But this Plaintiff was a direct purchaser. The rationale of Illinois Brick --

QUESTION: Well, the issue here is not an Illinois Brick issue?

MR. SHENFIELD: That's correct.

QUESTION: Given the understanding of the reach of the Commerce Clause in 1890 by the people who enacted the law, it is really sort of unrealistic to talk about whether they actually thought about this particular kind of action. That's probably why they didn't discuss it very much. Again, that may not be dispositive here.

MR. SHENFIELD: They didn't discuss class actions, obviously, but there is language in the debates of discussing consumer actions, individual rights, the rights of individuals to recover.

QUESTION: It has taken quite a bit of time for that to surface, hasn't it?

MR. SHENFIELD: It was not until Rule 23, and until the class action procedure was developed it simply wasn't an

effective remedy for an individual.

QUESTION: Except for large purchasers.

MR. SHENEFIELD: Very large consumers, that is correct.

QUESTION: Like municipalities or foreign governments.

MR. SHENEFIELD: That's correct.

But antitrust in general is regarded as having been designed to promote consumer welfare through the protection of the competitive process. This Court described it as "better products at lower prices" in Northern Pacific.

It simply cannot have been the purpose of Congress in formulating a treble damage remedy, in aid of consumer welfare, to deny that remedy to the very person that the laws were designed to protect in the first place.

In Chattanooga, which is controlling in this case, the Court held that the city there was a buyer of goods, as is Reiter in this case.

Chattanooga paid more for those goods as the result of an antitrust violation, as did Reiter in this case. Chattanooga's property was diminished as a result of that overcharge. And so, too, was Reiter's property diminished in this case it is alleged.

The Court held that Chattanooga, therefore was injured in its property and could come into court under Section 4.

Does it really make sense to think of Chattanooga, a consumer, a city that has standing to come into court entitled to recover, or even a foreign government as a consumer entitled

to recover, and not admit U.S. citizens, American citizens, into court as consumers entitled to recover?

There is nothing that rules that out in the Eighth Circuit opinion. Indeed, its whole suggestion is that consumers simply do not have an adequate interest in prosecuting and in suing antitrust violations to be permitted to come into court.

The legislative history, the language of the statute, the words of this Court and, above all, the policy purposes of the private treble damage remedy under the Antitrust Laws all argue strongly for permitting citizens to come into court as consumers.

QUESTION: Mr. Shenefield, it just ran through my mind that -- You say, "Does it make any sense?" -- Did it make any sense for Congress to say, in substance, if a citizen has a claim that is worth over $10,000, he can raise a federal question in federal court, but if he only has a $10 claim he may not, and yet they did just that.

MR. SHENEFIELD: I would hate to be examined on which aspect of congressional utterances made sense and which did not.

QUESTION: But there is a difference, I suppose, a practical difference between a suit by a city for $1 million pipe purchase and a $10 purchase by an individual.

MR. SHENEFIELD: It seems to me that if you have no plaintiffs here, if you have a retail sale in which there was an antitrust violation and there is no plaintiff whatsoever, that

you come inevitably to the conclusion that Congress simply could not have intended that kind of a situation.

QUESTION: Do you recall, Mr. Shenefield, the legislation that was introduced within recent years, two, three at most, that was called the "toothpaste amendment" because one of the illistrations was that all of the consumers of a particular brand of toothpaste could tack their claims, mass their claims at 75 cents per tube and achieve federal jurisdiction under the same concept you are presenting here today? That was rejected by the Congress, or at least it was not enacted. Are you familiar with that?

MR. SHENEFIELD: I am not.

QUESTION: It was called the "toothpaste amendment" because that's the way the debate in the Congress evolved.

MR. SHENEFIELD: The most recent congressional utterance on this subject, specifically, that we know about is the Parens Patriae Amendments in 1976, where at least this Court found a new procedural device for achieving old and existing substantive rights was being created.

QUESTION: Do you see any basic difference between massing the claims, tacking the claims of consumers of toothpaste and doing so with reference to hearing aids or electric toothbrushes, or what not?

MR. SHENEFIELD: Whether or not there is a philosophical difference, in my view, there is a clear legal difference,

because of the statute and the scheme of enforcement of the antitrust laws, where the private remedy was designed to promote enforcement, to supplement enforcement, where it was more than simply a compensatory device, where the deterrent effect of enforcement --

QUESTION: Wouldn't there be a deterrent effect if X millions of people were allowed a 10 cent toothpaste rebate? You would have no difficulty with the jurisdictional aspect if you could mass them. I have difficulty seeing the difference between what is being advanced here. If your view prevails you wouldn't need an amendment to the statute to mass toothpaste claims, would you, or toothbrush claims?

MR. SHENFIELD: I don't think -- I am not familiar with the proposed amendment, but I don't think that amendment could have been in the context of the Antitrust Laws.

QUESTION: Well, there is no jurisdictional limitation, minimum, on private antitrust action, is there?

MR. SHENFIELD: That's correct.

The parens patriae legislation assumed that there did exist a substantive right of recovery for consumers. And the parens patriae legislation, if the Eighth Circuit's opinion is affirmed and is generalized, the parens patriae legislation is entirely visciated because there will be no consumer right of recovery.

Thank you, very much.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Attorney General.

ORAL ARGUMENT OF WARREN SPANNAUS, ESQ.,

ON BEHALF OF STATE OF ALABAMA, ET AL., AS AMICI CURIAE

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

The states are interested in this case because of the state's increasing role in antitrust law enforcement. The language of Section 4, the legislative history and the overwhelming weight of the case law supports nonbusiness consumer standing. But even more importantly, the existence of nonbusiness consumer standing is important in the overall scheme of antitrust law enforcement. The threat of treble damages is a strong, indeed the strongest, threat against antitrust violations. Denial of standing of private purchasers would certainly reduce the number of treble damage actions. This would defeat the two major purposes of Section 4, to deter violators, and deprive them of the right to keep their illegal profits, and, two, to compensate victims for their injuries.

States recognize the importance of nonbusiness consumer standings. Criminal prosecutions and government civil actions certainly are not a sufficient deterrent. Public agencies do not have the ability to bring every possible action. The Justice Department can only bring about sixty to a hundred cases a year, and the states are severely and similarly restricted.

The lower court exhibited a strong dislike toward private consumer action, saying that they were either coercive by nature, or many times nonmeritorious. States disagree with this and the Congress has disagreed.

Affirmance of the Eighth Circuit opinion would eliminate all nonbusiness consumer actions. Certainly there are many cases when private parties can bring a lawsuit on their own, and there are many cases when a class would be small ehough to be manageable. For example, a conspiracy to fix real estate prices on residential homes in a particular area could give a small group of individuals enough economic incentive to bring an action on their own, or an individual who purchases a large quantity of goods or a large quantity of a single item over a long period of time, for example, a life maintenance drug, might have the incentive to bring an action on his own, individually.

The remedy for a nonmanageable class is the refusal to certify the classes. And the remedy for a nonmeritorious action is either dismissal or summary judgment.

Next, we would like to discuss the parens issue that was raised here a few minutes ago. Ideally, the parens patriae authority should not be an issue in this case. However, we would hope that this Court would not rely on the parens issue, as did the Eighth Circuit, to deny private rights. The parens issue was not meant to be a substitute for all private actions. It was meant to be a supplement and not a replacement. Making

parens the exclusive remedy would certainly -- was not the intention of Congress when they passed the Antitrust Improvement Act of 1976.

QUESTION: When you say parens, Mr. Spannaus, do you mean parens patriae?

MR. SPANNAUS: Yes, sir. Excuse me, Mr. Justice.

QUESTION: It's derivative, isn't it? I mean, if we were to hold that the consumers had no right here, it would rather significantly diminish the scope of the parens patriae.

MR. SPANNAUS: Yes, Mr. Justice Rehnquist, that certainly could be. We would have some very difficult problems under Footnote 14 of the Illinois Brick case, although we would still argue, the Attorneys General in the states would still argue that we had a substantive remedy created by the Act.

QUESTION: You, as parens patriae, State of Minnesota, could recover for Mrs. Reiter's loss, even though she could not herself?

MR. SPANNAUS: We would argue that way, but the reason we feel that private actions are important is because, first of all, the states don't have the resources and the ability to bring all the possible meritorious actions that may exist, and, secondly, it could make the whole situation become very political. If the Attorney General had to bring every conceivable action in the state, he might then be forced to bring some actions he wouldn't normally bring because he felt

they were without merit, and he would bring them merely to make sure that he wasn't criticized at some future date for not bringing the action.

And so, the other provision that Congress granted was the opt-out provision in the bill itself. Congress said that individuals who didn't feel they wanted to participate in the action of the Attorney General and wanted to retain their own private right to sue, could opt out of any specific action that their attorney general might bring, and Congress also provided for an opt-out provision by the entire state. Upon action of the legislature, the attorney general can be prohibited from bringing any action whatsoever. And you could find a very serious and difficult position that a consumer in one state would have a remedy because his legislature did not opt out and a situation in another state where his state did opt out and he would have no recourse under the federal law.

And so it is clear, I think, in the legislative history, that Congress did not intend the attorneys general to be the exclusive parties in these matters and that private rights were intended to remain because of the two opt-out provisions.

And, as I said earlier, the attorneys general don't have the resources to bring all these potential actions in their states.

Finally, this Court has expressed concern with the

complexity of the treble damage actions and stated recently that the already protracted treble damage proceedings should be kept as simple as possible.

The states would like to suggest that this would -- affirmance of the Eighth Circuit would merely make a more complex situation, because an entirely new line of thinking would have to be devised, a new body of law, to determine whether or not it was a business or personal purchase, and whether or not the business purchase was used as intended for a genuinely business purpose.

So, we would respectfully hope that this Court would reverse the Eighth Circuit, that affirmance of the Eighth Circuit would frustrate the underlying principles of the Antitrust Laws that would permit a price-fixer to keep his illgotten gains and deprive the victim of his most effective remedy and have no means to be compensated and it would eliminate a major deterrent to treble damage actions. And so we would urge this Court to reverse the Eighth Circuit and reaffirm the existence of nonbusiness consumer standing.

QUESTION: Your colleague refers to the Eighth Circuit opinion as being, basically, a policy decision. Given the background in this whole area, is this not something Congress could correct very, very swiftly if the Eighth Circuit is wrong in its reading of the statute, or if they thought that the Eighth Circuit was perhaps correct, but they wanted to enlarge the

remedies?

MR. SPANNAUS: I think that it is clear, Mr. Chief Justice -- I think it is clear from the legislative history that Congress has always felt that consumers did have the right to bring these actions. However, if the Eighth Circuit were affirmed there would be a lot of immediate activity to have this corrected. But I feel that that would certainly be unnecessary and, in all due respect, sometimes very time-consuming because Congress does not always act as swiftly as one might hold.

QUESTION: It is often suggested that the Court should take steps because the legislative process is a bit on the slow side. That's not a reason for a decision, is it?

MR. SPANNAUS: No, sir, Mr. Chief Justice, it is not. However, I think that Congress has already acted and through the reading of the language of the legislative history of the Sherman Act, as we talked about here earlier, and also the discussions that were -- back in '73, '74 and '75 when the Antitrust Improvement Acts were passed -- that Congress had already assumed that the consumer had this right and, consequently, they felt that it wasn't necessary to make it any more clear.

I think that the courts, if I may say -- that the Eighth Circuit has gone beyond what the Congress intended and they are the ones who have acted as a policy in a legislative way, rather than this Court doing the same thing if they reverse the Eighth Circuit.

QUESTION: General Spannaus, your brief is joined by forty-nine states?

MR. SPANNAUS: Yes, Mr. Justice.

QUESTION: Which is the missing one?

MR. SPANNAUS: Mr. Justice Blackmun, the only state who is not participating is the State of Georgia.

QUESTION: Does that imply they are on the other side of the case?

MR. SPANNAUS: No. The Attorney General of Georgia, Mr. Arthur Bolton, has not participated in the Antitrust Improvement Act of 1976, in using any of the funds, and so he has also decided not to participate in this amicus brief.

QUESTION: He is a frequent litigator here. I wondered. No implication.

QUESTION: Of course, Georgia recovered once as a consumer, didn'it it, in a Georgia case where Georgia was the plaintiff? Maybe it doesn't need this statute.

MR. SPANNAUS: Mr. Justice Stevens, that's probably the reason he figures he can do it on his own. The other 49 states have it.

Thank you, very much for allowing us to participate.

MR. CHIEF JUSTICE BURGER: Mr. Wilheim.

ORAL ARGUMENT OF JULIAN R. WILHEIM, ESQ.,

ON BEHALF OF RESPONDENTS

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

My name is Julian R. Wilheim, and I am one of the attorneys who will argue today for the Respondents, the other one being Mr. Eliot S. Kaplan.

With the Court's permission, I will try to devote my time primarily to the background of the legislation involved in this case and the legislative history that goes to the question here which is a very narrow one. Accordingly, I will use fifteen minutes or less in the process.

I would like, initially, to put into perspective what I haven't heard yet this morning. This is a case involving a very narrow issue. It purports to be a class action, but as yet there has been no certification of the class. So we are talking essentially about a Plaintiff named Mrs. Reiter.

The complaint in the case -- and the pleadings are in the Appendix before the Court -- speaks on occasion as if there had been price-fixing by these Respondents, as if there had been a retail price maintenance program.

While it is true that in a motion to dismiss, which essentially is what this motion was that raised the standing issue, the facts that are well pleaded are admitted for the purpose of the motion. The motion did not admit either legal

conclusion or facts that do not exist.

This is not a price-fixing case. And the reason I wish to emphasize that is that in the opposing briefs there is a concerted effort to pose the case as a price-fixing case, and therefore to indicate as if the Respondents were doing something that is per se bad under the Antitrust Laws.

We have noted in a footnote in our brief in opposition that with respect to Beltone Electronics Corporation, which happens to be my client, we have been in a very long Section 5 FTC case in which the Administrative Law Judge has found flatly that Beltone does not fix prices.

QUESTION: Mr. Wilheim, is the thrust of your argument then that if this were a price-fixing case the Plaintiff would have standing?

MR. WILHEIM: No, sir.

QUESTION: Well, then, what's the point of it?

MR. WILHEIM: The point is I do not want this Court to have the psychological view that these are these bad things called "price-fixes," as distinguished from other violations of the Antitrust Laws which, for example, would come under the Sylvania case under the rule of reason.

QUESTION: But the merits of the case aren't before us at all here, are they?

MR. WILHEIM: No, the merits are not before you, nor should they be at this moment, but on the other hand candor to

Court should require the Petitioners to point out not again and again and again, as they do in their briefs, that these are price-fixers.

QUESTION: But Mr. Wilheim, if we should adopt the rule that you urge us to adopt, it would apply to price-fixers. So, I don't know why that's an unfair argument. He is saying we shouldn't adopt a rule that will give an immunity bath to price-fixers.

MR. WILHEIM: True, Mr. Justice Stevens, but all I am saying is that I don't want the Court to get the impression that they are dealing with these bad fellows called "price-fixers."

QUESTION: Nevertheless, you are the spokesman for those bad fellows on that issue we have to decide.

MR. WILHEIM: It is not based on price-fixing. It is based on --

QUESTION: But you are still the spokesman for the price-fixers because the way we decide the case will depend -- will determine how those people can act.

MR. WILHEIM: Inferentially, I presume that if you go to the wide world that is true.

QUESTION: Better take the hard facts and meet them square on.

MR. WILHEIM: Now, we are dealing with a statute that is now ninety years old. Judge Larsen, in the Reiter decision at the outset of this case denying the motion to dismiss for

lack of standing very aptly pointed out at page 937 of his opinion that nobody knows what the word "consumers" meant when the Sherman Act was under consideration. Nobody knows what Congress was thinking about at the time with regard to retail consumers, except if you read the history you will find that there was great concern in the Congress that they would be interfering with state's rights and state's jurisdiction if they dealt with the kind of retail consumer that we have today in our society.

In the context of the society at the time, we had come to the end of the first hundred years of the Republic. There had been a depression in the '70s. There had been a depression in the '80s, and there had come along in our economic society this then new thing which we called "trusts." There were corporations and corporations were to some degree regulated by the states, but there were these trusts which were completely unregulated. And there was the squabble going on between the Democratic Party and the Republican Party at the time over protective tariffs, and peoplw were clamoring for some halter on the trusts, as they were called at the time.

President Grover Cleveland made a speech to the Congress in his third message on the State of the Union that something had to be done about the trusts. And in 1888, Senator Sherman, in the Fiftieth Congress, introduced resolutions to the effect that something had to be done about the trusts.

We finally get to the Fifty-third Congress, where we

had his bill, Senate Bill 1, which was the forerunner of the Sherman Antitrust Act. And if you read this legislative history carefully, the bill was finally sent to the Senate Judiciary Committee and it came out in a relatively few days with nothing left except its title S. 1 and Senator Sherman's name. Absolutely obliterated everything he had in his bills except his name and the title.

The bill came out of the Senate Judiciary Committee and for the first time we had this phrase that we are worrying here with today called "business or property." What does it mean? The various members of the Senate Judiciary Committee talked about the small businessman, the small mechanic who is in business. He talked about small farmers and you can find in there references to problems such as the one I remember most specifically. If a small tobacco farmer had to go to the "trust" to buy bailing cotton to bail his tobacco and he was overcharged, this was the kind of commercial enterprise we were talking about. Nowhere do we find any definition of property such as we try to find in the dictionary, the Webster's International Unabridged, Black's Law Dictionary. I went back to Bouvier's Law Dictionary of my law school days of many years ago -- Nothing that will give us a guideline. All that you can sense out of this total legislative history on the Sherman Act was they were talking about business or property in the total commercial sense of property involved in business.

I heard today they didn't talk about a class action. They did. There was reference to a class action. There was even reference to setting up a dual jurisdiction between the federal and the state courts for class action, and then Congress turned tail and said, "Forget it, because we are worried. We think our only basis for enacting this kind of antitrust legislation is the Commerce Clause."

Now we hear ninety years later about the consumer. And I think Mr. Chief Justice is correct. The answer lies not in this Court. It is a different society. It is a different world. It is a different economic picture. If the consumer needs the protection that we are trying to engraft on this ancient statute, this antiquated statute, in that sense, the remedy lies in the Congress.

QUESTION: Of course, the insurance industry heard about it fifty-five years later in Southeastern Underwriters.

MR. WILHEIM: Yes, they did, Mr. Justice Rehnquist. But we are talking about a retail consumer for personal use of articles of wear, if you will, in this case.

QUESTION: What do you do about all the language in the cases and debates and all about the purpose to protect consumers, as the ultimate objective of this legislation?

MR. WILHEIM: I think in many instances nobody has found out what we are talking about. The cases are there, Mr. Justice Stevens, but the word "consumer" as we know it today

has never been defined.

In one of the briefs, and I think it is the Government brief, for example, there is a citation to the text written by Areeda & Turner. And I checked it out and I am amazed to find that in that reference these authors have a heading in black letters called "Consumers and Noncommercial Plaintiffs."

I really would like to know what he's talking about, because when you read the next half a dozen pages it's as unclear as a mist.

But why did he, this notable text writer, use the words "consumers and noncommercial plaintiffs"? He must have had something in mind.

QUESTION: Suppose he had Mrs. Reiter in mind. She seems to fit that class.

MR. WILHELM: Consumers and noncommercial plaintiffs. Are they two different kinds of people? Or is it one? If "consumers" meant in 1890 what I think it meant, from reading the extensive legislative history, then noncommercial plaintiffs used today -- a Mrs. Reiter -- and while she is a consumer in our modern society, obviously, she was not that consumer about which the Congress was talking in 1890.

When we turn to the 1914 Clayton Act legislative history, there is no help to be found. They simply reiterated what was Section 7 of the Sherman Act.

I have heard some talk here today about parens patriae

and about direct purchases. This Plaintiff was not based on the pleadings and could not have been a direct purchaser. She bought from a retail hearing aid dealer. She did not buy from these manufacturers.

I don't know where Illinois Brick is coming into the picture, if and when we ever go back to the lower court.

With regard to parens patriae, I went through the legislative history of the 1976 statute very carefully because in the Government's brief they say it's a procedural device. They point to Footnote 14 in the Illinois Brick case, in the state's brief. We find that the states are saying it created a new cause of action, a substantive right. And if, by chance, you have to interpret the 1976 parens patriae provisions, they would prefer to have it treated as a substantive provision.

Well, the legislative history of the '76 Act is quite something to read. There were three bills in the House. There was one bill in the Senate. The bills went back and forth. There came a time when they were worried about losing the bill because of a filibuster by Senator Allen of Alabama, at the end of that particular session. There was never a conference. There was a legislative legerdemain such as I have never read in my lifetime, where a motion was made by Senator Byrd, then the Majority Whip. Senator Philip Hart handled it, and the upshot was two sections, which we are not concerned with here, the first two sections of that Act, were the House's version. The

third section, which is parens patriae, was the version of the Senate. It was the Senate's bill. And if you read what the sponsor of the bill said, Senator Hart, and his analysis of the bill, as they passed it, he says very specifically, "We created a new cause of action."

In that respect, with due deference to the Court, Footnote 14, in the Illinois Brick case, which says it's a procedural device, and which cites only the House report on the bill, is just plain incorrect, because Senator Hart's remarks, as sponsor of the bill, of the intention, the intention to create, quote, "a new cause of action," unquote, and the Senate report are to the contrary.

And I would say they govern it. And so you have a new cause of action and I do not believe that an adverse ruling such as that of the Eighth Circuit will obviate the parens patriae provision or take the heart out of it.

I think that is all that needs to be said on the legislative history, and that I can sit down.

MR. CHIEF JUSTICE BURGER: Your timing is very good, Mr. Wilheim.

MR. WILHEIM: Thank you, sir.

MR. CHIEF JUSTICE BURGER: Mr. Kaplan.

ORAL ARGUMENT OF ELIOT S. KAPLAN, ESQ.,

ON BEHALF OF RESPONDENTS

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

Mr. Wilheim has stated for you in summary form the legislative history which inequivocally demonstrates that a consumer who purchases for noncommercial purpcses does not have standing under Section 4 of the Clayton Act.

I would like to take just a moment to dwell on the term "consumer." That term has been used throughout the briefs and throughout the morning's arguments.

Anyone who makes a purchase, who consumes goods, is a consumer. General Motors is a consumer. My client, Textron, is a consumer. Mrs. Reiter is also a consumer.

The courts and the Congress never talked about consumers who purchase for nonbusiness or commercial purposes. Today, in our present day society, the word "consumer" has taken on some new meaning. When we talk about consumer, we think of the myriad of people out there, the masses of people. The Congress in 1890 and the courts prior to Judge Larsen didn't think of consumer as that group of people.

QUESTION: Generally, doesn't it mean retail purchases, in the common parlance of today?

MR. KAPLAN: That may be, Your Honor. However, that is not necessarily the definition of the term "consumer."

QUESTION: What is the definition?

MR. KAPLAN: Consumer is anyone who buys and consumes goods, that's correct. Presumably --

QUESTION: -- either for his own use or for use of the purchased product in the manufacture of other products, or whatever. He consumes it.

MR. KAPLAN: That is correct, Mr. Justice Stewart.

QUESTION: Whether it is a bar of soap or a thousand tons of steel.

MR. KAPLAN: That is right.

However, the Congress and the courts have limited the term "consumer," throughout the debates in the Congress and through interpretation.

I direct this Court's attention to its opinion -- the opinion of Mr. Justice Marshall -- in the case of Hawaii v. Standard Oil, a case that has not yet been mentioned this morning, which we suggest is controlling in this case. The Court may recall the issue in Hawaii was whether or not Hawaii could maintain an action on behalf of its citizens. -- It was not whether it could maintain an action on behalf of its citizens, but rather whether the injury was compensible under Section 4.

The critical question was whether the injury asserted by Hawaii, in its parens patriae count is an injury to its business or property. That was the critical question this

Court addressed in Hawaii v. Standard Oil.

QUESTION: In that case, Hawaii was not suing as a purchaser, was it?

MR. KAPLAN: It was, but that was not the issue before the Court.

QUESTION: That's not what was dealt with in the opinion?

MR. KAPLAN: That's right. It was suing its parens patriae capacity for injuries to the general economy of Hawaii. That was the issue before the Court. And this Court, as a threshold question, had to determine what is business or property? Is an injury to the general economy of the State of Hawaii an injury to business or property?

This Court, through Mr. Justice Marshall, said like the lower courts, that it considered the meaning of the words "business or property," "We conclude that they refer to commercial interests or enterprises. States can only sue when they seek damages for injuries to their commercial interests."

It couldn't be more clear than as articulated by Mr. Justice Marshall in Hawaii v. Standard Oil.

There are many other lower courts' decisions that have also followed the same language. The Ninth Circuit's decision in the Air Pollution case is in accord with the decision in Hawaii v. Standard Oil.

QUESTION: But that was a state, and almost by

definition a state -- A state, for example, doesn't boy a pair of shoes to wear. If it buys shoes, it buys them in its commercial capacity for people in its prisons, or whatever.

MR. KAPLAN: The states are always buying in a business or commercial sense, when they buy in their proprietary capacity.

QUESTION: Yes. They will never buy a dress to wear.

MR. KAPLAN: They may buy a dress for nurses who work for a state hospital.

QUESTION: Yes.

MR. KAPLAN: Now, Mr. Thomas pointed out that Judge Williams in the famous California trilogy of cases was concerned about this, the dress that's worn by a nurse and the one that she wears to a party in the evening.

That may be a problem, but that can be handled very easily. All that need be done is when a plaintiff brings on an action it believes that the purpose was for a business or commercial use.

If the Congress believes that that is the wrong result, the Congress can change that. That is a problem of Congress' making, not of our making.

QUESTION: Mr. Kaplan, what if Mrs. Reiter here had alleged she needed a hearing aid to adequately perform as a lawyer, she was in the business of a lawyer, being a lawyer?

MR. KAPLAN: Mr. Justice Rehnquist, if Mrs. Reiter had alleged she purchased the hearing aid in order to carry out

her profession or her chosen occupation, she would be buying it as a tool for her business or profession, which would then be protected under Section 4 of the Clayton Act. She would then have a cuase of action for damages, under Section 4. If she did not make that allegation, she would not have standing under Section 4.

QUESTION: So, it is really just unemployed consumers?

MR. KAPLAN: That is not -- It is a person who is purchasing for strictly personal use. If Mrs. Reiter has just decided that she is going to wear a hearing aid, just because she wants to hear the television a bit better, and she may have been overcharged, she doesn't have standing. That was not the intent of Section 4.

There has been discussion by our worthy opposition this morning that how can we allow a foreign government to sue but yet we can't allow consumers of this country. That is a very interesting question, and obviously this Court was not unanimous in deciding that a foreign government had standing. However, Mr. Justice Stewart in writing the majority opinion in the Pfizer case, said expressly that there was no legislative history that he could find, and therefore he looked to other areas of law and found that foreign governments have traditionally been held to be persons who could sue in the courts in the United States.

In the instant case, we have a clear mandate from the Congress, and that mandate has been revealed here this morning by

Mr. Wilheim.

The Court in Illinois Brick recognized that not every person injured by the Antitrust Laws is going to have a remedy. The Court said in the Illinois Brick decision, "Not every injury traceable to an antitrust violation is cognizable under Section 4 of the Clayton Act."

This Court further limited the right to bring treble damage actions to those persons who purchase directly from alleged violators and refuse to permit indirect purchasers to demonstrate a pass-on of alleged price overcharges.

This Court, therefore, expressly acknowledged that the decision would deny recovery to some who may have been injured by antitrust violations, but recognized the practical limits upon the sanction on a private right of action.

The Court was mindful that there are people who will be injured, just as we suggest Mrs. Reiter might be injured, by an alleged overcharge that came about because of an antitrust violation. But there are many others who will have standing to bring the action that will serve as the deterrent to antitrust violators.

I might point out --

QUESTION: It worries me. I thought all antitrust was to protect the consumer.

MR. KAPLAN: Mr. Justice Marshall, there is no question but that antitrust laws --

QUESTION: I have yet to find anybody who sells me anything protecting me. He protects himself, but he doesn't protect me.

MR. KAPLAN: Mr. Justice Marshall, the concern of the antitrust laws is to protect the consumer welfare. That is a term that is used throughout the briefs. Professor Bork has been cited on many occasions.

Let me explain that term.. When we are talking about consumer welfare, the Congress and the courts have not been talking about compensating a consumer. We are talking about permitting the consumer to purchase goods in a free and open competitive society. That is the ultimate test that every court must apply in determining whether or not there has been a substantive violation of the antitrust laws, whether or not the action will permit the consumer to buy in that open competitive society. The issue is not whether the consumer can be compensated.

And that is an important distinction that we have today. The distinction --

QUESTION: How am I protected if I am overcharged?

MR. KAPLAN: You are protected, Mr. Justice Marshall --

QUESTION: I just don't know how well off I am.

MR. KAPLAN: Let me tell you how well off you are.

QUESTION: I'd be interested in that.

MR. KAPLAN: There are several ways that you are going

to be protected. Number one, in 1976, the Congress permitted your attorney to collect attorney's fees if he brings an action for injunction.

QUESTION: Who pays the attorney? Don't I have to go get the attorney?

MR. KAPLAN: You have to go to an attorney, sir, and if he collects for you the injunction action he will now be entitled to --

QUESTION: What kind of an injunction is Mrs. Reiter going to get?

MR. KAPLAN: She will get an injunction stopping these practices.

QUESTION: She's already got the hearing aid.

MR. KAPLAN: The other remedies, Mr. Justice Stevens, are that the parens patriae action is available to her.

QUESTION: So she's got to go to the Attorney General and convince him to bring a parens patriae. She would rather go to the lawyer on the corner and say, "All I want is about $9 on this thing. They overcharged me."

Does she have to go through all this to get her $9?

MR. KAPLAN: Let me just address that question, if I may, Mr. Justice Stevens.

Let's talk to Mrs. Reiter and going to that corner lawyer, because I think that may be the very cornerstone of this case.

Mrs. Reiter has a miniscule claim.

QUESTION: Miniscule to whom?

MR. KAPLAN: Miniscule in terms of total balance.

QUESTION: You are talking about her. The person you are protecting is the consumer. That might be whether she eats the next day or not.

MR. KAPLAN: It may have a direct impact upon her economic situation. There is no question about that, Mr. Justice Marshall, but it is a miniscule claim in terms of the size of claims that the federal courts have traditionally heard.

As Mr. Chief Justice Burger talked about the tooth-paste amendment earlier, she has a relatively small claim in terms of the size of most of the claims that are filed. She has undertaken a very complex piece of litigation. As Mr. Wilheim pointed out, this is not a simple price-fixing case, if there is such a thing as a simple price-fixing case.

This case alleges a whole garden variety of vertical restrictions imposed upon dealers who then resold the good to Mrs. Reiter. This is a complex case.

Who has the real interest in this case? I respectfully submit to this Court that it is not Mrs. Reiter. It is not the consumers, because they can be protected. It is, rather, the Plaintiff's bar that has the real and direct interest in this litigation. It is they who are concerned about what's going to happen in this case. They are not concerned with the burden

that's going to be placed upon the administration of justice and upon the courts of this country by having miniscule claims of consumers imposed upon it.

But for Rule 23, Mrs. Reiter wouldn't be here. She would not assert her claim. It is interesting that Judge Larson said --

QUESTION: Yes, but suppose she bought an Oriental rug or, perhaps, she bought a house and didn't like the commission she was charged and wanted to complain about the fixing of brokers' commissions or didn't like the fee that her lawyer was charging, because there are minimum fee schedules. There are a lot of individual consumer claims that might amount to enough money to precipitate litigation. And you would rule all thouse out, too.

MR. KAPLAN: That is correct, Mr. Justice Stevens. And I believe that we have to look at what is the intent and the object of the Antitrust Laws? Is it just to compensate people, or is it to deter antitrust violations?

QUESTION: Well, what kind of deterrent would remain for a conspiracy among retail Oriental rug dealers, if your view prevails? What would be the deterrent?

MR. KAPLAN: The parens patriae action. The threat of Government action, both in the United States and elsewhere.

QUESTION: How many of those have succeeded? How many parens patriae actions were there in the last 80 years?

MR. KAPLAN: I am sorry, Mr. Justice Stevens, I don't have the number.

QUESTION: There haven't been any, have there?

MR. KAPLAN: I don't know.

QUESTION: Is there a difference, Mr. Kaplan, between merchandise which is fungible and merchandise which is not? I suppose hearing aids, like automobiles, fall into certain categories, but Oriental rugs -- one Oriental rug is unlike any other Oriental rug in the world. Is that not so?

MR. KAPLAN: Mr. Chief Justice Burger, it certainly is a one-of-a-kind item. I am not sure that is a valid distinction, that one should be recoverable and another not.

I think it is important to understand that the Respondents are not arguing before a congressional body today. We are not saying who should or who should not recover. We are simply saying, "Let us look at the congressional history. Let us look at the cases. Let us see what has happened."

That is the result. If it is an unpopular result, that is one of Congress' making. That is for Congress to correct, not for the Court to say it is what the law intended in 1890.

QUESTION: Well, Mr. Kaplan, if you have been reading the papers for the last three or four weeks, you realize this Court doesn't hesitate to reach unpopular results.

What about the Chattanooga language of Justice Holmes?

MR. KAPLAN: The opposition, Mr. Justice Rehnquist,

has certainly relied upon Chattanooga as the controlling case. Chattanooga was a case that involved the statute of limitations. That was the issue in Chattanooga. It involved the City of Atlanta purchasing pipe for its city sewer and water operations. It bought in a proprietary capacity. The issue of a noncommercial or a nonbusiness consumer was not before the Court when Mr. Justice Holmes wrote that opinion. The issue is not there. That case is a very narrow case and that speaks only to the question of the statute of limitations, and there happens to be some discussion about the fact that the City of Atlanta was injured in its business or property because it overpaid and the worth of the property was overpriced because of an alleged price-fixing conspiracy.

QUESTION: We would at least have to disavow what you consider to be dicta in that case, would we not?

MR. KAPLAN: No, because in that case you did not have the noncomsumer purchaser. You had a state acting in a business or proprietary capacity, which is exactly what we say the results should be in that case. And that is what the courts have followed consistently since Chattanooga.

The issue of a nonconsumer -- excuse me, a nonbusiness consumer -- was not before the Court in Chattanooga.

QUESTION: So, you read as a gloss on the language "any injury to business or property" that it must be suffered by a business consumer?

MR. KAPLAN: No. It must be an injury to your business or to your property.

And the Court might ask me, why use both words, if we are talking about a business. And I think that is a very valid question.

If the Court will look at the Waldron decision, cited in our brief, Mr. Waldron was an individual who was involved, as kind of an investment, in buying and selling oil. It was not his business. And because of some price-fixing in the oil industry, he was injured in this investment. It covered his property, a commercial property. It was not his business. So, if the Congress had simply said "injury in your business," Mr. Waldron would not have had standing to recover damages under Section 4.

QUESTION: Well, it was his business. It wasn't his principal business, maybe.

MR. KAPLAN: It was stricly an investment, just as, Mr. Justice Stewart, if you or I bought a stock. It would not be our business, or even an ancillary business, of buying stocks. It's an investment, strictly something that we do. And it is a commercial property right that we would have.

QUESTION: I wonder if you have really fully dealt with the Chattanooga case, because, as I recall the case, Mr. Justice Holmes first indicated he did not have to rely on the fact that the city was in the business of supplying water,

and therefore put the business aspect to one side, and, therefore, relied exclusively on the fact that there was an overcharge for property. Which seems to me to take the commercial aspect out of the analysis.

MR. KAPLAN: Well, I don't think that you can divorce the property aspect, Mr. Justice Stevens, from the decision. You must look at the entire decision of the Court.

QUESTION: But he specifically did, as I remember it. I may have remembered incorrectly.

MR. KAPLAN: I don't believe, Mr. Justice Stevens, that he defined the term "property" in that decision. And the only property involved in that case, if we are talking about the property, was a commercial property. That was the property in that case.

If all you had to do was to pay more money than something was worth, because of a price-fixing conspiracy, the Congress could have eliminated the words "business or property." Why are they there? They are there for a specific reason, because if the Congress wasn't concerned about commercial interests they could have done with Section 4 exactly what it did with Section 16.

The Congress knew how to do it when they wanted to provide a remedy to everyone, and they did it in Section 16.

In conclusion, I'd like to point out that the fact that current thinking today, in the minds of the American public,

might dictate a congressional result different from that which the Congress reached in 1890 and again in 1914, does not provide a justification for this Court to legislate. If a new remedy is needed, then the Congress should provide for it.

Again, this was the approach taken by this Court just a year ago in the famous Illinois Brick decision. This Court recognized that indirect purchasers may be injured as much or more than direct purchasers, but nevertheless the mass of litigation and administrative burden on the courts caused this Court to conclude that treble damage actions should be limited to direct purchasers.

QUESTION: Well, there were other considerations besides that, were there not, in Illinois Brick?

MR. KAPLAN: Yes, there certainly were, Mr. Chief Justice. However, the Court recognized that not everybody is going to have a remedy for compensation. That is an important distinction. The right to compensation versus the deterrent effect. The deterrent effect will be there because in almost every consumer case -- here I am using the word quite loosely -- in every case brought by a nonbusiness consumer, I think the Court would find that there has been a companion case brought by a business consumer.

QUESTION: Are you talking about the Butone case?

MR. KAPLAN: Beltone?

QUESTION: Beltone, yes.

MR. KAPLAN: That is correct.

In the hearing aid case that we have right here, there were also dealer actions brought.

QUESTION: Before or after this one?

MR. KAPLAN: Prior to. Perhaps a year or two before this case was brought.

QUESTION: Don't assume that I agree with you that it is important.

MR. KAPLAN: No.

However, I point out that, in terms of the deterrent effect, if the Court will examine almost every action that has been brought by a nonbusiness consumer, it will find that in almost every situation there has also been a companion case brought by a business consumer. Therefore, the deterrent effect is not lost by the fact that the nonbusiness consumer cannot bring the action.

If there are no further questions --

QUESTION: Could you explain for me again why you think Congress used both words.

MR. KAPLAN: In order to demonstrate that there must be a commercial or business interest involved. If it had just said "business" without property, for example, it would have excluded the kind of injury that Mr. Waldron had who was employed in one business but was injured in an investment, a contract. He was buying and selling contracts in oil importation.

QUESTION: That's an injury to business.

MR. KAPLAN: That wasn't his business.

QUESTION: Well, it was an injury to business.

MR. KAPLAN: But not to his.

And we believe that the Congress had in mind interest -- What about a situation, perhaps, of owning a building? That is a piece of property, and that may be an investment. That is not your business, but it is a commercial property interest. I believe in 1890 the Court saw a distinction between the two. There had to be a reason.

If the Congress, Mr. Justice White, had intended that everyone recover --

QUESTION: Well, it is a strange way to cover just the things you want us to say are property. If all that we are trying to do is to cover the things you just mentioned. It is a strange way of doing it. Why didn't they just say "commercial"?

MR. KAPLAN: Well, certainly, we all wish we knew why they said what they said. We believe the converse would be true if they had intended to permit everyone to have the right for compensation. They could have left out --

QUESTION: So, you think Congress intended then to cover something besides business?

MR. KAPLAN: They intended to cover property interests, something that was commercial.

QUESTION: So the answer is yes?

MR. KAPLAN: No. The answer is commercial property and business. And there is a distinction between the two.

QUESTION: So, it does cover something besides business?

MR. KAPLAN: It covers commercial property interests, yes.

QUESTION: So, it does cover something besides business, as I say? Yes, it does.

MR. KAPLAN: Yes, it does.

QUESTION: So, the answer is not "no."

MR. KAPLAN: The answer is not no. It covers business and commercial property.

Are there any other questions from the Court?

QUESTION: I wasn't quite sure -- You started to answer why the Pfizer case wasn't important, or didn't control. I never quite understood the end of your answer. You started to discuss it.

MR. KAPLAN: In the Pfizer decision, Mr. Justice Stewart looked to legislative history and didn't find any help in the legislative history. He then went to other areas of the law beyond, the antitrust area, beyond Section 4 of the Clayton Act, which uses the term "person," and found that foreign governments have traditionally had standing to sue in our courts. He, therefore, found that a foreign government must, therefore, have standing to sue under Section 4.

In our case, we have called this Court's attention to

a clear legislative history that indicates that a person who buys for nonbusiness use or noncommercial use does not have standing.

QUESTION: Do you think your argument applies to foreign governments who buy drugs for noncommercial use?

MR. KAPLAN: Mr. Justice Stevens, I can't conceive of a situation where any government would buy in a nonbusiness or nonproprietary capacity. If it is buying rugs for its state office building --

QUESTION: Say they are buying drugs for their army to use for -- or bandages to bandage up people who get wounded.

MR. KAPLAN: In our opinion, anything --

QUESTION: Would they have --

MR. KAPLAN: Yes, they would.

QUESTION: If I bought bandages for my family, I would not be?

MR. KAPLAN: That is correct.

QUESTION: What's the difference?

MR. KAPLAN: The difference being that you are not a state or a government purchaser, and that is a distinction --

QUESTION: There is a preferred position to foreign governments?

MR. KAPLAN: Yes.

QUESTION: According to the Chattanooga case, if you owned a big place like Kings Ranch and you bought 100 million

pipes to put in your ranch, you wouldn't recover?

MR. KAPLAN: That is correct.

You point out the inequities in the situation, Mr. Justice Marshall, and we concede those inequities may exist. They may trouble all of us.

QUESTION: Where is the business in the King Ranch thing?

MR. KAPLAN: There is no business there.

QUESTION: They couldn't collect?

MR. KAPLAN: That's right.

QUESTION: If they set up a business there, if they opened up a McDonald's, then it becomes --

MR. KAPLAN: They are then in a business, that is correct.

QUESTION: I don't know about the King Ranch, but I suppose they are in the cattle business, aren't they?

MR. KAPLAN: Is that the case? I am sorry. If they are, yes. Then they would be in the business, that's correct.

Thank you.

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

Mr. Thomas.

MR. THOMAS: Mr. Chief Justice, and the other Members of this Court, I have nothing to say in rebuttal.

MR. CHIEF JUSTICE BURGER: I have a question for you, Mr. Thomas.

On your theory of the case, suppose an action were brought by a housewife, saying that there were nine people in her household and they consumed three loaves of bread every day -- I don't know what bread is now. Around 50 cents, I guess, maybe more -- and that's twenty-one loaves of bread a week and she is being overcharged 15 cents per loaf and that she is acting on behalf of all the people who buy loaves of bread in St. Paul and Minneapolis. Covered by the theory of your case here?

MR. THOMAS: If it is price-fix? Yes, Your Honor, and the beauty of it is that there are certain courts in this country that are managing those cases. The other side of it, and the beauty of it is, from the judicial aspect, that the judges are free to say, "I cannot manage this case."

There is a milk case out in Arizona where they actually sent out the class notices, under the court direction, on the milk cartons.

They could go out on the bread wrappers, Your Honor.

Thank you, very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:23 o'clock, a.m., the case was submitted.)