

Notes and Comments

Consumers and Antitrust Treble Damages: Credit-Furniture Tie-ins in the Low Income Market

—by John Ladd

Any person who shall be damaged in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

—Section 4, Clayton Act, 15 U.S.C. § 15 (1964).

I predict . . . that not one suit will ever be brought under this . . . section by any person who is simply damaged in his character as a consumer

—Senator George, 21 CONG. REC. 3150, April 8, 1890.

Despite the apparent utility of Section 4 of the Clayton Act to protect and compensate private citizens,¹ damage suits by or on behalf of citizens qua consumers have been rare.² Commentators in the areas of

1. See pp. 278-83 *infra*.

2. See p. 278 *infra*. The reasons for this neglect are fairly clear. The prediction of Senator George, *supra*, was apparently based on the probability that the expense of an action to recover a small sum would be prohibitive, and on the restrictive law in 1890 applying to class actions. See 21 CONG. REC. 3150 (1890); M. FORKOSCH, ANTITRUST AND THE CONSUMER (ENFORCEMENT) 128 (1965). Treble damage litigation is long and expensive, and the amount of recovery by individual consumers is likely to be slight. Until recently consumers have not been organized sufficiently to bring class actions. Generally, people who see themselves more as consumers than as entrepreneurs do not conceive of law as a tool to be used offensively, and even poverty lawyers seem loath to bring actions as plaintiffs. Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 765 and authorities cited in n.123 (1967). The pattern of federal enforcement seems to reflect a priority given to regulating conduct among businessmen rather than conduct between businessman and consumer, with the result that most federal prosecutions are brought against manufacturers rather than retailers. This in turn facilitates private suits by businessmen rather than by consumers.

FORKOSCH 328 suggested a theory that states could sue as *parens patrie*. States have been aggressive in suing to recover damages based on their own purchases. See, e.g., *Michigan v. Morton Salt Co.*, 259 F. Supp. 35 (D. Minn. 1966) (consolidated suits by seven states for treble damages for enhanced price of rock salt purchased for road de-icing). One *parens patrie* suit has been brought by Hawaii, claiming damages from price fixing of gasoline. The federal district court denied a motion to dismiss a *parens patrie* count, but dismissed a class action without opinion. Appeal to the Ninth Circuit is planned. See *Hawaii v. Standard Oil Co.*, 5 TRADE REG. REP. ¶ 72,916 (D. Hawaii, July 2, 1969); Letter from Deputy Atty. Gen'l of Hawaii to the Yale Law Journal, June 2, 1969, on file at the Yale Law Journal. Cf. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945).

Consumers and Antitrust Treble Damages

antitrust and consumer protection have failed to explore the opportunities for such actions.³ This Note will consider a dimension of the use of antitrust treble damage actions as a consumer remedy and will explore the application of antitrust doctrine to certain tie-ins in consumer sales.

Consumers are frequently faced with sales of one product (the tying product) conditioned upon the purchase of another (the tied product).⁴ In a common form of tying arrangement, a low-income market (LIM) retailer will extend long-term credit only if the consumer uses it to buy consumer durables from the retailer; under the special conditions of the low-income market, the retailer can then shift part of the cost of the credit to his stated price for furniture (or other consumer durable) to make his credit appear "cheap."⁵

For example, a recent F.T.C. study of Washington, D.C., found that general market retailers gave credit to good credit risks at 21%, and sold furniture wholesaling for \$100 at \$159 retail. Credit sales comprised 27% of the total. In contrast, LIM retailers gave credit to virtually any consumer at 24%, and sold furniture wholesaling at \$100 for \$255 retail. Credit was extended in ninety-three per cent of their sales. The minimal increase in credit price for the incurring of substantial extra risk, coupled with the sharply inflated furniture price, led the F.T.C. to conclude that charge shifting had occurred.⁶ Com-

3. *E.g.*, E. TIMBERLAKE, *FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS* (1965); NEW YORK STATE BAR ASS'N, 1967 ANTITRUST LAW SYMPOSIUM (extensive discussion of antitrust and consumer protection without considering suits by consumers); Note, *Consumer Legislation and the Poor*, 76 *YALE L.J.* 745 (1967).

4. A complaint claiming illegality of a contract tying food to a patented freezer was filed in a recent New York case, but bankruptcy of the seller prevented judgment on the merits. Hayden v. Cohen, Index No. 2552/68 (N.Y. Sup. Ct., N.Y. Co., Filed Dec. 5, 1967), noted *N.Y.L.J.*, Aug. 21, 1968, at 2, Col. 2; 12 *WELF. L. BULL.* 15 (April, 1968), 16 *WELF. L. BULL.* 21 (March, 1969); for the complaint, see C. KATZ, *THE LAW AND THE LOW INCOME CONSUMER* 344, 348-49 (1968). A current promotion in New York City involves the tie-in of a "free" stereo to weekly purchases of overpriced records. The total price was one-third higher than the estimated market price of the components. "Rooms" of furniture may also be sold at a unit price, without itemization, allowing the seller to avoid effective rescissions for defects in individual pieces. Karpel, *Ghetto Fraud on the Installment Plan*, *NEW YORK*, May 26, 1969, at 26, 27, 29-31, and June 2, 1969, at 41 [hereinafter cited as *Ghetto Fraud I* and *II*]. Several writers have discussed and generally dismissed the problem of consumer tie-ins. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 *HARV. L. REV.* 50, 73-74 (1958); Baldwin & McFarland, *Tying Arrangements in Law and Economics*, 8 *ANTITRUST BULL.* 743, 776-77 (1963). See also note 105 *infra*.

5. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969), gives this question current interest. The Court held that a cause of action was stated where the defendant, U.S. Steel, had given attractive financing to plaintiff real estate developer on the condition that a large portion of the funds be used to purchase U.S. Steel's prefabricated homes. The majority and dissenting opinions all left open the possibility that some retailer credit transactions may be illegal. 394 U.S. at 507, 515-16, 523.

6. FEDERAL TRADE COMMISSION, *ECONOMIC REPORT ON INSTALLMENT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS ix-x, xii-xiii* (1968) [hereinafter cited

mentators have observed this same practice in other low-income markets.⁷

I.

The following hypothetical is designed to show how a LIM retailer might discover that shifting charges would allow him to increase his price without loss of demand. At time *A*, a cash-only merchant who sells a given item at \$190 in the low-income market decides to begin extending credit. He offers a one-year installment contract to anyone who purchases furniture from him, but does not make loans to non-purchasers. Keeping his furniture price at \$190 because he still wishes to compete on cash sales, he prices his standard loan at \$35, which he estimates to be the market value of credit to his high risk customers. Since he deals almost exclusively with the poor, he soon finds that the great majority of his sales are on the installment plan. At time *B*, perhaps to avoid either credit disclosure, usury laws⁸ or customer resentment of obviously high interest rates, he decides to decrease the price of credit and increase that of furniture. The LIM retailer still receives a total of \$225 for his combined products, but now sets the "credit price" at \$22 and the "furniture price" at \$203. Perhaps unexpectedly, he finds that the new pricing arrangement has increased his sales beyond their normal level. At time *C* therefore, he increases his total price to a combined \$240. He finds that he can now maintain his accustomed

as F.T.C.]. One welfare recipient supporting a family of nine on an income of \$194 a month was sold a \$308.95 television and extended credit at \$40 per month. F.T.C. at 49, Table IV-14. The average LIM customer had 4.3 family members and a monthly income of \$348, as compared to the Bureau of Labor Statistics "moderate" standard of living for a family of four of \$730 and a median D.C. family income of almost \$500. F.T.C. at x, 39. Bad-debt losses for the low-income market retailers were 20 times those of general market retailers. F.T.C. at 18, Table II-5. The District of Columbia laws relating to loans and retail credit do not vary significantly from those of most states in such a way as to suggest that the D.C. practice is unusual. The District apparently had no credit disclosure laws at the time of the study. See 1 CCH CONSUMER CREDIT GUIDE (D.C.) (1969). The F.T.C. study does not reveal the retailers' practices regarding disclosure of credit rates. Similar mark-ups of goods tied to high-risk credit seem to occur in other products. See *In re Leon A. Tashof*, Docket No. 8714 (F.T.C., Dec. 2, 1968) (on file at the Yale Law Journal) (eyeglasses); F.T.C. at 9 (clothing, jewelry, service markets).

7. Note 16 *infra*; Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 756 & authorities cited in n.61 (1967) (regarding high product prices); *Ghetto Fraud I*, *supra* note 4, at 27; Interviews with New Haven and Bridgeport, Conn., Legal Services attorneys, and with Mr. Craig Karpel, author of *Ghetto Fraud*.

8. See Markovits, *Tie-ins, Reciprocity and the Leverage Theory*, 76 YALE L.J. 1397, 1458-59 (1967). Usury laws do not wholly explain the practice of charge shifting which occurs in jurisdictions without usury laws that apply to retailers. Charge shifting in response to truth-in-lending tends to support the explanation of the practice in terms of consumer irrationality. See p. 258 *infra*. In any case, the mere fact that the tying seller had other motives than to take advantage of irrationality or that the practice has other effects does not necessarily mean that the tie-in is legal. See p. 270 *infra*.

Consumers and Antitrust Treble Damages

volume at prices higher than those charged before shifting his pricing arrangement. These events are summarized in the following table:

Time	A	B	C
Furniture price	190	203	215
Credit charge	35	25	25
Interest rate ⁹	32%	20%	21%
Total price	225	225	240
Volume	X	X + Y	X

Of course the real price to the consumer of a given piece of furniture bought simultaneously with a given term of credit is the total price of the whole transaction.¹⁰ Demand should not be affected by the allocation of the total between the component products, *i.e.*, by the apparent interest rate. Thus an increase in demand as a result of charge shifting must be the result of economically "irrational" behavior by consumers.¹¹ On the basis of intuition and existing empiric data, low-income consumers in the credit-furniture market appear for several reasons to behave irrationally when confronted with the shifting of charges: the tie-in is therefore immediately profitable for the retailer and harmful for the purchaser.

First, despite the theoretical irrelevance of stated interest rate to his decision, the consumer is likely to be influenced by it nonetheless, and to avoid purchases which seem to involve high stated credit charges.¹² This may occur because high rates violate conventional notions of a "fair price" for credit.¹³ Where the buyer is an especially poor credit risk his tendency to look to separate charges rather than the package will be accentuated by the unavailability to him of any "package" price

9. Approximate. Computed by the "actuarial method" from the Dep't. of Defense table reproduced at 1 CCH CONSUMER CREDIT GUIDE 3734 (1969).

10. See F. JUSTER & R. SHAY, CONSUMER SENSITIVITY TO FINANCE RATES: AN EMPIRICAL AND ANALYTICAL INVESTIGATION 98-105 (1964). Interest rates are superfluous to comparisons of the cost of credit among retailers, because in each case furniture will probably be tied to credit offered over the same term. *Id.* at 1-2. Accurate interest rate comparisons are necessary, of course, for comparison with untied sources of credit. See p. 270 *infra*.

11. Exploitation of irrationality, or, what is the same thing, the concealment of information, can be a deliberate tactic to achieve a number of goals prohibited by the Sherman Act. Compare *Small Co. v. Lanborn & Co.*, 267 U.S. 248 (1925), with *Record* at 9, 29-30, *id.* (price-fixing by group-created illusion of shortage of supply). Cf. *United States v. National Retail Credit Ass'n*, 1953 TRADE CAS. ¶67,608, at 68,920 (E.D. Mo. 1953); *United States v. Savannah Cotton & Naval Stores Exchange, Inc.*, 1950-51 TRADE CAS. ¶62,929, at 68,844 (S.D. Ga. 1951). For a theoretical analysis of buyer irrationality, see *Ozga, Imperfect Markets Through Lack of Knowledge*, 74 QUARTERLY J. OF ECON. 29 (1960).

12. JUSTER & SHAY, *supra* note 10, at 4, 64-75. When consumers were asked to react to contracts with stated interest rates over 16%, they tended to say that they would not buy under such contracts.

13. See testimony of former Senator Paul Douglas, *Hearings Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 90 Cong., 1st Sess., 37, 38-39 (1967) [hereinafter cited as *Senate Lending Hearings*].

without price shifting; since general market retailers do not extend high-risk credit, the low-income purchaser will be forced to compare the charge-shifted package of the low-income market retailer with the separate prices of the small loan company and the general furniture retailer. Unless he has an especially analytic mind, he is as likely to compare the separate untied prices with each arbitrary component of the LIM price as he is to add together the untied prices and to compare the packages.¹⁴

Second, whenever consumers do look to the elements of the package price, they are likely to be more responsive to a shift in credit price (*e.g.*, from \$35 to \$22), than to a compensatory shift in furniture price (*e.g.*, from \$190 to \$203). Recent truth-in-lending legislation seems to have altered the former insensitivity of consumers to interest rates.¹⁵ Perhaps the best evidence of this new responsiveness is that sellers have in fact reacted to disclosure requirements with charge shifts,¹⁶ and that charge-shifting occurs in jurisdictions where no usury laws apply to retailers.¹⁷ Greater sensitivity to credit than to furniture prices may be a result of the lack of quality differences in credit as opposed to the consumer durables with which it is sold.¹⁸ The consumer may well have a general idea of current credit prices, but no idea of the

14. Indeed, many U.S. Congressmen seemed to be unclear at the time of the truth-in-lending act as to when *credit rate* and when *total price* was the relevant variable for purchasing decisions. See H.R. REP. NO. 1040, 1968[2] U.S. CODE CONG. AND ADMIN. NEWS 1962, 1963.

15. The studies establishing unresponsiveness to credit charge variations were based on undisclosed interest rates and transactions involving only package price. See JUSTER & SHAY, *supra* note 10, at 28, n. 29. Many commentators suggested disclosure as a means of increasing consumer sensitivity. See, *e.g.*, H. BLACK, BUY NOW, PAY LATER 218-24 (1961).

16. Pullen, *The Impact of Truth-in-Lending Legislation—The Massachusetts Experience*, Research Rept. to the Federal Reserve Bank of Boston No. 43, at 49-50 (1968), reported that LIM retailers responded to Massachusetts disclosure laws by shifting finance charges into stated cash prices. Paul Rand Dixon noted the possibility that ghetto retailers would respond to truth-in-lending by shifting charges, and correctly predicted that nothing in the proposed legislation would prevent them from so doing. *Hearings on the F.T.C. Report on Credit Practices Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess., 10 (1968) [hereinafter cited as *FTC Report Hearings*]. The reporters for the Uniform Commercial Credit Code recognized this problem as applied to interest ceilings, but the UCCC provides only the unconscionability doctrine to prevent the gutting of the disclosure requirement by ghetto retailers. Jordan & Warren, *The Uniform Commercial Credit Code*, 68 COLUM. L. REV. 387, 393-94 (1968); UCCC § 6.111(3)(c) & comment 3 (Rev. Final Draft 1968). See generally Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1, 7-8, 13-14 (1969). As Kripke points out, the disclosure-charge shift problem is one that is difficult to solve. The unconscionability solution is likely to reach only extreme abuses, and regulation of prices of durables poses an unacceptable administrative burden. *Id.* at 7. See also Murphy, *Lawyers for the Poor View the UCCC*, 44 N.Y.U.L. REV. 298, 326 (1969).

17. The site of the F.T.C. study (Washington, D.C.) has no such laws. See 1 CCH CONSUMER CREDIT GUIDE section on District of Columbia.

18. See JUSTER & SHAY, *supra* note 10, at 48.

price of stoves of varied levels of quality.¹⁹ Even if he comparison shops and finds variations in credit charges, the consumer may be unable to tell whether furniture price differentials are explained by quality or brand differences between different stores.²⁰ He is likely to prefer a store that he "knows" has lower credit charges over one that *may* have better savings on furniture.²¹

Third, the shifting of charges makes a number of consumer decisions more difficult, and thus creates confusion which high-pressure sales techniques can turn to the seller's advantage.²² Since he is confronted with a purely arbitrary "interest rate," it may be almost impossible for the consumer to decide whether he should purchase goods on credit or defer purchase until he has cash. He will also have difficulty deciding whether to buy the combined products from the tying market or to take a loan from a finance agency and purchase furniture in the general market.²³

19. The knowledge of the consumer is frequently based on the shared experiences of other consumers. In this way he had, before disclosure laws, an "institutional" knowledge of what types of credit were more expensive than others. See JUSTER & SHAY, *supra* note 10, at 56-62. If this pattern of shared information continues under the disclosure laws, the consumer would be likely to know prices of an homogeneous commodity used by nearly all of his neighbors. See note 30 *infra*.

20. See *Hearings on S. 985 Before the Senate Comm. on Commerce*, 89th Cong., 1st Sess., ser. 89-28, at 566-68 (1965) [hereinafter cited as *Senate Packaging Hearings*]. Indeed, buyers may even take the LIM retailer's higher price as an indication of its quality. W. BAUMOL, *ECONOMIC THEORY AND OPERATIONS ANALYSIS* 170 (1965).

21. Much of the testimony on the federal Fair Packaging and Labeling Act, 15 U.S.C. § 1451-61 (Supp. IV, 1965-68), concerned the practice of "concealed inflation" by which the manufacturer held price and box frontal size constant while decreasing the less noticeable net content of the box. See, e.g., *Senate Packaging Hearings*, *supra* note 20, at 675-76; *Hearings on H.R. 15440 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess., ser. 89-44, Part I, at 44, 237-38 (1966) [hereinafter cited as *House Packaging Hearings*]. This practice, like the pricing shift, is a particular case of seller's propensity to use interdependent pricing factors in such a way as to conceal pricing increases. Elimination of the tie-in, like the standardization of containers, would remove an interdependency likely to harm consumers.

22. See testimony of Mrs. Betty Furness, *Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 90th Cong., 1st Sess., Part I, at 88 [hereinafter cited as *House Lending Hearings*].

23. Such confusion prevents the consumer from fulfilling his economic role of allocating productive resources and defeats the disclosure philosophy behind the Truth-in-Lending and Fair Packaging and Labeling laws. The statement of Paul Rand Dixon clearly applies to credit as well as goods choices. "Our competitive economy to be effective proceeds on the assumption that consumers have [information for intelligent comparisons between competing products], so that they can maximize their satisfactions by purchasing those goods and services which most nearly meet their needs or desires Surely it would not be asking too much to suggest that the label disclose accurately . . . the price in terms which are understandable to the consumer They should not be lured by . . . combination offers." *Senate Packaging Hearings*, *supra* note 20, at 79. See also testimony of Senator Hart, sponsor of the Packaging Bill, *Senate Packaging Hearings* 719; of Sec'y of Commerce Barr, *House Lending Hearings*, *supra* note 22, at 75; of President Johnson, MESSAGE, H.R. Doc. No. 57, 90th Cong., 1st Sess. 3 (1967). See also Section 2 of the Fair Packaging and Labeling Act, 15 U.S.C. § 1452 (Supp. IV 1965-68); Warren, *Regulation of Finance Charges in Retail Installment Sales*, 65 YALE L.J. 837, 848-49 (1958).

II.

Given both a segregated market and the tying arrangement the LIM retailer is able to allocate his total price arbitrarily between "furniture price" and "credit price." If he were to sell untied credit the LIM retailer could not lower his stated credit price without having to sell a great deal of it at a loss.²⁴ The complicated relationship between market segregation and charge shifting can best be understood through the theory of circular and cumulative causation.²⁵

Circular cumulative causation in an economic system means that a number of social factors affecting consumer welfare are interrelated in such a way that a consumer-detrimental change in factor *A* induces consumer-detrimental changes in other factors *B*, *C*, and *D* (cumulation). Where this causation system runs through many factors and especially where the initial changed factor *A* will eventually be itself further changed to be still more consumer-detrimental as a result of changed *B*, *C*, and *D* (circularity), the economic system will be subject to large fluctuations occurring from an initially small impetus. The classic illustration is Gunnar Myrdal's study of Blacks in America.²⁶ White racism causes inequality of opportunity, which in turn causes economic and educational deprivation (cumulative). The resulting incapacity feeds the myth of natural inferiority, which in turn increases racist practices (circular).²⁷

The importance of the principle of cumulative and circular causation is that it belies the validity of the fundamental assertion of neo-classical economic analysis that economic systems tend to stable equilibria in which resources and rewards are almost always rationally distributed. Appreciation of the principle leads to the understanding that an unregulated market can produce swings affecting

24. The assumption is made here that for a buyer of a given credit risk the LIM merchant's untied credit ("loan") price would have to be quite similar to his tied credit price. To state the prices differently would tend to reveal his charge shifting. He may, of course, have additional reasons (such as the difficulty of obtaining a small loan license) for the tie-in other than to facilitate charge shifting.

25. The general theory of circular and cumulative causation is developed in G. MYRDAL, *AN AMERICAN DILEMMA* 75-78, 1065-70 (20th anniv. ed. 1962); G. MYRDAL, *ECONOMIC THEORY AND THE UNDER-DEVELOPED REGIONS* 3-49 (1947).

26. G. MYRDAL, *AN AMERICAN DILEMMA* (20th anniv. ed. 1962).

27. Many abusive practices in the low-income durables market represent instances of circular and cumulative causation—they arise and flourish because of segregation and in turn reinforce the segregation which engendered them. The existence of abuses keeps middle class consumers away, and discourages general market retailers from competing for the purchases of the poor. Increased market segregation in turn makes existing abuses more profitable and creates opportunities for the invention of new abuses. Segregation and abuses together make poor consumers poorer; greater poverty makes it even more difficult to combat abuses, and so fosters segregation. And so on.

consumer welfare which have no tendency to correct themselves in the absence of deliberate outside intervention. Likewise, individuals or social classes who are initially in a position of substantial economic equality with other individuals or classes may move quickly to a disastrous inequality caused by a seemingly minor impetus.²⁸

The effects of market segregation on the welfare of poor consumers can be considered under two headings: exclusion of middle class consumers and "capture" of low-income consumers.²⁹ The exclusionary aspect of the low-income market raises what might be called the "consumer defense" aspect of segregation. Consumer knowledge and consumer protection are group efforts,³⁰ and the poor as a group lack the sophistication and resources which permit middle class buyers to enforce reasonable standards of honesty in the general market.³¹ As a result, when the poor buy in a segregated market they are particularly likely to fall prey to the whole gamut of retailer abuses. In the absence of middle class buyers,³² low-income market sellers are free to engage in bait-and-shift advertising; sandbagging; turnovers; delivery of inferior, damaged, or used furniture; failure to repair; dishonor of warranties; strong-arm collection techniques; sewer service; and the use of garnishment as a nearly automatic collection device.³³ The absence of middle class consumers also perpetuates abusive charge shifting. The deceptiveness and the mathematical nature of the practice makes absence of middle class sophistication particularly harmful. The substantial exclusion of middle class cash buyers is also, of course, a

28. Cumulative causation does not imply that a social system need progressively worsen. Just as the interrelationships of factors within the system cause change for the worse to accelerate, even a slight change for the better is likewise self-incrementing. Beneficial cumulative changes may succeed in overcoming cumulative adverse change.

29. The market is of course not totally segregated. Not all of the poor shop in the low-income market. But it can be safely said that there is a market patronized by a substantial number of the poor but by almost no middle-class buyers. See F.T.C., *supra* note 6, at 39, Table IV-5. Of the 486 LIM customers surveyed in the F.T.C. study, only 35 had incomes over \$8,000 and only 9 over \$10,000. Only 31 lived in a house which they owned or were purchasing. Only 8 of 549 customers were professionals or technical workers, proprietors or managers. F.T.C. at 38-42.

30. Consumers tend to have accurate notions of broad propositions, such as that ghetto merchants have high furniture prices, or the general ranking of credit prices among various types of institutions; yet most of them are incapable in a given specific instance to compute even such a simple matter as an interest rate. Cf. H. BLACK, BUY NOW, PAY LATER 135 (1961); JUSTER & SHAY, *supra* note 10, at 56-62; note 19 *supra*.

31. See Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 745-67 (1967).

32. Cf. F.T.C., *supra* note 6, at 18, table II-5. See also Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967); Statement by Dr. David Caplovitz, *House Lending Hearings*, *supra* note 22, Part II, at 664-65. The few middle-class buyers who do enter the low-income market seem likely to be extremely unsophisticated ones, given the higher prices charged there.

33. *Ghetto Fraud I and II*, *supra* note 4.

prerequisite to charge shifting. A seller with a large proportion of cash buyers could not overprice furniture without a loss of cash sales.

The second aspect of segregation, the "capture" of the poor, also has negative effects on consumer welfare, since it makes possible a form of price discrimination.³⁴ Whenever a seller can isolate a group of buyers with more steeply sloped demand curves³⁵ he can charge those buyers a higher price than other buyers. The buyers in the low-income market will make purchases at the higher price according to their demand curve, though only to the extent that the increased price does not cause them to escape to the general market. It seems likely that low-income consumers do have steeper demand curves than average consumers. As compared with the average consumer, a high proportion of durables purchased by the poor are not easily foregone or deferred. Purchases of cost-saving appliances (kitchen equipment, washing machines, televisions) by the poor are more likely to be initial purchases, or replacements of totally inoperative old appliances, rather than replacements of merely outmoded equipment; thus, the value to the poor consumer of substituting home for commercial washing is likely to be higher than the value to the more wealthy consumer of substituting a 1969 washer for a 1960 model.³⁶ The low-income consumer's lack of sophistication and lesser propensity to comparison shop also insure a steeper demand curve for the products of the LIM retailer.³⁷ Through the tie-in and charge shifting, the low-income market retailer thus achieves much the same effect as the classic price discriminator, who segregates buyers with different demand curves and

34. For an account of price discrimination, see G. STIGLER, *THE THEORY OF PRICE* 209-14 (3d ed. 1966).

35. *I.e.*, those buyers who with a given increase in price decrease purchases less than other buyers.

36. "The demand for durable goods is implicitly a demand for their services." Even if the value of the services of an old machine is less than that of a new one, any positive value of the old machine represents a deduction from the desire for a new one. See STIGLER, *supra* note 34, at 29-31.

37. The theory in the text is somewhat simplified for the general reader. Segregation and differing individual demand curves are central to price discrimination. The other elements are also present here. A limited number of LIM retailers, product differentiation and failure to comparison shop will ensure that a portion of the greater slope of individual demand curves will be passed on as a sloped firm demand curve. See STIGLER, *supra* note 34, at 42, 90, 340, 342; Note, *The Logic of Foreclosure: Tie-In Doctrine after Fortner v. U.S. Steel*, 79 YALE L.J. 86, 94 (1969) [hereinafter cited as *Tie-in Doctrine*]. The requirement that buyers in the less steep portion do not resell to those in the steeper is undoubtedly met here. Since induced consumer irrationality keeps the poor from the general market, it even more surely keeps them from buying from the middle-class. See pp. 258-59 *supra*. It is true that discrimination effects become less serious as there are multiple sellers within the low-income market, but this factor does not totally eliminate the effects. See STIGLER 90.

Consumers and Antitrust Treble Damages

then sells to both groups, charging higher prices to those with steeper demand curves and lower prices to those with less steep curves.

The LIM retailer's ability to raise prices above the general market level—the result of the poor consumer's difficulties in entering the general market—can be converted into the ability to impose conditions which consumers regard as abusive.³⁸ This may be illustrated by considering how "capture" facilitates charge shifting. Consider the low-income buyer who recognizes some aspect of the harm caused by charge shifting—he realizes that the LIM retailer has high furniture prices and uses various deceptive practices.³⁹ Because of his high need for the durable he will not forego purchase entirely. His only effective defense—to use the general rather than the LIM retailer—will be precluded as long as he perceives the cost of transferring to the general market (*e.g.*, costs in terms of transportation; suffering of class, racial or cultural prejudice; unavailability of credit⁴⁰) as higher than the detriments imposed by the LIM retailer. When he then goes back to the low-income market store, the consumer may be determined not to be gulled, but in the face of shifted charges and high pressure sales techniques, this determination is likely to be a much less effective defense than staying away entirely.⁴¹ The customer's wariness itself may increase his vulnerability by leading him to check carefully the interest rate or to jump at minor price reductions.⁴²

It should be noted that in the above analysis, market segregation is a continuous, not a quantum, phenomenon. The more complete the segregation, the fewer middle-class resources are brought to bear in discovering and combatting retailer abuses and the steeper the firm demand curve and the higher the price to the group bearing the brunt of price discrimination.⁴³ The perceived costs of entering the general market define how much perceived deviation from general market norms the low income consumer will accept in the low-income market—deviation in the form of higher prices, low quality, bad service, deception and offensive collection techniques.

38. See *Tie-in Doctrine*, *supra* note 37, at 91.

39. Many customers seem to have some knowledge that the durables prices of LIM retailers are high. See sources cited note 30 *supra*.

40. See Comment, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 749-64 (1967).

41. See testimony of Mrs. Betty Furness, *House Lending Hearings*, *supra* note 22, at 88.

42. See *GHETTO FRAUD I*, *supra* note 4, at 24-25. See also note 20 *supra*.

43. See *STIGLER*, *supra* note 34, at 42, 340.

III.

Segregation, then, is necessary for the initiation of charge shifting;⁴⁴ it also has a cumulative effect on consumer-detrimental aspects of the low-income market, including a further intensification of the irrationality induced by charge shifting.⁴⁵ Analysis of cumulative and circular causation in the low-income market will be completed upon a showing that charge shifting in turn intensifies and perpetuates market segregation. It is of course not claimed that charge shifting is the only cause of market segregation. Residential segregation, inadequate public transportation, community bonds, failure to comparison shop and many other factors may contribute to market segregation.⁴⁶ But charge shifting does add to market segregation in ways that may be very important, even vital, to its maintenance.⁴⁷

The contribution of charge shifting to the exclusion of middle class buyers from the low income market is fairly plain. The increase in the stated furniture price makes cash (and therefore middle class) purchases from the LIM retailer unlikely. Though the LIM retailer might agree to lower his furniture price to one offering cash, most middle class customers are unlikely to "haggle" over price.

The contribution of the tie plus charge shift to the other aspect of segregation—"capture" of the poor consumer by the LIM retailer and consequent exclusion of general market sellers—is more complicated. Although it could conceivably represent new demand, the increase in sales at a given price which occurs as a result of charge shifting presumably is at least in part at the expense of the general retailer. But more important, the main effect of the charge shift is that it creates a barrier against entry into the low-income market by

44. P. 261-62 *supra*.

45. Pp. 261-63 *supra*.

46. Note 40 *supra*.

47. Availability of credit may be the central factor in the use of the low-income market furniture store. The store is usually far enough away and the purchases bulky enough to require transportation to and from either class of store. Nor are the furniture stores such neighborhood operations that familiarity or personal knowledge is a prime factor in store selection. See J. Chapman, *Role of Consumer Finance Companies in a Credit Economy*, in THE CONSUMER FINANCE INDUSTRY 1, 19 (J. Chapman & R. Shay eds. 1967); F.T.C. *supra* note 6, at xiii; Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 745-54 (1967); *Ghetto Fraud I*, *supra* note 4, at 27, 31; Lee, *An Analysis of Installment Borrowing by Durable Goods Buyers*, 30 ECONOMETRICA 770, 776 (1962). The low-income market merchants in the F.T.C. study succeeded in capturing "44% of our estimated total expenditures of low-income households for furniture and appliances," F.T.C., *supra* note 6, at 7. However one defines the class of "the poor," some members of that class probably shop at general market retailers. But those individuals who do shop with the ghetto merchant are probably the poorest of the poor and the least sophisticated of a group of the unsophisticated shoppers, and these individuals are very unlikely to make use of general market stores.

the general retailer. The most likely process for such entry would be as follows:⁴⁸ (1) the general market furniture retailer achieves significantly lower costs than the LIM retailer;⁴⁹ (2) such lower costs are translated into a significant furniture price differential between the general and the LIM retailer;⁵⁰ (3) this furniture price differential is perceived by the low-income consumer as fully compensating him for the inconvenience and higher price of obtaining credit from a small loan company and undergoing the other costs of leaving the specialized low-income market. The charge-shift reduces the likelihood that this sequence will occur, since it greatly increases the cost and difficulty of the third step of convincing the poor consumer that his savings from going downtown will be sufficiently great as to make the trip worthwhile.

To any seller, consumer knowledge and rationality involves costs. Consumer perception of his prices and product is as much a fact of economic life to him as the distance of his plant from his market or the price of his raw materials. He will ordinarily pay for substantial advertising solely to influence these perceptions. Here, however, the costs of propagandizing the consumer are significantly increased by the charge-shifting of his LIM competitors. Consider first the problem of the small loan company—the untied seller of high risk credit. In the absence of retailer charge-shifting, the small loan company could compete with the credit-furniture merchant merely by showing the consumer that his credit is cheaper than that of the retailer, a fairly simple message given the undifferentiated nature of the product. But with

48. The general retailer is unlikely to feel that there is any good reason for providing high risk credit himself in installment sales contracts. The general market credit that he does give is a business involving administrative costs and the foregoing of immediate return. He is not in the business of providing *risk* capital, but serving the credit needs of the low-income customer would require just that. See F.T.C., *supra* note 6, at 18, Table III-5. Furthermore he would have to make considerable changes in at least two of his departments to enter the high-risk credit business. His collection department would probably have to learn the distasteful tactics of the collection agency. Frequent garnishment proceedings and repossession would likely have to be added to the more subtle means he can use for his general customers. Paul Rand Dixon, *F.T.C. Report Hearings*, *supra* note 16, at 4. Likewise his credit department would have to make pricing decisions rather than merely accept or reject applications. See J. Zwick, *A Cross-Section Study in Industry Costs and Earnings*, in *THE CONSUMER FINANCE INDUSTRY* 55, 63-67 (J. Chapman & R. Shay eds. 1967).

The general retailer might well fear that entering the new high-risk credit business would jeopardize his existing business. Any publicity given to his new collection methods and new higher rates might well hurt his image in the eyes of his middle-class customers. Tie-in law developed partly to protect tied product sellers from being forced into a new industry. See *Tie-in Doctrine*, *supra* note 37, at 93. Even if he wanted to enter this new industry, he would still face the difficulty of charging rates in excess of those stated by the charge-shifting retailer.

49. See F.T.C., *supra* note 6, at 17-20.

50. See p. 255 *supra*.

the tie-in, the loan company must convince the consumer that the clear appearance of cheaper credit is misleading because of inflated prices on furniture whose actual value is difficult to assess. Further, it may be that the low-income consumer's idea of a "fair price" for credit is lower than the economic cost of providing it for him, and that he will therefore consider the loan company's rate excessive.⁵¹ If all credit bore a stated price commensurate with its economic costs, the consumer's notion of a "fair price" would presumably be revised upward under the pressure of his desire for consumer durables. But as long as the tying retailer can keep his stated credit price low, conventional objections to "usurious" rates block opportunities for those who must price at or above cost.⁵²

The general market furniture retailer faces a similar problem. In order to convince the low-income buyer that his furniture is cheaper than that of the LIM retailer, he must somehow expose the false nature of his competitors' apparently low credit price.⁵³ The difficulty of both the small loan company and the general retailer might be overcome by their joining forces and presenting a total package (or monthly payment) price rather than separate elements at two prices. But such a joint advertising campaign would present special problems and special costs just because the general retailer and the small loan company are different enterprises in different locations. Such close cooperation would be hampered by state laws limiting the small loan licensee to a single office located in the city neighborhood which he serves, away from the general retailers who are likely to be concentrated "downtown" or in the suburbs.⁵⁴

Besides erecting an economic barrier to the reduction of market segregation, charge shifting in many cities may perpetuate a legal barrier to the use of the general market by the poor. In many states usury laws effectively prevent small loan companies from servicing those of

51. See pp. 257-58 *supra*. For a general description of the small loan industry, see J. CHAPMAN & R. SHAY, *THE CONSUMER FINANCE INDUSTRY* (1967). It would seem likely that the LIM retailers in the F.T.C. study were pricing credit below cost. General market stores charged 21%, while ghetto merchants charged 24%, despite bad-debt losses of 6.7% of total sales (as opposed to general market losses of .3%).

52. See note 12 *supra*.

53. Consumers do know that the stated furniture price in the general market is lower than the LIM price, but are unlikely to be able to know whether the difference is sufficient to overcome the unavailability or higher cost of credit. See note 30 and sources cited therein.

54. See B. CURRAN, *TRENDS IN CONSUMER CREDIT LEGISLATION 16-19* (1965). See generally CGH *CONSUMER CREDIT GUIDE*. Because the loan companies and the general market retailers are also injured by the low-income merchants' tie-in, they might join the suit as plaintiffs, and cooperate with the consumer group in bringing about compliance to injunctions and changes in state law where necessary to facilitate relief.

the poor who present the greatest risk.⁵⁵ In many states an even lower interest maximum prevents the general market retailer from providing very high risk credit. While such retail credit laws purport to control the LIM retailer as well, they fail to do so because his charge shifting conceals the true cost of his credit.⁵⁶ The consumer who is so poor that he cannot be serviced at legal rates must therefore choose between the LIM retailer and no credit at all. If the usury laws were stable and permanent, poor consumers might reasonably regard the charge shift as beneficial by allowing them to escape what must appear as an illegitimately paternalistic law. But the history of usury laws reveals them to be characteristically *unstable*.⁵⁷ The charge shifting LIM retailer is filling the function of the loan shark, acting as ghetto lender of last resort. He keeps the abuses inherent in the practice sufficiently low and well concealed to prevent the very reform of the usury laws which would allow the poor to obtain credit from untied or general market sources.

Of course any number of retailers might forego sales in the general market and enter the specialized low-income market by reproducing the charge shift. Such decisions may in fact serve to drive the long-range profits of all LIM retailers down to a "competitive" level.⁵⁸ But such entry would not prevent charge shifting from causing consumers to act irrationally by increasing their purchases at a given package price merely because of a different allocation of stated prices. Free entry of LIM retailers would merely spread to more sellers the benefits of the higher price.

IV.

Relevant antitrust doctrine is based on the Supreme Court's notion that while tie-ins are seldom if ever beneficial or necessary for sellers,

55. See J. Chapman, *Role of Consumer Finance Companies in a Credit Economy*, in *THE CONSUMER FINANCE INDUSTRY* 1, 19 (J. Chapman & R. Shay eds. 1967); H. BLACK, *BUY NOW, PAY LATER* 212 (1961); Lee, *An Analysis of Installment Borrowing by Consumer Durable Goods Buyers*, 30 *ECONOMETRICA* 770, 776 (1962); note 101 *infra*.

56. See articles cited *supra* note 16.

57. As soon as a usury law becomes effective—*i.e.*, where no device such as charge shifting is available to avoid its effect—illegal sources of high-risk credit arise. These "loan sharks," uncontrolled by the law and unable to use the courts to enforce collection, charge such excessive rates and use such violent methods that the political costs of retaining the usury level becomes unacceptable; the interest ceilings are removed or raised, or an exception is created. Just such a development allowed the institution of small loan companies. CURRAN, *supra* note 54, at 2. See also Warren, *Regulation of Finance Charges in Retail Installment Sales*, 68 *YALE L.J.* 859 (1959), who develops the thesis that there should be no legal distinction drawn between "loans" and "credit."

58. See *Tie-in Doctrine*, *supra* note 37, at 95.

they *may* cause unjustifiable harm either to purchasers or to competitors.⁵⁹ Purchasers may pay more for the tied package than they would have for identical untied goods because the complexity introduced by a tie prevents purchasers from properly quantifying their preferences.⁶⁰ For the competitors, foreclosure by a tying arrangement goes beyond simple "hard competition" because it leaves the tied product seller defenseless. Since the tying seller's advantage may derive from his position in the tying market, the tied product competitor cannot necessarily recoup sales in the fashion which competition theoretically produces—the reduction of the costs of the competitor's own production to the lowest possible level. Foreclosure through tying is thus regarded as a competitive tort.⁶¹ In the cases that have come before the Court, the danger of foreclosure has arisen from the possible use of economic power—or, more accurately, "excess profits"—in the tying market to subsidize sales in the tied market. When this danger is indicated by product differentiation or, in the most recent case,⁶² by the tying merchant's significant cost advantages in the tying market, the policy against tie-ins ripens into a single-test per se rule.⁶³ Such

59. See *id.* at 91-99; and, e.g., *United States v. Loew's Inc.*, 371 U.S. 38, 44-45 (1962). The Note on *Tie-in Doctrine*, 79 YALE L.J. 86 (1969), was written as a companion to the present Note. The reader interested in a fuller treatment of anti-trust law as applied to tie-ins—especially one familiar with the common debunking of the doctrine by economists—should refer to the prior Note.

The formal requirements of a tie-in are met in the low-income furniture market. The furniture sold in either the general or LIM stores travels in interstate commerce. The volume of the business of LIM retailers exceeds the *de minimis* "not insubstantial amount" requirement. Compare F.T.C., *supra* note 6, at ix, with *Tie-in Doctrine* 86 n.2, and *United States v. Loew's Inc.*, 371 U.S. 38, 49 (1962) (\$60,000 per year not insubstantial). Two separate products are involved. Both long-term credit and furniture are sold separately a majority of the time. See F.T.C. *supra* note 6, at ix; J. Chapman, *Role of Consumer Finance Companies in a Credit Economy*, in *THE CONSUMER FINANCE INDUSTRY* 1, 8, table 2 (J. Chapman & R. Shay eds. 1967). They have no more functional connections than other subjects of illegal tying arrangements. See, e.g., *International Salt Co. v. United States*, 332 U.S. 392, 393 (1949). Separate charges are made even when the products are sold together. Both buyers and sellers regard them separately, and in low-income markets both may regard credit as the *sine qua non* of the transaction. See Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 750 & nn.28-29 and citations therein (1967). "Several of the retailers indicated that, if they were forced to make a choice, they would rather give up their merchandising business than their credit business. These were retailers with large amounts involved in conditional sales contracts—some more than a half million dollars. Furniture and appliance retailers with adequate capital have entered into a dual-role organization—that of merchant and financier." N. NYBROTEN, *CREDIT PRACTICES OF RETAILERS AND FINANCERS OF FURNITURE AND HOME APPLIANCES IN TWO NORTHWEST CITIES* 77 (1963). See also note 48 *supra*. Since the credit tie-in functions as a tie-in, pp. 269-70 *infra*, it should be regarded as involving separate products. See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 498, 507 (1969).

60. *Tie-in Doctrine*, *supra* note 37, at 91-92.

61. *Id.* at 92-99.

62. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

63. *Tie-in Doctrine*, *supra* note 37, at 94-101.

Consumers and Antitrust Treble Damages

indications of market power are alone sufficient to make the practice illegal.

The credit/furniture tie-in of the low-income market retailer may fall within the existing per se rule which bars a tying arrangement where there exists market power over the tying product. The various low-income market retailers in any one area may have oligopolistic control over high-risk credit.⁶⁴ This will be the case where there are a limited number of such sellers and little effective competition from other sources of high-risk credit.⁶⁵

But while the application of such market power may well cause harm in the credit/furniture tie-in situation, the threat of oligopolistic subsidization of furniture competition is clearly less serious than the economic distortion which has been described in the previous section of this Note and which is produced even in the absence of market power.⁶⁶ The market power test does not rest on its own bottom—it is not the fact of possession of power that is disapproved, but consequences associated with that power. One should always be able to expand such a per se rule to effect its purposes: prevention of foreclosure of competitors and harm to purchasers.

The underlying competitive evils that led to the policy against tie-ins are present in the LIM retailer's charge-shifting tie-in. The purchaser harm rationale is invocable here: the complexity introduced by the combination of tying and charge shifting is likely to lead to unwise decisions by purchasers. And the practice of the LIM retailer is used against those groups least able to tolerate increased complexity—segregated low-income consumers. Foreclosure of the tying product competitor—the general market furniture retailer—is also a danger. From the viewpoint of the general retailer, the existence of a segregated low-income market means that a large group of potential buyers are

64. *Id.* at 99-100. See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 520 (1969).

65. Though entry into the low-income market is probably relatively open, the size of the market in some cities may be so small as to allow oligopolistic control. Washington, D.C.'s 18 large LIM furniture retailers, F.T.C., *supra* note 6 at 4-5, probably is close to an upper limit on the number of LIM competitors, yet may itself give rise to the perceived interdependency that defines oligopoly. See also note 37 *supra*.

Seventy per cent of the customers of LIM merchants in the F.T.C. study listed no credit references other than low-income market tying merchants. F.T.C., *supra* note 6, at 42-43. Where state law sets restrictive usury rates that only LIM retailers can escape, see p. 277 *infra*, lack of general market competition is almost certain to help isolate those consumers with the highest risk complexion.

The "market power" need apply to only a portion of the buyers in the market. *Tie-in Doctrine*, *supra* note 37, at 97.

66. See *Tie-in Doctrine*, *supra* note 37, at 95.

effectively denied him. Inasmuch as charge shifting intensifies and perpetuates segregation, it penalizes the general market retailer for failure to enter a new industry (the provision of high-risk credit) and increases the cost to him of effectively competing for sales on the basis of the price and quality of his furniture.

The current per se rule against tie-ins grew from judicial recognition that tie-ins based on market power might produce just this kind of harm, and from the failure of economists to convince the Supreme Court that tie-ins offer any significant benefits. Where the tie-in plus charge shift of the LIM retailer presents the same dangers as the market power tie-in and is equally lacking in legitimate compensatory benefits, such a tie-in ought to be held illegal.

The Supreme Court has recently noted that a tie-in not involving market power may be illegal as an unreasonable restraint of trade.⁶⁷ The development of the market-power rule establishes that once substantial harm to purchasers and foreclosure of competitors are present, the absence of criminal intent is irrelevant and any possible beneficial effects of the tie lead at most to narrow exceptions to a broad prohibition.⁶⁸ Actual proof of damage to purchasers and competitors as suggested herein should therefore be dispositive of the issue of legality. Our preceding analysis has shown the presence of the tie-in danger, and the only "legitimate business purpose" which has been suggested for charge shifting is the avoidance of usury laws. There are serious questions whether a court may consider usury avoidance as a "legitimate business purpose."⁶⁹ But even if this is appropriate, presence of "legitimate business purpose" does not alone justify a tie-in.⁷⁰ The court may at most consider the proven benefits of usury avoidance in a given instance—as where the usury laws seem stable and unavoidable by other means⁷¹—as creating at most a specific, narrow exception to the general policy against production of consumer and competitor harm.⁷²

The same considerations which led to the market power standards for predicting foreclosure may lead here beyond a finding of an unreasonable restraint of trade to an extended per se rule. The com-

67. See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 499-500 (1969).

68. *Tie-in Doctrine*, *supra* note 37, at 95-96, 101.

69. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 8 (1958).

70. See *Tie-in Doctrine*, *supra* note 37, at 86, 95 n.46, 101.

71. See p. 277 *infra*.

72. *Tie-in Doctrine*, *supra* note 37, at 95-96, 101.

Consumers and Antitrust Treble Damages

plexity of economic fact finding in a situation like this one creates a considerable danger that a multi-factor inquiry into actual damage to consumers and competitors will lead only to uncertainty. Uncertainty, especially while under pressure to reach some result, is likely to lead to confused and irrational decision making.⁷³ Since a charge-shifting tie-in is unlikely to be of any legitimate benefit,⁷⁴ we should be willing to form a new per se rule based on more simple facts strongly predictive of harm to purchasers or to competitors: *i.e.*, actual charge-shifting should be illegal per se.

But we may wish to extend our new per se rule still further, because attempted proof of actual charge shifting may still leave a large area of uncertainty. If we must determine whether a given seller's credit is underpriced the difficulty of allocating different costs between credit and furniture remains. Without endangering beneficial practices, we could extend our per se rule to all of those situations in which the tying merchant is *able* to achieve dangerous charge shifting.⁷⁵ The following set of conditions would delineate these illegal situations: (1) the purchasers are consumers or other small-unit or unsophisticated buyers;⁷⁶ (2) the price of at least one of the tied products is quoted individually;⁷⁷ (3) both products form a substantial element of cost in the production of the package;⁷⁸ (4) neither product is sold individually in sufficient volume to insure that the stated price reflects the seller's full costs and a reasonable profit.⁷⁹

73. See Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 227-28, 241-44, 271-75 (1960); Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism and Cynicism*, 67 MICH. L. REV. 925, 930-92 (1968).

74. But see p. 270 *supra*.

75. This would then follow the development of the market power rules. See *Tie-in Doctrine*, *supra* note 37, at 95-96, 99-100.

76. Large-unit commercial buyers have the resources, the economies of scale and the expertise to pierce all but the most deceptive of sales practices. The "consumer," however, is almost defined by his inability to make sophisticated purchasing decisions. T. SCITOVSKY, *WELFARE AND COMPETITION* 17-18, 398-406 (1951).

77. Package deals which contain a substantial "free" element implicitly quote the price of that element as zero, and thus may be prohibited. A seller could legally sell a package of two separate products at a single package price. Since the law requires a separate statement of the credit charge, however, the LIM retailer will not be able to avoid per se illegality by offering only a package price.

78. If one of two products comprises so minor an addition to the package that the buyer is unswayed by its having a low stated price, substantial harm is unlikely. The seller may thus provide "free" services to accompany his consumer product if they do not represent a substantial cost in comparison to the product.

79. These four criteria do not require the prohibition of all tie-ins of consumer products. The fourth point preserves the legality of the credit/furniture tie-in in the general market because the volume of cash sales precludes the arbitrary increase in furniture price. See pp. 256, 262 and note 24 *supra*.

V.

Once a violation of the Sherman Act has been shown, Section 4 of the Clayton Act provides a comprehensive right to treble damages to any person who is thereby "damaged in his business or property."⁸⁰ The consumer is clearly entitled to recover in this case, since either of the two grounds for holding tie-ins illegal will have caused him substantial damage. As the purchaser he will have been led to pay an enhanced price. In addition, foreclosure of the general market retailer will have produced a segregated market in which the consumer's vulnerability to a wide range of marketing abuses is aggravated and in which he is exposed to price discrimination. It is impossible to measure precisely the amount of damages due to consumers. As a theoretical matter, there is no factual pattern that exactly duplicates the low-income market in all respects but charge shifting. The tying merchants' own actions preclude such an unrestrained market which would serve as a base for comparing the detriment caused by the tie-in plus charge shift. But this difficulty is characteristic of antitrust litigation, and courts have been, quite rightly, unwilling to allow the actions of defendants to bar damages as "uncertain."⁸¹ Although no tie-in case has ever reached the question of damages to purchasers,⁸² the standard defined for purchaser damages in price fixing cases is applicable here. Purchaser damages equal the difference between the restricted purchase price and "the market . . . price . . . under natural conditions."⁸³ In the absence of an unrestrained market, the "reasonable price" serves as a standard for comparison.⁸⁴

The consumer plaintiffs in our charge shifting case will assert as a certain and easily ascertainable measure of damages the difference between the furniture price paid to the low-income market retailer and the price charged in the general market stores.⁸⁵ The tying merchants

80. See note 106 *infra*.

81. While there remain unrestrained markets for comparison—the untied furniture and high-risk credit markets—the defendant's actions may have obscured the extent to which the poor would have used such markets and the price of credit to very poor consumers. A series of Supreme Court decisions reacted to a number of lower court dismissals of damages as "uncertain" by asserting the traditional principles that defendants' own wrongdoing should not shield him from damages, and that damages need only be based on the best possible evidence. The court has therefore allowed juries great freedom in weighing the arguments of the parties as to damages. See *Bigelow v. RKO Pictures*, 327 U.S. 251 (1946); *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931). Compare *McCORMICK, DAMAGES* 100-04 (1935).

82. But see note 85 *infra*.

83. *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906).

84. See *Ring v. Spina*, 148 F.2d 647, 653 (2d Cir. 1945). Cf. *Thomsen v. Cayscr*, 243 U.S. 66 (1917).

85. The only reported tie-in decisions concerning purchaser damages assumed that

Consumers and Antitrust Treble Damages

would of course be free to argue that the consumers were damaged to an extent less than the full amount of the price differential between LIM stores and those of the general retailer. They might argue that, without charge shifting, consumers would have paid more for credit; or that some consumers would have bought in a high-priced segregated market even absent the foreclosure effects of the tie-in;⁸⁶ or that interest maximum laws would have prevented them from getting credit and furniture at all.⁸⁷ But these are issues for the jury in determining the amount of damages.

In addition to defining the measure of damages, courts in tie-in cases must form explicit injunctive decrees both to end the illegal practice and to dissipate its effects.⁸⁸ The court should require the untying of credit and furniture, *i.e.*, require the seller to make a good faith offer to sell untied credit ("loans") for use to purchase furniture

such a difference was both possible and an element of damages. Neither case, however, involved a holding. *See Osborn v. Sinclair Refining Co.*, 324 F.2d 566, 570, 575 (4th Cir. 1963); *Bascom Laundry Corp. v. Telecan Corp.*, 204 F.2d 331, 334 (2d Cir.), *cert. denied*, 345 U.S. 994 (1953). In *Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495, 497 (1969), the plaintiff alleged damages consisting of the "unreasonably high prices" and the low quality of the tied product. The Supreme Court failed to comment that these damages were inappropriate, despite its implicit recognition that an important feature of the tying product was its low cost. 399 U.S. at 504-05. These cases, and cases concerning other violations, might be seen to suggest that difficulty in computing damages should be reduced, and antitrust violations therefore deterred, by accepting a standard of damages that ignores factors which could possibly decrease the main provable element of plaintiff's damages. *See Fowler Mfg. Co. v. Gorlick*, 1969 TRADE CAS. ¶72,898 (9th Cir. 1969) (measure of damages in price discrimination action the difference between price to plaintiff and price to others). Many cases have rejected the "passing on" defense apparently on the same grounds. *See Note, The Defense of "Passing On" in Treble Damage Suits Under the Antitrust Laws*, 70 YALE L.J. 469 (1961). But no such harsh rule seems necessary here. Placing the burden of proof of mitigating factors on the defendant ought to be sufficient.

One recent case has awarded damages resulting to a tied product competitor. *Advance Business Systems & Supply Co. v. SCM Corp.*, 1968 TRADE CAS. ¶72,511, at 85,751 (D. Md. 1968).

In the face of substantial, provable elements of damage in our LIM tie-in case, the trial court could take the case from the jury only a theory that buyers in tie-in cases necessarily pay for the combined products what they would have paid for separate ones. But such a theory would have to be based on an asserted inability of the tie-in to cause consumer irrationality or to foreclose tied product competitors. The fact that the tie-in "works" as it does negates both assumptions.

86. Since the tie-in itself helps keep low-income consumers in the segregated market, it is appropriate to require defendant to show that plaintiffs would have stayed within the low-income market despite the tie-in. To require plaintiffs to prove they would have left would be to allow defendants' own actions to make proof of damages extremely difficult. Defendant must also show that his furniture prices would have been higher than those of general stores even without the tie-in. Such facts, largely involving higher costs, are peculiarly within his knowledge.

87. For the defendant to make such an argument he would have to admit that this charge shifting was a device to avoid state laws regulating interest rates. Even if the court were to allow him to make such an argument, the jury would be free to set an amount on the value of the protection which the legislature declared usury laws to confer on the poor.

88. *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947).

from other stores. While he can still sell the credit/furniture package, the seller must not coerce consumers to take the package rather than the untied items. The price of the package must therefore equal the sum of the prices for the two untied goods less any *proven* economies of package selling.⁸⁹

Even a tie-in held to be legal in itself—*e.g.*, where only *charge shifting* is held illegal—should be enjoined in order to guarantee the effectiveness of relief. Violators of the antitrust laws have frequently been enjoined even from legal practices where this was found necessary to “pry open the market” that they have restrained.⁹⁰ In this case untying would be useful, first, because it provides a market mechanism for preventing charge shifting. Since we would require the stated “credit” price to follow the untied price of “loans,” the LIM retailer will be forced to keep up the price of credit if a significant number of buyers would purchase underpriced loans.

The untying of credit would also tend to decrease market segregation. The mere end of charge shifting will not necessarily dissipate the effects of such charge shifting either upon consumer irrationality or upon market segregation. After years of the deceptive practice, the poor may have developed community “knowledge” that the LIM retailer provides “cheap” credit. It may take both time and further information to reverse that notion and the buying habits it underlies.⁹¹ Also, as noted above, the low-income market is a system of cumulative, circular causation. Removal of a cause of segregation will not remove the other causes of segregation that have been strengthened by the original abuse. The immediate effect of untying would be to allow at least some buyers to purchase furniture in the general market with the use of LIM retailer credit. Untying will make people aware that they can get credit in one place and use it in another, ending the illusory distinction between credit and loans. It may act as a check on various retailer abuses if it makes buyers feel more free to walk away from the LIM retailer’s sales pitch. Ultimately, untying may force the package price downward as the LIM retailer comes more clearly into competition with the general retailer.⁹²

89. *United States v. Paramount Pictures Inc.*, 334 U.S. 131, 157-59 (1948). The court may also require that the retailer advertise and make initial offers to sell the credit untied. *See United States v. Loew's Inc.*, 371 U.S. 38, 53-54 (1962). *Cf. United States v. R. Hoc & Co.*, 1955 TRADE CAS. ¶68,125, at 71,006 (S.D.N.Y. 1955) (consent judgment).

90. *United States v. Loew's Inc.*, 371 U.S. 38, 53 (1962); *International Salt Co. v. United States*, 332 U.S. 392, 400 (1947).

91. *See* note 30 *supra*.

92. *See* note 28 *supra*.

Consumers and Antitrust Treble Damages

One difficulty with the untying of "credit" is the limitations imposed by states on the granting of "loans." Every state has a general usury law that sets an interest maximum at an impractically low level (usually between 6 and 12 per cent).⁹³ Loans to the poor must find some formal exception to the general usury laws, and the only one generally available (other than a retail installment contract) is that provided by small loan company acts.⁹⁴ Most state statutes do not in terms prevent LIM retailers from becoming small loan licensees, nor do they pose onerous burdens. But the state small loan commission is generally given discretion in the granting of licenses and may impose conditions onerous to the LIM retailer.⁹⁵ It is therefore possible that legal barriers will prevent the effective untying of credit.

Assuming, however, that the LIM retailer is able to become a small loan company, permissible terms of the credit may vary between the "credit" form and the "loan" form—the small loan act and the retail installment sales act may put different limits on the rates, term, amount or security permissible under the "different" forms.⁹⁶ The poor who

93. CURRAN, *supra* note 54, at 15-16.

94. See generally *id.* at 15-83.

95. Though requirements for licensing vary from state to state, it seems likely that such applications will be accepted in a number of states. The barriers to allowing such licensing fall under several general headings.

In a few states, requirements for licensing and application fees, N.Y. BANKING LAWS § 341 (McKinney Supp. 1969), (\$1250 1st year), or for minimum liquid capital, CONN. GEN'L STATS. ANN. § 36-226 (1969); N.Y. BANKING LAW, §§ 341, 345 (McKinney Supp. 1969); N.J. STATS. ANN. 17:10-5 (Supp. 1969) (all \$25,000), may impose an intolerable burden for the smaller of the tying merchants who would be likely to do a small volume of untied credit business. The court may have to weigh the burden of the capital and cost requirements against the size and expected volume of the individual defendants and require only those who can afford it to sell untied credit.

While in some states issuance of small loan licenses apparently follows automatically upon application and the fulfilling of requirements of good character and financial responsibility, CAL. FINANCIAL CODE § 22206 (West 1969), MASS. ANNO. LAWS, Ch. 140, § 97 (1965), most states allow an administrative agency to deny the licensing where it will not serve the "convenience and advantage" of the community. The administrative bodies in some states have apparently used this requirement to restrict the number of small loan companies to one per "community."

Limitations on the conducting of other businesses on the premises of a licensed small loan company obtain in most states. Usually the administrator either must grant prior authorization or may subsequently prohibit the conducting of other businesses. The criterion for allowing other businesses is that the nature of the business be such that it does not facilitate evasions of the small loan act. The only way in which a retail sales business might facilitate evasions would be the transferring of interest charges from credit into furniture. But the federal court's injunction and enforcement are designed to prevent just that occurrence. Besides, all credit issued in conjunction with a sale will be in the form of retail credit rather than that of a loan. However, OHIO REV'D CODE § 1321.16 (1962) is probably an absolute bar on small loan retailers. See also CONN. GEN'L STATS. 36-236 (1969) (limitation on security); MICH. COMPIL. LAWS ANN. § 493.17 (1967).

96. See note 101 *infra*; CURRAN, *supra* note 54, at 15-124.

cannot be served in the "loan" form will continue to be captured by the LIM retailer.⁹⁷

Because of the limitations on the practical effectiveness of the untying of credit, injunctive relief should include the direct prohibition of charge shifting.⁹⁸ The retailer can be left free to choose the rate of return he will attempt to obtain on the resources he contributes (capital, entrepreneurship, good will). But the court should require that the rate of return be the same for resources used in sale of credit as for those used in sales of furniture.⁹⁹ If the LIM retailer's untying is made ineffective by the application of state usury and small loan laws the direct prohibition would replace the automatic charge-shifting control of effective untying. Alternative methods of countering market segregation could be devised, such as a requirement that LIM retailers give to prospective buyers conspicuous notice of the availability and rates of small loan companies.

The direct effects of barring charge shifting and untying credit should be to increase stated credit prices and to decrease furniture prices. Rationality of buyers should then lead to a decrease in demand for high-risk credit generally and a decrease in demand for both furniture and credit from the LIM retailer. There should be an increase in the number of the poor purchasing furniture in the general market, resulting in a decrease in market segregation. Conceivably there will be cumulative effects decreasing retailer abuses and price discrimination.¹⁰⁰ A decrease in the real price of furniture from the LIM retailer is also possible.

In recommending such relief, one must, of course, consider the possible secondary, aggregate effects of prohibiting charge shifting and tying. If the long-range effects were to be higher prices or unavailability

97. But such capture will not necessarily allow charge shifting. As long as the LIM retailer has a significant number of buyers who do have the alternative of the small loan market there will be pressure keeping the furniture price low. The court can require the LIM retailer to hold firm his furniture price independent of the credit arrangement or risk characteristics of the buyer. Overstating of the furniture price would drive from the market those buyers free to purchase credit from the small loan company. See note 24 *supra*.

98. Direct prohibition of charge shifting was not necessary in previous tie-in cases because untying would indirectly prevent such shifting. See p. 274 *supra*.

99. There are clearly practical difficulties with such judicial regulation. The thorny problem of determining a "fair" rate of return is avoided, but problems of allocating unitary costs to the separate products remains. For example, a portion (but hardly $\frac{1}{2}$) of the cost of space must be allocated as a cost of credit. To avoid this difficulty, the court might adopt the assumption that the cost of credit to the LIM retailer is the same as its cost to the small loan company, and place on him the burden of proving otherwise. It seems unlikely that the LIM retailer's costs are much different from the small loan company, and the facts proving otherwise are within the control of the LIM retailer.

100. See note 28 *supra*.

Consumers and Antitrust Treble Damages

of credit, we might wish to reconsider the wisdom of litigation or the legality of the practice. But independent of legal restraints the relief suggested above should not have detrimental side effects. Standard marginal analysis would suggest that whatever the effect of the relief on supply or demand, the market would respond by attaining a new equilibrium position not greatly differing from the pre-relief position. Barriers to entry or exit do not seem high here and no other facts are suggested which would lead to a greater departure from the ideal than is usual.

Once again, however, the artificial restraints posed by state credit/loan laws may have undesirable effects. The most serious problem arises in those states which have allowed charge-shifting as the only (covert) means to escape restrictive maximum rates of interest. The laws of these states, which pose maximum rates for both "loans" and "credit," may result in a cut-off of credit to the very poor once charge-shifting is eliminated.¹⁰¹ Therefore counsel to the poor, before instituting such suits, owe it to their client class to consider this problem very carefully, estimating as best they can how many people will be denied credit and how likely it is that the resulting crisis will cause a rapid revision in the maximum rates.¹⁰²

It is also necessary to consider the possibility that an end to tie-in plus charge shifting will drive a large number of LIM retailers out of the credit business altogether.¹⁰³ So long as small loan companies exist and are legally able to serve all the poor the problem raised by the demise of the LIM retailer would probably not be a serious one. While a sharp cut in the sources of supply may have short-range effects, neither legal nor economic restraints are likely severely to limit the flow of new capital into the small loan industry to balance the increased demand for loans.

101. Maximum retail and small loan rates vary widely from state to state. For example, California, Massachusetts, Michigan, New York, New Jersey, Ohio and Pennsylvania have retail maximums as well as small loan maximums. Connecticut, D.C. and Illinois do not. Whether poor consumers will be deprived of credit in any given state will require a more detailed analysis than can be set forth here. See generally CURRAN, *supra* note 54; CCH CONSUMER CREDIT GUIDE. See also p. 270 *supra*.

102. "Consumer credit restraint tends to raise the real income of the recipients of income from dividends and interest, and to lower that of the recipients of income from the sale of labor services." Abstract of L. Graves, *The Effects of Consumer Credit Restraint on the Distribution of Income* (unpublished doctoral thesis, U. Cal., Berkeley, 1963), 24 DISSERTATION ABSTRACTS 3586 (Univ. Microf. Order No. 64-2054).

103. The loss of the profits from the practice may drive some sellers out of the market, but this should increase the volume of their more efficient LIM competitors. *But see* Commentary of Senator McIntyre, *FTC Report Hearings, supra* note 16, at 16-17. LIM retailers are more likely to be forced out of the untied credit business by interest maximums on retail credit. See note 101 *supra*.

An Exhortatory Appendix: Consumer Treble Damage Actions

Consumer protection advocates have often called for effective actions for consumer relief in the federal courts.¹⁰⁴ But both advocates and commentators have failed to note the potentially useful treble damage antitrust action.¹⁰⁵ The Sherman Act on its face seems to indicate that a consumer action is possible.¹⁰⁶ The one piece of serious inquiry into the subject¹⁰⁷ established on the basis of the legislative background and history of the Act that consumers were given a remedy. The case law does not foreclose the action, and in fact gives every indication that it would be favored.¹⁰⁸

Antitrust violations involving consumers are likely to injure a

104. See, e.g., Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 788 (1966). State court procedure has often been criticized as impeding consumer litigation. See, e.g., Schrag, *Bleak House 1968: a Report on Consumer Test Litigation*, 44 N.Y.U.L. REV. 115 (1969).

105. See notes 2-3 *supra*. This note concentrates on treble damages as a remedy, because it is believed to be the most useful to consumers. To void contracts between the consumer and the violating seller would, of course, be of great benefit to consumers in antitrust suits, particularly where the amount of damages is difficult to prove. Recent suits have requested such relief. *Complaint, Contract Buyers League v. F & F Investment*, 2 CCH Pov. L. REP. § 9611 (N.D. Ill. 1969) (complaint on file Yale Law Library); *Hayden v. Cohen*, *supra* note 4. However, the Supreme Court has not looked favorably on such relief and has denied it except where otherwise "the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act." *Kelly v. Kosuga*, 358 U.S. 516, 521 (1959). Ironically, such a situation would more frequently occur where the plaintiffs were co-conspirators rather than purely victims, as consumers usually are. See *id.* But some consumer situations might give rise to a legitimate claim for voidness of contract, e.g., where the consumer is trying to avoid a contractual obligation to purchase the tied product of a tying arrangement. See *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), cert. denied, 383 U.S. 820 (1965). See generally A.B.A. SECTION OF ANTI-TRUST LAW, *ANTITRUST DEVELOPMENTS 1955-1968*, at 308 (1968); Wood, *Unenforceable Contracts and other Consequences*, in A.B.A. SECTION OF ANTI-TRUST LAW, *AN ANTI-TRUST HANDBOOK 567* (1958); Lockhart, *Violations of the Anti-Trust Laws as a Defense in Civil Actions*, 31 MINN. L. REV. 507 (1947).

106. See p. 254 *supra*. In a very early case, *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906), the Supreme Court recognized that a purchaser was injured "in his property" simply by being led to pay more for a product than it was worth. *Id.* at 396. The line between entrepreneurial and consumer purchasers is not always easy to draw and there seems to be no reason in theory or policy for distinguishing between them. See, e.g., cases in which governmental units sue as purchasers, note 2 *supra*; *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) (class action on behalf of 3,750,000 private investors in "odd lots" against brokers for price fixing). See also *United States v. Cooper Corp.*, 312 U.S. 600, 615 (1941) (Black, J., dissenting). Frequent consumer suits would act as an effective sanction without loss of the compensatory character of private actions, a result sometimes feared from extensions of the entrepreneurial action. See Note, 71 YALE L.J. 280, 295-96 (1961).

107. FORKOSCH, *supra* note 2. This appears to be the only published work directly considering the problem of a consumer's right to sue. Several cases and articles do argue for consumer suits in specific situations, but without considering the problems caused by the plaintiff's status as consumer. See notes 108, 111 & 124 *infra* and note 4 *supra*.

108. FORKOSCH, *supra* note 2, at 290 n.2, states that no consumer action had been reported prior to 1941, and the author knew of none since then. *Id.* 265 n.1. They are still uncommon. Only a few other consumer antitrust cases have come to the author's attention. See notes 2, 4 *supra* and 124 *infra*. Cf. *Bader v. Zurich Gen'l Accident & Liability Ins. Co.*, 12 F.R.D. 437 (S.D.N.Y. 1962).

Consumers and Antitrust Treble Damages

large number of persons in amounts too small to justify the cost of individual litigation, joinder or frequently even rigorous proof of the amount of individual damages.¹⁰⁹ Consumer treble damage suits would require flexible and innovative use of all the procedures the law has developed to ease multiparty litigation.¹¹⁰ The class action under Federal Rules of Civil Procedure 23(b)(3) would appear to be the only practical procedure in consumer suits and should be adequate in most situations.¹¹¹ Common questions—those of fact or law affecting all members of the plaintiff class—will predominate over individual ones because the defendants are more likely to have treated the whole class similarly than to have devised different tactics for each consumer. Consumer or community organizations could collect assignments donated by their members¹¹² and serve as institutional plaintiffs to bear the burdens of paying court costs, gathering data, and informing class members of their rights to participate in any judgment.¹¹³

109. See *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 714-15, 433 P.2d 732, 63 Cal. Rptr. 724, 738 (1967); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686-88 (1941); Comment, *Recovery of Damages in Class Actions*, 32 U. CHI. L. REV. 768, 776 (1965) (suggesting claims under \$5000 unlikely to be brought).

110. See Kalven & Rosenfield, *supra* note 109, at 686.

111. FED. R. CIV. P. 23(a) and 23(b)(3):

One or more members of a class may sue . . . as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims . . . of the representative class are typical of the claims . . . of the class, and (4) the representative parties will fairly and adequately protect the interests of the class . . . and in addition . . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other methods for fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of the members of the class in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation already commenced by . . . members of the class; (C) the desirability of undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Entrepreneurial and governmental class actions under the antitrust laws have been common. *E.g.*, *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) (on behalf of 3,750,000 odd lot stock buyers and sellers); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968); *City of Chicago v. Allen Bradley Co.*, 32 F.R.D. 448 (N.D. Ill. 1963). Two cases have allowed class actions for consumer antitrust suits. *Bratcher v. Akron Area Board of Realtors*, 381 F.2d 723 (6th Cir. 1967); *Contract Buyers' League v. F & F Investment*, 2 CCH Pov. L. REP. § 9611 (N.D. Ill. 1969).

112. Trade associations are frequent antitrust plaintiffs as assignees of their members. See, *e.g.*, *Louisiana Farmers' Protective Union v. Great Atl. & Pac. Tea Co.*, 131 F.2d 419 (8th Cir. 1942). See also *Sampliner v. Motion Picture Patents Co.*, 254 U.S. 233 (1920).

113. The community organization holding assignments of claims could insure adequacy of representation as required by FED. R. CIV. P. 23(a). It would have a sufficient interest and sufficient funds to retain competent and experienced counsel. If its assignments covered multiple fact patterns it would be motivated to give effort to sustain the claim of various subclasses within the overall plaintiff class. See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560-62 (2d Cir. 1968); *Contract Buyers League v. F & F Investment Co.*, 2 CCH Pov. L. REP. § 9611, at 10,750. Legal services organizations might take such suits. Though normally precluded from fee-generating suits, they may take suits where the difficulty of litigation and the uncertainty of recovery are so high as to make private

Within the context of the class action and the multiple assignment, the court can use its considerable flexibility in trial procedures¹¹⁴ to protect the defendant's rights without making the consumer's remedy impractical.¹¹⁵ The defendant will have an interest in protection against strike suits, undeserved bad publicity, and champerty, but the courts should go no further in limiting plaintiffs' rights than is necessary to avoid actual abuse.¹¹⁶ The policy against champerty, in particular, must not be applied so as to deny consumers the right to be informed about the law.¹¹⁷ Business and trade associations have their own lawyers to safeguard their interests—consumers should have equal access to factual and legal information from "public service" attorneys. As long as attorney profiteering¹¹⁸ and raising of spurious claims¹¹⁹ are avoided, defendants should not be allowed to shield themselves behind their customers' ignorance or lethargy.¹²⁰

attorneys unlikely to take the suit. See Dole, *Consumer Class Actions Under the Uniform Deceptive Practices Act*, 1968 DUKE L.J. 1101, 1112.

114. *Dolgow v. Anderson*, 43 F.R.D. 472, 481-82 (E.D.N.Y. 1968).

115. Courts and commentators considering class actions usually invoke these two policies linked with a third, "the interest of the members of the class in individually controlling the prosecution or defense of separate actions." FED. R. CIV. P. 23(b)(3). But in most consumer actions "the stake for individuals may be so small that separate suits would be impractical," and this last interest is negligible. Judicial Conference of the United States, *Amendments to Rules of Civil Procedure*, 39 F.R.D. 69, 104 (1966). Devices developed in the entrepreneurial context to protect this interest can be applied with much less rigor in consumer cases.

It has been suggested that FED. R. CIV. P. 23(c)(2), in requiring that "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," would effectively preclude consumer actions under Rule 23(b)(3). Dole, *supra* note 113, at 1127. But the individual notice requirement need not be prohibitive. Where substantial expense of notice is required, the court should hold a preliminary hearing on the likelihood of plaintiff's success. *Dolgow v. Anderson*, 43 F.R.D. 472, 501 (E.D.N.Y. 1968). Many consumer suits will involve a class of plaintiffs who are not "reasonably identifiable" and thus need not be individually notified, or who can be identified only as those persons living within a limited geographic area (in which case a plaintiff community organization could deliver notice house-to-house). See also *Contract Buyers League v. F & F Investment Co.*, 2 CCH POV. L. REP. § 9611, at 10,753-54.

116. FED. R. CIV. P. 23 requires the court's consent to any settlement of a class action, thus providing a check on the strike suit and removing a motive for inflicting undeserved bad publicity. See Kalven & Rosenfield, *supra* note 109, at 720; Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 169-72 (1958); Dole, *supra* note 113, at 1104 & n.22.

117. See Kalven & Rosenfield, *supra* note 109, at 718 n.98; Comment, *Recovery of Damages in Class Actions*, 32 U. CHI. L. REV. 768, 781-82 (1965). The assignment has generally been recognized as a legitimate device for enforcing rights, and not champertous. See *Wagner v. Braunsberg*, 5 App. Div.2d 564, 568, 173 N.Y.S.2d 525 (1958); *California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co.*, 175 F. Supp. 857, 861 (N.D. Cal. 1959). Both the facts and the law of antitrust violations are likely to be little known to consumers, unlike entrepreneurs who have greater access to both.

118. Attorney profiteering will be controlled by the court's ability to set the fees the attorney receives from non-joined class members through quantum meruit or by 15 U.S.C. § 15 (1964). See Kalven & Rosenfield, *supra* note 109, at 715-17.

119. See note 116 *supra*.

120. See Kaplen, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 HARV. L. REV. 356, 398 (1967).

Consumers and Antitrust Treble Damages

Problems of proof will raise the same kinds of conflicts between defendants' rights and the practicality of enforcement. As to "common questions" affecting the plaintiff class as a whole—such proof of an antitrust violation—consumers can be expected to bear the same burden as entrepreneurial plaintiffs. But a requirement of great rigor in proof of individual questions—such as amount of purchases by each particular plaintiff—would often make enforcement extremely difficult without significant gains in due process for defendants.¹²¹ Given the large number of class members and the small size of their individual claims, an improved estimate of plaintiff *A*'s purchases affects only a minute fraction of the total award and inaccuracies increasing recovery would likely be set off by inaccuracies decreasing it.¹²² Trial time is better spent on assuring the most accurate possible determination of common questions such as the market effect of the antitrust violation. These questions affect the entire award, and since there are few of them, they are unlikely to balance each other out.

Use of the class action helps make the consumer treble damage action a quasi-public tool of antitrust enforcement and not merely a means for the most sophisticated consumers to gather damages. It might also serve as an effective organizing device. Much as civil rights suits often provided a nucleus around which black organizing could develop, the antitrust action could be a means for bringing the consuming public together against corporate crime.¹²³

In order to avoid burdensome proof that a given restraint of trade is "unreasonable," practical treble damages litigation must usually allege violation of per se antitrust rules.¹²⁴ Definitions of per se offenses,

121. Several cases brought by entrepreneur classes have required individual proof of damages. *E.g.*, *Louisiana Farmers' Protective Union v. Great Atl. & Pac. Tea Co.*, 131 F.2d 419, 423 (8th Cir. 1942). But smaller individual damages, lesser variation between individuals and lack of business records make such a requirement in a consumer suit less desirable.

122. The very large number of individuals would tend to ensure randomness. The procedure followed in *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 589 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1963), would seem especially useful in consumer actions. In that case the jury determined damages to defendant's competitors as a function of the units they sold, and a special referee was appointed to apply the jury's formula to the volume of business each non-joined class member could prove. *See Kalven & Rosenfield, supra* note 109, at 693-95.

123. "Any form of consumer protection policed only by the government will suggest to low-income consumers that their problems are for the government to solve. Giving consumers a policing role will increase their motivation for both personal shopping habits and community action techniques." Note, *Consumer Legislation and the Poor*, 76 *YALE L.J.* 745, 788 (1967).

124. *See Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958), on the difficulties of proof under the "rule of reason." The only aspect of consumer antitrust to receive extensive discussion has been the effort to make refusals to sell houses to Blacks fall within the per se prohibition on group boycotts. *See Bratcher v. Akron Area Board of Realtors*,

perhaps even more than most legal definitions, grow out of judicial experience with the factual patterns presented by litigants.¹²⁵ An increase in the number and variety of antitrust suits brought by consumers may therefore lead to new per se categories specifically designed to protect the buying public. The preceding Note has proposed one such per se rule as an expansion upon the current prohibition on some tie-ins. In the meantime, however, consumer litigants will have to choose grievances which fit within the established per se rules.¹²⁶ Private suits based on violations of the rules against price fixing and agreements not to compete may be the most financially rewarding since such violations are apparently commonplace¹²⁷ and since in both areas the application of antitrust law to consumer-retailer dealings is

381 F.2d 723 (6th Cir. 1967) (per curiam). Cf. *Contract Buyer's League v. F & F Investment Co.* 2 CCH Pov. L. REP. ¶9611 (N.D. Ill., Mar. 28, 1969), *subsequent opinion* at 300 F. Supp. 210 (N.D. Ill. 1969) (price fixing of Negro homes in segregated market, class action maintainable); *United States v. Mortgage Conference of New York, 1948-49 TRADE CAS. ¶62,616* (S.D.N.Y. 1948) (refusal to lend, consent decree). N. DORSEN, *FRONTIERS OF CIVIL LIBERTIES* 377-92 (1968); Marcus, *Civil Rights and the Anti-Trust Laws*, 18 U. OF CHI. L. REV. 171, 209-14 (1951); Comment, *Application of the Sherman Act to Housing Segregation*, 63 YALE L.J. 1124 (1954). Both the cases and the commentaries suggest that the group conspiring to boycott black home-buyers is the real estate community. However, it may be that the conspiracy should be more properly conceived of as the majority of whites. The defendants sued could, of course, remain the real estate community. Cf. S. Palmer, *The Role of the Real Estate Agent in the Structuring of Residential Areas: A Study in Social Control* (Unpublished Ph.D. dissertation, Yale University 1955) (University Microfilm order # 65-7526); *E.V. Prentice Machinery Co. v. Associated Plywood Mills, Inc.*, 252 F.2d 473 (9th Cir.), *cert. denied* 356 U.S. 951 (1958); *Theatre Enterprises Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541-42 (1954) (each defendant had an independent business reason for his conduct).

125. See *White Motor Co. v. United States*, 372 U.S. 253, 261 (1963).

126. There are three elements to any treble damage action; an antitrust violation; damage to the plaintiff; and "direct" causation of the damage by the violation. See E. TIMBERLAKE, *FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS* Sec. 3.03 (1965). Note that only violations of the Sherman, Clayton and Wilson Antitrust Acts are subject to private suits. 15 U.S.C. § 12 (1964); A.B.A. SECTION OF ANTITRUST LAW, *ANTITRUST DEVELOPMENTS 1955-1968*, at 277-79 (1968). Antitrust violations require an effect on interstate commerce, but the Supreme Court has held that the Congress has used its full powers over interstate commerce in the antitrust laws and has been generous in finding such an effect. See *United States v. Frankfort Distilleries*, 324 U.S. 293, 298 (1945); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

If the United States has received a final judgment against a defendant, treble damages litigants may use the judgment as prima facie proof of an antitrust violation. 15 U.S.C. § 16 (1964). Plaintiff need prove only damages caused by defendant's violation. And in at least one consumer case the Justice Department has filed an amicus brief supporting a consumer class action. *Bratcher v. Akron Area Board of Realtors*, 381 F.2d 723, 724 (6th Cir. 1967).

127. Lack of federal enforcement at lower economic levels and continuing cases of price fixing even at well-policed levels would make one suspect that such agreements do occur on the retailer level. "Often these [local] restraints, carried out by small concerns without experienced antitrust counsel, are of a flagrant type which antitrust compliance has largely removed from national markets." U.S. ATT'Y GENERAL'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS, REPORT 349 (1955). A recent consumer class action has been brought by Chicago black home owners for fixing prices of home sales to blacks. *Contract Buyers League v. F & F Investment Co.*, 2 CCH Pov. L. REP. ¶9611 (N.D. Ill. 1969). In general, damages would be more simple to prove in price fixing cases than for other per se violations.

Consumers and Antitrust Treble Damages

relatively straightforward.¹²⁸ Once “public service” advocates realize that treble damage actions are not necessarily “businessmen’s laws,” the consuming public may begin to benefit from federal antitrust law.

128. These per se categories have evolved with the direct protection of purchasers clearly in mind. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 775-76 (1965). Conspiracies by persons who sell directly to consumers, such as retailers, clearly have damage to the consumer as their principal effect and intent. Conspiracies at higher economic levels can result in higher prices to retailers which are passed on to consumers, and consumers should have no less clear an action in these cases. See Note, *The Defense of “Passing On” in Treble Damage Suits under the Antitrust Laws*, 70 YALE L.J. 469, 470 (1961). Cf. *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 258 F.2d 831 (7th Cir. 1958). To allow defense “indirectness of injury” to prevent recovery would be an anomalous result. Cases denying recovery because of indirectness of causation have functioned to prevent excessive liability due to ripple effects of harm done to some principal victim. Plaintiffs in these cases have been lessors, stockholders or suppliers of the principal victim. See, e.g., *Erone Corp. v. Skouras Theatres Corp.*, 166 F. Supp. 621 (S.D.N.Y. 1957).