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In the
Supreme Court SUPREME COURT COPY
Of the State of California

JAMES CLAYWORTH, *et al.*,
Plaintiffs-Appellants,

v.

PFIZER, INC., *et al.*,
Defendants-Respondents.

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SUPREME COURT
FILED

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Deputy

After a Decision By the Court of Appeal
First Appellate District, Division Two
Case No. A116798

PETITION FOR REVIEW

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ALIOTO LAW FIRM
JOSEPH M. ALIOTO (SBN 42680)
JOSEPH M. ALIOTO, JR. (SBN 215544)
555 CALIFORNIA STREET
THIRTY-FIRST FLOOR
SAN FRANCISCO, CALIFORNIA 94104
(415) 434-8900

*Counsel for JAMES CLAYWORTH,
et al., Plaintiffs-Appellants*

(Additional counsel on last page)

1

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Counsel for JAMES CLAYWORTH,
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(Additional counsel on last page)

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QUESTIONS PRESENTED FOR REVIEW

1. Whether price-fixing defendants sued under the Cartwright Act may assert a “pass-on” defense to escape all liability.

2. Whether a plaintiff who has paid an overcharge as a result of unfair competition has standing and is entitled to restitution under the Unfair Competition Law, as amended by Proposition 64, where the plaintiff has raised his own price in response to the overcharge.

WHY REVIEW SHOULD BE GRANTED

This case presents questions of great importance to retail businesses and consumers throughout California. If the ruling of the First District is allowed to stand, it will effectively legislate a re-write of the century-old Cartwright Act, striking from that law the very provisions upon which it was founded: the punishment of price-fixers and the promotion of free competition. For the first time in this country, a reviewing court has allowed guilty price-fixers to assert the pass-on defense and totally evade liability.

The availability of the pass-on defense is an issue of first impression in California. But, the issue has percolated in the appellate courts for twenty years. The cases that have discussed the defense have declined to squarely address the issue, citing an incomplete record. This case, in contrast, presents a fully developed set of facts. The issue here is purely one of law. This case is an ideal opportunity for this Court to bring California back in line with every other jurisdiction in this nation that has considered the matter.

The pass-on defense ostensibly arises in situations where defendants have conspired to fix prices in violation of the antitrust laws. Manufacturers asserting the

defense attempt to show that retailer plaintiffs, having been forced to pay high prices resulting from the price-fixing arrangement, have passed on the overcharges to their own customers, the consumers, in the form of higher retail prices. Having passed these overcharges on – a simplified version of the defense would posit – the retailers have suffered no injury;¹ the consumers have, since they absorbed the overcharge. It would be one thing if the defense were allowed in cases where the consumers have filed suit too, since at least *they* would be poised to enforce the law, recover the overcharge, punish and disgorge the defendants, and deter future misconduct. However, if, as in this case, *no other plaintiff* has filed suit, the defense will result in the violation going utterly unaddressed. The defendants, guilty of fixing prices, will be allowed to get off scot-free. This, the First District has unfathomably concluded, properly reflects the purposes of the Cartwright Act and the intent of its drafters.

The pass-on defense was first analyzed in 1968 by the United States Supreme Court in *Hanover Shoe v. United Shoe Mach. Corp.* (1968) 392 U.S. 481. The Court outlawed the defense, basing its decision on the important public policies of promoting vigorous private antitrust enforcement and preventing wrong-doers from escaping liability with their illegal profits. (*Id.* at 492-494.) In the twenty-five years that followed *Hanover Shoe*, the Supreme Court twice reaffirmed this rule in *Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720 and again in *Kansas v. Utilicorp United Inc.* (1990) 497 U.S. 199. Thus, the defense has been forbidden in the federal courts for over two generations.

The state jurisdictions have steadily adopted versions of the *Hanover Shoe* rule, both through legislation and judicial decision. Legislatures from eight states and the District of Columbia have forbidden the pass-on defense as a complete defense to

¹ In fact, as discussed, *infra*, a retailer may suffer injury even if it passes on 100% of the overcharge.

price-fixing. The courts in two other states have similarly rejected the defense. In all, eleven jurisdictions have rejected it, not including those which mirror federal law and therefore likewise refuse to recognize it. But, no legislature or reviewing court from any state in this country has ever allowed the pass-on defense as a total and complete defense to price-fixing.

Until now.

California's antitrust statute, the Cartwright Act, was expressly created to promote free enterprise, punish wrong doers, and compensate victims. This Court has further interpreted the law's purpose as including the deterrence of anticompetitive behavior and the disgorgement of illegally obtained profits. But, dismissing those policies out of hand with little or no analysis, the First District has rewarded the wrong-doers, granting them a windfall in derogation of the law.

If permitted to stand, there is little doubt of the negative impact this holding will have on future competition enforcement in this state. Retailers and suppliers – or any business that purchases from a price-fixer and resells its products – will have little incentive to bring suit if the decision below remains law. Their cases will become bogged down with endless discovery as defendants seek to prove the defense.

The continuing vitality of competition law enforcement in California mandates granting the petition and reversing the decision below.

BACKGROUND

A. Procedural History

In August, 2004, plaintiff Pharmacies filed a complaint against the defendant Drug Manufacturers for conspiring to fix the prices of brand name pharmaceuticals in violation of the Cartwright Act (CAL. BUS. & PROF. CODE §16720, *et seq.*) and the California Unfair Competition Law (CAL. BUS. & PROF. CODE §17200, *et seq.*)

(“UCL”). The Drug Manufacturers answered the complaint, each asserting the pass-on defense as an affirmative defense.

In August, 2006, Pharmacies filed a Motion for Summary Adjudication seeking to strike the pass-on defense as an affirmative defense. The Drug Manufacturers cross-moved for Summary Judgment, arguing that Pharmacies passed-on the overcharge and thereby suffered no injury. The trial court granted Drug Manufacturers’ motion and denied plaintiffs’ motion in December, 2006.

The Court of Appeal affirmed the trial court’s ruling on July 25, 2008, which became final on August 24, 2008.

Pharmacies timely filed a petition for rehearing on various grounds, which was denied on August 19, 2008. In light of Pharmacies’ petition, however, the Court of Appeal modified its opinion and struck from the decision a three-page section concerning the so-called “cost plus contract exception” to *Hanover Shoe*. That issue was neither briefed nor proposed by any party, formed no basis of the trial court’s summary judgment ruling, and the First District’s analysis of it mandated rehearing. (CAL. CIV. PROC. §437c(m)(2); CAL. GOV. CODE §68081.) The applicability of the “cost plus contract exception” is not an issue before this Court.

This petition is timely filed within ten days of the finality of the Court of Appeal’s decision.

B. Statement of Facts

For purposes of this appeal, the defendant Drug Manufacturers are presumed to have conspired to fix the prices of their brand-name pharmaceuticals in violation of the Cartwright Act and Unfair Competition Law. (*Clayworth v. Pfizer, Inc.* (2008) 165 Cal.App.4th 209, 218, n.6, *modified and rehearing denied*, 2008 Cal.App.LEXIS

1325 (August 19, 2008) (“*Clayworth*”).² Those prices were set at artificially high prices that included an “overcharge,” *i.e.*, the difference between the conspiratorial price and the price Pharmacies would have paid in a competitive market. (*Id.* at 217.)

Defendants sell their drugs to wholesalers at a price referred to as the Wholesale Acquisition Cost (“WAC”). (*Id.*) The wholesalers resell the drugs to the Pharmacies at prices using a formula mathematically tied to the WAC, called the Average Wholesale Price (“AWP”). (*Id.*) As a result, when the defendants increase their prices, the prices paid by the plaintiffs increase by the same percentage amount. (*Id.*) So, plaintiffs pay the full amount of the overcharge, which they seek in damages.³ (*Id.*)

Plaintiffs in turn sell their drugs to two types of customers: (1) insured customers, who are covered by “third-party” insurance plans and government drug plans that pay the Pharmacies, and (2) uninsured or “cash-paying” customers. (*Id.*) The majority of Pharmacies’ customers are insured by third-party payers. (*Id.*)

These third party payers reimburse Pharmacies on behalf of the insured customers at a rate that is contractually or statutorily fixed, and which is tied to a percentage of AWP, plus a dispensing fee. (*Id.*) Thus, because their reimbursements

² The decision below and the order modifying the decision are attached as Exhibits A and B, respectively. The decision and modifying order exceed 10 pages and are attached pending Plaintiffs’ application to the Chief Justice for permission to file an enlarged attachment.

³ Plaintiffs waived their right to collect money damages on “lost profits.” (*Clayworth*, 165 Cal.App.4th at 218, n.4.) But, the waiver of collecting money damages for lost profits does not constitute an admission that Plaintiffs did not suffer lost profits.

are tied to the same formula at which they purchase their drugs, Pharmacies' reimbursements increase at roughly the same percentage as their costs.

Prices charged to cash-paying customers are set according to price-lists maintained by the Pharmacies. (*Id.*) Pharmacies use AWP as a benchmark when formulating these price-lists. (*Id.*) Thus, when the Pharmacies sell drugs to cash-paying customers, their prices increase at roughly the same percentage as their costs. (*Id.*)

In sum, the Pharmacies passed-on the overcharge to their customers.

None of these facts are contested. However, on petition for rehearing, the Pharmacies pointed out additional relevant facts in the record that the First District omitted. These facts relate to an issue ignored below, namely, that to show a plaintiff in an overcharge case has suffered no injury, a defendant must not only prove the plaintiff passed on the overcharge *but also* that it could not have increased its prices prior to and in the absence of the overcharge.

With respect to the cash-paying customers, first, although Pharmacies use AWP as a benchmark when formulating their price-lists, Pharmacies maintain full discretion over prices paid to cash-paying customers and can charge whatever they want.⁴ Second, Pharmacies are often able to charge cash-paying customers higher prices.⁵ Third, although the majority of Pharmacies' customers are insured, this has not always been the case. The percentage of cash-paying customers was substantially higher in the past, and in some cases constituted 75% or 90% of the Pharmacies'

⁴ Petition for Rehearing, filed August 11, 2008 ("Pet. Reh.") at 5; VIII Clerk's Transcript ("CT") 1919 (Dep. p. 248); IV CT 902; VI CT 1345; VII CT 1597; VIII CT 1965; VIII CT 1842-44.

⁵ *Id.*

business.⁶ Finally, the drastic decrease in the number of cash-paying customers is attributable to the defendants' price-fixing conspiracy, since more and more customers began needing insurance as drug prices escalated.⁷

With respect to insured customers, first, the formulas used to calculate the Pharmacies' reimbursements are flexible and change over time as market conditions fluctuate.⁸ Second, in some cases, the reimbursement formulas are negotiable.⁹

Finally, at oral argument below, the Court of Appeal inquired as to why end consumers had not sued here. The majority of Pharmacies' customers are covered by insurance, only pay a small co-pay which does not fluctuate with the rising cost of drugs, and may not have adequate incentive or damages to file suit.¹⁰ Other than the Pharmacies, no other plaintiff has sued to redress the violations alleged in this case.

LEGAL DISCUSSION

- I. **THE PASS-ON DEFENSE HAS BEEN UNIVERSALLY REJECTED BY THE STATES AND FEDERAL COURTS, THREATENS ENFORCEMENT OF THE COMPETITION LAWS, CONTRADICTS WELL-ESTABLISHED POLICY, AND MUST BE REJECTED BY THIS COURT**
- A. **This Case Presents A Unique Opportunity For This Court To Resolve An Important Question Of Law That Has Percolated In The Courts Of Appeal For Two Decades**

⁶ Pet. Reh. At 8-9; VIII CT 1847; V CT 1098; V CT 1039-40; VIII CT 1813; IV CT 962; VII CT 1532.

⁷ Pet. Reh. At 8; VIII CT 1847.

⁸ Pet. Reh. At 9-10; VII CT 1553; VI CT 1613; VIII CT 1826.

⁹ Pet. Reh. At 10; VI CT 1524-26.

¹⁰ Pet. Reh. At 14; VII CT 1670-71; VII CT 1722; VIII CT 1783; VIII CT 1911 (Dep. p. 175:18-23).

Whether the pass-on defense is permitted in California has been discussed in the Courts of Appeal over a twenty-year period. While these cases have discussed the issue, none has squarely answered the question for lack of an adequate factual record. The facts in this case, however, have been fully developed, and the question is now ripe for decision by this Court.

The first case to deal with the issue was *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341. *B.W.I.*, as this case, involved various stages of distribution. While termed “intermediate purchasers,” the plaintiffs purchased the product from defendants indirectly, so their suit was barred under federal law. (*Id.* at 1346, citing, *Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720, 728.) As a result, as here, plaintiffs’ sole source of relief was with the California courts. At the class certification stage, the defendants sought to assert the pass-on defense, arguing that plaintiffs suffered no injury, since they passed the overcharge onto their own customers. (*B.W.I., supra*, 191 Cal.App.3d at 1353.) The *B.W.I.* court declined to address the issue, stating that “[w]hether defendants can bar class certification or negate injury by showing plaintiff and the class ‘passed on’ the overcharge is a question that has not been addressed by any California court, and it would be premature to resolve it at this juncture because we do not have an adequate factual record.” (*Id.*)

More recently, in two companion cases decided in 2003, the Court of Appeal reiterated the unresolved status of the pass-on defense, stating it “still remains an open question in California.” (*J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 212, n.10; *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 852, n.10.) With a full factual record before the Court, the time has come to resolve that open question once and for all.

B. The Pass-on Defense Has Been Prohibited In The Federal Courts For Forty Years, And Every State Jurisdiction In The Nation That Has Considered The Defense Has Rejected It

While no court before now has definitively determined the availability of the pass-on defense in California, it has been prohibited in the federal courts for forty years, and every state jurisdiction that has considered the issue has prevented pass-on evidence as a complete defense to price-fixing.

The pass-on defense was first proscribed by the United States Supreme Court in *Hanover Shoe v. United Shoe Mach. Corp.* (1968) 392 U.S. 481. The plaintiff Hanover was a manufacturer of shoes and a customer of United, a maker of shoe machinery. Hanover alleged that United monopolized the shoe machinery industry by leasing – and refusing to sell – essential machinery. United was found liable. Hanover sought to recover the “overcharge,” *i.e.*, the difference between what it paid United in machine rentals and what it would have paid had United sold the machines. United asserted the pass-on defense, claiming Hanover suffered no injury because it merely passed the illegal overcharge onto its own customers in the form of higher prices. (*Id.* at 487-88.) The Supreme Court rejected United’s pass-on defense, holding, “[a]s long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.” (*Id.* at 489.)

The Supreme Court’s rejection of the defense was rooted in preserving the public’s interest in the private enforcement of the antitrust laws. The Court first reasoned that in order to successfully assert the pass-on defense, a defendant would have to do more than merely show the plaintiff passed-on the overcharge. Rather, to show a plaintiff suffered no injury, a defendant would have to prove the plaintiff could not have raised its prices prior to the overcharge. (*Id.* at 493, n.9.)

The Court concluded that “demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge” would amount to a “nearly insuperable difficulty,” and since defendants would frequently seek to invoke the

defense, treble damage actions would deteriorate into “long and complicated proceedings involving massive evidence and complicated theories.” (*Id.* at 493.)

Furthermore, if the defense is asserted against the only plaintiff poised to redress the violation, antitrust violators would be permitted to “retain the fruits of their illegality because no one was available who would bring suit against them.” (*Id.* at 494.) “Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.” (*Id.*)

Eight years later, the Supreme Court reaffirmed *Hanover Shoe* in *Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720, 745-46. While affirming *Hanover Shoe*, the Supreme Court went a step further, holding that “indirect purchasers” cannot use pass-on “offensively” to show they absorbed some of the overcharge and therefore lacked standing. (*Id.* at 728.). The decision was based on two theories. First, it held that “whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants.” (*Id.* at 728.) Second, it reasoned that allowing offensive pass-on while preventing defensive pass-on would create a “serious risk of multiple liability for defendants.” (*Id.* at 730.)

Justice Brennan’s dissent found the majority opinion a “regrettable retreat” from well-established antitrust principles, “flout[ing] Congress’ purpose and severely undermin[ing] the effectiveness of the private treble-damages action as an important instrument of antitrust enforcement.” (*Id.* at 749.) It attacked the majority’s theories, rejecting the multiple liability argument because “as a practical matter, existing procedural mechanisms can eliminate this danger in most circumstances.” (*Id.* at 761.) It also rejected the majority’s primary argument that “offensive” and “defensive” pass-on should be treated equally:

Despite the superficial appeal of the argument that *Hanover Shoe* should be applied “consistently,” thus precluding plaintiffs and defendants alike from proving that increased costs were passed along the chain of distribution, there are sound reasons for treating offensive and defensive passing-on

cases differently. *The interests at stake in “offensive” passing-on cases, where the indirect purchasers sue for damages for their injuries, are simply not the same as the interests at stake in the Hanover Shoe, or “defensive” passing-on situation.* There is no danger in this case [*i.e.*, in the *Illinois Brick* offensive pass-on situation], as there was in *Hanover Shoe*, that the defendant will escape liability and frustrate the objectives of the treble-damages action. Rather, the same policies of insuring the continued effectiveness of the treble-damages action and preventing wrongdoers from retaining the spoils of their misdeeds favor allowing indirect purchasers to prove overcharges were passed on to them. *Hanover Shoe thus can and should be limited to cases of defensive assertion of the passing-on defense to antitrust liability, where direct and indirect purchasers are not parties in the same action.* (*Illinois Brick, supra*, 431 U.S. at 753 (emphasis added).)

Thus, the dissenting opinion advocated for permitting indirect purchaser standing while simultaneously rejecting the pass-on defense.

Thirteen years after *Illinois Brick*, the U.S. Supreme Court again confirmed *Hanover Shoe* in *Kansas v. Utilicorp United Inc.* (1990) 497 U.S. 199, 204. Thus, the pass-on defense has been prohibited in the federal courts for over forty years.

Just as California did in 1978, some twenty-four states and the District of Columbia have enacted “*Illinois Brick* repealer” statutes that guarantee indirect purchaser standing. Some of these states have also considered, both through legislative enactment and judicial decision, whether the pass-on defense should be permitted. How these states have responded to this issue is of vital interest in this case.

Nine jurisdictions have legislated laws regarding the pass-on defense. In contrast to the First District’s decision below, these jurisdictions only allow defendants to use pass-on evidence (a) where another plaintiff is poised to redress the violation, or (b) to avoid multiple liability. In other words, none of these jurisdictions allows a defendant’s violation to go utterly unaddressed.

The statutes of these nine jurisdictions fall into two categories. The first group of states *only* permits defensive pass-on evidence where the overcharge has been

passed on to another plaintiff which is himself entitled to recover, thereby ensuring that the defendant is prosecuted.¹¹ The second group of states, similar to the first, allows defensive pass-on evidence to be admitted only where necessary to avoid multiple liability, *i.e.*, where another plaintiff has already sued or a different plaintiff's suit is pending, thereby ensuring that the defendant is prosecuted.¹²

¹¹ The following statutes are attached to the appendix as Exhibit C, pending Petitioners' application to the Chief Justice for enlargement of attachments. District of Columbia (D.C. CODE §28-4509 (b) (Allows defensive pass-on evidence only "where both direct and indirect purchasers are involved" and where overcharge "has been passed on to others who are themselves entitled to recover...."); Hawaii (HAW. REV. STAT. §480-13 (c)(2) (Defensive pass-on evidence only allowed "in class actions or de facto class actions where both direct and indirect purchasers are involved, or where more than one class of indirect purchasers are involved" and where overcharge "has been passed on or passed back to others who are themselves entitled to recover...."); Nebraska (NEB. REV. STAT. §59-821.01) (Permits defensive pass-on evidence only where "the illegal overcharge or undercharge has been passed on to others who are themselves entitled to recover"); New York (N.Y. GEN. BUS. LAW §340 (6) (Allows defensive pass-on evidence only "[i]n actions where both direct and indirect purchasers are involved," and the overcharge "has been passed on to others who are themselves entitled to recover...."); North Dakota (N.D. CENT. CODE §51-08.1-08(4) (Permits defensive pass-on evidence only where overcharge passed-on "to another purchaser or seller *in that action.*"); and Utah (2006 BILL TEXT UT S.B. 16) (Allows defensive pass-on evidence only "[w]hen a defendant has been sued in one or more actions by both direct and indirect purchasers," and the overcharge has been "passed on to others who are entitled to recover....").

¹² The following statutes are attached to the appendix as Exhibit C, pending Petitioners' application to the Chief Justice for enlargement of attachments. New

Two additional states have prohibited the defense through judicial decision, as this Court should do. The Supreme Court of Minnesota outlawed the pass-on defense in *Minnesota ex rel. Humphrey v. Philip Morris, Inc.* (Minn. 1996) 551 N.W.2d 490, 496, reasoning that the defense “has been uniformly rejected in the courts, primarily on the theory that the injury is sustained as soon as the price, artificially raised for whatever reason, has been paid.” (*Id.*)

Similarly, Arizona’s appellate court rejected the defense, although not in the antitrust context, in *Northern Arizona Gas Service, Inc. v. Petrolane Transport, Inc.* (Ariz. Cir. 1984) 145 Ariz. 467, 475-76, *review denied* (June 25, 1985). That case, which the Arizona Supreme Court declined to review, noted the “almost universal disallowance of the defense,” and reasoned that if the defendant were able to assert the defense, “it would be able to retain its overcharges with impunity.” (*Id.* at 475-76.)

In addition to these eleven jurisdictions, many other states prohibit the pass-on defense by virtue of their “harmony clauses.” These states have enacted laws or issued decisions that require conformity with federal law, and therefore they too reject the pass-on defense. (*See, e.g.*, Massachusetts (MASS. GEN. LAWS ANN. CH. 93, §1); Oklahoma (OKLA. STAT. 79, §212); Texas (TEX. BUS. & COM. CODE ANN. §15.04); Missouri (*Ireland v. Microsoft Corp.*, 2001 WL 1868946 (Mo. Cir. Jan. 24, 2001);

Mexico (N.M. STAT. ANN. §57-1-33(C) (Allows defensive pass-on evidence only “in order to avoid duplicative recovery....”); Maryland (MD. COMM. LAW CODE ANN. §11-209 (Defendant may “prove that all or any part of an alleged overcharge was ultimately passed on” only “in order to avoid duplicative liability.”); and Illinois (740 ILL. COMP. STAT. 10/7(2) (“[I]n any case in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicative liability....”).

New Hampshire (*Minuteman, LLC v. Microsoft Corp.* 147 N.H. 634); New Jersey (*Sickles v. Cabot Corp.* (N.J. Super. A.D. 2005) 877 A.2d 267).)

Of all the appellate and Supreme Court decisions and state statutes that have rejected the defense, two trial courts have written opinions allowing it. The first is a federal district court decision interpreting Michigan state law. (*In re Vitamins Antitrust Litigation* (2003) 259 F.Supp.2d 1.) *Vitamins* has never been cited or adopted by Michigan's courts and does not constitute Michigan law. Furthermore, it relies almost exclusively on defense-oriented idiosyncracies of Michigan law which do not exist in California, including the rejection of punitive damages in all tort actions and the denial of treble-damages in antitrust cases. The other decision is a scant four-page ruling from a trial court in Wisconsin that has not been reviewed. (*J&R Ventures v. Rhone-Poulenc S.A.* (Wis. Cir. Dec. 4, 2006, No. 00-1143); XI CT 2602.) Neither of these cases represents the law of its respective state.

In sum, neither the federal courts nor any state jurisdiction in this nation allows what the First District has allowed here: a group of guilty defendants to escape all liability with the spoils of their misdeeds.

C. The First District's Holding Conflicts With Established Law That An Antitrust Plaintiff Suffers Injury The Moment It Pays An Illegal Overcharge

Under the law in California, a plaintiff suffers injury as soon as it pays an excessive price for a product whose price has been fixed through conspiracy. Yet, the First District, ignoring this established law, held that Plaintiffs "sustained no injury," even though they purchased a price-fixed product. (*Clayworth, supra*, 165 Cal.App.4th at 228.) It held "the pass-on defense is available to defendants and, as applied here, defeats plaintiffs who have passed on all the claimed overcharges." (*Id.*) In arriving at this holding, the First District further erred because an overcharged

plaintiff may still suffer compensable injury, *even if* it passes on 100% of the overcharge.

First, the First District erred in holding that Pharmacies suffered no injury. It acknowledged that the Drug Manufacturers, for purposes of this appeal, “in fact engage[d] in price-fixing.” (*Id.* at 218, n.6.) It similarly acknowledged that Pharmacies “pay the full amount of the alleged overcharge.” (*Id.* at 217.) But, under established California law, this payment – the purchase of a price-fixed product at a conspiratorially-fixed price – is sufficient *by itself* to show plaintiffs suffered “injury.”

In determining that a complaint sufficiently pled compensable injury, the Court of Appeal in *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234-1235, held that “the individual plaintiffs allege they paid, as consumers, excessive prices for cellular service due to the price fixing agreement between [defendants]. Thus, they were injured directly by the alleged retail price fixing....” The Court of Appeal likewise held in *B.W.I. Custom Kitchens v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341 that “Courts have shown no hesitancy in ruling that when a conspiracy to fix prices has been proven and plaintiffs have established they purchased the price-fixed goods or services, the jury can *infer* plaintiffs were damaged.” (*Id.* at 1350, emphasis in original.) California courts have echoed this principle for over twenty-five years. (*Rosack v. Volvo of America Corp.* (1982) 131 Cal.App.3d 741, 753; *California Dental Ass’n v. California Dental Hygienists’ Ass’n* (1990) 222 Cal.App.3d 49, 61; *In re Cipro Cases I & II* (2004) 121 Cal.App.4th 402, 413.)

This rule in California – that a plaintiff suffers compensable injury as soon it purchases a price-fixed product – is precisely the holding in *Hanover Shoe* which,

interpreting Section 4 of the Clayton Act¹³ held, “[w]e think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of §4.” (*Hanover Shoe, supra*, 392 U.S. at 489.) Thus, California appellate decisions have for twenty-years relied on the same principle as *Hanover Shoe*.

Ignoring these authorities and without analyzing at all whether Pharmacies suffered “injury,” the First District instead *began* its discussion with the assumption that plaintiffs sustained no injury: “we must first examine the language of section 16750 to ascertain whether it evidences an intent to allow plaintiffs to maintain a Cartwright Act case *even though they themselves have sustained no injury*.” (*Clayworth, supra*, 165 Cal.App.4th at 228 (emphasis added).) The First District has assumed the very thing it seeks to prove.

Moreover, the amount of damages in an overcharge case *is* the overcharge. This conclusion is borne out by an authority cited by the First District itself: CACI No. 3440, the Judicial Council of California Civil Jury Instruction on damages under the Cartwright Act. (*Id.* at 230.) The cited instruction states in part: “The following are the specific items of damages claimed by [name of plaintiff]: ...; [¶] 2. [*An increase in [plaintiff]’s expenses...*” (*Id.* at 230, emphasis added.) Thus, Pharmacies suffered injury when they purchased the price-fixed products, and the amount of their damages is the “increase in their expenses,” *i.e.*, the overcharge.

Second, the First District misunderstood that an overcharged plaintiff may suffer compensable injury, *even if it passes on 100% of the overcharge*. This was explained by the United States Supreme Court in both *Hanover Shoe* and *Kansas v.*

¹³ The language of Section 4 (15 U.S.C. §15) is, with irrelevant exceptions, operatively identical to that of the Cartwright Act, CAL. BUS & PROF. CODE §17650.

Utilicorp United Inc., *supra*, 497 U.S. 199. In *Utilicorp*, a group of utilities brought claim against natural gas pipelines for price-fixing. The State of Kansas also brought suit *parens patriae*, alleging that the citizens of Kansas had suffered the injury – and not the utilities – because 100% of the overcharges had been passed on. The Supreme Court disagreed, holding that the utilities suffered injury and damages even though they passed on the full amount of the overcharge. (*Id.* at 205.) In analyzing whether a party is injured, *Hanover Shoe* and *Utilicorp* concluded that “[a]n overcharge may injure a [plaintiff] ... even if the [plaintiff] raises its rates to offset its increased costs.” (*Utilicorp*, *supra*, 497 U.S. at 209.) Quoting *Hanover Shoe*, the Court in *Utilicorp* held:

The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for the price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. (*Utilicorp*, *supra*, 497 U.S. at 209, quoting, *Hanover Shoe*, *supra*, 392 U.S. at 493, n.9.)

The *Utilicorp* Court then held that “[t]o show that a direct purchaser has borne no portion of an overcharge, the [defendant] would have to prove, among other things, that the direct purchaser could not have raised its rates prior to the overcharge.” (*Utilicorp*, *supra*, 497 U.S. at 209.) But, the Drug Manufacturers in this case have made no attempt to offer such proof and the First District omitted any analysis of this question. Thus, even assuming, *arguendo*, that the pass-on defense were available in California, the Drug Manufacturers have failed to successfully assert it.

In fact, the record in this case demonstrates that the Pharmacies could have increased their prices in the absence of the overcharge. Pharmacies have full discretion over prices charged to their cash-paying customers. The percentage of

cash-paying customers was substantially higher before the overcharge was implemented, in some cases constituting 75% or 90% of the Pharmacies' business. In the absence of the conspiracy, they therefore could have raised rates to a substantially larger portion of their customer base and kept the overcharges for themselves.

Moreover, the formulas used to calculate Pharmacies' reimbursements for their insured customers are flexible and change over time. It would be practically impossible for the defendants here to prove that the formulas would have remained precisely the same in the absence of the conspiracy. As the Supreme Court explained in *Utilicorp*, the existence of such formulas would make this proof more, not less, complicated. (*Utilicorp, supra*, 497 U.S. at 209-210.)

The near impossibility of proving that the plaintiff could not have raised its rates absent the conspiracy is integral to *Hanover Shoe*'s holding. It reasoned that such a proof would amount to a "nearly insuperable difficulty." (*Hanover Shoe, supra*, 392 U.S. at 493 (emphasis added).) But, that would not prevent defendants from nevertheless "frequently seek[ing] to establish its applicability," resulting in "long and complicated proceedings" that would "substantially reduce [the] effectiveness" of treble-damage actions, "the importance of which the Court has many times emphasized." (*Hanover Shoe, supra*, 392 U.S. at 493-94.)

The First District confused this point, instead interpreting *Hanover Shoe*'s warning of "insuperable difficulties" as the difficulty of "establishing the amount of overcharge passed on." (*Clayworth, supra*, 165 Cal.App.4th at 223.) But, tracing the overcharge is *not* the difficulty *Hanover Shoe* warned of, and the First District erroneously concluded that "[t]he proof problems present in *Hanover Shoe* are not apparent in the record here." (*Clayworth, supra*, 165 Cal.App.4th at 233.) Determining the amount of overcharge passed-on is a matter of relatively simple discovery. Whether, on the other hand, the plaintiffs could have raised their rates

absent the overcharge is a question that no defendant could easily prove and antitrust actions involving such proofs would be severely weighed down.

In sum, the First District's analysis is contrary to well-established California law that a plaintiff is injured once it purchases a price-fixed product. The amount of damages sustained is the overcharge. Defendants here have failed to prove Plaintiffs suffered no injury, even though they passed on the overcharge, since the Defendants have not shown Plaintiffs could not have increased their prices absent the conspiracy.

D. The Express Policy And Law In California Does Not Tolerate Granting Windfall Profits To Wrongdoers, Which The First District Has Done

The antitrust laws are of paramount importance to economic freedom, as the United States Supreme Court has often explained:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. (*United States v. Topco Associates, Inc.* (1972) 405 U.S. 596, 610.)

“[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.” (*Perma Life Mufflers, Inc. v. Int'l Parks Corp.* (1968) 392 U.S. 134, 139.) “Moreover, the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.” (*Zenith Radio Corp. v. Hazeltine Research, Inc.* (1969) 395 U.S. 100, 130-31.)

These same policies drove the creation of California's Cartwright Act in 1907, and they are written directly into the Act itself:

An act to define trust and to provide for criminal penalties and civil damages, and *punishment* of corporations, persons, firms, and associations, or persons connected

with them, and *to promote free competition* in commerce and all classes of business in this state. (1907 STATS., CH. 530, tit. (emphasis added).)

This Court has also declared that “[t]he purposes of the private damages action for violations of the Cartwright Act include disgorgement and deterrence as well as compensation.” (*California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472.)

But, ignoring these policies, the First District instead issued a ruling in defiance of them. Rather than promote free competition, the Court of Appeal condoned the conspiracy. Rather than punish and deter the wrong-doers, it rewarded them. The ruling below contradicts the bedrock “maxims of jurisprudence” that “No one can take advantage of his own wrong” and “For every wrong there is a remedy.” (CAL. CIV CODE §§ 3517, 3523).

Rather than construe the statute in light of these policies, the First District construed it contrary to them, frustrating the very goals of antitrust law. “The court may consider the impact of an interpretation on public policy, for where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.” (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663 (internal quotations omitted).)

Without legal authority, the First District has substituted its own policies in lieu of California’s. In response to Pharmacies’ argument that “offensive” and “defensive” pass-on should be treated differently, the court below accused Plaintiffs of “ignoring the principle which calls for the equal treatment of claims and defenses,” citing *Illinois Brick* in support and arguing that this principle was “fundamental” to the holding in that case. (*Clayworth, supra*, 165 Cal.App.4th at 242.) But, the First District ignored the fact that the Legislature specifically rejected that case with its 1978 “Illinois Brick repealer.” It overlooked the views of the *Illinois Brick* dissent –

held by this Court to have reflected the intent of the Legislature¹⁴ – that treating offensive and defensive pass-on “consistently” was of merely “superficial appeal.” (*Illinois Brick*, 431 U.S. at 753.) The dissent explained, “[t]here is no danger in [offensive pass-on cases], as there was in *Hanover Shoe*, that the defendant will escape liability and frustrate the objectives of the treble-damages action.” (*Id.*) It is for that reason that “*Hanover Shoe* thus can and should be limited to cases of defensive assertion of the passing-on defense to antitrust liability, where direct and indirect purchasers are not parties in the same action.” (*Id.*)

The First District also elevated the policy disfavoring windfall damages over punishment, deterrence and disgorgement of the wrongdoer. (*Clayworth, supra*, 165 Cal.App.4th at 242-43.) But, those policies have been either written into the Cartwright Act of 1907 or directly sanctioned by this Court. As Justice Brennan wrote in his *Illinois Brick* dissent:

[F]rom the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation. ... [*Hanover Shoe*] recognized that some plaintiffs would recover more than their due, but concluded that the necessity of assuring that someone recover and thus deter future violations and prevent the antitrust offender from profiting by his illegal overcharge outweighed any resulting injustice. (*Illinois Brick, supra*, 431 U.S. at 760.)

Yet, in its obstinate determination to prevent granting the plaintiffs a windfall, the First District has instead given a windfall to those that violated the law.

The First District hinged this decision on a statement from *Bruno v. Superior Court* (1981) 127 Cal.App.3d 120, that “although compensation is the primary

¹⁴ In *Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15, 24 this Court interpreted the *Illinois Brick* dissent as having reflected the intent of the Legislature in amending the Cartwright Act in 1978.

rationale for the allowance of private antitrust lawsuits, the prevention and punishment of anti-competitive acts is a not insignificant purpose of antitrust laws.” (*Id.* at 132 (emphasis added)). Seizing on the word “primary” and elevating “compensation” above any other policy consideration of the Cartwright Act, the court concluded that plaintiffs “have already been paid for the claimed overcharges,” so there is nothing left to compensate. (*Clayworth, supra*, 165 Cal.App.4th at 243.) While the compensation of victims is certainly an essential policy rationale of the Cartwright Act, the drafters never elevated it above the policies favoring “punishment of corporations,” or “promot[ion of] free competition,” as the original 1907 Cartwright Act makes plain. (STATS. 1907, CH. 530, tit.) This Court placed no such hierarchy among these policies in *California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472 when it held that “the purposes of the private damages action for violations of the Cartwright Act include disgorgement and deterrence as well as compensation.”

Even if a judgment for Plaintiffs did amount to a windfall, the policy disfavoring it must take a backseat to those mandating vigorous enforcement, punishment, deterrence, and disgorgement of illegally obtained profits. California has permits windfall recoveries where doing so serves important public interests. One such example is the “collateral source rule,” which prevents defendants from offsetting damages by showing a plaintiff has been reimbursed by insurance. (*Anheuser-Busch, Inc. v. Starley* (1946) 28 Cal. 2d 347, 349.) In analyzing this rule, the courts have correctly noted that “[t]he wrongdoer is not permitted to obtain a windfall by reason of the principle that an injured person should be compensated only once.” (*Dodds v. Bucknum* (1963) 214 Cal.App.2d 206, 214.) So it is with the pass-on defense.

Finally, the decision below will have a chilling effect on antitrust prosecution involving all but end consumers. Rather than deter violations, the decision below will deter actions brought by direct and intermediate purchasers – any party that resells a

product. At the oral argument before the trial court, the defendants all but admitted that the ruling would have this effect, essentially responding that it made no difference, since, “[d]irect purchasers don’t bring suits in California. They sue under the federal statute.” (Trial Court Reporter’s Transcript at 112.) But, that cavalier reaction belies the intent of the 1978 amendment to the Cartwright Act which sought to promote more (not less) private antitrust enforcement, “regardless of whether such injured person dealt *directly* or indirectly with the defendant.” (CAL. BUS. & PROF. CODE §16750(a) (emphasis added).) Moreover, their response says nothing about intermediate purchasers, whose suits are barred in federal court by *Illinois Brick* and which would be barred as a practical matter in California.

In sum, the pass-on defense has been prohibited by the federal courts and every state that has considered the issue, legislatively and judicially. The Plaintiffs here suffered injury when they bought the price-fixed drugs inclusive of the overcharge, which amounts to their damages. The First District’s decision turns the policies of this state upside-down by rewarding the very defendants that broke the law and it must be reversed.

II. A PLAINTIFF ESTABLISHES STANDING UNDER THE UCL AND IS ENTITLED TO RESTITUTION AND INJUNCTIVE RELIEF AT THE MOMENT IT PAYS THE DEFENDANT AN ILLEGAL OVERCHARGE

A. A Plaintiff Has Standing Under The UCL When It “Expends Money” “As A Result Of” Unfair Competition

In 2004, the California electorate passed Proposition 64 which amended the UCL by limiting private party standing. (CAL. BUS. & PROF. CODE §17204.) While this Court has not clarified the standing requirements since Proposition 64, it has granted review in cases now pending before it in which the interpretation of Proposition 64 is at issue. (*In re Tobacco Cases II* (2006) 142 Cal.App.4th 891, *review granted*, 51 Cal.Rptr.3d 707 (S147345).)

The First District’s decision in this case has created a new element to standing that is not recognized by any other appellate decision and runs contrary to established law: that once plaintiffs establish they “lost money,” they must also prove they did not recoup it from a third-party. The decision attempts to impose a new barrier on plaintiffs that is above and beyond those mandated by Proposition 64. This Court should reaffirm the standing requirements set forth by the voters and reverse the First District’s ruling.

Proposition 64 amended the UCL to limit private party standing to those who (1) suffered “injury in fact” and (2) “lost money or property as a result of the unfair competition.” (CAL. BUS. & PROF. CODE §17204.) The Fourth District in *Hall v. Time, Inc.* (2008) 158 Cal.App.4th 847, 849, recently analyzed this two-prong test, holding that the second prong required a showing of “causation,” and that to have standing under the UCL a plaintiff therefore need only show “injury in fact [and] causation.” (*Id.*) In *Hall*, the plaintiff alleged it had been illegally induced to purchase books by defendant Time, Inc which offered a “free preview period.” (*Id.* at 850.) The complaint alleged that Time had no intention of fulfilling its promise of a “no obligation, free trial period;” rather it employed a scheme to obtain immediate payment from the consumer through “misleading and deceitful tactics.” (*Id.*)

In analyzing standing, the court first determined whether plaintiff suffered “injury in fact,” which it defined as having “expended money due to the defendant’s acts of unfair competition.” (*Id.* at 854.) In support of this definition, the Fourth District cited cases showing the plaintiff had paid more for the product than it was worth. (*Id.*, citing, e.g., *Aron v. U-Haul Co. of California* (2nd Dist. 2006) 143 Cal.App.4th 796, 802-803 (plaintiff purchased excess fuel when returning rental truck).) In each of these cases, the plaintiff proved that he suffered “injury in fact” when it showed it *paid more than it should have* for the product or service at issue. In concluding that the plaintiff in *Hall* had not suffered injury in fact, it held “[h]e did

not allege ... *the book was worth less than what he paid for it.*” (*Hall, supra*, 158 Cal.App.4th at 855, emphasis added.) Under this reasoning, the Pharmacies in the present case suffered injury in fact when they purchased drugs worth less than what they paid for them, *i.e.*, their prices included an illegal overcharge. In the words of *Hall* and its cited authorities, Pharmacies suffered injury in fact when they “expended money due to the defendant’s acts of unfair competition.”

The second prong of the Fourth District’s standing test was that the plaintiff “lost money or property as a result of” the unfair competition. However, vital to this prong is *not* a showing that the plaintiff “lost money,” since it had already shown it “expended money” in excess of the product’s value. The *Hall* court instead focused on the “as a result of” language and interpreted the phrase as requiring a *causation* element. (*Id.* at 857.) Under this analysis, Pharmacies have proven causation since it is undisputed the overcharge was a direct result of the price-fixing conspiracy. (*Clayworth, supra*, 165 Cal.App.4th at 217.)

Other California cases interpreting UCL standing have adopted *Hall*. (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1592; *Medina v. Safe-Guard Products, Intern’l, Inc.* (2008) 164 Cal.App.4th 105, 114.) Cases from the Second District are also in accord, one of which this Court is presently reviewing. (*Aron, supra*, 143 Cal.App.4th at 802-803; *O’Brien v. Camisasca Automotive Mfr’ing, Inc.* (2008) 161 Cal.App.4th 388, *review granted, depublished* (July 9, 2008) 187 P.3d 886, 2008 Cal. LEXIS 8247.)

In contrast to *Hall*, the First District summarily held that Plaintiffs lacked standing. (*Clayworth, supra*, 165 Cal.App.4th at 244.) It rested this conclusion on its analysis of restitution, that Pharmacies have not “lost money” because they recouped the overcharge. (*Clayworth, supra*, 165 Cal.App.4th at 244.) Thus, the First District’s ruling impermissibly creates a *third* element to standing in contrast to established law,

namely, that the plaintiff prove it did not recoup the “expended money” from a third-party.

B. Restitution Is Available Under The UCL If A Plaintiff Pays An Illegal Overcharge, Even If He Recoups That Money From Third Parties

In referring to restitution, the statute reads in relevant part, “The court may make such orders or judgments ... as may be necessary to restore to any person in interest any money or property, real or personal, which *may have been acquired* by means of such unfair competition.” (CAL. BUS. & PROF. CODE §17203.) The amount of the restitution, by the very terms of the statute, is the amount that has been acquired by the defendant – not the amount the plaintiff has paid less what it has recouped from others. Therefore, the language of the statute itself prohibits the use of the pass-on defense for restitution claims.

The decisional law of this Court states that restitution granted to the plaintiff is determined by that “money or property that was once *in its possession*.” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149 (emphasis added)). Pharmacies in this case are entitled to restitution for the simple reason that the money they used to purchase the price-fixed drugs, inclusive of the illegal overcharge, was “once in their possession.”

Avoiding this well-established law, the First District sought to analogize the present case with *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440. (*Clayworth, supra*, 165 Cal.App.4th at 245.) It falsely accused Pharmacies of claiming monies based on a theory of “unjust enrichment,” because those monies are “measured by defendants’ gain, not [plaintiff]’s loss.” (*Id.* at 245-47.) In doing so, it incorrectly claimed that “[p]laintiffs’ argument here is in different words the same argument rejected in *Madrid*.” (*Id.* at 247.) In fact, Pharmacies’ argument is nothing like *Madrid*’s. Unlike here, *Madrid* did not seek to recover the overcharges, specifically “disavowing” that theory of recovery. (*Id.* at 454-55.) This Court

correctly rejected Madrid’s argument because he was asking for what he called “restitution,” even though the money he sought was never in his possession. (*Id.* at 455.) The only “restitution” he wanted was for “profits defendants may have received from third parties,” or “[defendant]’s \$250 million start-up costs.” (*Id.* at 453.) Neither of those categories describes restitution and neither is analogous to what Pharmacies seek here. Plaintiffs seek the money that was taken from them by the Drug Manufacturers by virtue of their unfair competition. The *measure* of restitution is determined by the amount acquired from the plaintiffs by the defendants. “In an action of restitution in which the benefit received was money, the measure of recovery for this benefit is the amount of money *received*.” (REST., RESTITUTION, §150, emphasis added).

The First District’s denial of restitution is based on the conclusion that “[o]nce Plaintiffs resold defendants’ products, and thereby recovered all of their costs, plaintiffs relinquished any ownership interest in the claimed overcharges – and forfeited any possible UCL claim.” (*Clayworth, supra*, 165 Cal.App.4th at 247.) In support of this conclusion, the First District cited two sources, neither of which says what the First District attributes to it.

First, citing the Restatement of Restitution, §141, the court reasoned that a plaintiff cannot recover if it has “transferred his entire interest therein to a third person.” (*Id.*, quoting, REST., RESTITUTION, §141, com.(2), p.564.) The First District did not cite the rule in its entirety, and the uncited portion is essential: “[a] person who has taken from the possession of another ... things in which a third person has an interest which is superior and antagonistic to the interest of the other, *cannot defend* the claim of the other for restitution merely because of such superior interests.” (REST., RESTITUTION, §141 (1) (emphasis added).)

Also in support, the First District cited a law review article for the proposition that plaintiffs relinquished their right to collect restitution once they passed-on the

overcharges. (*Clayworth, supra*, 165 Cal.App.4th at 247.) In fact, citing *Hanover Shoe*, the cited article arrived at the opposite conclusion:

Removing the gain from the wrongdoer is of prime importance in [cases where deterrence is paramount], and one might tolerate a plaintiff's windfall if awarding a windfall to a plaintiff is necessary to deprive the defendant of wrongful gain. (Woodward, "*Passing-on*" *the Right to Restitution* (1985) 39 U.Miami L. Rev. 873, 919.)

The First District has no authority for holding that a plaintiff "relinquishes its right" to restitution once it resells its products and recovers all of its costs.

Finally, this Court has interpreted the UCL as allowing courts to issue orders which "may encompass broader restitutionary relief, including disgorgement of all money so obtained even when it may not be possible to restore all of that money to direct victims of the practice." (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129.) This disgorgement must be "restitutionary disgorgement." (*Korea Supply, supra*, 29 Cal.4th at 1152.) Citing the *Kraus* and *Korea Supply* passages, the Court of Appeal in *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1013 confirmed that "[r]estitutionary disgorgement also refers to situations where it is not possible to restore the money to the specific direct victims of the unfair practice." Therefore, restitution is still mandated here for the additional reason that it is not possible to restore the money to Pharmacies' customers, even if they were more direct victims of the overcharge.

C. Plaintiffs With Standing Are Entitled To Injunctive Relief

Finally, even if restitution were not available, Pharmacies prayed for injunctive relief, which was denied for lack of standing. (*Clayworth, supra*, 165 Cal.App.4th at 247, n.18.) Because Pharmacies have standing, as discussed above, they are entitled to injunctive relief.

In sum, the First District's decision contorts the law of standing, adding to it a third element that conflicts with courts that have interpreted Proposition 64's standing requirements. Pharmacies are entitled to restitution because, even though they may have passed-on the overcharge, there is no authority in this state for the proposition that restitution is lessened by the degree it was mitigated. In order to ensure the uniformity of decisions in this state and properly construe Proposition 64's mandate, the First District's decision must be reviewed and reversed.

CONCLUSION

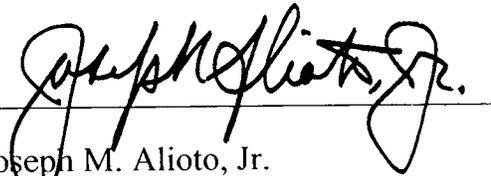
California has long been considered the cutting edge of antitrust law enforcement. But, if the First District's decision is permitted to stand, the pass-on defense will invite a wave of burdensome discovery that will deter enforcement, rather than illegal behavior; punish the victims, instead of the wrong-doers; and reward the illicit, rather than the harmed. If the State is to rollback its competition laws and welcome into its borders price-fixers from near and far, then such a decision belongs with the elected representatives of the California Legislature.

Proposition 64's mandate was to require certain elements of private plaintiffs before they would be permitted to maintain a cause of action under the UCL. But, the First District has contorted that mandate, adding to the requirements a third element that has no support in law or policy. Refusing to grant Plaintiffs standing or award them restitution or injunctive relief runs contrary to established law and creates a conflict in the courts that must be corrected.

This Court should grant Pharmacies' Petition for Review and act decisively to reject the First District's rogue interpretations of the Cartwright Act and Unfair Competition Law, and outlaw for good the pass-on defense as a complete defense to price-fixing and unfair competition.

Dated: September 3, 2008

Respectfully submitted,

By: 
Joseph M. Alioto, Jr.

ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104

*Attorneys for JAMES CLAYWORTH, et al.,
Plaintiffs, Appellants, and Petitioners.*

WORD COUNT CERTIFICATION

Pursuant to California Rules of Court 8.204(c), the undersigned certifies that the foregoing Petition for Review contains 8,384 words.

Dated: September 3, 2008

Respectfully submitted,

By: 

Joseph M. Alioto, Jr.

ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104

*Attorneys for JAMES CLAYWORTH, et al.,
Plaintiffs, Appellants, and Petitioners.*

COUNSEL FOR PETITIONERS

ALIOTO LAW FIRM

Joseph M. Alioto (SBN 42680)
Theresa D. Moore (SBN 99978)
Angelina Alioto-Grace (SBN 206899)
Joseph M. Alioto, Jr. (SBN 215544)
Thomas P. Pier (SBN 235740)
555 California Street, Suite 3160
San Francisco, California 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200

**LAW OFFICES OF
JAMES M. DOMBROSKI**

James M. Dombroski (SBN 56898)
Post Office Box 751027
Petaluma, California 94975
Telephone: (707) 762-7807
Facsimile: (707) 769-0419

**LAW OFFICES OF
JEFFERY K. PERKINS**

Jeffery K. Perkins (SBN 57996)
1275 Columbus Avenue
San Francisco, California 94133
Telephone: (415) 474-3833
Facsimile: (415) 474-2890

**LAW OFFICES OF
JOHN H. BOONE**

John H. Boone (SBN 44876)
555 California Street, Ste. 3160
San Francisco, California 94104
Telephone: (415) 434-1133
Facsimile: (415) 434-9200

FOREMAN & BRASSO

Russell F. Brasso (SBN 85417)
930 Montgomery Street, Suite 600
San Francisco, California 94133
Telephone: (415) 433-3475
Facsimile: (415) 781-8030

**GARY D. MCCALLISTER &
ASSOCIATES**

Gary D. McCallister (*pro hac vice*)
Thomas A. Kelliher (*pro hac vice*)
Eric I. Unrein (*pro hac vice*)
120 North LaSalle Street, Ste. 2800
Chicago, Illinois 60602
Telephone: (312) 346-0611
Facsimile: (312) 345-0612

APPENDIX

- A. Decision of the First Appellate District, Division Two, filed July 25, 2008, reported at 165 Cal.App.4th 209.
- B. Order Modifying Opinion and Denying Petition for Rehearing, filed August 19, 2008
- C. Out-of-state statutes
 - 1. District of Columbia, D.C. CODE §28-4509
 - 2. Hawaii, HRS §480-13
 - 3. Illinois, 740 ILCS 10/7
 - 4. Maryland, MD. COMM. LAW CODE ANN. §11-209
 - 5. North Dakota, N.D. CENT. CODE §51-08.1-08
 - 6. New Mexico, N.M. STAT. ANN. §57-1-3
 - 7. New York, NY CLS GEN. BUS. §340
 - 8. Nebraska, R.R.S. NEB. §59-821.01
 - 9. Utah, Enrolled Copy, 2006 BILL TEXT UT S.B. 16

Exhibit A

Decision of the First Appellate District, Division Two, filed July 25, 2008, reported at 165 Cal.App.4th 209.

LEXSEE 165 CAL.APP.4TH 209

**JAMES CLAYWORTH et al., Plaintiffs and Appellants,
v. PFIZER, INC., et al., Defendants and Respondents.**

A116798

**COURT OF APPEAL OF CALIFORNIA, FIRST
APPELLATE DISTRICT, DIVISION TWO**

165 Cal. App. 4th 209; 2008 Cal. App. LEXIS 1151

July 25, 2008, Filed

SUBSEQUENT HISTORY: Modified and rehearing denied by *Clayworth v. Pfizer, Inc.*, 2008 Cal. App. LEXIS 1325 (Cal. App. 1st Dist., Aug. 19, 2008)

PRIOR HISTORY: [**1]

Superior Court of Alameda County, No. RG04172428, Ronald M. Sabraw, Harry R. Sheppard, Judges.

JUDGES: Opinion by Richman, J., with Kline, P. J., and Haerle, J., concurring.

OPINION BY: Richman

RICHMAN, J.--This case presents an issue of first impression in California antitrust law: whether the pass-on defense is available to defendants accused of price fixing. We hold that it is.

Retail pharmacies (plaintiffs) sued pharmaceutical companies (defendants) alleging price fixing, asserting claims for violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*),¹ and for restitution and injunctive relief under the California Unfair Competition Law (UCL) (*§ 17200 et seq.*). Defendants [*215] asserted as an affirmative defense that plaintiffs "passed on" all of the claimed overcharges to their customers. Discovery demonstrated that they did pass on the

charges, and plaintiffs further admitted that they sought no other damages, such as lost or delayed sales, aside from the claimed overcharges.

1 All statutory references are to the Business and Professions Code unless otherwise noted.

Plaintiffs moved for **[**4]** summary adjudication on the pass-on defense, contending that it is not recognized in California, relying primarily on *Hanover Shoe v. United Shoe Mach. (1968) 392 U.S. 481 [20 L. Ed. 2d 1231, 88 S. Ct. 2224]* (*Hanover Shoe*), which rejected the pass-on defense, and the legislative history of the Cartwright Act. Defendants filed their own motion, contending that California never adopted the *Hanover Shoe* holding and that the language of the Cartwright Act makes clear that plaintiffs in an antitrust action cannot recover for an overcharge passed on to a subsequent purchaser.

The trial court decided the cross-motions in favor of defendants, concluding that the pass-on defense is available in California, and that plaintiffs did not suffer any compensable injury within the meaning of *section 16750* and thus could not recover on the Cartwright Act claim. The court also concluded that plaintiffs lacked standing to bring a UCL claim because they had not lost money or property and, alternatively, were not eligible for restitution. The trial court thus granted summary judgment. We affirm.

BACKGROUND

1. *The Parties and the Pleadings*

Plaintiffs are retail pharmacies located in California.² Defendants are, with two exceptions, companies **[**5]** that **[*216]** manufacture, market, and/or distribute brand-name pharmaceutical products throughout the United States.³ Defendants also manufacture, market, and/or distribute similar brand-name pharmaceutical products in Canada where, unlike in the United States, the products are subject to government-imposed pricing limitations.

2 Plaintiffs are James Clayworth, R.Ph., an individual, doing business as Clayworth Pharmacy and Clayworth Healthcare; Marin Apothecaries, Inc., doing business as Ross Valley Pharmacy; Golden Gate Pharmacy Services, Inc., doing business as Golden Gate Pharmacy; Pediatric Care Pharmacy, Inc.; Chimes Pharmacy, Inc.; Mark Horne, R.Ph., an individual, doing business as Burton's Pharmacy; Meyers Pharmacy, Inc.; Benson Toy, R.Ph., an individual, doing business as Marin Medical Pharmacy; Seventeen Fifty

Medical Center Pharmacy, Inc.; Tony Mavrantonis, R.Ph., an individual, doing business as Jack's Drug; Julian Potashnick, R.Ph., an individual, doing business as Leo's Pharmacies; Jerry Shapiro, R.Ph., an individual, doing business as a Uptown Drug, Co.; Tilley Apothecaries, Inc., doing business as Zweber's Apothecary; RP Healthcare, Inc.; Rohnert Park Drugs, Inc.; and JGS Pharmacies, Inc., doing business as Dollar Drugs.

3 Defendants are Abbott Laboratories; AstraZeneca LP; Novartis Pharmaceuticals Corp.; Allergan, [**6] Inc.; Boehringer Ingelheim Pharmaceuticals, Inc.; Eli Lilly & Company; Janssen Pharmaceutical, Inc.; Ortho McNeil Pharmaceutical, Inc.; Ortho Biotech, Inc.; GlaxoSmithKline; Pfizer, Inc.; Hoffman-LaRoche; Aventis Pharmaceuticals, Inc.; Amgen, Inc.; Purdue Pharma L.P.; Merck & Co., Inc.; Bristol-Myers-Squibb Company; Wyeth; Johnson & Johnson Health Care Systems Inc., which apparently does not manufacture, market, or distribute pharmaceutical products; and Pharmaceutical Research and Manufacturers of America, a United States-based nonprofit trade association.

Plaintiffs' action sought treble damages, restitution, and injunctive relief, alleging that defendants fixed the prices of their brand-name pharmaceuticals in violation of the Cartwright Act and the UCL. The case came at issue on the third amended complaint, which alleged that plaintiffs were injured by defendants' purported price fixing "because they have paid more than they otherwise would have or should have paid in the absence of the [d]efendants' violations ..."; specifically, plaintiffs alleged that defendants conspired "to eliminate price competition and fix prices" in the United States market by, among other things, [**7] using Canadian prices as a "floor" or minimum price for defendants' United States products.

Each defendant filed a separate answer, denying plaintiffs' allegations and asserting as an affirmative defense that plaintiffs' claims were barred on the ground plaintiffs passed on any alleged overcharge to third parties and therefore did not suffer a compensable injury.

The case was designated as complex and assigned to the Honorable Ronald M. Sabraw.

2. *The Facts*

Over plaintiffs' objection, and without deciding whether the pass-on defense was available in California, Judge Sabraw permitted defendants to conduct discovery "that is relevant to the 'pass on' defense." The resulting discovery included requests for production of documents, requests for admissions, form inter-

rogatories, special interrogatories, and depositions. Multiple discovery disputes ensued, resulting in detailed discovery orders providing the parties with guidance as to the discovery to be produced and setting schedules for the production of written discovery and the taking of depositions. In one such order, entered on May 22, 2006, Judge Sabraw concluded that defendants' request that plaintiffs compile information and produce reports [**8] regarding their purchases and sale of certain specified drugs was neither overly burdensome nor oppressive, explaining: "No [p]laintiff has submitted a declaration describing how the information is maintained, how it must be retrieved, and the burden of retrieval and organization. The deposi- [*217] tion testimony of the witnesses for [five plaintiffs] suggests that the information sought is kept by each of the [p]laintiffs in readily retrievable electronic form and that it can be accessed and organized by [p]laintiffs without undue burden." Judge Sabraw then ordered plaintiffs to produce, among other things, "all responsive purchasing, pricing and sales-related documents and information," including in electronic form where appropriate, within 10 days, with any disputes over the production of the data to be resolved with the assistance of information technology consultants retained by both sides. Judge Sabraw also ordered each plaintiff to "provide a narrative ... describing that [p]laintiff's pricing and price-setting practices."

The resulting narratives, as well as deposition testimony of the persons most knowledgeable and plaintiffs' responses to written discovery, revealed the following [**9] salient facts, which are essentially undisputed.

Defendants sell their drugs to wholesalers at a price referred to as the wholesale acquisition cost (WAC). The wholesalers resell the drugs to plaintiffs at prices using a formula mathematically tied to the WAC, called the average wholesale price (AWP), which apparently represents a benchmark price published in lists by companies unrelated to defendants. As a result, when defendants' prices increase, the cost of drugs to plaintiffs increases by the same percentage amount. So, plaintiffs pay the full amount of the alleged overcharge, defined in plaintiffs' brief as "the difference between what [plaintiffs] actually paid and what they would have paid in the absence of the conspiracy."

Plaintiffs sell the drugs to two groups of customers, also on the basis of the AWP: (1) those with "third party" insurance or a drug benefit plan offered by either a private entity or the government, which in turn pay customers' claims on their behalf; and (2) uninsured (or "cash-paying") customers. The vast majority of customers are covered by third party payers, which reimburse plaintiffs at a contractually or statutorily fixed amount, predetermined as a [**10] percentage of the AWP plus a dispensing fee, which provides plaintiffs a percentage profit

above their acquisition cost. As to the sales to cash-paying customers, plaintiffs charge a set percentage of the AWP, and sometimes a dispensing fee, which could result in plaintiffs' receiving a price above their acquisition cost. The result of this is that each time defendants increase their prices for a product, plaintiffs increase the price they charge their customers by at least the same amount. And the higher defendants' prices, the higher plaintiffs' revenues--and the higher their gross profits. [*218]

In sum, discovery demonstrated two undisputed facts: (1) plaintiffs passed on to their customers all claimed overcharges, and (2) plaintiffs waived any claims for damages not based on the alleged overcharge, claiming no lost or delayed sales, or any other diminution in business.⁴ Stated conversely, the only damages plaintiffs sought to recover were the claimed overcharges.

4 In the separate statement of undisputed facts in support of their cross-motion, defendants stated as fact No. 7, "Plaintiffs have expressly waived any claims for damages not based on the alleged overcharge, including lost sales [**11] and diminished business damages." Plaintiffs responded, "Undisputed as written, though immaterial and irrelevant. Plaintiffs have waived their right to *collect money damages* on lost profits. Plaintiffs' damages are the full extent of the overcharge paid by [p]laintiffs--no more or less. However, [p]laintiffs have *never* stated they were not 'damaged in fact' by [d]efendants' overcharge, which put them at a competitive disadvantages *vis-à-vis* other pharmacies; they simply choose not to collect monies owed them for lost profits."

3. *The Motions*

On August 21, 2006, plaintiffs moved for summary adjudication on the pass-on defense, seeking an order striking it on the ground it was unavailable as a matter of law. Plaintiffs argued that the defense could not be asserted against their Cartwright Act claims based on the United States Supreme Court opinion in *Hanover Shoe, supra*, 392 U.S. 481, the legislative history of the Cartwright Act, and public policy. Plaintiffs also argued that the pass-on defense was inapplicable to the calculation of restitution under their UCL claim.⁵

5 Plaintiffs also sought summary adjudication on other affirmative defenses. These were not ruled on below, and are not [**12] at issue here.

On September 15, 2006, defendants filed a joint opposition to plaintiffs' motion. They also filed a joint cross-motion for summary judgment or, in the alter-

native, summary adjudication regarding pass-on issues. Defendants argued that the plain language of the Cartwright Act demonstrates plaintiffs cannot recover damages they did not sustain and that *Hanover Shoe* has not been adopted in California. Alternatively, defendants argued that "even if a pass-on defense is not generally available under California law, such a defense should be permitted here where it is easy to prove that plaintiffs have not been damaged."⁶ Defendants also argued that the pass-on theory defeated plaintiffs' UCL claim.

6 This motion assumed arguendo that defendants did in fact engage in price fixing. At the same time, defendants filed a motion for summary judgment on the merits of plaintiffs' claims, which motion was pending at the time the motions at issue here were decided.

[*219]

On December 1, 2006, Judge Sabraw issued a tentative ruling granting defendants' cross-motion and denying plaintiffs' motion as moot. On December 11 and 14, 2006, in response to statements contained in the tentative ruling, plaintiffs [*13] filed two separate requests for judicial notice of (1) the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Hart-Scott-Rodino Act; Pub.L. No. 94-435, Sept. 30, 1976, 90 Stat. 1383) and California's 1977 amendment to the Cartwright Act, and (2) the amicus curiae brief filed on behalf of the state of California in *Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720 [52 L. Ed. 2d 707, 97 S. Ct. 2061] (*Illinois Brick*). Judge Sabraw granted both requests.⁷

7 Plaintiffs also filed a request for judicial notice in this court, asking us to take notice of two items from the litigation in the United States District Court in *In re TFT-LCD (Flat Panel) Antitrust Litigation* (N.D.Cal., May 27, 2008, No. M-07-1827-SI) 2008 U.S. Dist. Lexis 54724): (1) the amicus brief of the State of California filed by the Attorney General, and (2) request for judicial notice filed by the Attorney General. We granted the request at oral argument.

The motions came on for hearing on December 15, 2006. Judge Sabraw heard lengthy argument, following which he took the motions under submission.

On December 19, 2006, Judge Sabraw issued a 26-page order containing a comprehensive analysis of the issues presented, concluding that defendants could assert the pass-on [*14] defense to defeat plaintiffs' antitrust claims: "[I]n defending a claim under the Cartwright Act, a defendant can present evidence that it has no liability or that its damages are lessened because the plaintiff has passed

on the alleged price overcharge and therefore has either suffered no injury or has limited its damages." This ruling was "based primarily on the language of the statute, which limits recovery to 'recovery three times the damages sustained.' " Judge Sabraw read the phrase "damages sustained" as referring to the "actual loss incurred by the [p]laintiffs," and concluded that because "[the] undisputed facts demonstrate that if [d]efendants ever overcharged [p]laintiffs as a result of the alleged conspiracy, the [p]laintiffs sustained no damages because they increased their prices to their customers 'by at least the same dollar amount.' [¶] ... If [p]laintiffs have not sustained actual damages, then they cannot prevail on their claim." Judge Sabraw thus granted summary adjudication for defendants on the Cartwright Act claims.

As to the UCL claim, Judge Sabraw concluded that plaintiffs lacked standing to pursue this claim because they had not " 'lost money or property' as [**15] required for standing under *section 17204*." Alternatively, he concluded that plaintiffs could not be awarded monetary relief under *section 17203* [*220] because they did not "have an ownership interest in whatever funds they paid as a result of any overcharge" and thus were ineligible for restitution. Judge Sabraw thus granted summary adjudication for defendants on the UCL claim. Having disposed of all of plaintiffs' claims, Judge Sabraw granted summary judgment for defendants.

Judgment pursuant to the December 19, 2006 order was entered on January 4, 2007, from which plaintiffs filed a timely appeal.

DISCUSSION

1. *Standard of Review*

Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. As applicable here, with moving defendants, they can meet their burden by demonstrating that "[a] cause of action has no merit ... ," which they can do by showing that "[o]ne or more of the elements of the cause of action cannot be separately established" (*Code Civ. Proc.*, § 437c, subd. (o)(1); see also *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 486 [59 Cal. Rptr. 2d 20, 926 P.2d 1114] [**16] [statute of limitations]; *Trujillo v. First American Registry, Inc.* (2007) 157 Cal.App.4th 628, 632 [68 Cal. Rptr. 3d 732] [summary adjudication and judgment properly granted where plaintiffs suffered no damages].) Once defendants

meet this burden, the burden shifts to plaintiffs to show the existence of a triable issue of material fact. (*Code Civ. Proc.*, § 437c, *subd. (p)(2)*.)

On appeal "[w]e review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citations.]" (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348 [1 Cal. Rptr. 3d 32, 71 P.3d 296].) Put another way, we exercise our independent judgment, and decide whether undisputed facts have been established that negate plaintiffs' claims. (*Romano v. Rockwell Internat., Inc.*, *supra*, 14 Cal.4th at pp. 486-487.) Or, as we said in *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807 [85 Cal. Rptr. 2d 459], in affirming a summary judgment for the defendant employer, "We review the evidence presented to the trial court and independently adjudicate its effect as a matter of law. (*Lee v. Crusader Ins. Co.* (1996) 49 Cal.App.4th 1750, 1756 [57 Cal. Rptr. 2d 550].)" [*221]

2. The Law

A. The Cartwright Act

(1) In 1907, [**17] the California Legislature enacted the Cartwright Act, *section 16700 et seq.*, which " 'generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices.' " (*Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1147 [69 Cal. Rptr. 2d 329, 947 P.2d 291] (*Pacific Gas & Electric*), quoting Antitrust & Trade Regulation Law Section of the State Bar of Cal., *Cal. Antitrust Law* (2d ed. 1991) p. 4.) As is pertinent here, *section 16750, subdivision (a)* provides, "Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor ... and to recover three times the damages sustained by him or her"

(2) It is often said that the Cartwright Act is patterned after the federal Sherman Act (15 U.S.C. § 1 *et seq.*) (e.g., *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 717 [187 Cal. Rptr. 797]), though "historical and textual analysis reveals that the [Cartwright] Act was patterned after the 1889 Texas act and the 1899 Michigan act" (*State of California ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1164 [252 Cal. Rptr. 221, 762 P.2d 385], overruled in part on other grounds by statute.) Our Supreme Court has noted that "judicial interpretation [**18] of the Sherman Act, while often helpful, is not directly probative of the Cartwright drafters' intent" (*Ibid.*) And such precedent

should be used "with caution." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 183, fn. 9 [91 Cal. Rptr. 2d 534].)

Bruno v. Superior Court (1981) 127 Cal.App.3d 120, 132 [179 Cal. Rptr. 342], a Cartwright Act case, noted that private antitrust lawsuits serve three purposes: (1) compensation, (2) deterrence, and (3) punishment: "although compensation is the primary rationale for the allowance of private antitrust lawsuits, the prevention and punishment of anticompetitive acts is a not insignificant purpose of antitrust laws."

B. *Hanover Shoe*

Hanover Shoe, supra, 392 U.S. 481, the focal point of the motions below, was an action by plaintiff Hanover Shoe, Inc. (Hanover Shoe), a shoe manufacturer, against United Shoe Machinery Corp. (United Shoe), a manufacturer of equipment used in the shoe-making process. The action alleged that United Shoe had monopolized the shoe industry in violation of the Sherman Act, 15 U.S.C. § 2, by its practice of only leasing, and refusing to sell, its machinery. (392 U.S. at pp. 483-484.) Hanover Shoe sought damages, trebled under section 4 of the Clayton [**19] Act, 15 U.S.C. § 15, for the overcharges, amounting to the difference between what it had paid United Shoe in shoe machine rentals and what it would have paid had United Shoe been willing to sell those machines. (392 U.S. at pp. 483-484.)

United Shoe countered that Hanover Shoe suffered no legally cognizable injury because any illegal overcharge was reflected in the price it charged its customers for its shoes, arguing that if Hanover Shoe had purchased the machines at a lower price, it would have charged less for the shoes sold to its customers--in short, that Hanover Shoe suffered no loss from the antitrust violation. (*Hanover Shoe, supra*, 392 U.S. at pp. 487-488.)⁸

8 Section 4 of the Clayton Act provides in pertinent part, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained" (15 U.S.C. § 15.)

The District Court awarded Hanover Shoe damages of \$ 4,239,609. The Court of Appeals affirmed the finding of liability, but disagreed with the District Court on certain questions relating to the damage award. (*Hanover Shoe, Inc. v. United Shoe Machinery Corp.* (3d Cir. 1967) 377 F.2d 776.)

In [**20] an seven-to-one opinion written by Justice White, the Supreme Court reversed the Court of Appeals on questions relating to the damage award. And as apt to the issue before us, the court held that Hanover Shoe proved injury and the amount of its damages within the meaning of section 4 of the Clayton Act when it proved [**222] that United Shoe had overcharged it and showed the amount of the overcharge, and the possibility that it might have recouped the overcharge by "passing it on" to its customers was not relevant in the assessment of its damages: "We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower." (*Hanover Shoe, supra*, 392 U.S. at p. 489.)

Justice White gave two reasons for the holding. First, establishing the amount of the overcharge passed on to the consumer would present insurmountable evidentiary problems. As he put it, "A wide range of factors influence a company's pricing policies. Normally [**21] the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a [**223] businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued." (*Hanover Shoe, supra*, 392 U.S. at pp. 492-493.)

Secondary to the "nearly insuperable difficulty" of establishing the amount of overcharge passed on, Justice White also expressed concern [**22] that if a direct purchaser such as Hanover Shoe were not allowed to sue for overcharges passed on to indirect purchasers, antitrust violators "would retain the fruits of their illegality" because indirect purchasers "would have only a tiny stake in [the] lawsuit" and would thus lack the incentive to bring an antitrust action. (*Hanover Shoe, supra*, 392 U.S. at p. 494.)

Though they will be discussed in detail *post*, three things about *Hanover Shoe* deserve mention here. The first is that the opinion holds as it does without analysis of the language of the Clayton Act. The second is that the court did not create an absolute bar to the pass-on defense in all situations. It "recognize[d] that there might be situations--for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged--where the considerations requiring that the passing-on defense not be permitted in this case would not be present. We also recognize that where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to [**23] the buyers." (*Hanover Shoe, supra*, 392 U.S. at p. 494.) Third, and as our colleagues in Division Five would later observe, "*Hanover Shoe* presented a particularly complicated problem with respect to the pass-on issue." (*B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal.App.3d 1341, 1352 [235 Cal. Rptr. 228] (B.W.I. Custom Kitchen).*)

Though *Hanover Shoe* focused on antitrust defendants and the proper limits of defensive arguments, it nevertheless suggested something about the nature of antitrust injury and the category of purchasers who might be viewed as having experienced it. Nine years later, the Supreme Court addressed the issue directly in *Illinois Brick, supra*, 431 U.S. 720.

C. *Illinois Brick and Its Aftereffects*

Illinois Brick was the flip side of *Hanover Shoe*, addressing whether the pass-on theory could be "used offensively by an indirect purchaser plaintiff against an alleged violator." (*Illinois Brick, supra*, 431 U.S. at p. 726.) *Illinois Brick* and its codefendants manufactured and distributed concrete block, selling primarily to masonry contractors who then submitted bids to general contractors in charge of construction projects for public entities, such as counties, municipalities, housing [**24] authorities, and school districts. Plaintiff State of Illinois brought an action on behalf of itself and local government entities seeking treble damages under section 4 of the Clayton Act, alleging that the defendants had engaged in a conspiracy to fix the prices of the concrete block, the inflated prices of which were ultimately absorbed by the end purchasers of the product. (431 U.S. at pp. 726-727.)

The defendants sought partial summary judgment against all plaintiffs that were indirect purchasers of concrete block, "contending that as a matter of law only direct purchasers could sue for the alleged overcharge." (*Illinois Brick, supra*, 431 U.S. at p. 727.) The district court granted summary judgment, but the

Court of Appeals reversed, "holding that indirect purchasers ... can recover treble damages for an illegal overcharge if they can prove that the overcharge was passed on to them through intervening links in the distribution chain." (*Id. at pp. 727-728.*)

The Supreme Court disagreed. In another opinion by Justice White, this time six to three, the court agreed with the defendants, holding that the plaintiffs as indirect purchasers of the concrete block were not the parties " 'injured in [their] business [**25] or property' " within the meaning of section 4 and therefore lacked standing to sue in federal antitrust cases. Only the direct purchaser was the injured party. (*Illinois Brick, supra, 431 U.S. at pp. 727-729.*) The court reached this result in two steps. (*Id. at p. 728.*)

The court first reasoned that the rule prohibiting use of the pass-on theory "must apply equally to plaintiffs and defendants" because "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants." (*Illinois Brick, supra, 431 U.S. at pp. 728, 730.*) Moreover, the court was concerned that "[p]ermitt[ing] the use of pass-on [*224] theories under [section] 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge--from direct purchasers to middlemen to ultimate consumers." (*Id. at p. 737.*) Finally, the court expressed concern that granting standing to indirect purchasers would result in under-enforcement of the antitrust laws. (*Id. at pp. 745-747.*)⁹

9 On behalf of the State of California, the Attorney General filed an amicus curiae brief in *Illinois Brick*, [**26] arguing in support of standing for indirect purchasers. The brief argued first that the defendants were improperly attempting to assert a pass-on defense that had already been rejected in *Hanover Shoe*. Alternatively, it argued that the facts of the case "would fall within the exception recognized in *Hanover Shoe* in any case."

(3) In the wake of the Supreme Court's holding that indirect purchasers lacked standing, numerous states enacted so-called *Illinois Brick* repealer [*225] amendments. One such state was California, where the amendment took the form of Assembly Bill No. 3222 (1977-1978 Reg. Sess.), which added the following language to *section 16750*: "This action may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant." The statute enacting the amendment declared that it "does not constitute a change in, but is declaratory of, the existing

law." (Stats. 1978, ch. 536, § 2, p. 1696.) So, while indirect purchasers lack standing to bring an action for treble damages under the federal antitrust law pursuant to *Illinois Brick*, such purchasers can **[**27]** pursue a claim in California. As discussed in detail below, this amendment to the Cartwright Act, as well as other amendments, are heavily relied on by plaintiffs.¹⁰

10 In the 40 years since *Hanover Shoe*, the Legislature has amended the Cartwright Act six times: Statutes. 1969, chapter 1234, page 2395; Statutes 1972 chapter 1140, page 2207; Statutes 1977 chapter 540, page 1741; Statutes 1978 chapter 536, page 1693; Statutes 1983 chapter 1069, page 3772; and Statutes 1987 chapter 865, page 2742.

D. Post-1978 California Cases

Few California authorities have even mentioned the pass-on issue or *Hanover Shoe* in the almost 40 years since its publication. And the only three Court of Appeal cases with any meaningful mention of the issue have explicitly recognized that whether or not the pass-on defense is available in California is an open question.¹¹

11 One Supreme Court case, *Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15 [201 Cal. Rptr. 580, 679 P.2d 14] (*Union Carbide*), mentions *Hanover Shoe*, but only in the dissenting opinion (*id.* at p. 26 (dis. opn. of Richardson, J.)). We ourselves discussed *Hanover Shoe* in *Crown Oil Corp. v. Superior Court* (1986) 177 Cal.App.3d 604, 608-609 [223 Cal. Rptr. 164], where the issue was whether the 1978 amendment to the Cartwright Act was preempted by federal law.

[*226]

The first case **[**28]** was *B.W.I. Custom Kitchen, supra*, 191 Cal.App.3d 1341, which involved a class of indirect purchasers of glass containers who alleged that the corporate manufacturers of glass containers had engaged in a conspiracy to set noncompetitive prices for the containers in violation of the Cartwright Act and the UCL. (191 Cal.App.3d at p. 1345.) The trial court denied class certification. Our colleagues in Division Five reversed.

Arguing against class certification, which largely hinged on whether the class would be able to prove that "defendants' overcharges were 'passed-on' to them," the defendants contended that "the considerations which persuaded the court in *Hanover Shoe*,¹ *supra*,] 392 U.S. 481 ... to reject a 'pass-on defense' should convince this court that the class proposed herein cannot demonstrate on a general-

ized basis that illegal overcharges were passed on to its members." (*B.W.I. Custom Kitchen, supra*, 191 Cal.App.3d at pp. 1351-1352.) The court first responded that, "It is important to point out that the facts of *Hanover Shoe* presented a particularly complicated problem with respect to the pass-on issue. The 'product' involved, shoe manufacturing machinery, was not itself resold by plaintiff. In [**29] effect, the court was being asked to determine whether plaintiff's pricing decision for shoes reflected the illegal overcharge for the machinery which was used in their manufacture. Where the product in question is ultimately sold to the consumer, and is largely unchanged in form from the price-fixing manufacturer to the indirect purchaser, assessing whether the manufacturer's overcharges were passed on is less difficult. ... The insurmountable difficulties found to exist in *Hanover Shoe* in proving injury are not apparent in the record before us." (*Id.* at p. 1352.)

Then, after concluding "that the issue of injury can be proven on a class-wide basis," the court said that "It should also be pointed out that *both* plaintiff and defendants have invoked the pass-on theory in this case. As we have seen, in order to demonstrate that plaintiff and the proposed class were injured by the alleged conspiracy, plaintiff must demonstrate that defendants' illegal overcharges were passed on to them in the form of higher prices for glass containers. Defendants have also invoked the pass-on theory, but have used it defensively instead of offensively. Defendants argue that the indirect purchasers in [**30] this case sustained no injury because they passed on any overcharges to *their* customers further down the chain of distribution. The trial court was apparently of the view that because California has rejected *Illinois Brick Co. v. Illinois, supra*, 431 U.S. 720, and has allowed indirect purchasers to maintain a cause of action under the Cartwright Act, the defendant should be able to assert this 'pass-on defense.' Whether defendants can bar class certification or negate injury by showing plaintiff and the class [*227] 'passed on' the overcharge is a question that has not been addressed by any California court, and it would be premature to resolve it at this juncture because we do not have an adequate factual record. However, even if a plaintiff has passed on the entire overcharge, he or she is not per se precluded from otherwise proving injury." (*B.W.I. Custom Kitchen, supra*, 191 Cal.App.3d at p. 1353.)

Sixteen years later came two companion cases also involving the issue of class certification in Cartwright Act cases, both of which stated that "this issue of the availability of a 'pass-on defense' in antitrust law still remains an open question in California ...": *J. P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 213, fn. 10 [6 Cal. Rptr. 3d 214]; [**31] and *Global Minerals*

& Metals Corp. v. Superior Court (2003) 113 Cal.App.4th 836, 852, fn. 10 [7 Cal. Rptr. 3d 28].¹²

12 While these cases say what they say, in both cases the Court of Appeal went on to decertify classes of antitrust plaintiffs on the grounds that their injuries could not be presumed on a classwide basis because some "members of the proposed class used loss mitigation techniques, such as ... passing on any inflated prices in subsequent resales." (*J. P. Morgan & Co., Inc. v. Superior Court*, *supra*, 113 Cal.App.4th at p. 218; *Global Minerals & Metals Corp. v. Superior Court*, *supra*, 113 Cal.App.4th at p. 857.) As the court put it, such evidence "may support a pass-on defense," further noting that the case was not one "in which classwide proof of illegality and impact [i.e., injury] could readily be proved . . ." (*J. P. Morgan*, at p. 218; *Global Minerals*, at p. 857.)

We now answer that open question.

3. *The Cartwright Act Requires That Plaintiffs Suffer a Compensable Injury*

As quoted above, *section 16750, subdivision (a)* provides that "[a]ny person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor ... and ... recover three times the damages sustained by him or her" Recovery for the antitrust plaintiff is three times the "damages sustained." What does that phrase mean?

(4) As we explained in *MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076 [36 Cal. Rptr. 3d 650] (*MacIsaac*), the rules governing statutory construction in California are well established. "[O]ur primary task is to determine the lawmakers' intent," which we are to do using a three-step process. (*Id.* at p. 1082.) We first "look [*228] to the words of the statute themselves. [Citations.] The Legislature's chosen language is the most reliable indicator of its intent because 'it is the language of the statute itself that has successfully braved the legislative gauntlet.' " [Citation.] We give the words of the statute 'a plain and commonsense meaning' unless the statute specifically defines the words to give them a special meaning. [Citations.] If the statutory language is clear and unambiguous, our task is at an end" (*Id.* at pp. 1082-1083.)

(5) "When the plain meaning of the statute's text does not resolve the interpretive question, we must proceed to the second step of the inquiry." (*MacIsaac, supra*, 134 Cal.App.4th at p. 1083.) In this step, we "may turn to rules or maxims of construction," and "[w]e may also [*33] look to a number of extrinsic aids,

including the statute's legislative history, to assist us in our interpretation." (*Ibid.*, fn. omitted.)

(6) We then described the third step: "If ambiguity remains after resort to secondary rules of construction and to the statute's legislative history, then we must cautiously take the third and final step in the interpretive process. [Citation.] In this phase of the process, we apply 'reason, practicality, and common sense to the language at hand.' [Citation.] Where an uncertainty exists, we must consider the consequences that will flow from a particular interpretation. [Citation.] Thus, '[i]n determining what the Legislature intended we are bound to consider not only the words used, but also other matters, "such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy and contemporaneous construction." [Citation.]' " (*MacIsaac, supra*, 134 Cal.App.4th at p. 1084; accord, *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [105 Cal. Rptr. 2d 457, 19 P.3d 1196]; *Pacific Gas & Electric, supra*, 16 Cal.4th 1143, 1152.)

(7) Consistent with these guidelines, we must first examine the language of section 16750 to ascertain [**34] whether it evidences an intent to allow plaintiffs to maintain a Cartwright Act case even though they themselves have sustained no injury. We conclude that the answer is "no." Put conversely, we hold that the pass-on defense is available to defendants and, as applied here, defeats plaintiffs who have passed on all the claimed overcharges. In the language of the Cartwright Act, plaintiffs have no "damages sustained."

The term "damages sustained" is not defined in the Cartwright Act. However, it is in other places and cases and, as will be seen, those authorities hold that the phrase refers to actual financial loss suffered. But two early [**229] California cases addressing the issue of damages in the context of the Cartwright Act also bear on the question, and we begin with discussion of those cases.

The first case is *Krigbaum v. Sbarbaro* (1913) 23 Cal.App. 427 [138 P. 364] (*Krigbaum*). *Krigbaum*, a real estate broker, filed an antitrust action against the stockholders of a bank, claiming that the defendants colluded to prevent him from acquiring certain property suitable for grape-growing. doing so, he alleged, so they could purchase the property themselves and secure a monopoly on the wine industry. (*Id. at pp. 429-431.*) [**35] The defendants demurred for failure to state a claim, which the trial court sustained. (*Id. at p. 429.*) The Court of Appeal affirmed, holding that the complaint did not state a cause of action under the Cartwright Act. (23 Cal.App. at p. 432.)

(8) The court reasoned that the plaintiff did not allege he suffered an injury as a result of a restraint in trade. At most, he alleged that he suffered an injury as a result of the "wrongful acts" of the defendants, which does not constitute a cause of action under the Cartwright Act. Rather, the court explained, "To be 'injured in business or property,' within the contemplation of [the Cartwright Act] ... is where the injury has *directly* resulted from the fact of the existence of the trust-- that is to say, where the business or property has directly sustained injury solely by reason of the restrictions in trade or commerce which are fostered by such trust or combination. In other words, while one whose business or property has been injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the anti-trust law for double the damages he has actually suffered [**36] from the injury so inflicted, yet he could not maintain an action based upon said law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, did not arise by reason of the restrictions in trade or commerce carried out by such trust or combination." (*Krigbaum, supra*, 23 Cal.App. at p. 433.) Importantly for our purposes, the court recognized that recovery was only available for the damages the plaintiff *actually* suffered as a result of the antitrust violation.

The other case is *Overland P. Co. v. Union L. Co.* (1922) 57 Cal.App. 366 [207 P. 412] (*Overland*). The claim there was by a publishing company which alleged that a cartel of publishing companies known as the Printers' Board of Trade had violated the Cartwright Act by engaging in price fixing and bid rigging in the publishing market, thereby eliminating competition among the cartel's members. (57 Cal.App. at pp. 373-374.) Again, the trial court [*230] sustained a demurrer on the ground that the plaintiff did not allege it had been damaged within the meaning of the Cartwright Act. (57 Cal.App. at pp. 374-375.) We affirmed, holding that "If plaintiff could secure union labor and continue to operate its business, the [**37] activities of the Printers' Board of Trade in restricting competition among its own members would not injure plaintiff in the least. It is alleged that these practices have continued for three years. Apparently they have not injured plaintiff, but have probably meant to it a business opportunity. ... [¶] Plaintiff cannot maintain an action against the Printers' Board of Trade because of these alleged practices without pleading and proving special damage to his business or property by reason thereof. There are no facts alleged in the complaint showing damage to plaintiff because of said defendant's methods of doing business." (*Id.* at p. 375.)

(9) *Overland* holds that an antitrust plaintiff must have "special damage." It also teaches that a plaintiff who benefits from the alleged collusion lacks a Cart-

wright Act cause of action. This is the situation here, where the result of the passing on of the claimed overcharges is that plaintiffs' gross profits are higher. In sum, the only two Cartwright Act cases remotely addressing the issue demonstrate the plaintiffs' action has no merit.

CACI No. 3440, the Judicial Council of California Civil Jury Instruction on damages under the Cartwright Act, [**38] is instructive. It provides: "If you decide that [*name of plaintiff*] has proved [his/her/its] claim against [*name of defendant*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called 'damages.' [¶] The amount of damages must include an award for all harm that was caused by [*name of defendant*], even if the particular harm could not have been anticipated. [¶] [*Name of plaintiff*] must prove the amount of [his/her/its] damages. ... [¶] The following are the specific items of damages claimed by [*name of plaintiff*]: [¶] 1. [Loss of reasonably anticipated sales and profits]; [¶] 2. [An increase in [*name of plaintiff*]'s expenses]; [¶] 3. [*Insert other applicable item of damage*]." This instruction clearly contemplates that the damages recoverable under the Cartwright Act are intended to compensate the injured plaintiff for actual monetary loss suffered.

Our conclusion finds further support in the cases applying the term "damages sustained" in contexts other than the Cartwright Act. Thus, for example, *Carter v. Agricultural Ins. Co. (1968) 266 Cal.App.2d 805, 807 [72 Cal. Rptr. 462]*, where, construing "damages sustained" in suits brought under [**39] Code of Civil Procedure former section 539, the court interpreted the term to [*231] mean "those [damages] suffered by [the plaintiff], his actual damages, to compensate him for the losses he has endured." Likewise *Scally v. W. T. Garratt & Co. (1909) 11 Cal.App. 138, 151 [104 P. 325]*, where, construing "damages sustained" in a jury instruction, the court stated that a plaintiff "could, manifestly, sustain such damages only as amounted to an actual loss to him." Two old Supreme Court cases are to the same effect: *Utter v. Chapman (1869) 38 Cal. 659, 663* [absent fraud, "it is always the aim of the Court to give damages, and such damages only as will compensate the plaintiff for his loss ..."]; and *De Costa v. Mass. Mining Co. (1861) 17 Cal. 613, 617* [plaintiff "could not recover beyond the injury sustained"].) While these cases do not involve antitrust claims or the Cartwright Act, nothing there, or elsewhere, suggests that the Legislature intended the phrase "damages sustained" to mean something different in the antitrust context.

Numerous other statutes employ the phrase "damages sustained." (See, e.g., §§ 7160, 10167.10, *subd. (e)*, 16804, 18413, *subd. (a)*; *Civ. Code*, §§ 798.29.5,

883.140, *subd. (c)*, [**40] 1710.1, 1786.50, *subd. (a)(1)*, 1798.48, 1812.31, *subd. (a)*.) We are unaware of any authority--and plaintiffs have not identified any--interpreting any of those statutes in a manner that allowed for the recovery of monetary compensation beyond the actual financial loss suffered by a plaintiff. And we can discern nothing suggesting that the term means something different in the antitrust context. As Judge Sabraw put it: "If the Legislature had intended to depart in *section 16750* from the usual meaning of 'damages sustained,' then it probably would have used different words. The Legislature did not, for example, state that a plaintiff can recover 'three times any excess price paid'"

Plaintiffs attempt to distinguish the above authorities on a variety of grounds. They argue *Krigbaum, supra*, 23 Cal.App. 427, and *Overland, supra*, 57 Cal.App. 366, are unpersuasive because neither case interpreted the phrase "damages sustained." They object to reliance on non-Cartwright Act cases, complaining that as contract or tort actions they do not take into account the act's "three-pronged policy objective." They take exception to consideration of the phrase "damages sustained" in other [**41] statutes, claiming that it violates principles of statutory construction. And they criticize any reliance on cases that postdate the enactment of the Cartwright Act, deeming it "implausible" that such cases influenced the drafters of the Cartwright Act. None of these arguments is convincing.

(10) It is true that *Krigbaum, supra*, 23 Cal.App. 427, and *Overland, supra*, 57 Cal.App. 366, did not expressly construe "damages sustained." But [**232] neither did *Hanover Shoe*. As to the "three-pronged policy objective" argument, the "primary" purpose of private antitrust actions is compensation. (*Bruno v. Superior Court, supra*, 127 Cal.App.3d at p. 132.) Plaintiffs who have passed on all overcharges and suffered no financial loss themselves have nothing that merits compensation. And as to the consideration of the phrase in other settings, the language in *Torres v. Parkhouse Tire Service, Inc. (2001) 26 Cal.4th 995, 1005 [111 Cal. Rptr. 2d 564, 30 P.3d 57]* is particularly apt: "'[W]hen words used in a statute have acquired a settled meaning through judicial interpretation, the words should be given the same meaning when used in another statute dealing with an analogous subject matter'" (Accord, *Mercer v. Department of Motor Vehicles (1991) 53 Cal.3d 753, 763 [280 Cal. Rptr. 745, 809 P.2d 404]*.)

Plaintiffs [**42] raise one final argument to attempt to dissuade us from holding that the language of *section 16750* means what it says. Relying on *Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 776 [72 Cal. Rptr. 2d 624, 952 P.2d 641]* for the proposition that "[a] statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable,"

plaintiffs argue that the United States Supreme Court in *Hanover Shoe* and Judge Sabraw here construed "virtually identical" language yet arrived at contradictory conclusions. As plaintiffs frame it: "The former read the language as excluding the pass-on defense; whereas the latter interpreted the statute as permitting it. For the language to be considered ambiguous, both readings must be 'reasonable.' The United States Supreme Court's reading must be considered at least 'reasonable,' given it has affirmed the reasoning on three separate occasions over the past four decades." Plaintiffs' argument is unsound for several reasons.

First, the Supreme Court did not decide *Hanover Shoe* based on the language of section 4 of the Clayton Act. Nowhere does Justice White analyze the phrase "damages sustained." Nowhere does he even note, much less determine, that *the* [**43] language was intended to include any amount the plaintiff was overcharged even if the full amount was passed on to a subsequent purchaser. Instead, the Supreme Court based its holding on concerns over "nearly insuperable" problems of proof as well as concerns that indirect purchasers would lack incentive to sue if the pass-on defense were recognized. (*Hanover Shoe, supra, 392 U.S. at pp. 492-494.*) *In re Western Liquid Asphalt Cases (9th Cir. 1973) 487 F.2d 191, 199 (Liquid Asphalt)*, a case cited numerous times by plaintiffs, confirms this point, observing as follows: "We do not believe that the Supreme Court [in *Hanover Shoe, supra, 392 U.S. 481*] intended a *per se* rule with respect to passing on? . The Court was applying policy to a specific case." [*233]

The proof problems present in *Hanover Shoe* are not apparent in the record here. To the contrary, while plaintiffs resisted discovery on various grounds, Judge Sabraw specifically found that plaintiffs had not shown it was unduly burdensome or oppressive for them to produce data regarding purchases and sales of drugs, since the information was maintained electronically and could apparently be extracted and compiled with relative ease. Indeed, as early as 1978, commentators were noting the significance and utility of the computer in antitrust litigation. (See, for example, Federal Jud. Center, *Manual for Complex Litigation (1978)* § 2.717, p. 80.) And the technological developments in the ensuing 30 years can hardly be exaggerated.

Language in *Kansas v. UtiliCorp. United Inc. (1990) 497 U.S. 199 [111 L. Ed. 2d 169, 110 S. Ct. 2807]* (*UtiliCorp.*), another case heavily relied on by plaintiffs, albeit only in reply, also bears on this issue--and not favorably to plaintiffs. In *UtiliCorp.* the Court of Appeals considered the following certified question: "In a private antitrust action under *15 U. S. C. § 15* involving claims of price fixing against the producers of natural gas, is a State a proper plaintiff as [**44] *parens patriae* for its citizens who paid inflated prices for natural gas,

when the lawsuit already includes as plaintiffs those public utilities who paid the inflated prices upon direct purchase from the producers and who subsequently passed on most or all of the price increase to the citizens of the State?" (*Id. at pp. 205-206.*) In other words, could the state bring a *parens patriae* action on behalf of indirect purchasers? The Court of Appeals answered this question in the negative. The Supreme Court affirmed. (*Id. at p. 206.*)

One of the arguments asserted by the plaintiffs was that the court "should apply an exception ... for actions based upon cost-plus contracts." (*UtiliCorp., supra, 497 U.S. at pp. 207-208.*) While the court ultimately declined to do so under the particular facts before it, it did acknowledge that *Illinois Brick* and *Hanover Shoe* allowed for a departure from the rule forbidding the assertion of the pass-on theory in certain circumstances. As the court hypothesized, it "might allow indirect purchasers to sue only when ... the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury." (*Id. at p. 218.*)

But most significant, and most [**45] worthy of comment here, are three comments in the dissent of Justice White, the author of *Hanover Shoe* and the *Illinois Brick* majority opinion. Urging that the indirect purchaser states should be allowed to sue, Justice White noted as follows: [*234]

(1) "[A]lthough the utility could sue to recover lost profits resulting from lost sales due to the illegally high price, its injury is not measured by the amount of the illegal overcharge that it has passed on, and hence the utility would have no incentive to seek such a recovery." (*UtiliCorp., supra, 497 U.S. at p. 224* (dis. opn. of White, J.))

(2) "Given a passthrough, the customer, not the utility, suffers the antitrust injury, and it is the customer or the State on his behalf that is entitled to recover treble damages." (*UtiliCorp., supra, 497 U.S. at p. 224* (dis., opn. of White, J.))

(3) "Again however, where there is a 'perfect and provable' passthrough, there is no danger that both the utilities and the indirect purchasers will recover damages for the same anticompetitive conduct because the utilities have not suffered any overcharge damage: The petitioners will sue for the amount of the overcharge, while the utilities will sue for damages resulting from their lost sales." (*UtiliCorp., supra, 497 U.S. at pp. 224-225* (dis. opn. of White, J.))

We read these comments [**46] to suggest that Justice White himself would rule against plaintiffs. It was the indirect purchaser which "suffers the antitrust injury." By contrast, the utility could only sue for "damages resulting from their lost sales"; its injury is "not measured by the amount of the illegal overcharge that it has passed on." (*UtiliCorp., supra, 497 U.S. at p. 224* (dis., opn. of White,

J.).) Substitute "pharmacies" for "utilities" and the author of *Hanover Shoe* devastates plaintiffs here: their injury "is not measured by the amount of the illegal overcharge [they have] passed on." (*Ibid.*)

Second, the United States Supreme Court has confirmed that *Hanover Shoe* and *Illinois Brick* were interpreting federal, not state, law. In *California v. ARC America Corp.* (1989) 490 U.S. 93, 102-103 [104 L. Ed. 2d 86, 109 S. Ct. 1661] (*ARC America*), another opinion by Justice White, the court explained: "As we made clear in *Illinois Brick*, the issue before the Court in both that case and in *Hanover Shoe* was strictly a question of statutory interpretation--what was the proper construction of § 4 of the Clayton Act. ... [¶] It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust [**47] law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust law." (Citation omitted.) [*235]

Also enlightening on this point are the briefs submitted on behalf of the State of California in *ARC America*, where Attorney General Van de Kamp expressed the view that the pass-on defense is recognized in California. For example, in appellants' opening brief, he is quoted as stating, "[R]ecover under states' laws is determined by actual injury." (Brief of Appellant States, *ARC America* [No. 87-1862], 1988 U.S. S.Ct. Briefs Lexis 736, at p. *59.) And in reply, that "a state plaintiff is not authorized to recover for the injuries sustained by another" (Reply Brief of Appellant States, *ARC America* [No. 87-1862], 1989 U.S. S.Ct. Briefs Lexis 1452, at p. *21.) So, too, is the conclusion of the author of the law review article cited by our Supreme Court in *Union Carbide, supra*, 36 Cal.3d 15, 20, that the pass-on defense is available in California. (See Comment, *The California Legislature Steers the Antitrust Cart Right Off the Illinois Brick Road* (1979) 11 Pac. L.J. 121, 137-138.)

Finally, *Hanover Shoe* [**48] relied on cases applying a privity rule that precluded indirect purchasers suits. (See *Hanover Shoe, supra*, 392 U.S. at pp. 489-490, citing *Southern Pac. Co. v. Darnell-Taenzer Co.* (1918) 245 U.S. 531, 533-534 [62 L. Ed. 451, 38 S. Ct. 186].) In enacting the *Illinois Brick* repealer statute, the California Legislature confirmed in no uncertain terms that indirect purchaser suits are permissible in California.

(11) We conclude this discussion with the observation that to allow plaintiffs to recover here would violate a fundamental precept of California damage law--that plaintiffs not receive a windfall. As one Court of Appeal put it long ago, the "fundamental principle of the law of damages" is that a plaintiff cannot "hold a

defendant liable ... for more than the actual loss which he has inflicted by his wrong." (*Avery v. Fredericksen and Westbrook* (1944) 67 Cal.App.2d 334, 336 [154 P.2d 41]; see generally *Privette v. Superior Court* (1993) 5 Cal.4th 689, 699-700 [21 Cal. Rptr. 2d 72, 854 P.2d 721] [allowing employee plaintiffs to recover from multiple sources for the same injury would result in "unwarranted windfall"].) ¹³

13 This same point is in the general definition of damages, in *Civil Code section 3281*, which provides as follows: "Every person who suffers detriment from the unlawful [**49] act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." And *Civil Code section 3282* in turn defines "detriment" to mean "a loss or harm suffered in person or property." As defendants correctly explain, "Overcharges that have already been fully recovered--the only damages alleged in this case--clearly cause no *detriment* and cannot be recovered again through the award of *damages*."

(12) In sum, the language of the Cartwright Act, all relevant case law, and all relevant statutes lead us to conclude that "three times the damages [**236] sustained" as used in *section 16750* refers to actual monetary loss suffered by plaintiffs. Plaintiffs suffered no such loss, as the claimed overcharges were passed on, a pass-on that defeats plaintiffs here. In the language of the issue as framed by the parties, the pass-on defense is available in California.

In light of the result we reach, we perhaps need not engage in any further level of statutory interpretation. (*MacIsaac, supra*, 134 Cal.App.4th at p. 1083.) But because the parties devote substantial portions of their briefs to the subject, we choose to address it and conclude that neither plaintiffs' [**50] extensive citation to legislative history nor their reliance on public policy supports any different conclusion.

4. *Neither Legislative History Nor Public Policy Demonstrates That Hanover Shoe Is the Law in California*

a. *Legislative History*

Plaintiff's primary argument, to which they devote some 13 pages in their opening brief and 12 in their reply, is that Judge Sabraw "erred by failing to interpret the intent of the Legislature." Their position--that *Hanover Shoe* is the law in California--relies on the fundamental premise that the legislative history demonstrates a recognition by the Legislature of the risk of multiple liability. In

plaintiffs' words, this risk "necessarily presumes the recognition of *Hanover Shoe*. If *Hanover Shoe* were not the law, the danger [of multiple liability] would simply not exist."

In arguing that the legislative history supports their construction of *section 16750*, plaintiffs focus primarily on three distinct aspects of such history: the 1976 Hart-Scott-Rodino Act and the 1977 California equivalent, the 1978 *Illinois Brick* repealer amendment, and the California Attorney General's amicus curiae brief in *Illinois Brick*.

In 1976, Congress passed the Hart-Scott-Rodino **[**51]** Act, an amendment to the federal antitrust statutes which authorized *parens patriae*¹⁴ suits by state attorneys general on behalf of citizens injured by anticompetitive conduct. A provision of the amendment read, "The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief **[*237]** (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity." (15 U.S.C. § 15c(a)(1).)

¹⁴ " ' "Parens patriae," literally "parent of the country," refers traditionally to [the] role of [the] state as sovereign and guardian of persons under legal disability [¶] ... [¶] State attorney generals [*sic*] have *parens patriae* authority to bring actions on behalf of state residents for anti-trust offenses and to recover on their behalf.' " (*Pacific Gas & Electric, supra*, 16 Cal.4th at p. 1148, *fn. 6*, quoting Black's Law Dict. (6th ed. 1990) p. 1114, col. 1.)

The Hart-Scott-Rodino Act included a provision to protect defendants from multiple liability in antitrust overcharge cases. As summarized in the **[**52]** Senate Committee on Judiciary report, the amendment "contains a proviso to assure that defendants are not subjected to duplicative liability, particularly in a chain-of-distribution situation where it is claimed that middlemen absorbed all or part of the illegal overcharge. The Committee intention is to codify the holding of the 9th Circuit in [*Liquid Asphalt*] 487 F.2d 191 (9th Cir. 1973)." ¹⁵

¹⁵ In *Liquid Asphalt*, the Ninth Circuit endorsed the use of the offensive pass-on theory, setting forth mechanisms available to deal with the problem of multiple liability should such a situation arise. (*Liquid Asphalt, supra*, 487 F.2d at pp. 197, 201.)

Representative Rodino, the bill's sponsor in the House of Representatives, expressed a similar intent: "[T]he courts that have required privity between the

plaintiff and the defendant as a prerequisite to standing [i.e., the *Donson* view], have generally done so, because they have misread the Supreme Court's *Hanover Shoe* opinion, 392 U.S. 481 (1968). Fearing that the first purchaser can, under *Hanover Shoe*, recover the entire overcharge, whether or not he absorbs all or merely part of it, these courts have clearly been motivated by the specter of [**53] double liability raised by successful actions by subsequent purchasers. However, the compromise bill--unlike the House bill--expressly forbids duplicative recovery."

From these legislative comments, plaintiffs conclude that "Congress' passage of the Hart-Scott-Rodino Act included (1) the intent to preserve the *Hanover Shoe* rule, (2) the intent to codify *Liquid Asphalt's* solution to the multiple recovery problem, and (3) the intent to allow standing to indirect purchasers."

The following year, the California Legislature passed Assembly Bill No. 1162 (1977-1978 Reg. Sess.) (Assem. Bill 1162) which, according to the bill digest, was "modeled directly on federal law." The bill codified the Hart-Scott-Rodino Act as California law, incorporating a *parens patriae* provision into the Cartwright Act. (§ 16760.)¹⁶ The provision included lan- [*238] guage that was substantively identical to the Hart-Scott-Rodino Act's prohibition against duplicate recovery. (Cf. § 16760, *subd. (a)(1)* and 15 U.S.C. § 15c(a)(1).) The Assembly Bill Analysis confirmed that "AB 1162 would enact into law basically the same provisions enacted into federal law last year by the [C]ongress." Plaintiffs also identify various writings suggesting Assem. Bill 1162 was intended [**54] to parallel the Hart-Scott-Rodino Act, including letters from the Los Angeles and San Diego County District Attorneys.

16 The California *parens patriae* provision permits the Attorney General or the district attorney of any county to bring a civil action in the name of the people of the State of California or the residents of the county, respectively, for treble damages arising from violations of the Cartwright Act. (§ 16760, *subds. (a), (g).*)

According to plaintiffs, the foregoing establishes that (1) the Legislature intended Assem. Bill 1162 to bring California law into line with the federal statute, (2) the federal statute was enacted to address the possibility of multiple liability, and (3) multiple liability can only occur if the pass-on defense is not permitted. Ergo, plaintiffs conclude, in passing Assem. Bill 1162 the California Legislature implicitly recognized *Hanover Shoe* as the law in California. We are not persuaded.

First, and as Judge Sabraw observed, if the Legislature was in fact concerned with the threat of multiple liability, logically it would have included a safeguard against double recovery in *section 16750* as well as in the *parens patriae* provision. Since it did not, one can reasonably [**55] conclude that it did not consider multiple liability in private actions a problem because the pass-on defense is available to defendants.

Moreover, the safeguard against multiple liability in the *parens patriae* provision undermines plaintiffs' claim that the provision necessarily assumes the non-existence of the pass-on defense. As defendants put it, "the multiple liability provision applies more logically where the Attorney General purports to bring suit on behalf of end-users (as to whom a pass-on defense would never be available), or other natural persons, who have already recovered for their injuries through different litigation or settlement--as, for example, through a consumer class action. When the Attorney General subsequently sues under the *parens patriae* statute on behalf of all natural persons in California, the Attorney General cannot recover a second time those portions of an overcharge that were already awarded as damages."

We cannot conclude that the legislative history of Assem. Bill 1162 clearly demonstrates the Legislature's intent to reject the pass-on defense in California. Nor does the legislative history of Assembly Bill No. 3222 (1977-1978 Reg. Sess.) (Assem. Bill 3222), the 1978 *Illinois Brick* repealer amendment. [*239]

According [**56] to plaintiffs, in passing the *Illinois Brick* repealer amendment, thereby clarifying that indirect purchasers have standing in California, "the Legislature intended to 'repeal' the *Illinois Brick* majority opinion" and to adopt the *Illinois Brick* dissent in its entirety. This argument derives in part from the bill synopsis prepared by the Senate Committee on the Judiciary, which states, "The purpose of the bill is to prevent a federal case interpretation of the Sherman Act ... from being applied to actions under the Cartwright Act"; and in part from the bill digest prepared by the Assembly Committee on the Judiciary. Plaintiffs argue that this suggests the Legislature's intent to incorporate the *Illinois Brick* dissent in its entirety, which includes recognition of *Hanover Shoe*. To bolster such assertion, plaintiffs point to the majority opinion in *Illinois Brick*, 431 U.S. at pages 729-730, footnote 10, which describes the dissenting view as the same view advocated by the State of California in its amicus curiae brief in *Illinois Brick*. And from this plaintiffs reason that "[i]f Justice Brennan's dissent accurately reflects California's position, then it must be concluded that California does not [**57] recognize the pass-on defense" since the justice expressly stated that "*Hanover Shoe* ... can and should be limited to cases of defensive assertion

of the passing-on defense to antitrust liability, where direct and indirect purchasers are not parties in the same action." (*Illinois Brick*, *supra*, 431 U.S. at p. 753.)

Defendants respond with their own numerous excerpts from the legislative history, including from the Senate Committee on the Judiciary analysis; from the bill digest of the Senate Committee on the Judiciary; from the history of Assem. Bill 3222 in the Senate Committee on the Judiciary; from a memorandum of the Senate Democratic Caucus; and from a bill analysis for the Governor's office. From that, defendants urge that the sole purpose of the amendment was to "ensure that the California courts did not apply the holding of [*Illinois Brick*]--that indirect purchasers could not sue under the federal antitrust laws--to the Cartwright Act."

We agree with defendants, and conclude that these passages show that passage of Assem. Bill 3222 was intended simply to codify standing for indirect purchasers under the Cartwright Act, rather than as an adoption of the *Illinois Brick* dissent in its entirety. Indeed, [****58**] and as defendants point out, if "*Hanover Shoe* automatically and tacitly became California law in 1968 ... then *Illinois Brick*'s rule against indirect purchaser suits likewise became the law as soon as the Supreme Court issued its decision in that case. But if that were so, the 1978 Amendment could not have been 'declaratory of' existing law as the Legislature stated, and instead would have *altered* existing law by overruling *Illinois Brick* in California." [***240**]

We end our discussion of legislative history with the observation that, however vigorous plaintiffs' presentation, it necessarily concedes that any adoption of *Hanover Shoe* was by implication. As plaintiffs candidly put it at one point, the legislative history manifests "a tacit approval" of the rule of *Hanover Shoe*. Such concession is appropriate, as one thing is clear: not once in the numerous pages of legislative history on which plaintiffs rely is *Hanover Shoe* even mentioned. Such fact militates strongly against plaintiffs, as we recently observed in *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 323 [76 Cal. Rptr. 3d 507]: "At the federal level, the United States Supreme Court has observed that ' "Congress [****59**] ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions--it does not, one might say, hide elephants in mouseholes." (*Whitman v. American Trucking Assns.* [(2001)] 531 U.S. 457, 468 [149 L. Ed. 2d 1, 121 S. Ct. 903] ... ; see *FDA v. Brown & Williamson Tobacco Corp.* [(2000)] 529 U.S. 120, 160 [146 L. Ed. 2d 121, 120 S. Ct. 1291] ... ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance ... in so cryptic a fashion").' (*Gonzales v. Oregon* (2006) 546

U.S. 243, 267 [163 L. Ed. 2d 748, 126 S. Ct. 904].) California courts have adopted a similar skepticism. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482 [66 Cal. Rptr. 2d 319, 940 P.2d 906]; *In re Christian S.* (1994) 7 Cal.4th 768, 782 [30 Cal. Rptr. 2d 33, 872 P.2d 574]; *Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 589 [48 Cal. Rptr. 3d 340]; *Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.* (2001) 91 Cal.App.4th 678, 680, fn. 7 [110 Cal. Rptr. 2d 708].)"

Finally, plaintiffs rely on *Union Carbide, supra*, 36 Cal.3d 15 to support their position that the 1978 amendment reflected the Legislature's claimed adoption of the *Illinois Brick* dissenting opinion in its entirety, including recognition of *Hanover Shoe*. Such reliance is misplaced.

The plaintiffs in *Union Carbide* were indirect purchasers of industrial gas and alleged [**60] that the defendants, producers of industrial gas, "conspired to fix prices of the gas, causing plaintiffs to pay more for it than they would have paid in the absence of the conspiracy." (*Union Carbide, supra*, 36 Cal.3d at p. 19.) As pertinent here, the defendants "demurred to the complaint, claiming a defect of parties (*Code Civ. Proc.*, § 430.10, *subd. (d)*; see § 430.30, *subd. (a)*) and moved to dismiss under *section 389* for absence of indispensable parties." (*Ibid.*, fn. omitted.) The trial court overruled the demurrer and denied the motion. [*241]

The defendants petitioned for a writ of mandate ordering the plaintiffs to join all persons in the chain of distribution between the plaintiffs and the defendants, arguing that the absence of such parties subjected them to multiple liability. (*Union Carbide, supra*, 36 Cal.3d at pp. 18-20.) This argument was driven by the existence of a federal action in Illinois brought by residents of states other than California, who alleged that they purchased gas directly from the defendants and were injured by the same price fixing misconduct at issue in the California case. (*Id.* at p. 20.) The defendants also expressed concern that other indirect purchasers in California not involved in the [**61] suit "would create a substantial risk of multiple liability because the intermediate purchasers might independently sue petitioners under the Cartwright Act, contending that they absorbed, rather than passing on to the present plaintiffs, all or part of the overcharges for which plaintiffs now seek damages." (*Id.* at p. 21.)

The Supreme Court denied the writ, noting that it was raised at the pleading stage, where the operative papers included only the plaintiffs' complaint, the complaint in the Illinois federal case, and proceedings regarding class certification in the federal case. (*Union Carbide, supra*, 36 Cal.3d at p. 22.) These papers, according to the Supreme Court, did not "demonstrate a substantial risk of multiple liability sufficient to require that additional parties be joined in the

complaint (or named therein with sufficient reasons for nonjoinder) as a prerequisite to [defendants'] being required to answer the complaint in order to avoid default." (*Id. at p. 22.*) The court continued, however: "We do not foreclose the possibility that through discovery or other means petitioners may be able later to make a showing of substantial risk of multiple liability that would entitle them [**62] to a joinder order." (*Id. at p. 24.*)

Citing one paragraph in *Union Carbide*--a paragraph of dictum, no less--plaintiffs argue that "the *Union Carbide* court adopted the view of the dissent in *Illinois Brick* that the risk of multiple liability was remote and that it could in any event be addressed through existing procedural mechanisms [¶] ... [¶] [and] the fact that the Supreme Court recognized that a danger of multiple liability could exist in *any situation at all* (albeit remote and procedurally ameliorated) necessarily presumes the recognition of *Hanover Shoe*." ¹⁷ Hardly.

17 The cited paragraph includes this quotation, with the italics as supplied by plaintiffs: "Moreover, the fact of purchasers intermediate between plaintiffs and direct purchasers in the chain of distribution, even if assumed, would not establish a substantial risk of multiple liability. There is no showing of any actual assertion of a Cartwright Act claim on behalf of any such intermediate purchaser. *We turn again to the views expressed by the Illinois Brick dissenting opinion that seem to have met with the California Legislature's approval when it amended section 16750, subdivision (a), in 1978 ...*" (See *Union Carbide, supra, 36 Cal.3d at pp. 23-24.*)

[*242]

To begin with, [**63] the issue in *Union Carbide* was one of joinder, not the pass-on defense. Moreover, the opinion begins by describing precisely which part of the *Illinois Brick* dissenting opinion the Legislature had approved in the 1978 amendment to the Cartwright Act, "that indirect purchasers are persons 'injured' by illegal overcharges passed on to them in the chain of distribution." (*Union Carbide, supra, 36 Cal.3d at p. 20.*) Nothing in *Union Carbide* supports the contention that the 1978 amendment included codification of *Hanover Shoe*--which, not incidentally, is not even mentioned in the majority opinion.

In sum, the legislative history does not establish the Legislature's intent to adopt *Hanover Shoe's* rejection of the pass-on defense. Nor does the public policy argued by plaintiffs.

b. *Public Policy*

Plaintiffs vigorously argue that public policy concerns mandate adherence to *Hanover Shoe*, asserting first that "California policy requires that 'offensive' and 'defensive' pass-on be treated differently." This is so, plaintiffs argue, because "[a]llowing indirect purchaser plaintiffs to use offensive pass-on adds an additional group of plaintiffs to an existing lawsuit, or it allows an antitrust violation to be redressed. [**64] Both of these situations are consistent with California's strong stated policy in favor of enforcing the antitrust laws. On the other hand, allowing defendants to assert an affirmative pass-on defense runs contrary to that policy, giving rise to the danger that no plaintiff will be able to sue a defendant, even where it has confessed to wrongdoing."

(13) Plaintiff's argument ignores the principle which calls for the equal treatment of claims and defenses, a principle fundamental to the holding in *Illinois Brick, supra*, 431 U.S. at p. 728: "[W]hatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants." This rule, called the "golden rule" by Judge Sabraw, finds support in California law, illustrated, for example, by *Civil Code section 1717*, which provides that in an action based on a contract containing a provision that affords attorney fees and costs to one party to the action, the prevailing party is entitled to reasonable attorney fees whether or not he or she is specified in the contract.

Plaintiffs' second public policy argument is that "where the choice is between a windfall to plaintiffs and letting guilty defendants [**65] go free, liability [*243] must be imposed." As plaintiffs describe it, they "were involuntarily subjected to an illegal price-fixing agreement that forced them to pay more than they should have; [defendants] masterminded this unlawful scheme and now seek to escape liability with their illegal profits intact." This result, plaintiffs submit, is "expressly forbid[den]" by California policy.

Citing nothing in support of the adjective "expressly," plaintiffs go on to discuss the deterrent and disgorgement purposes of actions under the Cartwright Act as recognized in *Bruno v. Superior Court, supra*, 127 Cal.App.3d at p. 132. And while deterrence and disgorgement are no doubt significant considerations, plaintiffs' argument ignores the fact that "compensation is the primary rationale for the allowance of private antitrust lawsuits" (*Bruno, supra*, 127 Cal.App.3d at p. 132.) In essence, plaintiffs' reading of *Bruno* stands the case on its head, placing the goal of deterrence above that of compensation, despite *Bruno's* express language to the contrary.

Furthermore, overlooked by plaintiffs is the fact that they themselves have already been paid for the claimed overcharges, so any recovery of the overcharges from [**66] defendants--not to mention treble recovery--would be a windfall to

plaintiffs. In other words, whether a windfall is to be tolerated apparently turns on who receives it. Finally, we cannot help but note that the only thing that would keep plaintiffs from having "damages sustained" is that they have passed on *all* the claimed overcharges. A plaintiff who passed on only *some* of these charges would maintain "damages" for which it could state a Cartwright Act claim.

Plaintiffs also argue that recognizing the pass-on defense will deprive plaintiffs of incentive to sue for an antitrust violation, claiming that the "availability of the pass-on defense would virtually wipe-out all but end-consumer overcharge cases." Maybe it will deprive plaintiffs of incentive, at least in the circumstances here, but those with damages have incentive indeed. The Cartwright Act itself provides ample incentive, in the form of treble damages, prejudgment interest, attorney fees, and costs. There is, in addition, the *parens patriae* provision, which authorizes the government to bring enforcement actions on behalf of private individuals who may lack incentive to bring a lawsuit to obtain compensation for their individual [**67] injuries.

To the extent that plaintiffs' argument intimates that recognition of the pass-on defense may discourage lawsuits by indirect purchasers because of the amount of damages, such is belied empirically. We saw this firsthand in [*244] the consolidated class action cases in *In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1046 [2 Cal. Rptr. 3d 358] (class of indirect purchasers of vitamins; total settlement of \$ 80 million). Other courts have seen it, too, as in *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 710 [37 Cal. Rptr. 3d 660] ([two classes of indirect acquirers of licenses; "billion-dollar settlement agreement"]) and *In re Natural Gas Antitrust Cases* (2006) 137 Cal.App.4th 387, 390-391 [39 Cal. Rptr. 3d 909] (seven coordinated class action lawsuits; settlement of \$ 1.55 billion).

(14) For each and all of the above reasons, we conclude that *Hanover Shoe* is not the law in California. [**68] [**69] [**70] [**71]

5. The UCL Claim Has No Merit

(15) In addition to their Cartwright Act claim, plaintiffs also alleged that defendants committed illegal business practices in violation of the Unfair Competition Law (UCL) (§ 17200 *et seq.*), which defines unfair competition to include "any unlawful, unfair or fraudulent business act or practice. ..." (§ 17200.)

Defendants moved for summary adjudication on this claim on two different grounds. First, they argued plaintiffs were not eligible for restitution, the sole

monetary remedy available to private plaintiffs under the UCL, because they did not have an ownership interest in any monies defendants wrongfully obtained from the overcharges. Defendants also argued plaintiffs lacked standing under *section 17204* because they did not lose money or property as required by that section.

Granting summary adjudication, Judge Sabraw first addressed the standing argument, concluding that plaintiffs lacked standing because they had not "lost money or property." Alternatively, he concluded that the court could not "award monetary relief under *section 17203* because [p]laintiffs do not [**72] have an ownership interest in whatever funds they paid as a result of any overcharge" and were therefore not eligible for restitution. We agree on both counts, but address the issues in reverse order, as briefed by the parties.

Section 17203 provides: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the [*245] use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

(16) The exclusive monetary remedy available to private plaintiffs under the UCL is restitution. (§ 17203; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144 [131 Cal. Rptr. 2d 29, 63 P.3d 937] (*Korea Supply*); *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440 [30 Cal. Rptr. 3d 210] (*Madrid*); *Industrial Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1093, 1095-1096 [257 Cal. Rptr. 655].) (17) *Madrid* provides particular insight into the meaning of "restitution" in [**73] the context of the UCL: "'Restitution' is an ambiguous term, sometimes referring to the disgorging of something that has been taken and sometimes referring to compensation for injury done. [Citation.] However, in the context of the UCL, 'restitution' is limited to the return of property or funds in which the plaintiff has an ownership interest (or is claiming through someone with an ownership interest). [Citation.] [¶] Thus, the California Supreme Court has defined a UCL order for restitution as one "'compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person." [Citation.] [Citation.] 'Restitution' under the UCL is not limited to money

that was once in the plaintiff's possession but also includes money in which the plaintiff had a vested interest. [Citation.]" (*Madrid*, at p. 453.)

Plaintiffs suggest that the overcharges at issue here fall within the meaning of restitution because there is no dispute that the overcharge was originally in their possession. They argue that "[i]f a defendant violates [**74] the law and extracts an overcharge from a plaintiff, it is taking 'money that was once in his possession,' which must be restored." Plaintiffs then submit that "no California authority hold[s] that restitution awards must be lessened to the degree they were mitigated." Plaintiffs are wrong. *Madrid* is dispositive.

Plaintiff Madrid, a customer of an electric company, filed a class action on behalf of electricity customers against various entities involved in restructuring the electricity market, alleging among other things UCL violations. Madrid sought recovery of " 'restitution to restore all funds acquired by means of any act or practice declared by this Court to be an unlawful or unfair business act or practice' "; he also sought equitable and injunctive relief, alleging that "[d]efendants' unfair and unlawful business practices [**246] include conspiring to establish phoney strategies designed to 'game' the California markets." (*Madrid*, *supra*, 130 Cal.App.4th at pp. 449, 445.) The defendants demurred, and the trial court sustained the demurrer without leave to amend.

Madrid appealed, addressing only his UCL claim, arguing that " '[r]estitution is measured by defendants' wrongful gain, not [plaintiff]'s loss [**75] (i.e., overcharges). Thus, the focus of restitution is on defendants' unjust enrichment. Restitution simply returns that which defendants obtained from [plaintiff] as a result of their wrongful conduct. That remedy is measured by the defendants' gain, not [plaintiff]'s loss.' " (*Madrid*, *supra*, 130 Cal.App.4th at pp. 448, 450, 454.) The Court of Appeal expressly rejected Madrid's attempt to define restitution in terms of the amount gained by the defendants, rather than the loss suffered by him: "Although this restitution serves to thwart the wrongdoer's unjust enrichment, courts ordering [**247] restitution under the UCL 'are not concerned with restoring the violator to the status quo ante. The focus instead is on the victim.' " (*Id.* at p. 455, quoting *People ex rel. Kennedy v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 134-135 [3 Cal. Rptr. 3d 429].)

Plaintiffs' argument here is in different words the same argument rejected in *Madrid*. We also reject it.

(18) Likewise persuasive is the comment in the Restatement of Restitution. As the authors there put it, "[a] person under a duty of restitution to another is discharged from his liability to the other for the restitution of the subject matter

or its value if subsequent [**76] to his receipt of the subject matter (a) the other transfers his entire interest therein to a third person." (*Rest., Restitution*, § 141(2), p. 564.) Once plaintiffs resold defendants' products, and thereby recovered all of their costs, plaintiffs relinquished any ownership interest in the claimed overcharges--and forfeited any possible UCL claim. (See Woodward, "*Passing-on the Right to Restitution* (1985) 39 *U.Miami L.Rev.* 873.)

Shersher v. Superior Court (2007) 154 *Cal.App.4th* 1491 [65 *Cal. Rptr. 3d* 634], the authority cited by plaintiffs after briefing was completed, is not to the contrary. There, a purchaser of a wireless product manufactured by Microsoft Corporation and purchased at a retail store sued Microsoft for, among other things, violations of the UCL. Microsoft moved to strike the restitution claim, arguing that only direct purchasers could assert a UCL claim. The trial court granted the motion, concluding that "the availability of restitution under the UCL was limited to direct purchasers and excluded plaintiffs such as the [consumer] in this case, who purchased Microsoft's product from a retailer." (154 *Cal.App.4th* at p. 1494.) The Court of Appeal issued a writ of mandate ordering the trial court [**77] to vacate its order granting the motion to strike, concluding that the recovery of restitution was not conditioned on the customer having made direct payments to the manufacturer. (*Id.* at p. 1498.) *Shersher* is of no help to plaintiffs, because the question is not whether they can assert a claim for restitution as indirect purchasers but whether such a claim is viable where they suffered no monetary loss.

(19) The focus of the UCL law is restitution. It is not punishment. "[I]n the absence of a measurable loss [the UCL] does not allow the imposition of a monetary sanction merely to achieve [a] deterrent effect." (*Day v. AT & T Corp.* (1998) 63 *Cal.App.4th* 325, 339 [74 *Cal. Rptr. 2d* 55].) Or, in the words of the Supreme Court in *Korea Supply, supra*, 29 *Cal.4th* at p. 1148, "A court cannot, under the equitable powers of [the UCL], award whatever form of monetary relief it believes might deter unfair practices."¹⁸

18 Plaintiffs' UCL claim also prays for injunctive relief, though their brief does not address the point. The same rationale that applies to the restitution analysis would preclude any right to any action for injunction, which can be brought only by prosecutors or by a person "who has suffered injury in fact [**78] and has lost money or property." (§ 17204.)

(20) Having decided that plaintiffs could not be awarded restitution, we need not analyze in detail the standing issue. We briefly observe that in 2004 Proposition 64 amended section 17204 to limit standing for UCL claims to "any person

... 'who has suffered injury in fact and has lost money or property as a result of such unfair competition.' " (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228 [46 Cal. Rptr. 3d 57, 138 P.3d 207]; see *Madrid, supra*, 130 Cal.App.4th at p. 445, fn. 1.) In other words, the California electorate voted to eliminate UCL representative actions brought on behalf of the general public where a plaintiff has not suffered a loss of money or property. (*Californians for Disability Rights v. Mervyn's, LLC, supra*, 39 Cal.4th at p. 228.)

Plaintiffs' position here--that they can bring what amounts to a representative action and keep for themselves any potential recovery despite the fact they suffered no monetary loss--flies in the face of the intent of Proposition 64. (See *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 853 [70 Cal. Rptr. 3d 466] ["The voters' intent in passing Proposition 64 and enacting the changes to the standing rules in *Business and Professions Code section 17204* [**79] was unequivocally to narrow the category of persons who could sue businesses under the UCL."].) [*248]

DISPOSITION

The summary judgment for defendants is affirmed.

Kline, P. J., and Haerle, J., concurred.

Exhibit B

Order Modifying Opinion and Denying Petition for Rehearing, filed August 19, 2008.

LEXSEE 2008 CAL. APP. LEXIS 1325

**JAMES CLAYWORTH, et al., Plaintiffs and Appellants, v. PFIZER, INC., et al.,
Defendants and Respondents.**

A116798

**COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT,
DIVISION TWO**

2008 Cal. App. LEXIS 1325

August 19, 2008, Filed

NOTICE: Modification of opinion (165 Cal.App.4th 209; ___ Cal.Rptr.3d ___), upon denial of rehearing.

PRIOR HISTORY: [*1]

Superior Court of Alameda County, No. RG04172428, Ronald M. Sabraw, Harry R. Sheppard, Judges.
Clayworth v. Pfizer, Inc., 165 Cal. App. 4th 209, 2008 Cal. App. LEXIS 1151 (Cal. App. 1st Dist., 2008)

OPINION

THE COURT.--The opinion filed herein on July 25, 2008, is modified as follows, and petition for rehearing is DENIED:

(1) On page 2, fn. 3, line 3, [*165 Cal.App.4th 215*, advance report, fn. 3 lines 2-3], the words "Johnson & Johnson" are deleted so that line 3 should read:

Janssen Pharmaceutical, Inc.; Ortho McNeil Pharmaceutical, Inc.;

(2) On page 10, [*165 Cal.App.4th 222*, advance report, 3d par., line 1], the first line of the fourth paragraph is modified so that it reads:

In an seven-to-one opinion written by Justice White, the Supreme Court reversed the

[*2]

(3) On page 22, [165 Cal.App.4th 232, advance report, after the 1st full par.], following the second full paragraph, a new paragraph is added as follows:

The proof problems present in *Hanover Shoe* are not apparent in the record here. To the contrary, while plaintiffs resisted discovery on various grounds, Judge Stribaw specifically found that plaintiffs had not shown it was unduly burdensome or oppressive for them to produce data regarding purchases and sales of drugs, since the information was maintained electronically and could apparently be extracted and compiled with relative ease. Indeed, as early as 1978, commentators were noting the

significance and utility of the computer in antitrust litigation. (See, for example, Federal Jud. Center, Manual for Complex Litigation (1978) § 2.717, p. 80.) And the technological developments in the ensuing 30 years can hardly be exaggerated.

(4) On page 24, line 15, [165 Cal.App.4th 233, advance report, last par., line 4], the third line of the third full paragraph, the words "again a unanimous" are deleted, and the word "another" substituted, so that the line should read:

Corp. (1989) 490 U.S. 93, 102-103 [104 L. Ed. 2d 86, 109 S. Ct. 1661] (*ARC America*), another opinion by

[*3]

(5) On page 25, line 8, [165 Cal.App.4th 234, advance report, 2d full par., line 4], the third line of the first full paragraph, the word "*Shoe*" is deleted, and the word "*Brick*" substituted, so that the line should read:

Darnell-Taenzer Co. (1918) 245 U.S. 531, 533-534 [62 L. Ed. 451, 38 S. Ct. 186].) In enacting the *Illinois Brick*

(6) On page 35, [165 Cal.App.4th 242, advance report, last par., lines 2-3], the second sentence in the second full paragraph, at lines 13-14, is deleted.

(7) On pages 35 through 37, the heading "**5. Even Assuming *Hanover Shoe* Were the Law in California, the Pass-On Defense is Available in the Setting Here**", [165 Cal.App.4th 243-244, advance report], and the following discussion are deleted.

(8) On page 37, [165 Cal.App.4th 244, advance report], the heading "**6. The UCL Claim Has No Merit**" is renumbered to read "**5. The UCL Claim Has No Merit**".

These

[*4] modifications do not effect a change in the judgment.

The petition for rehearing is denied.

Exhibit C

A. Out-of-state statutes

1. District of Columbia, D.C. CODE §28-4509
2. Hawaii, HRS §480-13
3. Illinois, 740 ILCS 10/7
4. Maryland, MD. COMM. LAW CODE ANN. §11-209
5. North Dakota, N.D. CENT. CODE §51-08.1-08
6. New Mexico, N.M. STAT. ANN. §57-1-3
7. New York, NY CLS GEN. BUS. §340
8. Nebraska, R.R.S. NEB. §59-821.01
9. Utah, Enrolled Copy, 2006 BILL TEXT UT S.B. 16

LEXSTAT D.C. CODE 28-4509

LEXIS DISTRICT OF COLUMBIA CODE ANNOTATED
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*** CURRENT THROUGH D.C. LAW 16-210, EFFECTIVE MARCH 2, 2007, AND THROUGH D.C. ACT 16-586

*** ANNOTATIONS CURRENT THROUGH DECEMBER 14, 2006 ***

TITLE 28. COMMERCIAL INSTRUMENTS AND TRANSACTIONS
SUBTITLE II. OTHER COMMERCIAL TRANSACTIONS
CHAPTER 45. RESTRAINTS OF TRADE

GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 28-4509 (2007)

§ 28-4509. Indirect purchasers

(a) Any indirect purchaser in the chain of manufacture, production, or distribution of goods or services, upon proof of payment of all or any part of any overcharge for such goods or services, shall be deemed to be injured within the meaning of this chapter.

(b) In actions where both direct and indirect purchasers are involved, a defendant shall be entitled to prove as a partial or complete defense to a claim for damages that the illegal overcharge has been passed on to others who are themselves entitled to recover so as to avoid duplication of recovery of damages.

(c) In any case in which claims are asserted by both direct purchasers and indirect purchasers, the court may transfer and consolidate cases, apportion damages and delay disbursement of damages to avoid multiplicity of suits and duplication of recovery of damages, and to obtain substantial fairness.

HISTORY: 1981 Ed., § 28-4509; Mar. 5, 1981, D.C. Law 3-169, § 2, 27 DCR 5368.

NOTES:

SECTION REFERENCES. --This section is referenced in § 28-4510.

LEGISLATIVE HISTORY OF LAW 3-169. --See note to § 28-4501.

LEXSTAT HAW. REV. STAT. 480-13

MICHIE'S HAWAII REVISED STATUTES ANNOTATED
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ANNOTATIONS CURRENT THROUGH OCTOBER 10, 2006

DIVISION 2. BUSINESS
TITLE 26 Trade Regulation And Practice
CHAPTER 480 Monopolies; Restraint of Trade
PART I. Antitrust Provisions

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

HRS § 480-13 (2006)

§ 480-13. Suits by persons injured; amount of recovery, injunctions.

(a) Except as provided in subsections (b) and (c), any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter:

(1) May sue for damages sustained by the person, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than \$1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorney's fees together with the costs of suit; provided that indirect purchasers injured by an illegal overcharge shall recover only compensatory damages, and reasonable attorney's fees together with the costs of suit in actions not brought under section 480-14(c); and

(2) May bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, the plaintiff shall be awarded reasonable attorney's fees together with the costs of suit.

(b) Any consumer who is injured by any unfair or deceptive act or practice forbidden or declared unlawful by section 480-2:

(1) May sue for damages sustained by the consumer, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than \$1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorney's fees together with the costs of suit; provided that where the plaintiff is an elder, the plaintiff, in the alternative, may be awarded a sum not less than \$5,000 or threefold any damages sustained by the plaintiff, whichever sum is the greater, and reasonable attorney's fees together with the costs of suit. In determining whether to adopt the \$5,000 alternative amount in an award to an elder, the court shall consider the factors set forth in section 480-13.5; and

(2) May bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, the plaintiff shall be awarded reasonable attorney's fees together with the costs of suit.

(c) The remedies provided in subsections (a) and (b) shall be applied in class action and de facto class action lawsuits or proceedings, including actions brought on behalf of direct or indirect purchasers; provided that:

(1) The minimum \$1,000 recovery provided in subsections (a) and (b) shall not apply in a class action or a de facto class action lawsuit;

HRS § 480-13

(2) In class actions or de facto class actions where both direct and indirect purchasers are involved, or where more than one class of indirect purchasers are involved, a defendant shall be entitled to prove as a partial or complete defense to a claim for compensatory damages that the illegal overcharge has been passed on or passed back to others who are themselves entitled to recover so as to avoid the duplication of recovery of compensatory damages;

(3) That portion of threefold damages in excess of compensatory damages shall be apportioned and allocated by the court in its exercise of discretion so as to promote effective enforcement of this chapter and deterrence from violation of its provisions;

(4) In no event shall an indirect purchaser be awarded less than the full measure of compensatory damages attributable to the indirect purchaser;

(5) In any lawsuit or lawsuits in which claims are asserted by both direct purchasers and indirect purchasers, the court is authorized to exercise its discretion in the apportionment of damages, and in the transfer and consolidation of cases to avoid the duplication of the recovery of damages and the multiplicity of suits, and in other respects to obtain substantial fairness;

(6) In any case in which claims are being asserted by a part of the claimants in a court of this State and another part of the claimants in a court other than of this State, where the claims arise out of same or overlapping transactions, the court is authorized to take all steps reasonable and necessary to avoid duplication of recovery of damages and multiplicity of suits, and in other respects, to obtain substantial fairness;

(7) In instances where indirect purchasers file an action and obtain a judgment or settlement prior to the completion of a direct purchaser's action in courts other than this State, the court shall delay disbursement of the damages until such time as the direct purchaser's suits are resolved to either final judgment, consent decree or settlement, or in the absence of a direct purchaser's lawsuit in the courts other than this State by direct purchasers, the expiration of the statute of limitations, or in such manner that will minimize duplication of damages to the extent reasonable and practicable, avoid multiplicity of suit, and obtain substantial fairness; and

(8) In the event damages in a class action or de facto class action remain unclaimed by the direct or indirect purchasers, the class representative or the attorney general shall apply to the court and such funds shall escheat to the State upon showing that reasonable efforts made by the State to distribute the funds have been unsuccessful.

(d) The remedies provided in this section are cumulative and may be brought in one action.

HISTORY: L 1961, c 190, § 11; Supp., § 205A-11; HRS § 480-13; am L 1969, c 108, § 1; am L 1974, c 33, § 1; am L 1980, c 69, § 3; am imp L 1984, c 90, § 1; am L 1987, c 274, § 4; am L 1998, c 179, § 2; am L 2001, c 79, § 1; am L 2002, c 229, § 3; am L 2005, c 108, § 3

NOTES:

The 2005 amendment, effective June 7, 2005, substituted "attorney's fees" for "attorneys fees" and "attorneys' fees" throughout subsections (a) and (c), and made additional stylistic changes.

Cross references.

As to injunctions, see HRCP, Rule 65.

NOTES TO DECISIONS

LEXSTAT 740 ILL. COMP. STAT. 10/7

ILLINOIS COMPILED STATUTES ANNOTATED
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*** STATUTES CURRENT THROUGH PUBLIC ACT 94-1113 ***
*** ANNOTATIONS TO STATE CASES CURRENT THROUGH DECEMBER 31, 2006 ***

CHAPTER 740. CIVIL LIABILITIES
ILLINOIS ANTITRUST ACT

GO TO THE ILLINOIS STATUTES ARCHIVE DIRECTORY

740 ILCS 10/7 (2007)

[Prior to 1/1/93 cited as: Ill. Rev. Stat., Ch. 38, para. 60-7]

§ 740 ILCS 10/7. [Civil actions and remedies]

Sec. 7. The following civil actions and remedies are authorized under this Act:

(1) The Attorney General, with such assistance as he may from time to time require of the State's Attorneys in the several counties, shall bring suit in the Circuit Court to prevent and restrain violations of Section 3 of this Act [740 ILCS 10/3]. In such a proceeding, the court shall determine whether a violation has been committed, and shall enter such judgment as it considers necessary to remove the effects of any violation which it finds, and to prevent such violation from continuing or from being renewed in the future. The court, in its discretion, may exercise all powers necessary for this purpose, including, but not limited to, injunction, divestiture of property, divorcement of business units, dissolution of domestic corporations or associations, and suspension or termination of the right of foreign corporations or associations to do business in the State of Illinois.

(2) Any person who has been injured in his business or property, or is threatened with such injury, by a violation of Section 3 of this Act [740 ILCS 10/3] may maintain an action in the Circuit Court for damages, or for an injunction, or both, against any person who has committed such violation. If, in an action for an injunction, the court issues an injunction, the plaintiff shall be awarded costs and reasonable attorney's fees. In an action for damages, if injury is found to be due to a violation of subsections (1) or (4) of Section 3 of this Act [740 ILCS 10/3], the person injured shall be awarded 3 times the amount of actual damages resulting from that violation, together with costs and reasonable attorney's fees. If injury is found to be due to a violation of subsections (2) or (3) of Section 3 of this Act [740 ILCS 10/3], the person injured shall recover the actual damages caused by the violation, together with costs and reasonable attorney's fees, and if it is shown that such violation was willful, the court may, in its discretion, increase the amount recovered as damages up to a total of 3 times the amount of actual damages. This State, counties, municipalities, townships and any political subdivision organized under the authority of this State, and the United States, are considered a person having standing to bring an action under this subsection. The Attorney General may bring an action on behalf of this State, counties, municipalities, townships and other political subdivisions organized under the authority of this State to recover the damages under this subsection or by any comparable Federal law.

No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages. Provided, however, that in any case in which claims are asserted against a defendant by both direct and indirect purchasers, the

court shall take all steps necessary to avoid duplicate liability for the same injury including transfer and consolidation of all actions. Provided further that no person other than the Attorney General of this State shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act.

Beginning January 1, 1970, a file setting out the names of all special assistant attorneys general retained to prosecute antitrust matters and containing all terms and conditions of any arrangement or agreement regarding fees or compensation made between any such special assistant attorney general and the office of the Attorney General shall be maintained in the office of the Attorney General, open during all business hours to public inspection.

Any action for damages under this subsection is forever barred unless commenced within 4 years after the cause of action accrued, except that, whenever any action is brought by the Attorney General for a violation of this Act, the running of the foregoing statute of limitations, with respect to every private right of action for damages under the subsection which is based in whole or in part on any matter complained of in the action by the Attorney General, shall be suspended during the pendency thereof, and for one year thereafter. No cause of action barred under existing law on July 21, 1965 shall be revived by this Act. In any action for damages under this subsection the court may, in its discretion, award reasonable fees to the prevailing defendant upon a finding that the plaintiff acted in bad faith, vexatiously, wantonly or for oppressive reasons.

(3) Upon a finding that any domestic or foreign corporation organized or operating under the laws of this State has been engaged in conduct prohibited by Section 3 of this Act [740 ILCS 10/3], or the terms of any injunction issued under this Act, a circuit court may, upon petition of the Attorney General, order the revocation, forfeiture or suspension of the charter, franchise, certificate of authority or privileges of any corporation operating under the laws of this State, or the dissolution of any such corporation.

(4) In lieu of any criminal penalty otherwise prescribed for a violation of this Act, and in addition to any action under this Act or any Federal antitrust law, the Attorney General may bring an action in the name and on behalf of the people of the State against any person, trustee, director, manager or other officer or agent of a corporation, or against a corporation, domestic or foreign, to recover a penalty not to exceed \$ 1,000,000 from every corporation or \$ 100,000 from every other person for any act herein declared illegal. The action must be brought within 4 years after the commission of the act upon which it is based. Nothing in this subsection shall impair the right of any person to bring an action under subsection (2) of this Section.

HISTORY: Source: P.A. 83-1362; 93-351, § 5.

NOTES:

NOTE.

This section was Ill.Rev.Stat., Ch. 38, para. 60-7.

EFFECT OF AMENDMENTS.

The 2003 amendment by P.A. 93-351, effective January 1, 2004, substituted "\$1,000,000" for "\$100,000" and "\$100,000" for "\$50,000" in subdivision (4).

CASE NOTES

ANALYSIS

Action by State
 --Election of Remedies
 --Proper Party
 --State Representative
 Antitrust Claim
 Class Actions

LEXSTAT MD. COMM LAW CODE 11-209

Annotated Code of Maryland
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COMMERCIAL LAW
TITLE 11. TRADE REGULATION
SUBTITLE 2. ANTITRUST

GO TO MARYLAND STATUTES ARCHIVE DIRECTORY

Md. COMMERCIAL LAW Code Ann. § 11-209 (2006)

§ 11-209. Civil actions

(a) Proceedings by Attorney General. --

(1) The Attorney General shall institute proceedings in equity to prevent or restrain violations of § 11-204 of this subtitle and may require assistance from any State's Attorney for that purpose.

(2) In a proceeding under this section, the court shall determine whether a violation has been committed and enter any judgment or decree necessary to:

- (i) Remove the effects of any violation it finds; and
- (ii) Prevent continuation or renewal of the violation in the future.

(3) The court may exercise all equitable powers necessary for this purpose, including but not limited to injunction, restitution to any person of any money or real or personal property acquired from that person by means of any violation, divestiture of property or business units, and suspension or termination of the right of a foreign corporation or association to do business in the State.

(4) In addition to the equitable remedies or other relief authorized by this section, the court may assess against any person who violates § 11-204 of this subtitle a civil penalty not exceeding \$ 100,000 for each violation, to be paid to the General Fund of the State.

(b) Action for damages and injunction. --

(1) The United States, the State, and any political subdivision organized under the authority of the State is a person having standing to bring an action under this subsection.

(2) (i) A person whose business or property has been injured or threatened with injury by a violation of § 11-204 of this subtitle may maintain an action for damages or for an injunction or both against any person who has committed the violation.

(ii) The United States, the State, or any political subdivision organized under the authority of this State may maintain an action under subparagraph (i) of this paragraph for damages or for an injunction or both regardless of whether it dealt directly or indirectly with the person who has committed the violation. In any action under this subsection, any defendant, as a partial or complete defense against a damage claim, may, in order to avoid duplicative liability, prove that all or any part of an alleged overcharge was ultimately passed on to the United States, the State, or any political subdivision organized under the authority of this State, by a purchaser or seller in the chain of manufacture, production, or distribution who paid an alleged overcharge.

(3) If an injunction is issued, the complainant shall be awarded costs and reasonable attorney's fees.

(4) In an action for damages, if an injury due to a violation of § 11-204 of this subtitle is found, the person injured shall be awarded three times the amount of actual damages which results from the violation, with costs and reasonable attorney's fees.

(5) The Attorney General may bring an action on behalf of the State or any of its political subdivisions or as parens patriae on behalf of persons residing in the State to recover the damages provided for by this subsection or any comparable provision of federal law.

(c) Parens patriae actions. -- An action brought by the Attorney General as parens patriae under subsection (b)(5) of this section is presumed superior to any class action brought on behalf of the same person.

(d) Limitation period for civil action. --

(1) An action brought to enforce this subtitle shall be commenced within 4 years after the cause of action accrues.

(2) For the purposes of this subsection, a cause of action for a continuing violation accrues at the time of the latest violation.

(3) Whenever the State commences a criminal proceeding under this subtitle or the United States commences a criminal antitrust proceeding under the federal antitrust laws, any civil action under this section related to the subject matter of the criminal proceeding shall be commenced within 1 year after the conclusion of the proceeding or within 4 years after the cause of action accrued, whichever is later.

HISTORY: An. Code 1957, art. 83, §§ 41, 46; 1975, ch. 49, § 3; 1982, ch. 214; 1993, ch. 632; 2005, ch. 25, § 13; ch. 397.

LEXSTAT N.D. CENT. CODE 51-08.1-08

NORTH DAKOTA CENTURY CODE
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*** ANNOTATIONS CURRENT THROUGH FEBRUARY 6, 2007 ***

TITLE 51 Sales and Exchanges
CHAPTER 51-08.1 Uniform State Antitrust Act

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

N.D. Cent. Code, § 51-08.1-08 (2007)

51-08.1-08. Damages and injunctive relief.

1. The state, a political subdivision, or any public agency threatened with injury or injured in its business or property by a violation of this chapter may bring an action for appropriate injunctive or other equitable relief, damages sustained and, as determined by the court, taxable costs and reasonable attorney's fees.

2. A person threatened with injury or injured in that person's business or property by a violation of this chapter may bring an action for appropriate injunctive or other equitable relief, damages sustained and, as determined by the court, taxable costs and reasonable attorney's fees. If the trier of fact finds that the violation is flagrant, it may increase recovery to an amount not in excess of three times the damages sustained.

3. In any action for damages under this section, the fact that the state, political subdivision, public agency, or person threatened with injury or injured in its business or property by any violation of the provisions of this chapter has not dealt directly with the defendant does not bar recovery.

4. In any action for damages under this section, any defendant, as a partial or complete defense against a claim for damages, is entitled to prove that the plaintiff purchaser, or seller in the chain of manufacture, production, or distribution, who paid any overcharge or received any underpayment passed on all or any part of the overcharge or underpayment to another purchaser or seller in that action.

HISTORY: S.L. 1987, ch. 590, § 8; 1991, ch. 524, § 1.

NOTES:

Inmate Barred From Bringing Suit.

Inmate Barred From Bringing Suit.

Inmate failed to state a claim under Rule 12(b) alleging state antitrust violations under this section, requesting damages and equitable relief, because § 32-12.2-02 precludes the State from liability for inmate claims of injury or threatened injury to property; in addition, inmate could not recover equitable relief under this section as a matter of law. *Burke v. North Dakota Dep't of Cors. & Rehabilitation, 2000 ND 85, 609 N.W.2d 729 (2000).*

Collateral References.

Constitutional right to jury trial in cause of action under state unfair or deceptive trade practices law, *54 A.L.R. 5th*
631.

LEXSTAT N.M. STAT. ANN. 57-1-3

MICHIE'S ANNOTATED STATUTES OF NEW MEXICO

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* CURRENT THROUGH THE RESULTS OF THE NOVEMBER 7, 2006 GENERAL ELECTION *
*** ANNOTATIONS CURRENT THROUGH 2007-NMCA-026 and 2007-NMSC-007 ***

CHAPTER 57. TRADE PRACTICES AND REGULATIONS

ARTICLE 1. RESTRAINTS OF TRADE

GO TO CODE STATUTES OF NEW MEXICO ARCHIVE DIRECTORY

N.M. Stat. Ann. § 57-1-3 (2007)

§ 57-1-3. Contracts for restraint of trade or monopoly void; civil liability of participants; injunctive relief; purchasers relieved from payment

A. All contracts and agreements in violation of *Section 57-1-1 or 57-1-2 NMSA 1978* shall be void, and any person threatened with injury or injured in his business or property, directly or indirectly, by a violation of *Section 57-1-1 or 57-1-2 NMSA 1978* may bring an action for appropriate injunctive relief, up to threefold the damages sustained and costs and reasonable attorneys' fees. If the trier of fact finds that the facts so justify, damages may be awarded in an amount less than that requested, but not less than the damages actually sustained.

B. The attorney general may bring an action under Subsection A of this section on behalf of the state, a political subdivision thereof or any public agency.

C. In any action under this section, any defendant, as a partial or complete defense against a damage claim, may, in order to avoid duplicative liability, be entitled to prove that the plaintiff purchaser or seller in the chain of manufacture, production, or distribution who paid any overcharge or received any underpayment, passed on all or any part of such overcharge or underpayment to another purchaser or seller in such chain.

D. For the purposes of this section, "business or property" includes business or nonbusiness purchases and business and nonbusiness injuries.

HISTORY: Laws 1891, ch. 10, § 3; C.L. 1897, § 1294; Laws 1907, ch. 18, § 1; Code 1915, § 1687; C.S. 1929, § 35-2903; 1941 Comp., § 51-1103; 1953 Comp., § 49-1-3; Laws 1979, ch. 374, § 5.

NOTES:

STATUTORY NOTES

CROSS REFERENCES. --Definition, *57-1-1.2 NMSA 1978*.

Judgment in favor of state as prima facie evidence, *57-1-11 NMSA 1978*.

Limitations of actions, *57-1-12 NMSA 1978*.

Limitation on recovery of damages, *57-1-17 NMSA 1978*.

LEXSTAT N.Y. GEN. BUS. LAW 340

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*** THIS SECTION IS CURRENT THROUGH CH. 13, 03/26/2007 ***

GENERAL BUSINESS LAW
ARTICLE 22. MONOPOLIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Gen Bus § 340 (2007)

§ 340. Contracts or agreements for monopoly or in restraint of trade illegal and void

1. Every contract, agreement, arrangement or combination whereby A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

2. Subject to the exceptions hereinafter provided in this section, the provisions of this article shall apply to licensed insurers, licensed insurance agents, licensed insurance brokers, licensed independent adjusters and other persons and organizations subject to the provisions of the insurance law, to the extent not regulated by provisions of article [fig 1] twenty-three of the insurance law; and further provided, that nothing in this section shall apply to the marine insurances, including marine protection and indemnity insurance and marine reinsurance, exempted from the operation of article [fig 2] twenty-three of the insurance law.

3. The provisions of this article shall not apply to cooperative associations, corporate or otherwise, of farmers, gardeners, or dairymen, including live stock farmers and fruit growers, nor to contracts, agreements or arrangements made by such associations, nor to bona fide labor unions.

4. The labor of human beings shall not be deemed or held to be a commodity or article of commerce as such terms are used in this section and nothing herein contained shall be deemed to prohibit or restrict the right of workmen to combine in unions, organizations and associations, not organized for the purpose of profit.

5. An action to recover damages caused by a violation of this section must be commenced within four years after the cause of action has accrued. The state, or any political subdivision or public authority of the state, or any person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby, as well as costs not exceeding ten thousand dollars, and reasonable attorneys' fees. At or before the commencement of any civil action by a party other than the attorney-general for a violation of this section, notice

thereof shall be served upon the attorney-general. Where the aggrieved party is a political subdivision or public authority of the state, notice of intention to commence an action under this section must be served upon the attorney-general at least ten days prior to the commencement of such action. This section shall not apply to any action commenced prior to the effective date of this act.

6. In any action pursuant to this section, the fact that the state, or any political subdivision or public authority of the state, or any person who has sustained damages by reason of violation of this section has not dealt directly with the defendant shall not bar or otherwise limit recovery; provided, however, that in any action in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability, including but not limited to the transfer and consolidation of all related actions. In actions where both direct and indirect purchasers are involved, a defendant shall be entitled to prove as a partial or complete defense to a claim for damages that the illegal overcharge has been passed on to others who are themselves entitled to recover so as to avoid duplication of recovery of damages.

HISTORY: Add, L 1909, ch 25, eff Feb 17, 1909, amd, L 1935, ch 12, eff Jan 25, 1935.

Sub 1, amd, L 1957, ch 893, § 1, eff July 1, 1957.

Sub 2, add, L 1948, ch 502, eff July 1, 1948.

Former sub 2, renumbered, sub 3, L 1948, ch 502.

Sub 3, formerly sub 2, renumbered, L 1948, ch 502.

Former sub 3, renumbered, sub 4, L 1948, ch 502.

Sub 4, formerly sub 3, renumbered, L 1948, ch 502.

Sub 5, add, L 1957, ch 893, § 2, amd, L 1959, ch 226, L 1975, ch 333, eff July 1, 1975.

Sub 2, amd, L 1984, ch 805, § 23, eff Sept 1, 1984.

The 1984 act deleted at figs 1 and 2 "eight" Sub 6, add, L 1998, ch 653, § 1, eff Dec 23, 1998; amd, L 1999, ch 31, § 1, eff April 26, 1999.

NOTES:

New York References:

This section referred to in CLS Ins Law § 175; CLS *Trans Law* § 181

This section referred to in §§ 342-b, 342-c; CLS Ins Law § 175; CLS *Trans Law* § 142

Relief from operation of this section as to agreements between carriers approved by Commissioner of Transportation, CLS *Transp Law* § 181(7)

Federal References:

Contracts in restraint of trade or commerce, 15 *USCS* §§ 1 et seq

Charitable Donation Antitrust Immunity Act of 1997, *P.L.* 105-26

Research References & Practice Aids:

14 *NY Jur 2d*, *Business Relationships* § 18

18 *NY Jur 2d*, *Charities* § 86

24 *NY Jur 2d*, *Costs in Civil Actions* § 212

32A *NY Jur 2d*, *Criminal Law* § 1152

33 *NY Jur 2d*, *Criminal Law* § 1708

43 *NY Jur 2d*, *Declaratory Judgments and Agreed Case* § 165

53 *NY Jur 2d*, *Employment Relations* § 423

1 of 1 DOCUMENT

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*** CURRENT THROUGH THE 2006 SECOND SESSION AND THE NOVEMBER 2006 GENERAL ELECTION

*** ANNOTATIONS CURRENT THROUGH FEBRUARY 6, 2007 ***

CHAPTER 59. MONOPOLIES AND UNLAWFUL COMBINATIONS
ARTICLE 8. UNLAWFUL RESTRAINT OF TRADE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

R.R.S. Neb. § 59-821.01 (2007)

§ 59-821.01. Illegal overcharge or undercharge case

In an illegal overcharge or undercharge case in which claims are asserted by both parties who dealt directly with the defendant and parties who dealt indirectly with the defendant or any combination thereof:

(1) A defendant may prove, as a partial or complete defense to a claim for damages under sections 59-801 to 59-831 and this section, that the illegal overcharge or undercharge has been passed on to others who are themselves entitled to recover so as to avoid duplication of recovery of such damages; and

(2) The court may transfer and consolidate such claims, apportion damages, and delay disbursement of damages to avoid multiplicity of suits and duplication of recovery of damages and to obtain substantial fairness.

HISTORY: Laws 2002, LB 1278, § 11.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading.

CIVIL ANTITRUST AMENDMENTS

2006 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Lyle W. Hillyard

House Sponsor: Stephen H. Urquhart

LONG TITLE

General Description:

This bill gives consumers and others the right to obtain judicial relief for violations of the Utah Antitrust Act even though they have not dealt directly with the wrongdoer.

Highlighted Provisions:

This bill:

▶ provides that the attorney general and any person who is injured or threatened with injury in his business or property as a result of a violation of this act may bring an action under this act regardless of whether the person dealt directly or indirectly with the defendant;

▶ provides that a defendant is entitled to prove as a partial or complete defense to a claim for damages that the illegal overcharge has been passed on to others who are themselves entitled to recover so as to avoid duplication of recovery of damages;

▶ provides for rebuttable presumptions that allocate damages among injured plaintiffs who dealt directly or indirectly with the defendant;

▶ provides for notification to the attorney general of any private class action alleging a violation of the act; and

▶ authorizes cy pres distributions of damage and settlement awards in antitrust cases.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

30 AMENDS:

31 **76-10-918**, as last amended by Chapters 83 and 99, Laws of Utah 1991

32 **76-10-919**, as last amended by Chapter 13, Laws of Utah 1987

33

34 *Be it enacted by the Legislature of the state of Utah:*

35 Section 1. Section **76-10-918** is amended to read:

36 **76-10-918. Attorney general may bring action for injunctive relief, damages, or**
37 **civil penalty.**

38 (1) The attorney general may bring an action for appropriate injunctive relief, and for
39 damages or a civil penalty in the name of the state, any of its political subdivisions or agencies,
40 or as parens patriae on behalf of natural persons in this state, for a violation of this act. Actions
41 may be brought under this section regardless of whether the plaintiff dealt directly or indirectly
42 with the defendant. This remedy is an additional remedy to any other remedies provided by
43 law. It may not diminish or offset any other remedy.

44 (2) Any individual who violates this act is subject to a civil penalty of not more than
45 \$100,000 for each violation. Any person, other than an individual, who violates this act is
46 subject to a civil penalty of not more than \$500,000 for each violation.

47 Section 2. Section **76-10-919** is amended to read:

48 **76-10-919. Person may bring action for injunctive relief and damages -- Treble**
49 **damages -- Recovery of actual damages or civil penalty by state or political subdivisions**
50 **-- Immunity of political subdivisions from damages, costs, or attorney's fees.**

51 (1) (a) A person who is a citizen of this state or a resident of this state and who is
52 injured or is threatened with injury in his business or property by a violation of the Utah
53 Antitrust Act may bring an action for injunctive relief and damages[-], regardless of whether
54 the person dealt directly or indirectly with the defendant. This remedy is in addition to any
55 other remedies provided by law. It may not diminish or offset any other remedy.

56 (b) Subject to the provisions of Subsections (3), (4), and (5), the court shall award three
57 times the amount of damages sustained, plus the cost of suit and a reasonable attorney's fee, in

58 addition to granting any appropriate temporary, preliminary, or permanent injunctive relief.

59 (2) (a) If the court determines that a judgment in the amount of three times the
60 damages awarded plus attorney's fees and costs will directly cause the insolvency of the
61 defendant, the court shall reduce the amount of judgment to the highest sum that would not
62 cause the defendant's insolvency.

63 (b) The court may not reduce a judgment to an amount less than the amount of
64 damages sustained plus the costs of suit and a reasonable attorney's fee.

65 (3) The state or any of its political subdivisions may recover the actual damages it
66 sustains, or the civil penalty provided by the Utah Antitrust Act, in addition to injunctive relief,
67 costs of suit, and a reasonable attorney's fee.

68 (4) No damages, costs, or attorney's fee may be recovered under this section:

69 (a) from any political subdivision;

70 (b) from the official or employee of any political subdivision acting in an official
71 capacity; or

72 (c) against any person based on any official action directed by a political subdivision or
73 its official or employee acting in an official capacity.

74 (5) (a) Subsection (4) does not apply to cases filed before April 27, 1987, unless the
75 defendant establishes and the court determines that in light of all the circumstances, including
76 the posture of litigation and the availability of alternative relief, it would be inequitable not to
77 apply Subsection (4) to a pending case.

78 (b) In determining the application of Subsection (4), existence of a jury verdict, court
79 judgment, or any subsequent litigation is prima facie evidence that Subsection (4) is not
80 applicable.

81 (6) When a defendant has been sued in one or more actions by both direct and indirect
82 purchasers, whether in state court or federal court, a defendant shall be entitled to prove as a
83 partial or complete defense to a claim for damages that the damages incurred by the plaintiff or
84 plaintiffs have been passed on to others who are entitled to recover so as to avoid duplication
85 of recovery of damages. In an action by indirect purchases, any damages or settlement amounts

86 paid to direct purchases for the same alleged antitrust violations shall constitute a defense in
87 the amount paid on a claim by indirect purchases under this act so as to avoid duplication of
88 recovery of damages.

89 (7) It shall be presumed, in the absence of proof to the contrary, that the injured
90 persons who dealt directly with the defendant incurred at least 1/3 of the damages, and shall,
91 therefore, recover at least 1/3 of the awarded damages. It shall also be presumed, in the
92 absence of proof to the contrary, that the injured persons who dealt indirectly with the
93 defendant incurred at least 1/3 of the damages, and shall, therefore, recover at least 1/3 of the
94 awarded damages. The final 1/3 of the damages shall be awarded by the court to those injured
95 persons determined by the court as most likely to have absorbed the damages.

96 (8) There is a presumption, in the absence of proof to the contrary, that each level in a
97 product's or service's distribution chain passed on any and all increments in its cost due to an
98 increase in the cost of an ingredient or a component product or service that was caused by a
99 violation of this act. This amount will be presumed, in the absence of evidence to the contrary,
100 to be equal to the change in the cost, in dollars and cents, of the ingredient, component product,
101 or service to its first purchaser.

102 (9) The attorney general shall be notified by the plaintiff about the filing of any class
103 action involving antitrust violations that includes plaintiffs from this state. The attorney
104 general shall receive a copy of each filing from each plaintiff. The attorney general may, in his
105 or her discretion, intervene or file amicus briefs in the case, and may be heard on the question
106 of the fairness or appropriateness of any proposed settlement agreement.

107 (10) If, in a class action or parens patriae action filed under this act, including the
108 settlement of any action, it is not feasible to return any part of the recovery to the injured
109 plaintiffs, the court shall order the residual funds be applied to benefit the specific class of
110 injured plaintiffs, to improve antitrust enforcement generally by depositing the residual funds
111 into the Attorney General Litigation Fund created by Section 76-10-922, or both.

112 (11) In any action brought under this act, the court shall approve all attorney's fees and
113 arrangements for the payment of attorney's fees, including contingency fee agreements.

PROOF OF SERVICE

James Clayworth, et al. v. Pfizer, Inc., et al.
Alameda County Superior Court Case No. RG04172428
Court of Appeal, First Appellate District, Division Two, No. A116798

I, Tamara Slye, declare as follows:

I am a citizen of the United States, am over 18 years of age, and am not a party in the above-entitled action. I am employed in the City and County of San Francisco and my business address is 555 California Street, Suite 3160, San Francisco, CA 94104.

On September 3, 2008, I served the attached document described as:

PETITION FOR REVIEW

 x on the parties in the above-named case by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon and deposited said envelopes with the U.S. Postal Service, addressed as follows:

SEE ATTACHED SERVICE LIST

 x on the parties in the above-named case by LEXIS/NEXIS FILE AND SERVE transmission by transmitting a true and correct copy to Lexis/Nexis File and Serve service to be served to the parties on the ATTACHED SERVICE LIST by email.

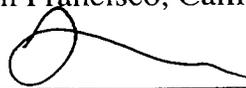
 x on the following recipient by placing a true copy thereof in a sealed envelope provided by an overnight delivery carrier and placed the envelope with the overnight delivery carrier to be delivered overnight to the following addresses:

Clerk of the Court
Alameda County Superior Court
1225 Fallon Street
Oakland, CA 94612

Clerk of the Court
California Court Of Appeal
First Appellate District - Div 2
350 McAllister Street
San Francisco, CA 94102

I, Tamara Slye, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 3, 2008, at San Francisco, California.



Tamara Slye

SERVICE LIST

Clayworth, et al. v. Pfizer, Inc., et al.;
Alameda Co. Superior Court Case No. RG04172428

Clayworth, Plaintiffs and Appellants v. Pfizer, Defendants and Respondents
In the Court of Appeal of the State of California
First Appellate District – Division Two – Case No. A116798

for Defendant **ABBOTT LABORATORIES**

Tyler M. Paetkau
Nicole P. Dogwill
WINSTON & STRAWN LLP
101 California Street, Suite 3900
San Francisco, CA 94111
Tel.: (415) 591-1000; Fax: (415) 591-1400
Email: tpaetkau@winston.com
Email: ndogwill@winston.com

Susan A. Pipal
James F. Hurst
Matthew J. Sullivan
WINSTON & STRAWN
35 W. Wacker Drive
Chicago, IL 60601
Tel.: (312) 558-6500; Fax: (312) 558-5700
Email: spipal@winston.com
Email: jhurst@winston.com
Email: msullivan@winston.com

for Defendant **ALLERGAN, INC.**

Jeffrey T. Thomas
James N. Knight
GIBSON, DUNN & CRUTCHER LLP
Jamboree Center, 4 Park Plaza, Suite 1400
Irvine, CA 92614-8557
Tel.: (949) 451-3800; Fax: (949) 451-4220
Email: jtthomas@gibsondunn.com
Email: jknight@gibsondunn.com

for Defendant **AMGEN, INC.**

Steven O. Kramer
John Nadolenco
MAYER BROWN ROWE & MAW LLP
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
Tel.: (213) 229-9500; Fax: (213) 625-0248
Email: skramer@mayerbrownrowe.com
Email: jnadolence@mayerbrownrowe.com

Donald M. Falk
MAYER BROWN ROWE & MAW LLP
2 Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112
Tel.: (650) 331-2000; Fax: (650) 331-2060
Email: dfalk@mayerbrownrowe.com

Joseph H. Young
Steven F. Barley
HOGAN & HARTSON LLP
111 South Calvert Street
Baltimore, MD 20201
Tel.: (410) 659-2724; Fax: (410) 539-6981
Email: jhyoung@hhlaw.com
Email: sfbarley@hhlaw.com

for Defendant **BOEHRINGER INGELHEIM
PHARMACEUTICALS, INC.**

Anita F. Stork
COVINGTON & BURLING
One Front Street
San Francisco, CA 94111
Tel.: (415) 591-6000; Fax: (415) 591-6091
Email: cabrown@cov.com

David L. Meyer
Thomas J. Cosgrove
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
Tel.: (202) 662-6000; Fax: (202) 662-6291
Email: dmeyer@cov.com
Email: tcosgrove@cov.com

for Defendant **ASTRAZENECA LP**

Arthur F. Golden
Amelia T.R. Starr
William J. Fenrich
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
Tel.: (212) 450-4000; Fax: (212) 450-3800
Email: agolden@dpw.com
Email: astarr@dpw.com
Email: wfenrich@dpw.com

Peter A. Strotz
William E. Steimle
FILICE BROWN EASSA & McLEOD LLP
1999 Harrison Street, 18th Floor
Oakland, CA 94612
Tel.: (510) 444-3131; Fax: (510) 839-7940
Email: pstrotz@filicebrown.com
Email: wsteimle@filicebrown.com

for Defendant **BRISTOL-MYERS SQUIBB COMPANY**

Paul J. Riehle
Matthew A. Fischer
SEDGWICK, DETERT, MORAN & ARNOLD LLP
One Market Plaza
Steuart Street Plaza, 8th Floor
San Francisco, CA 94105
Tel.: (415) 781-7900; Fax: (415) 781-2635
Email: paul.riehle@sdma.com
Email: matthew.fischer@sdma.com

Evan R. Chesler
Elizabeth L. Grayer
Jeffrey B. Korn
Marek P. Krzyzowski
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza, 825 Eighth Avenue
New York, NY 10019
Tel.: (212) 474-1000; Fax: (212) 474-3700
Email: echesler@cravath.com
Email: egrayer@cravath.com
Email: jkorn@cravath.com
Email: mkrzyzowski@cravath.com

for Defendant **ELI LILLY & COMPANY**

Gary Hansen, Esq.
OPPENHEIMER WOLFF & DONNELLY
Plaza VII, Suite 3300
45 South Seventh Street
Minneapolis, MN 55402-1609
Telephone: 612.607.7584
Facsimile: 612.607.7100
Email: ghansen@oppenheimer.com

Michele Floyd, Esq.
REED SMITH LLP
Two Embarcadero Center, Suite 2000
San Francisco, CA 94111
Telephone: 415.659.5934
Facsimile: 415.391.8269
Email: mfloyd@reedsmith.com

for Defendant **GLAXOSMITHKLINE**

George S. Cary
Sara D. Schotland
David I. Gelfand
Matthew Bachrack
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Tel.: (202) 974-1920; Fax: (202) 974-1999
Email: gcary@cgsh.com
Email: sschotland@cgsh.com
Email: dgelfand@cgsh.com
Email: mbachrack@cgsh.com

Alexander F. Wiles
John C. Keith
IRELL & MANELLA LLP
1800 Avenue of the Stars, Suite 900
Los Angeles, CA 90067-4276
Tel.: (310) 277-1010; Fax: (310) 203-7199
Email: awiles@irell.com
Email: jkeith@irell.com

for Defendant **HOFFMANN-LA ROCHE INC.**

H. Christian L'Orange
DRINKER BIDDLE & REATH LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105-2235
Tel.: (415) 591-7500; Fax: (415) 591-7510
Email: chris.lorange@dbr.com

Paul H. Saint-Antoine
Mary E. Kohart
David J. Antczak
Joanne C. Lewers
DRINKER BIDDLE & REATH LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996
Tel.: (215) 988-2700; Fax: (215) 988-2757
Email: paul.saint-antoine@dbr.com
Email: mary.kohart@dbr.com
Email: david.antczak@dbr.com
Email: joanne.lewers@dbr.com

for Defendants **JANSSEN PHARMACEUTICA, INC., JOHNSON & JOHNSON HEALTH CARE SYSTEMS, INC., ORTHO BIOTECH, INC., and ORTHO-McNEIL PHARMACEUTICAL, INC.**

Beatrice B. Nguyen
Cecilia C. Ogbu
FOLGER LEVIN & KAHN LLP
Embarcadero Center West
275 Battery Street, 23rd Floor
San Francisco, CA 94111
Tel.: (415) 986-2800; Fax: (415) 986-2827
Email: bnguyen@flk.com

William J. Cavanaugh, Jr.
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036
Tel.: (212) 336-2000; Fax: (212) 336-2222
Email: wfcavanaugh@pbwt.com

for Defendant **MERCK & CO., INC.**

John M. Townsend
Robert P. Reznick
Scott H. Christensen
HUGHES HUBBARD & REED LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401
Tel.: (202) 721-4600; Fax: (202) 721-4646
Email: townsend@hugheshubbard.com
Email: reznick@hugheshubbard.com
Email: christensen@hugheshubbard.com

Rita M. Haeusler
HUGHES HUBBARD & REED LLP
350 South Grand Avenue, 36th Floor
Los Angeles, CA 90071-3442
Tel.: (213) 613-2800; Fax: (213) 613-2950
Email: haeusler@hugheshubbard.com

for Defendant **NOVARTIS PHARMACEUTICALS CORP.**

Aton Arbisser
Bryant S. Delgadillo
KAYE SCHOLER LLP
1999 Avenue of the Stars, Suite 1700
Los Angeles, CA 90067-6048
Tel.: (310) 788-1000; Fax: (310) 788-1200
Email: aarbisser@kayescholer.com
Email: bdelgadillo@kayescholer.com

James A. O'Neal
FAEGRE & BENSON LLP
90 South Seventh Street
Minneapolis, MN 55402
Tel.: (612) 766-8420; Fax: (612) 766-1600
Email: joncal@faegre.com

Saul P. Morgenstern
Karin E. Garvey
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022-3598
Tel.: (212) 836-8000; Fax: (212) 836-8689

Kim J. Walker
FAEGRE & BENSON LLP
801 Grand Ave., Suite 3100
Des Moines, IA 50309-8002
Tel.: (515) 248-9002; Fax: (515) 248-9010
Email: kwalker@faegre.com

for Defendant **PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA (PhRMA)**

Charles H. Samel
Belinda S. Lee
Jennifer A. Carmassi
LATHAM & WATKINS LLP
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007
Tel.: (213) 485-1234; Fax: (213) 891-8763
Email: charles.samel@lw.com
Email: belinda.lee@lw.com
Email: jennifer.carmassi@lw.com

Margaret M. Zwisler
Steven H. Schulman
LATHAM & WATKINS LLP
555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Tel.: (202) 637-2200; Fax: (202) 637-2201
Email: Margaret.zwisler@lw.com
Email: steven.schulman@lw.com

for Defendant **PFIZER, INC.**

Peter J. Kadzik
Bernard Nash
Maria Cosley Heard
Milton Marquis
Andres Colón
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
1825 Eye Street, N.W.
Washington, D.C. 20006-5403
Tel.: (202) 420-2200; Fax: (202) 420-2201
Email: kadzik@dicksteinshapiro.com
Email: nashb@dicksteinshapiro.com
Email: heardm@dicksteinshapiro.com
Email: marquism@dicksteinshapiro.com
Email: colona@dicksteinshapiro.com

Katrina June Lee
Michael G. Thornton
NOSSAMAN, GUTHNER, KNOX & ELLIOTT LLP
50 California Street, 34th Floor
San Francisco, CA 94111-4799
Tel.: (415) 398-3600; Fax: (415) 398-2438
Email: klec@nossaman.com

for Defendant **WYETH**

Ronald C. Redcay
ARNOLD & PORTER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Tel.: (213) 243-4000; Fax: (213) 243-4199
Email: Ronald_Redcay@aporter.com

Douglas L. Wald
Daniel R. Waldman
Anne P. Davis
Ryan Z. Watts
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
Tel.: (202) 942-5000; Fax: (202) 942-5999
Email: Douglas_Wald@aporter.com
Email: Daniel_Waldman@aporter.com
Email: Anne_David@aporter.com
Email: Ryan_Watts@aporter.com