No. S166435

IN THE

Supreme Court of the State of California

JAMES CLAYWORTH, *et al.*,

Petitioners,

v.

PFIZER, INC., *et al.*,

Respondents.

On Review of the Court of Appeal
First Appellate District
Case No. A116798

PETITIONERS' OPENING BRIEF ON THE MERITS

JOSEPH M. ALIOTO (STATE BAR NO. 42680)
JOSEPH M. ALIOTO, JR. (STATE BAR NO. 215544)
THERESA D. MOORE (STATE BAR NO. 99978)
ANGELINA ALIOTO-GRACE (STATE BAR NO. 206899)
THOMAS P. PIER (STATE BAR NO. 235740)
ALIOTO LAW FIRM
555 CALIFORNIA STREET
THIRTY-FIRST FLOOR
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE: (415) 434-8900

Counsel for Plaintiffs and Petitioners, James Clayworth, et al.

(Additional counsel listed inside cover)

No. S166435

IN THE

Supreme Court of the State of California

JAMES CLAYWORTH., *et al.*,

Petitioners,

v.

PFIZER, INC., *et al.*,

Respondents.

On Review of the Court of Appeal
First Appellate District
Case No. A116798

PETITIONERS' OPENING BRIEF ON THE MERITS

JOSEPH M. ALIOTO (STATE BAR NO. 42680)
JOSEPH M. ALIOTO, JR. (STATE BAR NO. 215544)
THERESA D. MOORE (STATE BAR NO. 99978)
ANGELINA ALIOTO-GRACE (STATE BAR NO. 206899)
THOMAS P. PIER (STATE BAR NO. 235740)
ALIOTO LAW FIRM
555 CALIFORNIA STREET
THIRTY-FIRST FLOOR
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE: (415) 434-8900

Counsel for Plaintiffs and Petitioners, James Clayworth, et al.

(Additional counsel listed inside cover)

JOHN H. BOONE (STATE BAR NO. 44876)
LAW OFFICES OF JOHN H. BOONE
555 CALIFORNIA STREET, SUITE 3160
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE: (415) 434-1133

RUSSELL F. BRASSO (STATE BAR NO. 85417)
FOREMAN & BRASSO
930 MONTGOMERY STREET, SUITE 600
SAN FRANCISCO, CALIFORNIA 94133
TELEPHONE: (415) 433-3475

JAMES M. DOMBROSKI (STATE BAR NO. 56898)
LAW OFFICES OF JAMES M. DOMBROSKI
POST OFFICE BOX 751027
PETALUMA, CALIFORNIA 94975
TELEPHONE: (707) 762-7807

JEFFERY K. PERKINS (STATE BAR NO. 57996)
LAW OFFICES OF JEFFERY K. PERKINS
1275 COLUMBUS AVENUE
SAN FRANCISCO, CALIFORNIA 94133
TELEPHONE: (415) 474-3833

GARY D. MCCALLISTER (*pro hac vice)*
THOMAS A. KELLIHER (*pro hac vice)*
ERIC I. UNREIN (*pro hac vice)*
GARY D. MCCALLISTER & ASSOCIATES
120 NORTH LASALLE ST., STE. 2800
CHICAGO, ILLINOIS 60602
TELEPHONE: (312) 346-0611

Counsel for Plaintiffs and Petitioners, James Clayworth, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES (CALIFORNIA AND FEDERAL)

STATUTES (OUT OF STATE)

VOTER INITIATIVES

LEGISLATIVE HISTORY

OTHER AUTHORITIES

QUESTIONS PRESENTED

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.

STATEMENT OF THE CASE

A. Nature Of The Case and Jurisdictional Statement

In 2005 Petitioners James Clayworth, *et al.* ("Pharmacies") brought this action against Respondents Pfizer, Inc., *et al.* ("Drug Manufacturers") for conspiring to fix the prices of brand-name pharmaceuticals in violation of the Cartwright Act (Bus. & Prof. Code § 16720, *et seq.*) and the Unfair Competition Law (Bus. & Prof. Code § 17200, *et seq.*) ("UCL"). Pharmacies contend they suffered injury when forced to pay artificially-high prices for Drug Manufacturers' brand-name pharmaceuticals. Pharmacies alleged that Drug Manufacturers agreed between themselves to sell drugs in California and the United States at prices that are 50% to 400% higher than prices for the exact same drugs sold outside the United States. In their Third Amended Complaint,

Pharmacies prayed for damages in the amount of the overcharge, trebled under the law, as well as restitution and injunctive relief under the UCL.

The Drug Manufacturers answered the complaint and asserted the affirmative "pass-on defense" to all claims. Pharmacies filed a motion for summary adjudication seeking to strike the pass-on defenses as unrecognized under California law, relying principally on the rationale used by the United States Supreme Court in *Hanover Shoe v. United Shoe Machinery Corp.* (1968) 392 U.S. 408 (*Hanover Shoe*). Claiming that neither *Hanover Shoe* nor its principles were recognized in California, the Drug Manufacturers cross-moved for summary judgment, asserting that, since Pharmacies passed-on the conspiratorial overcharges by increasing prices to their own customers, they suffered no injury.

The Superior Court granted Drug Manufacturers' cross-motion and denied plaintiffs' motion in December, 2006. (Volume XI Clerk's Transcript ("CT") at pp. 2614-2640.) The Superior Court entered final judgment on January 4, 2007. (XI CT pp. 2643.)

The Court of Appeal, First District ("First District") affirmed summary judgment for Drug Manufacturers on July 25, 2008 (*Clayworth v. Pfizer* (2008) 165 Cal.App.4th 209 (*Clayworth*), which became final on August 24, 2008.

Pharmacies timely filed a petition for rehearing on various grounds. Among other things, Pharmacies objected to the First District's analysis of the so-called "cost plus contract

exception" to *Hanover Shoe*. A cost-plus contract is one in which the customer "is committed to buying a fixed quantity regardless of price." (*Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720, 736 (*Illinois Brick*).) Because none of Pharmacies customers purchased drugs on this basis, the cost-plus contract exception does not apply in this case, and the Drug Manufacturers did not argue it below. Because the issue was neither briefed nor proposed by any party, and formed no basis of the trial court's summary judgment ruling, the First District analysis mandated rehearing. (Code Civ. Proc. § 437c(m)(2); Gov. Code § 68081.) Pharmacies also petitioned for rehearing on the basis that the First District omitted material facts.

Pharmacies' petition for rehearing was denied on August 19, 2008. (*Clayworth v. Pfizer* (2008) 2008 Cal.App.Lexis 1325.) However, in light of it, the First District modified its opinion on August 19, 2008 (*ibid.*), and struck the section pertaining to the cost-plus contract exception. Various stray remarks still remain in the decision. (*Clayworth, supra*, 165 Cal.App.4th at pp. 223, 234.) Nevertheless, the cost-plus contract exception is not at issue in this appeal.

This Court granted Pharmacies' timely petition for review on September 3, 2008.

B. Factual Background

The pharmaceutical industry is one of the most profitable in the world. (I CT p. 12.) The sale of brand-name pharmaceuticals in the United States accounts for 50% of the Drug Manufacturers' worldwide revenues. (I CT p. 13.)

Beginning at least as early as 2001, the Drug Manufacturers agreed among themselves to artificially increase the prices of drugs sold in the United States, which are sold at rates 50% to 400% higher than the prices of the same drugs sold abroad. (I CT p. 4.) Drug Manufacturers have acted in concert to protect their conspiracy by preventing less-expensive variations of their drugs from coming into the market and eroding their conspiracy rates. (I CT p. 3.) Thus, they have restricted generic drug competition (I CT p. 3), and have punished wholesalers and retailers who threatened to disrupt the conspiratorial prices by importing drugs into the United States. (I CT p. 15.)

For purposes of this appeal, the above facts are deemed true, and the Drug Manufacturers are presumed guilty of fixing-prices in violation of the law. (*Clayworth, supra,* 165 Cal.App.4th at p. 218, n.6.)

Drug Manufacturers' prices were set at artificially-high prices that included an "overcharge," that is, the difference between the conspiratorial price and the price Pharmacies would have paid in a competitive market. (*Clayworth, supra,* 165 Cal.App.4th at p. 217.)

Defendants sell their drugs to wholesalers at a price referred to as the Wholesale Acquisition Cost ("WAC"). (*Clayworth, supra*, 165 Cal.App.4th at p. 217.) The wholesalers resell the drugs to the Pharmacies at prices using a formula mathematically tied to the WAC, called the Average Wholesale Price ("AWP"). (*Ibid.*) As a result, when the defendants increase their prices, the prices paid by the plaintiffs increase by the same percentage amount. (*Ibid.*) So, plaintiffs pay the full amount of the overcharge, which they seek in damages. (*Ibid.*)

Plaintiffs in turn sell their drugs to two types of customers: (1) insured customers, who are covered by third-party insurance and government drug plans, and (2) uninsured or "cash-paying" customers. (*Clayworth, supra*, 165 Cal.App.4th at p. 217.) The majority of Pharmacies' customers are insured by third-party payers. (*Ibid.*)

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. (*Clayworth, supra*, 165 Cal.App.4th at p. 217.) However, the formulas used to calculate the Pharmacies' reimbursements are flexible and change over time as market conditions fluctuate.[1] In some cases, the reimbursement formulas are negotiable.[2]

---

[1] Petition for Rehearing, filed August 11, 2008 ("Pet. Reh.") at pp. 9-10; VII CT 1553; VI CT 1613; VIII CT 1826.

Prices charged to cash-paying customers are set according to price-lists maintained by the Pharmacies. (*Clayworth, supra*, 165 Cal.App.4th at p. 217.) Pharmacies often use AWP as a reference when formulating these price-lists. (*Ibid.*) However, Pharmacies maintain full discretion over prices charged to cash-paying customers and can charge whatever they want.[3] Although the majority of Pharmacies' customers are insured, this has not always been the case. The percentage of cash-paying customers was substantially higher before the overcharge was implemented, and in some cases constituted 75% or 90% of the Pharmacies' business.[4] 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.[5] Thus, prior to the implementation of the overcharge, Pharmacies had full discretion over the prices they charged to a vast majority of their customers.

Because the majority of Pharmacies' customers are covered by insurance, they pay only a small co-payment which

---

[2] Pet. Reh. at p. 10; VI CT 1524-26.

[3] Pet. Reh. at p. 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.

[4] Pet. Reh. at pp. 8-9; VIII CT 1847; V CT 1098; V CT 1039-40; VIII CT 1813; IV CT 962; VII CT 1532.

[5] Pet. Reh. at p. 8; VIII CT 1847.

does not fluctuate with the rising cost of drugs.[6] They therefore may not have adequate incentive or damages to file suit.

As a result, other than the Pharmacies, no other plaintiff has sued to redress the violations here.

C. The Opinion Below

The First District concluded that *Hanover Shoe* is not the law in California. (*Clayworth, supra*, 165 Cal.App.4th at p. 244.) It held, "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.'" (*Id.* at p. 228.)

Construing what it considered the plain meaning of the statute, the First District held that Section 16750's phrase "damages sustained" means "actual financial loss suffered," which, it held, precludes recovery of plaintiffs that have passed-on the overcharge. It also determined that various policies, as well as the legislative history of the Cartwright Act, did not mandate rejection of the defense. (*Id.* at pp. 242, 244.)

The court also dismissed Pharmacies' claims under the Unfair Competition Law. (*Clayworth, supra*, 165 Cal.App.4th at p. 244.) It held Pharmacies lacked standing because "they

---

[6] Pet. Reh. at p. 14; VII CT 1670-71; VII CT 1722; VIII CT 1783; VIII CT 1911 (Dep. p. 175:18-23).

had not 'lost money or property'." (*Id.* at pp. 244, 247.) It likewise held that Pharmacies were not entitled to restitution or injunctive relief because they did not have an "ownership interest" in the money they used to purchase the price-fixed drugs. (*Id.* at p. 247, and p. 247, n. 18.)

STANDARD OF REVIEW

The questions presented concern the statutory interpretation of Section 16750 of the Cartwright Act and Sections 17203 and 17204 of the UCL. The Supreme Court independently determines the proper interpretation of a statute. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.)

SUMMARY OF ARGUMENT

The pass-on defense has been asserted in situations where the defendants are proven to have fixed prices in violation of the antitrust laws. Manufacturers asserting the defense attempt to claim that retailer plaintiffs, having been forced to pay illegally-high prices, have passed-on the overcharge to their own customers in the form of higher retail prices. Having passed the overcharge on, a simplified version of the defense would posit, the retailers have suffered no injury. But, overcharged plaintiffs suffer injury, even if they pass-on the overcharge. And, allowing the defense runs counter to the very purposes of any antitrust scheme.

1. The Cartwright Act must be read as rejecting the pass-on defense.

a. For over forty years, the pass-on defense has been forbidden in the federal courts. The United States Supreme Court first proscribed the defense in *Hanover Shoe*. It held that a plaintiff suffers injury at the moment it pays an unlawful price, and it is irrelevant if he subsequently increases the price to his own customers. Moreover, by injecting burdensome discovery requirements on litigants, the defense will encumber antitrust enforcement and thwart the law's purpose. And, if the defense is applied to the only plaintiff poised to redress the violation, wrongdoers will escape liability and punishment with their ill-gotten gains intact.

b. The pass-on defense attempts to prove that the plaintiff suffered no injury. But, it has been the law of this State for nearly a century, as it has been in the federal courts, that a plaintiff suffers injury the *moment* it is overcharged and its damages are the amount of overcharge, recoverable as soon as it is illegally exacted, without regard to later events. Moreover, a pass-on plaintiff suffers injury – even where it passes on 100% of the overcharge and suffers no lost sales – because it lost the opportunity to increase its own prices had the overcharge never been implemented.

c. The Cartwright Act was created to promote unfettered competition, punish those who illegally restrain trade, deter future misconduct, and disgorge the violators of

the fruits of their misdeed. The pass-on defense, however, runs directly counter to these express purposes. It condones illegal restraints of trade, rewards a windfall to violators, grants a perverse incentive to break the law, and discourages vigorous enforcement by private plaintiffs. Any interpretation of the Cartwright Act must be accomplished with the law's purpose in mind. Yet, in construing the Act below, the First District's holding flouts these purposes. Its wooden interpretation of a cherry-picked two-word phrase cannot withstand scrutiny and must be reversed.

d. The legislative history of the Cartwright Act demonstrates the Legislature's intent to reject the pass-on defense. The dissenting opinion in *Illinois Brick* offers sound reasoning to reject the pass-on defense. This Court has held that the Legislature incorporated many of the views of the *Illinois Brick* dissent when it amended the Cartwright Act in 1978, and those incorporations demonstrate the Legislature's desire to reject the pass-on defense.

Moreover, in 1977, the Legislature adopted certain provisions of the federal law which ameliorate the threat of multiple liability that can result in legal schemes that refuse to recognize the pass-on defense. By specifically codifying these provisions into California law, the Legislature intended that the pass-on defense would not be available in this State.

Finally, in 1968, when *Hanover Shoe* was issued, the state of the law viewed federal interpretations of the Sherman Act with great deference. It was for that reason that the

Legislature acted so decisively in "repealing" *Illinois Brick*. Yet, it did nothing to stop *Hanover Shoe* from being incorporated into the law.

e. All eleven states that have considered the pass-on defense have rejected it. No state in this nation allows the defense. By virtue of the decision here challenged, California has become the *only* state in the nation to allow a guilty defendant to assert the defense to completely escape liability.

2. The purposes of the Unfair Competition Law, like the Cartwright Act, include the promotion of competition, disgorgement, and deterrence. Any construction of the law must be accomplished to serve, rather than thwart, these purposes.

a. An overcharged plaintiff has standing under the UCL, even if it has passed-on the overcharge. It suffers "injury in fact" the moment it purchases a price-fixed product, and it has "lost money" under the statute because the money used to purchase the price-fixed product belonged to the plaintiff when it was illegally exacted.

b. An overcharged plaintiff maintains an "ownership interest" in the money expended as the result of an act of unfair competition, even if it resells the defendant's product. In short, if the money used to pay the overcharge is the plaintiff's own money, its illegal extraction demands restitution.

For all these reasons, the First District's flawed interpretation of these vital competition laws should be

reversed, and the pass-on defense must be rejected as a matter of law.

ARGUMENT

I. THE PASS-ON DEFENSE IN CARTWRIGHT ACT CLAIMS MUST BE REJECTED IN THIS STATE

A. The Legal Background Prohibiting The Pass-On Defense

The pass-on defense has been prohibited in the federal courts for over 40 years. It was first rejected by the United States Supreme Court in *Hanover Shoe, supra*, 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 shoe making machinery. United was found liable, and 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 pp. 487-488.) The Supreme Court rejected the defense, and held that Hanover proved injury and the amount of damages as soon as it showed it had been overcharged:

> We 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.

(*Id.* at p. 489.) The fact that Hanover may have passed the overcharge on to its own customers in the form of higher prices was held irrelevant as a matter of law:

> 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.

(*Ibid.*)

The Supreme Court gave three reasons in support of its holding. First, relying on early rail transportation overcharge cases, the Court held that an overcharged plaintiff suffers injury the moment it pays an illegally high price. In those cases, the possibility that plaintiffs had recouped the overcharges from their customers was held irrelevant in assessing damages:

> The general tendency of the law, in regard to damages at least, is not to go beyond the first step. ... The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events.

(*Hanover Shoe, supra*, 392 U.S. at pp. 489-490 and p. 490, n. 8.)

Second, the pass-on defense was rejected because the complex proof involved in the defense would serve to thwart vitally important private enforcement of the antitrust laws. In arriving at this conclusion, the Court concluded that a plaintiff may suffer injury, even where it has passed-on 100% of the overcharge and suffered no lost sales or profits. It explained that just because "[plaintiff's] price rise followed [defendant's] unlawful price increase does not show that the sufferer of the cost increase was undamaged." (*Hanover Shoe, supra*, 392 U.S. at p. 493, n. 9.) Since the customer was willing to pay an increased price, and the plaintiff could have increased its prices absent the overcharge, "the fact that [plaintiff] was earlier not enjoying the benefits of the higher price should not permit the [defendant] who charges an unlawful price to take those benefits from [plaintiff] without being liable for damages." (*Ibid.*) Thus,

> 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 p. 493, italics added.) The "nearly insuperable difficulty" of a defendant proving what the plaintiff *would* have charged but for the conspiracy was deemed "virtually unascertainable," and "the task would normally prove insurmountable." (*Ibid.*)

Yet, if the defense were allowed, "antitrust defendants will frequently seek to establish its applicability," and treble damage actions "would often require additional long and complicated proceedings involving massive evidence and complicated theories." (*Hanover Shoe, supra*, 392 U.S. at p. 493.) As a result of this burdensome invasion, enforcement of the antitrust laws would be thwarted.

The First District's confusion of this point is vital and reflects a fundamental misunderstanding of *Hanover Shoe*. The "nearly insuperable difficulties" warned of is *not* the difficulty of "establishing the amount of overcharge passed on," as the First District thought. (*Clayworth, supra*, 165 Cal.App.4th at p. 223.) And, its finding that such difficulties are "not apparent in the record before us," is premised on that erroneous reading. (*Id.* at p. 226.) The discovery problem *Hanover Shoe* warned of is *not* the tracing of the overcharge through the distribution chain, but the "insurmountable" task of defendant's proof that the plaintiff could not have increased its prices had the overcharge never been implemented.

Third, the Supreme Court supported its holding by relying on the policy against allowing guilty defendants to escape liability with their ill-gotten profits. If the defense is

asserted against the only plaintiff poised to redress the violation, "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them." (*Hanover Shoe, supra*, 392 U.S. at p. 494.) "Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." (*Ibid.*)

The rule proscribing the pass-on defense was reaffirmed in *Illinois Brick, supra*, 431 U.S. 720, 745-746. *Illinois Brick* was the flip-side of *Hanover Shoe*. Whereas the *Hanover Shoe* case dealt with pass-on as a defense, *Illinois Brick* concerned so-called "offensive pass-on" – the claim by plaintiffs that, since overcharges were passed through to them, they had standing to sue. In that case, Illinois Brick Company and other manufacturers sold bricks to masonry contractors, who submitted bids to general contractors for public building projects which in turn were sold to the State of Illinois. Illinois, an indirect purchaser of the bricks, brought suit against the brick manufacturers alleging $3 million in damages arising from overcharges resulting from the brick manufacturers' price-fixing conspiracy.

The *Illinois Brick* Court rejected the plaintiff's standing argument 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." (*Illinois Brick, supra*, 431 U.S. at p. 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 in *Illinois Brick*, with which Justices Marshall and Blackmun joined, 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." (*Illinois Brick*, 431 U.S. at p. 749, dis. opn. of Brennan, J.) It attacked both of the majority's theories, first rejecting the multiple liability argument because "as a practical matter, existing procedural mechanisms can eliminate this danger in most circumstances." (*Id.* at p. 761.) It also rejected the majority's primary argument that "offensive" and "defensive" pass-on should be treated equally.

Despite that argument's "superficial appeal," the dissent correctly noted that because of the different interests at stake in "defensive" and "offensive" pass-on, there are "sound reasons for treating [them] differently." (*Illinois Brick, supra*, 431 U.S. at p. 753, dis. opn. of Brennan, J.) The dissent explained:

> The interests at stake in "offensive" passing-on cases ... are simply not the same as the interests at stake in the *Hanover Shoe*, or "defensive" passing-on situation. There 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.

(*Ibid.*) It therefore concluded:

> *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.

(*Ibid.*)

The year following *Illinois Brick*, the California Legislature passed the so-called "Illinois Brick repealer," amending the Cartwright Act to guarantee that any injured person may sue, "regardless of whether such injured person dealt directly or indirectly with the defendant." (Stats. 1978, ch. 536, § 1, p. 1693.)

Later, in *Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15, 21-24 (*Union Carbide*), this Court would conclude that many of the views expressed by the *Illinois Brick* dissent reflected the Legislature's intent when it amended the Cartwright Act in 1978.

B. The Pass-On Defense Is Unsustainable Because A Plaintiff Suffers Injury The Moment It Purchases A Price-Fixed Product, Even If It Passes-On 100% Of The Overcharge And Suffers No Lost Sales

Just as described in *Hanover Shoe*, the law in California cannot recognize the pass-on defense because a plaintiff

suffers injury the moment it purchases a price-fixed product. The amount of the plaintiff's damage is the amount of the overcharge exacted. And, even if a plaintiff passes-on 100% of the overcharge and suffers no lost sales or profits, it has *still* suffered compensable injury.

First, at its core, the pass-on defense is premised on a showing that the plaintiff has suffered no injury. But, under the law in California, as in the federal courts, a plaintiff suffers compensable injury the moment it purchases a price-fixed product at an inflated rate set by conspiracy.

"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." (*B.W.I. Custom Kitchens v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1350, italics in original.) A similar holding comes from *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1234-1235, a case arising out of the sufficiency of the plaintiff's complaint: "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 ...." 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 Assoc. v. California Dental Hygienists' Assoc.* (1990) 222 Cal.App.3d 49, 61; *In re Cipro Cases I & II* (2004) 121 Cal.App.4th 402, 413.)

This principle has also been applied by this Court in other areas of the law. In *California Adjustment Co. v. Atchison, Topeka and Santa Fe Ry. Co.* (1918) 179 Cal. 140 (*California Adjustment*), a railroad overcharge case, this Court held that once an overcharge has been exacted, "the transaction fixes conclusively the liability of the [defendant] ... as soon as it occurred," and the measure of damages is the overcharge:

> When a charge has been paid to a [defendant] ... the transaction fixes conclusively the liability of the [defendant], [and] the transaction itself furnishes the measure of damage which the [plaintiff] suffered as soon as it occurred ....

(*Id.* at p. 145, bracketed text added.)

The *Hanover Shoe* Court relied on the same principle, which likewise had its foundation in the railroad overcharge cases, as quoted in the previous section. (*Hanover Shoe, supra*, 392 U.S. at p. 490, n. 8, *quoting*, *Southern Pacific Co. v. Darnell-Taezner Lumber Co.* (1918) 245 U.S. 531, 533-534 ("The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events.").)

Second, as *California Adjustment* also teaches, the amount of damages in an overcharge case is the overcharge: "the transaction itself furnishes the measure of damage which the [plaintiff] suffered as soon as it occurred." (*California*

Adjustment, supra, 179 Cal. at p. 145.) This conclusion finds further support in one of the First District's own citations, the Judicial Council of California Civil Jury Instructions on damages in Cartwright Act cases. (*Clayworth, supra*, 165 Cal.App.4th at p. 230.) The instruction states in part, "[t]he following are the specific items of damages claimed by [*name of plaintiff*]: [¶] 1. ... [¶] 2. [An increase in [*name of plaintiff*]'s expenses] ...." (CACI No. 3440, brackets and italics in original.) Because the overcharge increased Pharmacies' expenses in the amount of the overcharge, it is rightly claimed as an item of damage.

Third, not only is a plaintiff injured at the moment it purchases the price-fixed product, that injury persists even if the plaintiff passes-on 100% of the overcharge and suffers no lost sales. This was the central holding in *Kansas v. UtiliCorp United, Inc.* (1990) 497 U.S. 199 (*UtiliCorp*). In *UtiliCorp*, a group of utilities brought suit against natural gas pipelines for fixing the price of gas. The State of Kansas also brought suit against the same defendants *parens patriae*, alleging that the utilities passed on 100% of the overcharges to the citizens of Kansas. In fact, because the utilities were regulated, they were required to file tariffs with the state agencies, and Kansas alleged it could identify the amount of passed-on overcharge down to the dollar. (*Id.* at 205.) Thus, they asserted, the citizens of Kansas – and not the utilities – suffered the requisite injury. The Supreme Court disagreed,

holding that the utilities suffered injury and damages even though they passed on 100% of the overcharge. (*Id.* at 209.)

In analyzing whether a party has suffered injury, the *UtiliCorp* Court concluded that "[a]n overcharge may injure a [plaintiff], apart from the question of lost business, even if the [plaintiff] raises its rates to offset its increased costs." (*UtiliCorp, supra*, 497 U.S. at p. 209.) Quoting *Hanover Shoe*, the Court in *UtiliCorp* explained:

> 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 businessmen 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.

(*Ibid., quoting, Hanover Shoe, supra*, 392 U.S. at p. 493, n.9.)

The Supreme Court went on to say, "[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 p. 209.) But, the Drug Manufacturers in this case have made no attempt to offer such proof, and the First District declined to address the issue. Thus, even assuming, *arguendo*, that the pass-on

defense exists in California, the Drug Manufacturers have failed to successfully assert it; they have not and cannot show that Pharmacies would not have been able to raise their rates in the absence of the overcharge and kept the excess profit for themselves.

In fact, the record in this case demonstrates that the Pharmacies could have increased their prices had the overcharge never been implemented, and that they suffered injury when the Drug Manufacturers took that benefit from them. For instance, Pharmacies have complete discretion over prices charged to their cash-paying customers. (VIII CT p. 1919 (Depo. p. 248); IV CT p. 902; VI CT p. 1345; VII CT p. 1597; VIII CT p. 1965; VIII CT pp. 1842-1844.) The percentage of cash-paying customers was substantially higher before the overcharge was implemented, in some cases making up 75% or 90% of the Pharmacies' business. (VIII CT p. 1847; V CT p. 1098; V CT pp. 1039-1040; VIII CT p. 1813; IV CT p. 962; VII CT p. 1532.) Absent the overcharge, they would have been able to raise prices at their own discretion to a substantially larger portion of their customer base and kept the excess.

With respect to Pharmacies' insured customers, Drug Manufacturers may claim it is easy to prove Pharmacies could not have increased their prices because strict mathematical formulas are used for their reimbursement. But, that was the same failed argument in *UtiliCorp*, where Kansas asserted that state regulations and filed tariffs made it easy to show

the utilities could not have increased their prices absent the conspiracy. "[Kansas] assume[s] that the presence of state regulation would make the proof less difficult here. We disagree. The state regulation does not simplify the problem but instead imports an additional level of complexity." (*UtiliCorp, supra*, 497 U.S. at p. 209.) The Court explained:

> To decide whether a utility has borne an overcharge, a court would have to consider not only the extent to which market conditions would have allowed the utility to raise its rates prior to the overcharge, as in the case of an unregulated business, but also what the state regulators would have allowed. In particular, to decide that an overcharge did not injure a utility, a court would have to determine that the State's regulatory schemes would have barred any rate increase except for the amount reflected by cost increases. Proof of this complex preliminary issue, one irrelevant to the liability of the defendant, would proceed on a case-by-case basis and would turn upon the intricacies of state law.

(*UtiliCorp, supra*, 497 U.S. at pp. 209-210.)

The record shows that the formulas used to calculate Pharmacies' reimbursements are flexible and change over time. (VII CT p. 1553; VI CT p. 1613; VIII CT p. 1826.) They are sometimes negotiable. (VI CT pp. 1524-1526.) It would be a practical impossibility for the defendants here, as it was in *UtiliCorp*, to prove that the formulas would have remained precisely the same in the absence of the conspiracy.

In sum, an antitrust plaintiff suffers injury in the amount of the overcharge as soon as it is exacted. This is so even where the plaintiff passes on 100% of the overcharge, and suffers no lost sales or profits. Because the pass-on defense is an affirmative defense, in order to prevail, a defendant must demonstrate that the plaintiff suffered no injury. Yet, Drug Manufacturers have made *no attempt* to show the Pharmacies could not have increased their prices in the absence of the overcharge, so their defense must fail, even if recognized.

C. In Order To Effectuate The Purposes Of The Cartwright Act, It Must Be Interpreted As Prohibiting The Pass-On Defense

1. The Cardinal Rule In Construing The Cartwright Act Is To Effectuate Its Purposes, Which Mandate Rejection Of The Pass-On Defense

The goals of the Cartwright Act include the punishment of wrongdoers and the promotion of free competition, as written directly into the Act:

> 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., p. 984, italics added.) In addition to these goals, this Court has held that "disgorgement and

deterrence" are also purposes of the Act. (*California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472 (*Levi Strauss*).)

However, by interpreting the Cartwright Act as permitting the pass-on defense, the First District has flouted these purposes. Rather than punish the wrongdoers, the pass-on defense rewards them with their illegally-obtained profits. Rather than promote free competition, it allows a perverse incentive for unlawfully restricting it. Rather than disgorge the defendants, it grants them a windfall. Rather than deter illicit behavior, it invites further violations of the law. The ruling below thereby violates a cardinal rule of statutory interpretation. "In construing a statute, our role is limited to ascertaining the Legislature's intent so as to effectuate the purpose of the law. [Citations.]" (*Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1271.)

The pass-on defense thwarts these goals in a number of ways. First, as *Hanover Shoe* warned, it injects massive evidence into antitrust trials. Not only would a defendant need to prove the overcharge was passed-on, and that the plaintiff suffered no lost sales or profits, but the defendant would also be required to prove that the plaintiff could not have increased its prices had the overcharge never been implemented. This proof, irrelevant to the defendant's liability, would amount to what *Hanover Shoe* called a "nearly insuperable difficulty" that would "normally prove insurmountable," and a defendant's assertion of it would "require additional long and complicated proceedings involving

massive evidence and complicated theories." (*Hanover Shoe, supra*, 392 U.S. at p. 493.)

As briefly indicated above, the First District profoundly confused this point, erroneously 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 p. 223.) It concluded that "[t]he proof problems present in *Hanover Shoe* are not apparent in the record here" (*ibid.*), and that the advent of the computer and electronically-maintained data would alleviate this problem. (*Id.* at p. 233.) The magnitude of the First District's misunderstanding cannot be overstated. Tracing the amount of overcharge is *not* the difficulty *Hanover Shoe* warned of. Determining the amount of overcharge passed-on may be a matter of simple discovery in some cases. But, whether, on the other hand, the plaintiff could have increased its prices in the absence of the overcharge is a proof that *no* defendant, and *no* computer, could easily make, if at all.

Moreover, even the evidence tracing the overcharge can be an overwhelming burden, as it was in this case. As a result of the decisions below, the Superior Court in this case has awarded the Drug Manufacturers a cost award in the amount of *$1.2 million*, the vast majority of which was spent collecting evidence tracing the overcharge.

Not only will the pass-on defense thus deter enforcement generally, it will chill enforcement actions that have been encouraged by the Legislature specifically. When it amended

the Cartwright Act in 1978, the Legislature invited claims by plaintiffs regardless of whether they "dealt *directly* or indirectly with the defendant." (Stats. 1978, ch. 536, §1, p. 1693, italics added.) But, the pass-on defense will deter actions brought by direct purchasers, who almost invariably resell the defendant's products. In *Union Carbide, supra*, 36 Cal.3d 15, 21, this Court took care to avoid an interpretation of the law "that would thwart the legislative intent, expressed in the 1978 amendment." Because the pass-on defense would effectively eliminate suits brought by direct purchasers, it runs directly contrary to Legislative intent.

The Drug Manufacturers all but admitted this eventuality, arguing before the trial court that chilling direct purchaser suits made no difference, since "[d]irect purchasers don't bring suits in California. They sue under the federal statute." (Reporter's Transcript on Appeal, at p. 112.) But, that cavalier response belies the express intent of the 1978 amendment, and it says nothing about intermediate purchasers, whose suits are barred in federal court under *Illinois Brick* and which would be discouraged if not barred as a practical matter in California.

The First District attacked these arguments by concluding that the defense's impact on the incentive to file suit would be none. (*Clayworth, supra*, 165 Cal.App.4th at p. 243.) It determined that "those with damages have incentive indeed" in the form of the Cartwright Act's treble-damage, pre-judgment interest, attorneys' fees and cost awards. (*Ibid.*)

But, that argument is well wide of the mark. Even "those with damages" will be deterred from filing suit if they will be forced to confront the enormous cost and complexity involved in the defendant's attempt to prove the defense.

The First District also made the astonishing suggestion that it makes no difference whether private enforcement is chilled, because the Attorney General can still bring cases *parens patriae*. (*Clayworth, supra*, 165 Cal.App.4th at p. 243.) But, that ignores the important enforcement role played by private parties. As this Court has held, "giving private parties treble-damage and injunctive remedies was not [intended] merely to provide private relief, but ... to serve as well the high purpose of enforcing the antitrust laws." (*Cianci v. Superior Court* (1985) 40 Cal. 3d 903, 913, brackets in original.)

Second, in addition to chilling enforcement, the pass-on defense would thwart the purpose of the Cartwright Act by granting a windfall profit to defendants for violating the law. The Cartwright Act's goals of punishing and disgorging violators (Stats. 1907, ch. 530, tit., p. 984; *Levi Strauss, supra*, 41 Cal.3d at p. 472) are hardly served by rewarding defendants for their misdeeds.

In lieu of the Cartwright Act's goals and without legal authority, the First District instead substituted its own policy judgments. First, it relied on "the principle which calls for equal treatment of claims and defenses," which the First District termed "the golden rule." (*Clayworth, supra*, 165

Cal.App.4th at p. 242.) It supported this "principle" with an irrelevant civil code section relating to attorneys fees[7], as well as a citation to *Illinois Brick* – claiming it was "fundamental" to the holding in that case. (*Ibid.*) But, the Legislature specifically denounced *Illinois Brick* when it amended the Cartwright Act in 1978. (*Union Carbide, supra*, 36 Cal.3d at p. 24.) And, in any event, *Illinois Brick* never relied on a "golden rule." It treated offensive and defensive pass-on equally in order to avoid the threat of multiple liability. (*Illinois Brick, supra*, 431 U.S. at p. 730.) But, as this Court has held, California decided to deal with the threat of multiple liability in alternative ways, in particular, through procedural mechanisms like joinder, interpleader, and the statute of limitations. (*Union Carbide, supra*, 36 Cal.3d at p. 24)

Dismissing the "equal treatment" argument for its merely "superficial appeal," the *Illinois Brick* dissent concluded there were "sound reasons" for treating offensive and defensive pass-on cases differently, explaining that "[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." (*Illinois Brick, supra*, 431 U.S. at p. 753, dis. opn. of Brennan, J.) Offensive pass-on simply allows another plaintiff group to join

---

[7] Civil Code section 1717 says nothing about treating claims and defenses equally. (*Clayworth, supra*, 165 Cal.App.4th at p. 242.)

an existing lawsuit, or it allows that plaintiff to redress an antitrust violation that would otherwise go unprosecuted. Both are consistent with Legislative intent and the Cartwright Act's goals. Defensive pass-on, on the other hand, allows a guilty out-of-state defendant to flee liability with its illicit profits, which runs afoul of the fundamental purpose of any antitrust jurisprudence.

There are other examples in the law where offensive and defensive theories are treated differently because of the distinct interests at stake in each. For instance, defensive collateral estoppel is available to any defendant against a plaintiff which has previously litigated and lost the same issue against a different defendant. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 829.) Offensive collateral estoppel, on the other hand, is not immediately available to plaintiffs because "a particular danger of injustice arises when collateral estoppel is invoked [offensively]. [Citations.]" (*Id.* at p. 829.) Thus, the plaintiff must meet various requirements before it is permitted to assert offensive collateral estoppel. (*Ibid.*; *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 329 (discussing the "several reasons ... why the two situations should be treated differently.").)

In short, there is no such thing as the "golden rule," and there is no sound reason why offensive and defensive pass-on situations should be treated equally.

The First District also elevated the policy disfavoring windfall plaintiff damages over punishment, deterrence and

disgorgement of the wrongdoer, ignoring the fact these goals were legislatively expressed. As the dissent in *Illinois Brick* correctly concluded:

> [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 p. 760, dis. opn. of Brennan, J.)

Yet, in its obstinate determination to prevent granting the Pharmacies a windfall, the First District has instead given the windfall to the guilty defendants. It hinged this decision on a statement from *Bruno v. Superior Court* (1981) 127 Cal.App.3d 120, 132 (*Bruno*), that "although compensation is the primary rationale for the allowance of private antitrust lawsuits, the prevention and punishment of anti-competitive acts is a not insignificant purpose of antitrust laws." Seizing on the word "primary" and isolating compensation over any other goal of the Cartwright Act, the First District's reasoning concluded that compensation was the *only* goal of the Cartwright Act, and since Pharmacies passed-on the overcharge, there is nothing left to compensate. (*Clayworth, supra*, 165 Cal.App.4th at p. 243.)

Even *Bruno* would have rejected this conclusion. That court specifically discarded three federal cases because they "base their holdings on the theory that the *only* goal of private antitrust actions is compensation of injured individuals." (*Bruno, supra*, 127 Cal.App.3d at pp. 131-132, italics added.) The First District is guilty of the same error. It considered compensation the only goal of the Cartwright Act and ignored the goals of "prevention and punishment of anti-competitive acts." (*Ibid.*)

But, even assuming, *arguendo*, that the overcharged plaintiff's recovery were a windfall, California tolerates such awards where doing so serves important public policies.

One such example is the collateral source rule, which prevents defendants from offsetting damages by proving the plaintiff has been reimbursed by a third party. (*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. Buckman* (1963) 214 Cal.App.2d 206, 214.) So it is with the pass-on defense.

Another example where plaintiffs are justified in receiving a recovery greater than their injury is found in application of fluid recovery in the Cartwright Act itself. In *Bruno, supra*, 127 Cal.App.3d at pp. 132-133, the Court of Appeal explained that opponents of fluid recovery argue that "no damages can be recovered unless they are to be distributed

only to those who suffered injury and *only* in the amount that each person was injured." (*Ibid.*, italics in original.) *Bruno* disagreed, holding:

> The antitrust laws, however, exhibit no requirement for such precision in compensation. If damages are distributed so as to substantially compensate the injured class members who have recovered the damages, and especially if that distribution serves to deter violations and disgorge illegal profits, the letter and spirit of the antitrust laws will have been obeyed.

(*Ibid.*)

Hanover Shoe and the dissent in *Illinois Brick* stated the right rule: "Where the choice is between a windfall to intermediaries or letting guilty defendants go free, liability is imposed." (*Illinois Brick, supra*, 431 U.S. at p. 762, dis. opn. of Brennan, J., *quoting*, *Hanover Shoe, supra*, 392 U.S. at p. 494.)

Thus, in order to effectuate the spirit of the law, the Cartwright Act tolerates windfalls where doing so acts to disgorge guilty defendants and deter future violations.

In sum, the proper construction of the Cartwright Act must reject the pass-on defense so as to promote, rather than frustrate, the policies and purposes underlying the law.

2. The Language Of The Statute Does Not Permit A Reading That Allows The Pass-On Defense

By Drug Manufacturers' own admission, "[t]he decision below turns almost exclusively on the meaning of the words 'damages sustained' in Section 16750 ...." (Answer to Petition for Review at p. 7.) In relying almost exclusively on its interpretation of the phrase "damages sustained," the First District violated the rules of statutory construction, failing at every turn to consider the law's inherent purpose.

To begin with, the First District interpreted the wrong language. Section 16750 states, in part:

> 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 therefore ... and to recover three times the damages sustained by him or her ....

(Bus. & Prof. Code § 16750(a).) The pass-on defense seeks to prove the plaintiff suffered no injury. But, rather than interpret the section's reference to "any person who is injured," it instead interpreted the phrase "damages sustained."

Second, in interpreting the statutory language as permitting the pass-on defense, the First District ignored the Act's underlying objectives. "As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's

purpose." (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Even if the First District's interpretation of the phrase "damages sustained" is correct, that construction is subservient to the "spirit of the act." "Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.]" (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

Rather than interpreting the statute in a manner that serves the law's purpose, the First District applied a wooden analysis that belied the statute's goals. Conceding the term "damages sustained" "is not defined in the Cartwright Act" (*Clayworth, supra*, 165 Cal.App.4th at p. 238), the First District supported its holding by cobbling together a motley collection of irrelevant cases and statutes to conclude that "damages sustained" means "actual financial loss suffered." (*Id.* at pp. 230-231.) The authorities it relied on, however, even if they do construe the language as the First District claimed, do not compel the ultimate conclusion.

It first cited dicta from two early Cartwright Act cases, *Krigbaum v. Sbarbaro* (1913) 23 Cal.App. 427 (*Krigbaum*) and *Overland P. Co. v. Union L. Co.* (1922) 57 Cal.App. 366 (*Overland*). (*Clayworth, supra*, 165 Cal.App.4th at p. 229.) But, while the First District claimed that these authorities "hold the phrase ["damages sustained"] refers to actual financial loss suffered" (*Clayworth, supra*, 165 Cal.App.4th at

p. 228), the truth is, they *held* nothing close to that, and the First District even admitted that "[i]t is true that *Krigbaum* and *Overland* did not expressly construe 'damages sustained.'" (*Clayworth, supra*, 165 Cal.App.4th at p. 231.)

The lower court's misuse of these early cases is also revealed by what amounts to a simple linguistic misunderstanding. Quoting *Krigbaum*, and seizing on its use of the words "actual damages," the First District concluded that "[f]or our purposes, the court recognized that recovery was only available for the damages the plaintiff *actually* suffered ...." (*Clayworth, supra*, 165 Cal.App.4th at p. 229.) But, *Krigbaum*'s use of the word "actual" simply differentiated between damages found by the jury ("actual") and damages statutorily awarded (trebled). This use of "actual" is nothing more than common nomenclature utilized by antitrust jurisprudence for over a century. (*Connolly v. Union Sewer Pipe Co.* (1902) 184 U.S. 540, 543 ("treble the amount of the actual damages sustained ...."); *Hawaii v. Standard Oil Co.* (1972) 405 U.S. 251, 265 ("actual rather than treble damages ....") In fact, the phrase "actual damages" occurs in Section 16750 itself, which awards successful plaintiffs "interest on his or her actual damages ...." (Bus. & Prof. Code § 16750(a).) The obvious context of the word is that the award of pre-judgment interest is calculated on the damages *before* trebling.

The lower court also relied on cases outside the antitrust context which, according to the court, prove that "damages sustained" means "actual financial loss suffered." (*Clayworth,*

supra, 165 Cal.App.4th at pp. 230-231.) But, the use of "damages sustained" by these sources does not *mandate* the pass-on defense. The United States Supreme Court has, for over a century, interpreted the phrase "damages sustained" to also mean "actual financial loss." (*E.g.*, *Local 20, Teamsters Union v. Morton* (1964) 377 U.S. 252, 260, n.15 ("damages by him sustained" means "actual, compensatory damages."); *Howard v. Stillwell & Bierce Mfg. Co.* (1891) 139 U.S. 199, 209 ("such damages as from the evidence they may believe it has sustained" means "only the actual damages."); *Beckwith v. Bean* (1879) 98 U.S. 266, 276 ("It is equally well settled that ... the jury should restrict damages to compensation or satisfaction for the actual injuries sustained."); (*Birdsall v. Coolidge* (1876) 93 U.S. 64 ("Damages are given as a compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant.").)

These cases are the federal mirror of the cases cited by the First District, all using or interpreting "damages sustained" in precisely the same way as the cases cited by the First District. Yet, these constructions – all United States Supreme Court cases pre-dating *Hanover Shoe* – had no impact on the *Hanover Shoe* Court's decision to reject the pass-on defense. That is because the availability of the pass-on defense hinges on the purposes driving the Cartwright Act, and not on a wooden reading that thwarts those purposes.

Third, the First District also erred by concluding the statutory language was so unambiguous as to compel only one

construction. But, the language of the Cartwright Act is operatively identical to Section 4 of the Sherman Act. (Compare, 15 U.S.C. § 15 with Bus. & Prof. Code § 16750.) And whereas here, the First District construed the statute as allowing the pass-on defense, the *Hanover Shoe* Court construed the same language as prohibiting the defense. (*Hanover Shoe, supra*, 392 U.S. at pp. 488-489.) "A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable." (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.3th 763, 776.) The language cannot therefore be considered "unambiguous" and extrinsic sources, including the "objects to be achieved" and the "evils to be remedied" by the statute must be considered. "If ... the language is susceptible to more than one reasonable interpretation, then we look to extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, [and] public policy ...." (*Hoechst Celanese Corp. v. Franchise Tax Board* (2001) 25 Cal.4th 508, 519.)

In response, the First District claimed *Hanover Shoe* was not based on statutory construction. (*Clayworth,* supra, 165 Cal.App.4th at p. 232.) That is not correct. "[T]he issue before the Court in [*Illinois Brick*] and in *Hanover Shoe* was strictly a question of statutory interpretation – what was the proper construction of §4 of the Clayton Act." (*California v. ARC America Corp.* (1989) 490 U.S. 93, 102-103.) It further argued that "nowhere does [*Hanover Shoe*] analyze the phrase 'damages sustained.'" (*Clayworth, supra*, 165 Cal.App.4th at p.

232.) But, that merely reveals how narrow the First District's analysis was. Rather than interpret the law with respect to its overriding purpose, the First District limited its analysis to a cherry-picked two-word phrase from the statute. The courts "do not, however, consider the statutory language 'in isolation.'" (*People v. Murphy, supra*, 25 Cal.4th at p. 142.) That is because "[t]he meaning of a statute may not be determined from a single word or sentence; the words must be construed in context ... [citation]" (*People v. King* (1993) 5 Cal.4th 59, 69), "keeping in mind the nature and obvious purpose of the statute .... [Citation.]" (*People v. Murphy, supra*, 25 Cal.4th at p. 142.)

In sum, the Cartwright Act was created for the purpose of punishing antitrust defendants, promoting free competition, disgorging ill-gotten profits, and deterring illegal behavior. In determining whether to permit the pass-on defense, the statute must be interpreted in obedience to these purposes. If the statute is read to permit a pass-on defense, not only will the purposes of the law go un-served, they will be perversely thwarted.

D. The Legislative History Of The Cartwright Act Demonstrates An Intent To Reject The Pass-On Defense

In addition to the foregoing reasons why the pass-on defense must be rejected, the California Legislature has, on

various occasions, indicated its intent to specifically adopt *Hanover Shoe*.

First, in *Union Carbide, supra*, 36 Cal.3d at pp. 20, 21, 22, 24, this Court determined that the Legislature incorporated various views from the dissent in *Illinois Brick* when it amended the Cartwright Act in 1978. The dissenting views incorporated by the Legislature demonstrate that it intended to reject the pass-on defense.

In *Union Carbide*, end consumers of industrial gases brought suit against the manufacturers for price-fixing. In a parallel action in federal court, the direct purchasers of the industrial gases had also brought suit against the same defendants for the same illegal conduct. Various intermediate purchasers had not filed suit in any court. The manufacturers demurred to the complaint, claiming plaintiffs had failed to join indispensable parties under Civil Code section 389. The issue was whether the failure to join the direct and intermediate purchasers could lead to later follow-on suits by those absent parties and result in the defendants' multiple liability.

The trial court denied demurrer; the Court of Appeal granted the defendants' writ, and this Court reversed, holding that the defendants failed to show a substantial risk of multiple liability. (*Union Carbide, supra*, 36 Cal.3d at p. 22.) *Union Carbide* heavily relied on Justice Brennan's dissenting opinion in *Illinois Brick*, which this Court concluded was adopted in various respects by the Legislature when it

amended the Cartwright Act in 1978. (*Id.* at pp. 20, 21, 22, 24.) There is good reason to conclude that the 1978 amendment was an adoption of the *Illinois Brick* dissent. For instance, in preparation of the 1978 amendment, the Bill Digest proposed the amendment in terms of *Illinois Brick*'s "vigorous dissent." [8] (Assem. Com. on Judiciary, Dig. of Assem. Bill No. 3222 (1977-1978 Reg. Sess.) May 11, 1978.)

One of the central tenets of the *Illinois Brick* decision was the concern that to allow plaintiffs to use offensive pass-on while preventing defendants from using the pass-on defense would subject defendants to multiple liability. (*Illinois Brick, supra*, 431 U.S. at p. 730.) The majority reasoned that, without the pass-on defense, defendants may be required to repay the full overcharge first to the direct purchasers and then to the indirect purchasers. Three scenarios would alleviate this concern: (1) allow the pass-on defense; (2) deny indirect purchaser standing and only allow direct purchasers to sue; or (3) prohibit the pass-on defense, permit indirect and direct purchaser standing, and allow existing procedural mechanisms like joinder or the statute of limitations to deal with the multiple liability problem.

Unwilling to overrule *Hanover Shoe*, and without considering option three, the *Illinois Brick* majority chose the second option and limited standing only to direct purchasers.

---

[8] III CT p. 551.

The dissent opted for the third solution. It argued for prohibiting the pass-on defense, permitting indirect purchaser standing, and allowing existing procedural mechanisms to ameliorate the multiple liability problem. While it "acknowledge[d] some abstract merit" to the multiple liability argument, the dissent argued that practical considerations and existing procedural mechanisms would reduce its severity. (*Illinois Brick, supra*, 431 U.S. at pp. 761, 763-764, dis. opn. of Brennan, J.)

This Court in *Union Carbide* quoted this portion of the dissent, as well as various other passages, and concluded that "[these] views expressed by the *Illinois Brick* dissenting opinion ... seem to have met with the California Legislature's approval when it amended section 16750, subdivision (a), in 1978." (*Union Carbide, supra*, 36 Cal.3d at p. 24.) If this is true, then the California Legislature must also have approved of the dissent's rejection of the pass-on defense. This is so because *the risk of multiple liability,* even though remote, *only exists in a legal scheme that rejects the pass-on defense and permits indirect purchaser standing*. (*See, Illinois Brick, supra*, 431 U.S. at p. 762, dis. opn. of Brennan, J. (explaining that "the possibility of multiple recovery arises in only two situations," neither of which would exist if the pass-on defense were available.).) Since California allows indirect purchaser suits, and recognizes the possibility of multiple liability (albeit remote), than it *ipso facto* must reject the pass-on defense. If it recognized the defense, multiple liability would never result.

Yet, this Court has concluded that multiple liability is a hypothetical possibility. "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 to a joinder order." (*Union Carbide, supra*, 36 Cal.3d at p. 24.)

The First District dismissed the argument merely because the passage cited from *Union Carbide* was dictum and because that case did not address the pass-on defense specifically. (*Clayworth, supra*, 165 Cal.App.4th at pp. 241-242.) But, whether the passage is dictum is not dispositive of its accuracy. And, while *Union Carbide* did not concern the pass-on defense specifically, it did outline the Legislature's intent with respect to the *Illinois Brick* dissent's views on multiple liability. If those views were incorporated, the Legislature also logically incorporated *Hanover Shoe*, just as the dissent did.

Second, the issue of multiple liability also arose in the context of the federal Hart-Scott-Rodino Antitrust Improvement Act of 1976. Within the context of *parens patriae* actions, Congress enacted a provision to prevent the risk of multiple liability in pass-on cases. (15 U.S.C. § 15(c).) The legislative history of this provision shows that it is a direct response to *Hanover Shoe*. The Senate Committee on Judiciary Report states:

Section 4C(a)(1) – Duplicative Liability

> Section 4C(a)(1) also 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 [following] holding ...:
>
> ...
>
> "... Where the choice is between a windfall to intermediaries or letting guilty defendants go free, liability is imposed. *Hanover Shoe, supra*, 392 U.S. at 494. ...."[9]

(Sen. Rep. No. 94-803, pt. 1, 2d Sess., p. 242 (1976).)

Furthermore, in describing the purpose of this provision, the sponsor of the legislation, Representative Rodino, made the following illuminating comment in debate on the House floor:

> [T]he first purchaser can, under *Hanover Shoe*, recover the entire overcharge, whether or not he absorbs all or merely part of it .... However, the compromise bill ... expressly forbids duplicative recoveries.

(II SMAR p. 266.)

---

[9] Volume II Stipulated Motion to Augment the Record ("SMAR") p. 237. For additional history of the Hart-Scott-Rodino Act, see I SMAR p. 155 - II SMAR p. 268.

Less than a year after Hart-Scott-Rodino's passage, the California Legislature incorporated the federal law verbatim, save administrative edits, codified at Business & Professions Code § 16760. (Stats. 1977, ch. 543, §1, p. 1747.) The Cartwright Act amendment was "modeled directly on federal law."[10] (Assem. Off. of Research, 3d reading analysis of Assem. Bill. No. 1162 (1977-1978 Reg. Sess.) as amended May 17, 1977.)

When the federal law is expressly referenced in the California legislative history, the California Legislature is presumed to be aware of the legislative history of the federal law. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1244, review den., 1996 Cal. Lexis 3724.) The federal history of the Hart-Scott-Rodino Act indicates that the provision on multiple liability was enacted specifically to deal with the problem created by *Hanover Shoe*'s rule. The federal legislative history specifically codified portions of *Hanover Shoe*. The California Legislature incorporated the federal history when it modeled its bill "directly" on the federal law. In doing so, the California Legislature intended to recognize *Hanover Shoe*.

Without disputing this logic, the First District merely concluded that since California only enacted this provision with respect to *parens patriae* cases, "one can reasonably

---

[10] I SMAR p. 117. For other references to the Legislature's intent to incorporate the federal law, see I SMAR pp. 73, 74, 84, 104, 119.

conclude that it did not consider multiple liability in *private actions* a problem because the pass-on defense is available to defendants." (*Clayworth, supra*, 165 Cal.App.4th at p. 238, italics added.) However, that reasoning hinges on the absurd premise that the Legislature intended for the pass-on defense to be available in some cases (private actions), but not others (*parens patriae* actions).

The First District also tried to deflect this evidence by claiming that it applies "more logically" to cases brought by the Attorney General on behalf of end-users who have already recovered for their injuries through a consumer class action. (*Clayworth, supra*, 165 Cal.App.4th at p. 238.) There is nothing logical about this conclusion. The Attorney General would have no reason to bring a *parens patriae* case representing a class of persons who had already recovered in a previous lawsuit. Moreover, the intent behind the multiple liability provision was made eminently clear by its sponsor, Representative Rodino, who clarified on the House floor that the provision was in response to the "fear[ ] that the *first purchaser* can, under *Hanover Shoe*, recover the entire overcharge" and the defendant would have to pay the same overcharge again in "successful actions by subsequent *secondary purchasers*." (II SMAR p. 266, italics added.) This explanation does not describe the First District's hypothetical. It only describes, and clearly, a situation where multiple liability could arise as a result of the rule in *Hanover Shoe*.

Third, while the Legislature immediately acted to prevent *Illinois Brick*'s assimilation into California law, it did nothing to forestall *Hanover Shoe*'s adoption. Legislative silence may not be conclusive in and of itself, but it gives rise to "an arguable inference of acquiescence or passive approval." (*Stop Youth Addiction v. Lucky Stores* (1998) 17 Cal.4th 553, 563.)

At the time *Hanover Shoe* was issued in 1968, California courts had a different view of Sherman Act interpretations than they do today. Rather than treat those interpretations as merely "persuasive," in 1968, Sherman Act interpretations were *applied* to the Cartwright Act. At that time, this Court's rule was "[t]he Cartwright Act is patterned upon the federal Sherman Act and both have their roots in the common law; hence federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act." (*Chicago Title Ins. Co. v. Great Western Fin. Corp.* (1968) 69 Cal.2d 305, 315.)

It was precisely because of this deference that the California Legislature acted so decisively in "repealing" *Illinois Brick*. As the legislative history of the 1978 amendment states, "[w]ithout this legislation it is quite probable that a California judicial interpretation will be forthcoming that will follow the direction of Illinois Brick Company v. State of Illinois." [11] (San Diego City Attorney John W. Witt, letter to Sen. Alfred Song, June 6, 1978,

---

[11] III CT p. 565.

legislative bill file, Sen. Comm. on Judiciary, Assem. Bill 3222 (1977-1978 Reg. Sess.).)

In sum, the legislative history of the Cartwright Act indicates that the Legislature intended to recognize *Hanover Shoe*.

E. The Pass-On Defense Has Been Universally Rejected By Every Jurisdiction In This Nation That Has Considered The Defense

Since *Illinois Brick*, some twenty-four states and the District of Columbia have joined California in enacting Illinois Brick repealer statutes. Of the 25 jurisdictions that have legislated indirect purchaser standing, eleven have also considered whether the pass-on defense should be permitted. *All of them* have rejected application of the defense that would allow the defendants to escape liability. No state in this country allows what the First District has permitted below.

The nine jurisdictions that have considered the defense allow the introduction of defensive pass-on evidence *only* where another plaintiff is poised to redress the violation. The statutes fall into two categories. The first group of jurisdictions only permits defensive pass-on evidence where the overcharge has been passed on *to another plaintiff in the suit* which is himself entitled to recover, thereby ensuring that the defendant is prosecuted.[12] The second group of states,

---

[12] See appendix, (D.C. Code § 28-4509 (b); Haw. Rev. Stat. § 480-13(c)(2); Neb. Rev. Stat. § 59-821.01; N.Y. Gen.

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.[13] None of these jurisdictions allows the defense as a method for completely evading liability.

Two additional states have prohibited the defense through judicial decision. The Supreme Court of Minnesota outlawed the pass-on defense in all forms in *Minnesota ex rel. Humphrey v. Philip Morris, Inc.* (Minn. 1996) 551 N.W.2d 490, noting it "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.* at 496.) In support of its holding, the Court determined that the Minnesota legislature's enactment of the "Illinois Brick repealer" reflected legislative intent to prohibit the pass-on defense. (*Id.* at 497.) Thus, the mere fact that the Minnesota legislature enacted an "Illinois Brick repealer," as California has done, sufficiently indicated its intent to abolish the pass-on defense.

Arizona similarly rejected the defense, although not in the antitrust context, in *Northern Arizona Gas Service, Inc. v.*

Bus. Law § 340(6); N.D. Cent. Code § 51-08.1-08(4); 2006 Bill Text UT S.B. 16.)

[13] See appendix, (N.M. Stat. Ann. § 57-1-33(C); Md. Comm. Law Code Ann. § 11-209; 740 Ill. Comp. Stat. 10/7(2).)

Petrolane Transport, Inc. (Ariz.Ct.App. 1984) 702 P.2d 696, review den. June 25, 1985.) The decision in that case 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 704-705.)

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. (Mass. Gen. Laws Ann. Ch. 93, § 1; Okla. Stat. 79, § 212; Tex Bus & Com. Code Ann. § 15.04; *Ireland v. Microsoft Corp.* (Mo.Ct.App. 2001), 2001 WL 1868946; *Minuteman, LLC v. Microsoft Corp.* (N.H. 2002) 795 A.2d 833; *Sickles v. Cabot Corp.* (N.J.Ct.App. 2005) 877 A.2d 267.)

All of these authorities were ignored by the First District. All of them reject what Drug Manufacturers seek here. Because Pharmacies are the only plaintiffs who have challenged Drug Manufacturers' illegal conspiracy, if their claim is defeated, the defendants will totally evade liability and profit from their illegality. California cannot tolerate such result.

II. THE PASS-ON DEFENSE CANNOT DEFEAT AN OVERCHARGED PLAINTIFF'S CLAIM UNDER THE UNFAIR COMPETITION LAW

Just as with the interpretation of the Cartwright Act, construction of the Unfair Competition Law must adhere to the legislative or voter intent so as to effectuate the purpose of the law. "In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration." (*In re Lance W.* (1985) 37 Cal.3d 873, 889.) Similar to the Cartwright Act, the legislative intent underlying the UCL is to deter illegal behavior, disgorge ill-gotten gains, and promote competition. Furthermore, in passing Proposition 64 in 2004, the voters reconfirmed the UCL's intent to protect California's small businesses.

Section 17203 authorizes the courts to "make such orders or judgments ... as may be necessary to prevent the use or employment by any person ... of any practice which violate[s] this chapter...." (Bus. & Prof Code § 17203, brackets added). "The purpose of such orders is 'to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains.'" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267, *citing, Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 449.) "To permit the retention of even a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement of the law is to

be achieved. One requirement of such enforcement is a basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom." (*Bank of the West v. Superior Court, supra*, 2 Cal.4th at p. 1267.) More recently, this Court has observed that "the 'prevent' prong of section 17203 suggests that the Legislature considered deterrence of unfair practices to be an important goal...." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1148 (*Korea Supply*).) Thus, disgorgement, when restitutionary in nature, continues to be a viable remedy under the UCL. (*Id.* at 1148, 1152.)

In addition to deterrence and disgorgement, the UCL was also created to promote competition. "The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." (*Shersher v. Superior Court* (2007) 154 Cal.App.4th 1491, 1496 (*Shersher*), *citing, Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 110.)

In passing Proposition 64, the voters found and declared that the UCL is "intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices." (Prop. 64, § 1, subd. (1) ["Findings and Declarations of Purpose"].)

These goals, expressed through both the Legislature and California's voters, must guide any interpretation of the UCL.

A. An Overcharged Plaintiff Has Standing To Assert A UCL Claim Because It Has Suffered "Injury In Fact" And Has "Lost Money" Previously In Its Possession

Proposition 64 inserted into the law the requirement that a private plaintiff, in order to have standing, must have "suffered injury in fact and ... lost money or property as a result of such unfair competition." (Bus. & Prof. Code § 17204.) In defining the new requirement, the voters declared that a proper UCL plaintiff must suffer "injury in fact" as defined "under the standing requirements of the United States Constitution." (Prop. 64, § 1, subd. (5).)

By making this finding and declaration, the voters specifically adopted "injury in fact" as defined by the federal law – including as it was defined by *Hanover Shoe*. (*Hanover Shoe, supra*, 392 U.S. at p. 489.)

Moreover, an abundance of federal authorities demonstrate that a plaintiff suffers injury once it purchases a product at prices set through the conspiracy. (*E.g., Gerlinger v. Amazon.com, Inc.* (9th Cir. 2008) 526 F.3d 1253, 1254; *Chattanooga Foundry & Pipe Works v. Atlanta* (1906) 203 U.S. 390, 396.)

Recent California cases have held likewise. In *Hall v. Time, Inc.* (2008) 158 Cal.App.4th 847, 849, the plaintiff suffered injury when it "expended money due to the defendant's acts of unfair competition." (*Id.* at 854.) Injury is thus shown when the money expended by the plaintiff for the

product is greater than the worth of that product. (*Id.* at 855.) The Court of Appeal arrived at the same conclusion in *Aron v. U-Haul of California* (2006) 143 Cal.App.4th 796. In *Aron*, the plaintiff purchased more fuel than it used, and, since it expended more money than the worth of the fuel, it was found to have suffered injury. (*Id.* at pp. 802-803.)

Because Pharmacies purchased drugs at prices greater than their worth, they suffered injury in fact.

In addition to the injury in fact requirement, a UCL plaintiff must also have "lost money." The First District concluded that a plaintiff who passes-on the overcharge lack standing because they "suffered no monetary loss." (*Clayworth, supra*, 165 Cal.App.4th at p. 247.) But, the lower court never attempted to define the term "lost money" or analyze the cases that have construed that phrase.

"Courts are to give statutory words their plain or literal meaning." (*People v. Allen* (1999) 21 Cal.4th 846, 859.) "Lost" is defined by Webster's Dictionary as "no longer possessed." Black's Law Dictionary likewise defines an item as lost when "the owner has lost possession or custody of it." (Black's Law Dict. (6th ed. 1991) p. 652 col.2.) (Merriam-Webster's Collegiate Dict. (10th ed. 1993) p. 689.) Similarly, this Court in *Korea Supply, supra*, 29 Cal.4th at p. 1149, defined restitution as "the return of money or property that was once in [plaintiff's] possession." Likewise, in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177 (*Cortez*), the Court defined "the object" of restitution as "money that once

had been in the possession of the person to whom it was to be restored."

A plaintiff has "lost money" when it has parted with money *previously in its possession* as a result of an act of unfair competition. It is undisputed that the overcharge paid by Pharmacies was previously in their possession; they therefore "lost money."

B. An Overcharged Plaintiff Has "Ownership Interest" In The Money Taken From It And Is Entitled To Restitution

Pharmacies use their own money, from their own bank accounts, to purchase drugs, which they place in inventory, and then sell to customers. This obvious arrangement eluded the First District, which concluded that Pharmacies did not have an "ownership interest" in the overcharges Pharmacies paid. Of course Pharmacies had an ownership interest in the money. It was theirs. And, its extraction by Drug Manufacturers through illegal means demands restitution.

An order for restitution is 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 of those claiming through that person." (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126-127 (*Kraus*).) In denying restitution, the First District concluded that "[o]nce plaintiffs resold

defendants' products, and thereby recovered all of their costs, plaintiffs relinquished any ownership interest in the claimed overcharges...." (*Clayworth, supra*, 165 Cal.App.4th at p. 247.)

The error in this conclusion is plain. Pharmacies had an "ownership interest" in the money because it was theirs, and it was "in their possession." Moreover, at the end of the day, the First District awarded the overcharges to the only party that has undoubtedly *no* interest in them: the defendants who illegally took them.

First, a plaintiff has an "ownership interest" in money when he was previously "in sole and peaceable possession of it," without respect to *how* or *from whom* he received it. In *Spitzer v. City of Oakland* (1917) 32 Cal.App. 748, *review den.*, 32 Cal.App. 748, 750 (1917), the plaintiff was given money from a third-party to gamble it on a horse race. Rather than bet the money as agreed, plaintiff went to the police with the aim of procuring the third-party's arrest. The police demanded the money, to be used as evidence, in case any arrests were made. Plaintiff reluctantly relinquished the money. In a claim for restitution, the plaintiff later sought to recover the money from the government. The government resisted, alleging that the money was illegally in plaintiff's possession. The court rejected the government's defense and affirmed judgment for plaintiff, holding:

> [T]he trial court rightly limited the inquiry as to the source of the plaintiff's acquisition of the money in question to the fact as to whether or

> not the plaintiff was apparently in *the sole and peaceable possession of it* at the time he ... delivered it into the keeping of the police department.

(*Id.* at p. 750, italics added.)

Similarly, in *Korea Supply*, the Court held that "[u]nder the UCL, an individual may recover profits unfairly obtained to the extent these profits represent monies given to the defendant ...." (*Korea Supply, supra*, 29 Cal.4th at p. 1148.) It further held that a plaintiff has "ownership interest" over money when that money "was once in his possession," and restitution is proper where "it would ... replace ... money or property that defendants took *directly* from plaintiff." (*Korea Supply, supra*, 29 Cal.4th at p. 1149, italics added; *accord, Cortez, supra*, 23 Cal.4th at p. 178 ("The concept of restoration or restitution [includes] ... the return of money or property that was once in the possession of that person.").).)

A similar rule of law was expressed by the Court of Appeal in *Shersher, supra*, 154 Cal.App.4th 1491. In that case, the defendant Microsoft argued that the plaintiff "lost any ownership interest in his money once he used it to purchase Microsoft's product from a retailer." (*Id.* at 1500.) The Second District disagreed, holding:

> The UCL does not make such a distinction, however. It requires only that the plaintiff must *once* have had an ownership interest in the money or property acquired by the defendant through unlawful means.

(*Ibid.*, italics added.)

It is undisputed that the money used to purchase the Drug Manufacturers' products belonged to Pharmacies at the time of the violation. The money was Pharmacies'; it belonged to no one else; and it was "in their possession."

In somehow evading this inevitable conclusion, the First District sought to analogize the present case to *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440 (*Madrid*), wrongly asserting that "[p]laintiffs' argument here is in different words the same argument rejected in *Madrid*." (*Clayworth, supra*, 165 Cal.App.4th at p. 245.) It claimed *Madrid* was dispositive. (*Ibid.*) But, Pharmacies' argument is *nothing* like Madrid's. Unlike here, the money Madrid sought was never in his possession. (*Madrid, supra*, 130 Cal.App.4th at p. 455.) Unlike here, Madrid specifically "disavow[ed]" the recovery of overcharges. (*Id.* at pp. 454-455.) The only "restitution" Madrid wanted was for "profits defendants may have received from third parties," or defendant's "start-up costs." (*Id.* at p. 453.) Neither of those categories describes restitution and neither even closely resembles what Pharmacies seek here.

In further support of its conclusion, the First District cited two additional authorities, neither of which says what the First District attributes to it.

The court primarily relied on Section 141 of the Restatement of Restitution, which states, "[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 to his receipt of the subject matter (a) the other transfers his entire interest therein to a third person." (*Clayworth, supra*, 165 Cal.App.4th at p. 247, *quoting*, Rest., Restitution, § 141(2), p. 564.).) But, the First District only quoted half of the rule. The uncited portion is dispositive:

> 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), p. 564, italics added.) In fact, the portion of the rule cited by the court only applies when the third-party has *authorized* the defendant to assert the third-party's rights on its behalf. "The bailee can only set up the title of a third person in an action by the bailor when he defends on such title, and by authority of such third person." (*Palmtag v. Doutrick* (1881) 59 Cal. 154, 168; Rest., Restitution, California Annotations (1937), § 141, pp. 126-127.)

The First District also relied on a law review article to support its holding. (*Clayworth, supra*, 165 Cal.App.4th at p. 247.) But in fact, citing *Hanover Shoe*, the article arrived at a the *opposite* conclusion: "[r]emoving the gain from the wrongdoer is of price 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.)

In short, there is no authority for holding that a plaintiff "relinquishes its right" to restitution once it resells the defendant's products.

Second, as seems obvious, the First District's decision denying restitution is plainly error because it rewards the violators for violating the law. Of any party, present or absent, the Drug Manufacturers are the last ones entitled to the overcharges. Where the defendant is a wrongdoer, he may not be allowed to keep his ill-gotten gain. (Rest.3d, Restitution (Tent. Draft No. 5, Mar 12, 2007), § 51 ("Conscious wrongdoer" must not be permitted to "profit from wrongdoing.").)

Moreover, disgorgement is a viable UCL remedy to the extent it is restitutionary, as it is here, where Pharmacies had an ownership interest in the money at the time they were forced to pay illegally high prices. (*Korea Supply, supra*, 29 Cal.4th at p. 1152.) The "prevent prong" of the UCL grants courts the power 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, supra*, 23 Cal.4th at p. 129.)

In sum, it cannot be debated that the money used to purchase the Drug Manufacturers' products at illegally-high

rates belonged to Pharmacies when it was illegally taken. Restitution is therefore proper.

C. An Overcharged Plaintiff With Standing Under The UCL Is Entitled To Injunctive Relief

Finally, Pharmacies prayed for injunctive relief, which was denied for lack of standing. (*Clayworth, supra*, 165 Cal.App.4th at p. 247, n.18.) Because they have standing, they are entitled to such relief.

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; reward the violator, rather than disgorge its ill-gotten gains; and punish the State's economy, instead of the wrong-doer. If the State is to rollback its competition law policy and welcome into its borders price-fixers from near and far, then such a decision belongs with the elected representatives of the California Legislature.

This Court should act decisively and reverse the First District's rogue interpretations of the Cartwright Act and Unfair Competition Law, and forbid the pass-on defense as a matter of law.

February 17, 2009 Respectfully submitted,

By: _____
Joseph M. Alioto, Jr.

JOSEPH M. ALIOTO, JR. (STATE BAR NO. 215544)
ALIOTO LAW FIRM
555 CALIFORNIA STREET
THIRTY-FIRST FLOOR
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE: (415) 434-8900

Counsel for Plaintiffs and
Petitioners, James Clayworth, *et al.*

WORD COUNT CERTIFICATION

The undersigned certifies that the foregoing PETITIONERS' OPENING BRIEF ON THE MERITS contains 13,995 words, exclusive of the tables, this certificate, and the quotation of the statement of issues, pursuant to California Rules of Court, rule 8.520(c)(1), as counted by the computer program used to prepare the foregoing brief.

February 17, 2009 Respectfully submitted,

By: _____
Joseph M. Alioto, Jr.

JOSEPH M. ALIOTO, JR. (STATE BAR NO. 215544)
ALIOTO LAW FIRM
555 CALIFORNIA STREET
THIRTY-FIRST FLOOR
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE: (415) 434-8900

Counsel for Plaintiffs and Petitioners, James Clayworth, *et al.*

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 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]ermitting 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 chahpter 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[, 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 **[**32]** 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]ecovery 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 nonexistence 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 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.

(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

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

*** 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

THIS DOCUMENT IS CURRENT THROUGH ALL 2006 LEGISLATION
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;

(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

*** 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

*** THIS DOCUMENT IS CURRENT THROUGH THE 2006 REGULAR AND SPECIAL SESSIONS ***
*** ANNOTATIONS ARE CURRENT THROUGH FEBRUARY 9, 2007 ***

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

*** THIS DOCUMENT IS CURRENT THROUGH THE 2005 LEGISLATIVE SESSION ***
*** 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

* 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

*** 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 workingmen 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

*** 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:

AMENDS:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) from any political subdivision;

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

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

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

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

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

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

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

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

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

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

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

114

PROOF OF SERVICE

James Clayworth, et al. v. Pfizer, Inc., et al.,
California Supreme Court No. S166435
Court of Appeal, 1st Appellate Dist., Div. 2, No. A116798
Alameda County Super. No. RG04172428

I, Tamara Slye, declare 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 February 17, 2009, I served the attached document described as:

PETITIONERS' OPENING BRIEF ON THE MERITS

_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 all parties in the above-named case by electronic transmission to Lexis-Nexis File & Serve, a true and correct copy to be served electronically on the recipients designated on the Transaction Receipt on the LexisNexis File & Serve website.

_x_ on the following recipients 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	Hon. Harry R. Sheppard Judge of the Superior Court **Alameda County Superior Court** 24405 Amador Street Hayward, CA 94544
Clerk of the Court **California Court of Appeal** First Appellate District, Div. 2 350 McAllister Street San Francisco, CA 94102	Kathleen Foote Senior Assistant Attorney General **Attorney General of California** 455 Golden Gate Avenue Suite 11000 San Francisco, California 94102-7004
Thomas Greene Special Assistant Attorney General **Attorney General of California** 1300 "I" Street Sacramento, CA 94244-2550	Hon. Thomas J. Orloff **Alameda County District Attorney** 1225 Fallon St., Room 900 Oakland, CA 94612

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 February 17, 2009, at San Francisco, California.

Tamara Slye

SERVICE LIST
James Clayworth, et al. v. Pfizer, Inc., et al.
California Supreme Court No. S166435
Court of Appeal, First Appellate District, Division Two, No. A116798
Alameda County Superior Court Case No. RG04172428

for Defendant **ABBOTT LABORATORIES** **Nicole P. Dogwill** **WINSTON & STRAWN LLP** 101 California Street, Suite 3900 San Francisco, CA 94111 **James F. Hurst** Matthew J. Sullivan **WINSTON & STRAWN** 35 W. Wacker Drive Chicago, IL 60601	for Defendant **ALLERGAN, INC.** **Jeffrey T. Thomas** James N. Knight **GIBSON, DUNN & CRUTCHER LLP** 3161 Michelson Drive Irvine, CA 92612-4412
for Defendant **AMGEN, INC.** **Steven O. Kramer** **John Nadolenco** **MAYER BROWN** 350 South Grand Avenue, 25th Floor Los Angeles, CA 90071-1503 **Donald M. Falk** **MAYER BROWN** 2 Palo Alto Square, Suite 300 3000 El Camino Real Palo Alto, CA 94306-2112 Joseph H. Young Steven F. Barley **HOGAN & HARTSON LLP** 111 South Calvert Street Baltimore, MD 20201	for Defendant **ASTRAZENECA LP** **Arthur F. Golden** **Amelia T.R. Starr** **William J. Fenrich** **DAVIS POLK & WARDWELL** 450 Lexington Avenue New York, NY 10017 **Peter A. Strotz** **William E. Steimle** **FILICE BROWN EASSA & McLEOD LLP** 1999 Harrison Street, 18th Floor Oakland, CA 94612
for Defendant **BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.** **Anita F. Stork** **COVINGTON & BURLING** One Front Street San Francisco, CA 94111-5356 Thomas J. Cosgrove **COVINGTON & BURLING** 1201 Pennsylvania Avenue, N.W. Washington, D.C. 20004-2401	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 **Evan R. Chesler** **Elizabeth L. Grayer** Marek P. Krzyzowski **CRAVATH, SWAINE & MOORE LLP** Worldwide Plaza, 825 Eighth Avenue New York, NY 10019

for Defendant **ELI LILLY & COMPANY** Gary Hansen **OPPENHEIMER WOLFF & DONNELLY LLP** Plaza VII, Suite 3300 45 South Seventh Street Minneapolis, MN 55402-1609	for Defendant **GLAXOSMITHKLINE** **George S. Cary** **David I. Gelfand** Sara D. Schotland, Senior Counsel Matthew Bachrack **CLEARY GOTTLIEB STEEN & HAMILTON LLP** 2000 Pennsylvania Avenue, N.W. Washington, D.C. 20006 **Alexander F. Wiles** John C. Keith **IRELL & MANELLA LLP** 1800 Avenue of the Stars, Suite 900 Los Angeles, CA 90067-4276
for Defendant **HOFFMANN-LA ROCHE INC.** H. Christian L'Orange, Of Counsel **DRINKER BIDDLE** 50 Fremont Street, 20th Floor San Francisco, CA 94105-2235 **Paul H. Saint-Antoine** **Mary E. Kohart** **David J. Antczak** **DRINKER BIDDLE** One Logan Square 18th and Cherry Streets Philadelphia, PA 19103-6996	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 **William J. Cavanaugh, Jr.** **PATTERSON BELKNAP WEBB & TYLER LLP** 1133 Avenue of the Americas New York, NY 10036
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 **Rita M. Haeusler** **HUGHES HUBBARD & REED LLP** 350 South Grand Avenue, 36th Floor Los Angeles, CA 90071-3442	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 **Saul P. Morgenstern** Karin E. Garvey **KAYE SCHOLER LLP** 425 Park Avenue New York, NY 10022-3598 **James A. O'Neal** **FAEGRE & BENSON LLP** 90 South Seventh Street Minneapolis, MN 55402 **Kim J. Walker** **FAEGRE & BENSON LLP** 801 Grand Ave., Suite 3100 Des Moines, IA 50309-8002

for Defendant **PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA (PhRMA)** **Charles H. Samel** **Belinda S. Lee** Jennifer A. Carmassi **LATHAM & WATKINS LLP** 355 South Granve Avenue Los Angeles, CA 90071-1560 **Margaret M. Zwisler** **LATHAM & WATKINS LLP** 555 Eleventh Street, N.W., Suite 1000 Washington, D.C. 20004-1304	for Defendant **PFIZER, INC.** **Peter J. Kadzik** **Bernard Nash** **Maria Cosley Heard** **Milton Marquis** Andres Colón **DICKSTEIN SHAPIRO LLP** 1825 Eye Street, N.W. Washington, D.C. 20006-5403 **Katrina June Lee** **Michael G. Thornton** **NOSSAMAN LLP** 50 California Street, 34th Floor San Francisco, CA 94111-4799
for Defendant **WYETH** **Ronald C. Redcay** **ARNOLD & PORTER LLP** 777 South Figueroa Street, 44th Floor Los Angeles, CA 90017-5844 **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	