FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

THE WINDS OF CHANGE FOR U.S. MERGER ENFORCEMENT

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Antitrust merger control is an unusual legal field almost everywhere: merger investigations and decisions tend to depend on a lot of "soft" evidence about long-run competitive effects, and yet can produce highly visible and politically uncomfortable results. In the United States, which has the longest history of merger enforcement, the statutory standards are very general, and so the task of developing substantive merger law has largely fallen to generalist judges sitting on the Supreme Court and lower federal courts.

These judges have charted something of a zig-zag course. In the 1960s and early 1970s, the Supreme Court handed down an unbroken string of government victories in sometimes improbable cases based on novel market theories. The rule from *Philadelphia National Bank* (decided in 1963) and its progeny was that a merger which created substantial market shares in a not-too-carefully-defined market was almost conclusively presumed to be anticompetitive and hence illegal.[1] "The sole consistency that I can find is that in litigation under s. 7, the government always wins," lamented Justice Stewart in his celebrated 1966 *Von's Grocery* dissent.[2]

Finally, in a decision written by Justice Stewart in 1974, the Supreme Court said that the factfinder could go behind market shares in analyzing potential anticompetitive effects of a merger. In that case (*United States* v. *General Dynamics*), the court held that market shares based on past sales of coal mining companies were not dispositive because one of the merging parties did not have uncommitted coal reserves necessary to make future sales.[3] This was followed by two more losses for the government during the next twelve months,[4] causing it to lose its enthusiasm for taking appeals to the Supreme Court.

Meanwhile, the level of merger enforcement gradually fell off at both the Department of Justice and the Federal Trade Commission, hitting new lows in the mid-1980s. Fewer cases were brought, many were promptly settled, and in those that were tried, federal courts showed no particular tilt either for or against the government. Because the government agencies were so often on the sidelines during the Reagan years, many of the most important anti-merger victories of the 1980s were as a result of private suits by takeover targets.[5]

The Bush administration has revived more aggressive antitrust enforcement against mergers, but it now seems that this aggressive spirit may be out of touch with the philosophical inclinations of the more conservative judiciary that is the legacy of the Reagan era.

Although today's issues are not new, some of the answers may be. In essence, the key legal question remains whether a presumption of anticompetitive effect should be inferred from fairly high market shares in a defined market. The populist judges of the 1960s regularly held that the presumption was very strong and virtually irrebuttable. Therefore, most ensuing merger cases were litigated over the boundaries of whatever the government had hand-picked as the relevant proper market in which to calculate the high market shares it desired.[6] In the 27 years since *Philadelphia National Bank*, there has been a tidal change: today, high market shares still create a *prima facie* case for the government, but merger defendants have a full opportunity to rebut such a case by offering expert and fact testimony.

The question of entry has become a particularly critical background in today's changing antitrust

world. If the merging parties can show that entry is relatively easy, then high-market shares do not alone prove monopoly power or consumer harm. This is in fact the teaching of the Justice Department in its 1982 and 1984 Merger Guidelines,[7] but it is now being used against the department by appellate judges who accuse the government of a continuing obsession with market shares.

This new trend can be seen in two fascinating Court of Appeals decisions just handed down in Washington, D.C. and San Francisco. Both cases involved merging parties with very high market shares who used ease of entry as their main defense and won sweeping victories.

The first of these cases, decided by the Ninth Circuit Court of Appeal on May 9, 1990, involved the movie distribution industry – an industry which is familiar to most American antitrust lawyers because it was an unmatched source of antitrust jurisprudence back in the heyday of the movie house, half a century ago.[8] In *United States* v. *Syufy Enterprises*,[9] the Justice Department challenged three acquisitions in 1983-84 which gave the defendant control of all the first-run movie theatres in Las Vegas – Nevada's largest city and the gambling capital of the United States. This was too much even for the Reagan Administration's Justice Department and it sued to "undo" these acquisitions.

Alas, for the government, it was confronted with some unhelpful post-merger facts. First, Syufy's prices to consumers had not risen after the acquisitions, which forced the department to focus on the bidding for movies. Secondly, the movie producers – the alleged victims under this theory – provided testimony supporting the defendant.[10] Finally, right after attaining its apparent first-run monopoly, Syufy got into a dispute with a major studio (Orion), which then gave its first-run rights to another local theatre (Roberts). Roberts quickly expanded its number of screens and became a very active competitor of Syufy for first-run films from all studios.

Armed with this record, a distinguished district judge (who, incidentally, had been head of the Justice Department's Antitrust Division during its landmark merger case period, 1963-65) found that the government had failed to prove its case. The Court of Appeal not only affirmed, but poured scorn on the antitrust enforcers in the process. In a memorable passage, the majority said:

> It is a tribute to the state of competition in America that the Antitrust Division of the Department of Justice has found no worthier target than this paper tiger on which to expend limited taxpayer resources. Yet we cannot help but wonder whether bringing a lawsuit like this, and pursuing it doggedly through 27 months of pretrial proceedings, about two weeks of trial and now the full distance on appeal, really serves the interest of competition.[11]

The key legal issue in the case was entry. As a general matter, said the Court,

> [i]f there are no significant barriers to entry... eliminating competitors will not enable the survivors to earn a monopoly profit; any attempt to raise prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods or personal services for less.[12]

Relying heavily on the Orion-Roberts story, the Court of Appeals then stressed:

> [T]he record discloses a rough-and-tumble industry, marked by easy market access, fluid relationships with distributors, an ample and continuous supply of product, and a healthy and growing demand.... By finding that Syufy did not possess the power to set prices or to exclude competition, the district court removed the firing pins from the government's litigation arsenal.[13]

The second case, decided by the Court of Appeal for the District of Columbia Circuit on July 6, 1990, focused more precisely on entry standards. This case, *United States* v. *Baker Hughes Inc.*,[14] involved very high market shares (about 76% of the market) and, like *Syufy*, a district judge experienced in antitrust law, Gerhard Gesell, who had found for the defendants. To ordinary mortals, the market was less familiar than that of movies: it was defined as "hardrock hydraulic underground drilling rigs" (or HHUDR) used in drilling for off-shore oil. It was a market, as the district court had found, of few suppliers, sophisticated buyers, and competitive prices – a market in which entry was likely, especially if the newly merged firm tried to raise its prices.

In *Baker Hughes*, the government had appealed on the ground that the District Court had failed to articulate a sufficiently stringent standard in allowing the defendants to rebut the government's *prima facie* case based on market

shares. According to the government, "defendants can rebut a *prima facie* case only by a clear showing that entry into the market by competitors would be quick and effective."[15]

The Court of Appeals found "no merit" in this proposed legal standard,[16] explaining that it would put too great a burden on a defendant that could not be met unless the party "produces evidence regarding specific competitors and their plans."[17] Moreover, "[i]f barriers to entry are insignificant, the threat of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs."[18]

Having noted that the ultimate burden of persuasion rests with the government, the court stressed that:

> Imposing a heavy burden of production on a defendant would be particularly anomalous where, as here, it is easy to establish a *prima facie* case. The government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7. The Herfindahl-Hirschman [concentration] Index cannot guarantee litigation victories.[19]

Together, *Syufy* and *Baker Hughes* underscore the fact that in the more activist enforcement environment of the Bush administration, the government will still have to be prepared to prove some likelihood of anticompetitive effects flowing from a merger. As the *Baker Hughes* court stated, "evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness."[20] A persuasive entry story will trump concentration in many cases – and other non-market share factors, such as efficiencies, changing market conditions, and foreign competition, may be equally effective. This is the lesson of *Syufy* and *Baker Hughes*.

This emerging reality may cause federal merger enforcement to gravitate increasingly into the hands of the Federal Trade Commission (FTC).[21] Unlike the Justice Department, the FTC staff does not have to prove its cases before independent (and increasingly skeptical) federal trial judges.[22] Rather, the FTC Commissioners serve as finders of fact in merger cases, and on appeal the Commission's findings of fact will be affirmed by a Court of Appeal if supported by plausible evidence.[23] The Commission is likely to give stronger presumptive weight than a district judge to high market shares and to be more skeptical in dealing with a contentious entry defense. By contrast, the Justice Department can be expected to lose fairly often on these issues before district judges (as in *Syufy* and *Baker Hughes*) and then will have to decide whether to go to a Court of Appeal with a tactically more difficult position.

The glory days of *Philadelphia National Bank* and *Von's Grocery* are clearly long gone for the Department of Justice, as these recent Courts of Appeals' decisions make clear. The fact that they coincide with the retirement from the Supreme Court of Justice Brennan (the author of *Philadelphia National Bank* and a consistent supporter of the government in other merger cases) simply underscores that message.

Notes

1 *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363 (1963).

2 *U.S.* v. *Von's Grocery Co.*, 384 U.S. 270, 301 (1966).

3 *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974).

4 *United States* v. *Marine Bancorporation*, 418 U.S. 602 (1974) (potential competition); *United States* v. *Citizens & Southern Nat. Bank*, 422 U.S. 86 (1975) (unique case involving affiliated entities).

5 *See, e.g., Consolidated Gold Fields PLC* v. *Minorco, s.A.*, 698 F. Supp. 487 (S.D.N.Y. 1988), aff'd, 871 F.2d 252 (2d Cir. 1989), cert. dismissed, 110 S.Ct. 29 (1989); *Marathon Oil Co.* v. *Mobil Corp.*, 530 F. Supp. 315 (N.D. Ohio), aff'd, 669 F.2d 378 (6th Cir. 1981), cert. denied, 455 U.S. 982 (1982); *Grumman Corp.* v. *LTV Corp.*, 665 F.2d 10 (2d Cir. 1981).

6 Cf. Justice Fortas' scornful comment about the Supreme Court's approval of the government's "strange red-haired, bearded, one-eyed man-with-a-limp" market definition in a monopolization case based on high market shares. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 591 (1966).

7 U.S. Department of Justice, Merger Guidelines, s.3.3, reprinted in 4 *Trade Reg. Rep.* (*CCH*) 13,103 at 20,562 (1988) ("If entry into a market is so easy that existing competitors could not succeed in raising prices for any significant period of time, the Department is unlikely to challenge mergers in that market.").

8 *See Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30 (1930) (boycott); *United States* v. *First National Pictures*, 282 U.S. 44 (1930) (boycott); *Interstate Circuit* v. *United States*, 304 U.S. 55 (1938) (price fixing); *United States* v. *Crescent Amusement*, 323 U.S. 173 (1944) (conspiracy to monopolize); *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251 (1946) (damage methodology); *United States* v. *Griffith*, 334 U.S. 100 (buyer monopolization); *Schine Chain Theatre* v. *United States*, 334 U.S. 110 (1948) (same); *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948) (monopolization and conspiracy to monopolize); and *Theater Entreprises Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954) (conscious parallelism).

9 903 F.2d 659 (9th Cir. 1990).

10 *E.g.*, post-merger license fees paid by Syufy "were comparable or better than any place in the United States. And in most cases better." Testimony of MGM/UA Chief Distribution Executive quoted at 903 F.2d at 669.

11 903 F.2d at 672.

12 903 F.2d at 664.

13 903 F.2d at 667, 671.

14 1990-1 Trade Cas. (CCH) 69,084 (D.C. Cir. 1990)

15 *Id.* at 63,974.

16 *Id.*

17 *Id.* at 63,978.

18 *Id.*

19 *Id.* at 63,981.

20 *Id.* at 63,975.

21 Under the *Hart-Scott-Rodino Act*, a proposed merger of adequate size is notified to both the Justice Department and the Federal Trade Commission. The agencies then agree among themselves on which agency will handle any investigation of a notified merger.

22 Where the FTC seeks a preliminary injunction to block a merger, it has to go into U.S. District Court. On the other hand, when it is suing to undo or eliminate a consummated merger, the proceeding is an administrative one carried out before an Administrative Law Judge with appeal to the Commission.

23 *See, e.g., Hospital Corp. of America* v. *FTC*, 807 F.2d 1381 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987).

INTERNATIONAL COMPETITION LAW

The following articles are taken from "Update", a newsletter published by the International Bar Association's Business Law Section (Committee on Antitrust and International Trade Law).

AUSTRALIA

Trade Practices

Australia and New Zealand recently took their most significant step towards closer economic relations since the *Memorandum of Understanding on Harmonization of Business Laws* was signed in July 1988 with the Australian government introducing the *Trade Practices* (Misuse of Market Power) *Bill 1990* and similar legislation being introduced in New Zealand.

The legislation inserts a new provision dealing with misuse of market power which provides that Australian corporations with a substantial degree of power in a market in Australia, New Zealand or Australia and New Zealand are prohibited from using that power for the purpose of eliminating or substantially damaging a competitor in any market in Australia (other than a market for services), preventing market entry into any market in Australia (other than a market for services), or deterring or preventing a person from engaging in competitive conduct in any such market.

The *Act* also extends the investigatory powers of the Australian Trade Practices Commission by empowering the Commission, in the investigation of claims of misuse of market power coming within the new provision to serve notices on persons in New Zealand requiring the production of relevant documents and provision of relevant information. Reciprocal provision is made for the provision of information and documents by Australians to the New Zealand Commerce Commission.

DENMARK

Danish Act on Competition – Recent Developments

For many years, prices in Denmark on tobacco products have been fixed, but this will now change. Council decided in a meeting on May 9, 1990 to withdraw permission for the tobacco industry to operate with fixed prices for consumers. The tobacco industry, which in Denmark is dominated 99% by one company, had argued that fixed prices contributed to maintaining a large net of retailers which should be to the benefit of the consumers. The Competition Council was of the opinion that fixed prices were restricting competition and was to the benefit of inefficient distribution systems. By free price competition more efficient retailers can use lower costs to lower their prices and obtain competitive advantages.

The change will take place January 1, 1991, and due to the EEC legislation, the cigarettes will still be labelled with a maximum price.

The decision by the Competition Council is in line with the purpose of the new *Competition Act*, and the chairman of the Competition Council, Professor Erik Gørtz, has, in an article, stated with reference to s.6 of the *Act* that the purpose is to strengthen the efficiency of business by furthering competition, and this will take place first of all by creating transparency in competition matters.

It has created some disturbance in the business community as publication of information which entails increasing competition can have a negative influence on businesses. According to Professor Gørtz, this is the essence of the *Act*, and the information concerned will only be specified information which will be easily available to any well-managed business.

EUROPEAN COMMUNITIES
Period: Apr 1, 1990 - Jun 30, 1990

Trademark License

The Commission has declared that a non-challenge clause in an exclusive trademark license agreement does not restrict competition in as far as the licensee may not challenge the licensor's ownership of the trademark. If, however, the licensee may not challenge the validity of the trademark, this may constitute a restriction of competition in case the use of a well known trademark would be an important competitive advantage.

Merger Control

The Commission held that the proposed acquisition by Siemens of a controlling interest in Nixdorf does not call for intervention under the EC competition rules. Although both companies will increase their market shares considerably, the merger does not create or strengthen a dominant position in the EC because of a number of other major competitors in and outside the EC. This merger is one of the first being examined in the light of the criteria of the Merger Control Regulation, which will enter into force on September 21, 1990.

FRANCE

Third Annual Report of Conseil de la Concurrence

On June 6, 1990, the Conseil de la Concurrence made public its report for 1989. According to the report, the action of the Conseil in 1989 has been characterized by the three following features:

- the extension of its scope of investigation to new sectors of activities, such as press, information, and audio-visual;
- a more in-depth analysis of antitrust practices in public tenders in two important cases relating to road works and electric maintenance;
- the imposition of fines for an amount of more than 350 million French Francs: 167 million in the road works case and 128 in the electric maintenance case.

The Conseil, however, specifies that the increase in the amount of fines should not be interpreted as the result of an increased severity, but rather as a consequence of the large number

of companies involved in these two cases, the large size of certain of these companies, and the number of public tenders in which violations were committed.

Vertical Restraints

In a judgment of June 7, 1990, on antitrust practices between the main manufacturers of sport shoes and their distributors, the Court of Appeals of Paris confirmed implicitly its now classic position about vertical restraints: a manufacturer may be condemned for antitrust violations realized through its contracts with distributors, even though the distributors have not been brought in the case.

Confirmation of a 20 Million French Francs Fine by the Court of Appeals of Paris

In a judgment dated May 21, 1990, the Court of Appeals of Paris confirmed the fine imposed on November 28, 1989, by the Conseil de la Concurrence on a company named France Loisirs for abuse of dominant position in the market of books sold by clubs.

The Court of Appeal considered that 20 million French Francs was justified by the market share of France Loisirs, its turnover, the size of a large group of companies to which it belongs, and the seriousness of the practices which were aiming at eliminating any form of competition in the market.

JAPAN

On June 20, 1990, the Japanese Fair Trade Commission (JFTC) decided to bring criminal charges against a company for violations of the *Anti-Monopoly Law* and refer the case to the Public Prosecutor's Office.

This action by the JFTC is regarded in part as a result of the Structural Impediment Initiative currently being negotiated by the United States Trade Representatives and the Japanese Government. In the past, the JFTC has long adopted the policy that the cease and desist order and the penalties for violations of the Japanese Anti-Monopoly Laws have provided sufficient sanctions against such violators.

Joint boycotts (refusal to deal), joint tender offers, agreements of territorial allocation, curtailment of quantities of supply and price fixing shall be regarded as typical illegal acts under the Japanese *Anti-Monopoly Law*, which will have a substantial impact on the life of the nation.

It is pointed out that in order to effectuate this change in the JFTC's policy, the JFTC will be required to improve its capabilities for investigation of these cases and to strengthen its investigative staff. At the same time, it is essential to improve the capability of the Public Prosecutor's Office to handle this sort of economic criminal case.

NEW ZEALAND

Major Changes to Competition Law

The *Commerce Act 1986* has been significantly amended by the *Commerce Amendment Act 1990*, enacted on June 29, 1990. The amendments form part of the further development of the Australia and New Zealand Closer Economic Relations Trade Agreement (CER). The major changes are as follows:

- With effect from July 1, 1990, anti-dumping relief is removed in respect of goods having the requisite level of Australian origin. These measures have been duplicated in Australia.
- With effect from January 1, 1991, the wholesale repeal of New Zealand's compulsory pre-merger notification regime and its replacement with a "strike down" system modelled on s.50 of the *Trade Practices Act* (Australia). In the Bill as introduced, it was proposed simply to fine tune the existing notification regime. The move to the strike down system emerged from deliberations of the Select Committee of Parliament and was endorsed by the government as a significant harmonization gesture in the context of CER. Under the new strike down system, it will be unlawful to enter into a "business acquisition", the effect of which is that any person (not being limited to the acquiring party) will acquire or strengthen dominance in any market for goods and services in New Zealand. Provision is made to apply to the Commerce Commission

for a prior clearance or authorization which will prevent contravention. (For other changes, see Australian report.)

Development of CER

As indicated, these changes to New Zealand's competition law have been introduced as part of the ongoing development of CER. Other measures implemented on July 1, 1990, have seen the total removal of formal entry barriers on trans-Tasman trade and are designed to support and enhance the single market between Australia and New Zealand. The two countries have now embarked on the so-called secondary stage of CER, the ultimate outcome of which may lead to a degree of co-operation falling short only of full economic or political union.

Notable are the measures designed to facilitate recourse to the courts on competition matters. Statutory amendments in each country have provided for the New Zealand High Court to sit in Australia, and the Australian Federal Court to sit in New Zealand, on trans-Tasman competition cases, with attendant recognition, and reciprocal enforcement, of judgments.

SPAIN

Cinema Distribution Companies Fall Under Competition Law

The Competition Defence Court has made a proposal to the Council of Ministers for the imposition of a fine of 164 million pesetas to several Cinema Distribution Companies, and an additional fine of 12 million pesetas to their associated companies.

The cause of this resolution is that Cinema Distribution Companies used to impose a "close lot" of films as the sole obligated way of acquiring the films. This is considered by the Court as an abuse of dominant position.

The main reason for this resolution is that the films distributed by these companies obtained between 80% and 100% of the total revenue of the Spanish cinema market, and the film exhibitors were almost unable to negotiate any other leasing contracting system other than accepting the "close lot" of films imposed by the distributors.

According to the court, the imposition of "close lots" of films of limited interest, as the only possible way of acceding to really good commercial movies, constitutes an abuse of dominant position.

UNITED KINGDOM

Mergers

The Monopolies and Mergers Commission (MMC) reported in May that the proposed acquisition by Kingfisher of Dixons Group should not be permitted as it may be expected to operate against the public interest. The MMC concluded that the acquisition would significantly reduce the overall amount and intensity of competition in electrical retailing and would lead to higher prices which would not be outbalanced by any probable benefit to customers.

Monopolies

Visa, one of the parties involved in the recent MMC investigation of the credit card industry, failed in judicial review proceedings against the MMC, the Secretary of State, and the OFT following the Secretary of State's announcement that he accepted the MMC's findings. Visa objected to the interpretation placed by the MMC on the definition of "complex monopoly" in the *Fair Trading Act* 1973. The term means that a group of persons who together supply more than 25% of a given market (even if they are competitors) and conduct their affairs in a similar way (even if they do not collude) so as to prevent, restrict, or distort competition (even if that is not a distortion for the worse) can be regarded as a monopoly. This definition is used by the MMC as a jurisdictional test which, if satisfied, enables them to go on to see if any particular industry is operating against the public interest. In this case, Visa did not actually provide credit card services and objected to having been included by the MMC in the group forming the complex monopoly. The MMC took the view that, although the *Fair Trading Act* does not actually say that all members of the group forming the complex monopoly have to supply reference goods or services, on a "purposive interpretation" that is what it means.

UNITED STATES

The United States Supreme Court Recently Addressed Antitrust Issues in Three Significant Opinions

In *California* v. *American Stores Co.*, 58 LW 4529 (April 30, 1990), the Supreme Court unanimously held that a private plaintiff could obtain injunctive relief in the form of divestiture for violations of s.7 of the *Clayton Act*. The State of California filed a complaint alleging that the acquisition of Lucky Stores, the largest supermarket chain in the state, by American Stores Co., the fourth largest supermarket chain, violated s.1 of the *Sherman Act* and s.7 of the *Clayton Act*. Justice Stevens, on behalf of the Court, rejected American's argument that s.16 of the *Clayton Act* is ambiguous as to whether a divestiture remedy is permitted private plaintiffs and noted that both the literal test of s.16 and the legislative history behind it supported authorizing injunctive relief, including an order of divestiture. The court stressed, however, that a private litigant must prove threatened loss or damage to his own interests in order to have standing for any s.7 action.

In another unanimous decision, the Supreme Court in *Texaco Inc.* v. *Ricky Hasbrouck*, 58 LW 4807 (June 14, 1990) held that Texaco Inc. violated federal antitrust laws by selling gasoline at its retail tank wagon prices to independent Texaco retailers while simultaneously granting substantial discounts to distributors. The court upheld a federal appeals court ruling that Texaco's pricing policy amounted to price discrimination in violation of s.2(a) of the *Clayton Act* (the *Robinson Patman Act*). Texaco claimed that its "functional discounts"— i.e., discounts that are given to a purchaser based on its role in the supplier's distributive system and which generally reflect services performed by the purchaser for the supplier — did not adversely affect competition within the meaning of the *Act*. Although the court agreed that functional discounts that reflect services performed do not violate the *Act*, it found Texaco had not produced substantial evidence indicating that the discounts in question constituted a reasonable reimbursement for the value to Texaco of the distributors' actual marketing functions.

In a 5-4 decision in *Kansas and Missouri* v. *Utilicorp*, 1990 U.S. Lexis 3293 (June 21, 1990), the Supreme Court reaffirmed its long-standing bar against antitrust suits for price-fixing overcharges by anyone other than direct purchasers (the so-called "Illinois Brick" rule). The court held that when suppliers violate the antitrust laws and overcharge industrial customers, and the industrial customer passes on the overcharge to ultimate customers, only the industrial customer has a cause of action under s.4 of the *Clayton Act* because it alone has suffered the requisite injury. The court rejected the argument that s.4C of the *Hart-Scott-Rodino Antitrust Improvements Act* of 1976 authorizes states to sue on behalf of consumers even though the consumers, as indirect purchasers, have no cause of action of their own.