Recovering Untold Millions: How Retail Consumer Plaintiffs can Counteract Wealth Transfer Under the Philippine Competition Law

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I. INTRODUCTION

The life of a Filipino consumer is a hard one, besieged on all sides by inefficiency and dissatisfaction in terms of the quality of goods and services made available to them. For the longest time, this status quo has generally been accepted by the purchasing public as a fact of life in this country.

From essential utilities like telecommunications in which the top two conglomerates controlled an approximate 99% of the total market,[1] to the scrooge-like electricity distribution monopoly charged with allegedly

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1. Rappler.com, Telco wars: Who's really number 1?, *available at* www.rappler.com/business/industries/telecommunications-and-media/89197-pldt-globe-dispute-top-spot-mobile-business (last accessed Aug. 10, 2017).

colluding to raise electricity prices during Christmas of 2014,[2] down to the alleged garlic and onion cartels which supposedly succeeded in doubling the prices of their produce, there appeared to be no sector of the economy which was immune to the power of the seller to impose their will.[3] Recent legislation, however, now presents the consumer with the unprecedented opportunity to challenge these players by presenting legal options never previously available.[4]

The 1987 Philippine Constitution, unique among its kind, has a substantial number of provisions dedicated to economic activity. For instance, it acknowledges the role of the worker,[5] requires service contracts to be based on "real contributions" to economic growth,[6] and enshrines the role of the free market as part of the law of the land.[7] In Article XII, Section 19, it even incorporates a normative proscription against monopolies and restraints on trade when the public interest so requires, further highlighting the generally more expansive coverage of our Constitution as it pertains to industrial and commercial activity.[8] These economic provisions had their genesis in the 1973 Philippine Constitution, namely Section 2 of Article XIV thereof, but with the noteworthy distinction that the term "private monopolies" in the old Constitution was changed to simply "monopolies" in the present one.[9]

To that extent, numerous laws governing competition policy and fair market behavior have been passed throughout the years, forming a body of laws which regulated commercial policy. Prior to the ratification of the

2. Judith Balea, What Meralco's rate hike tells us about the power sector, *available at* www.rappler.com/business/industries/power-and-energy/52823-meralco-record-high-rate-hike-wesm-power-mess (last accessed Aug. 10, 2017).

3. Gilbert P. Felongco, Filipinos told to bear high prices of fuel, commodities, *available at* gulfnews.com/business/economy/filipinos-told-to-bear-high-prices-of-fuel-commodities-1.990042 (last accessed Aug. 10, 2017).

4. *See* An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefor [Philippine Competition Act], Republic Act No. 10667 (2015).

5. PHIL. CONST. art. XII, § 12.

6. PHIL. CONST. art. XII, § 2.

7. PHIL. CONST. art. XII, § 1.

8. PHIL. CONST. art. XII, § 19.

9. FR. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1233 (2009 ed.).

Philippine Competition Act on 21 July 2015,[10] the rules and standards that governed economic conduct have not always been clear. After all, it must be emphasized that the Constitution does not prohibit the existence of monopolies per se, and neither does it prescribe the penalties to be provided in case of prohibited monopolies.[11] However, a "combination in restraint of trade" is, in fact, prohibited.[12] Thus, the Constitution left this provision to be supplemented by the legislature with various statutes. The older laws, however, were quite distinct in scope, factual milieu, and dates of passage; such that prior competition laws actually appeared fragmented and incoherent in comparison, despite making reference to the same types of punishable acts with catch-all terms like "combinations in restraint of trade." For example, Article 186 of the Revised Penal Code[13] punishes "monopolies and combinations in restraint of trade," which itself was derived from the old criminal codes of the Republic during the American period.[14] Prosecutions under this law almost never reached the level of the Supreme Court. Only one case involving such practices in the old criminal code had ever reached the highest court in the land — the unique case of *United States v. Fulgueras*,[15] a criminal prosecution which involved manipulating prices through threats of magic and superstition upon a gullible population, rather than modern anti-competitive behavior as it is understood in its contemporary sense.[16]

Prior to the passage of the new competition law, previous understanding of antitrust policy in the Philippines was premised upon a few key decisions penned by the Philippine Supreme Court with respect to defining the extent of the judicial mandate to regulate monopolies.

Most noteworthy in this regard is the case of *Tatad v. Secretary of the Department of Energy*,[17] which concerned the deregulation of the downstream oil industry, a key strategic industrial sector.[18] The Supreme Court struck down certain provisions pertaining to predatory pricing, minimum

10. Philippine Competition Act, § 56.

11. *See* Avon Cosmetics, Incorporated v. Luna, 511 SCRA 376, 391-92 (2006).

12. PHIL. CONST. art. XII, § 19.

13. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 186 (1932).

14. BERNAS, *supra* note 9, at 1233.

15. United States v. Fulgueras, 4 Phil. 432 (1905).

16. *Id.* at 433.

17. Tatad v. Secretary of the Department of Energy, 281 SCRA 330 (1997).

18. *Id.* at 338.

inventory requirements, and tariff differentials of Republic Act No. 8180[19] on the ground that these provisions were likely to promote monopolies in a sector which had very few players.[20] It also explicitly recognized that Section 19 of Article XII is expressly antitrust in nature —

> Section 19, Article XII of our Constitution is [antitrust] in history and spirit. It espouses competition. The desirability of competition is the reason for the prohibition against restraint of trade, the reason for the interdiction of unfair competition, and the reason for regulation of unmitigated monopolies. Competition is thus the underlying principle of [Section] 19, Article XII of our Constitution[.][21]

As to what specifically constitutes a "monopoly" itself, local legislation has been silent when it comes to providing a fixed or operative definition.[22] Hence, the Court has taken it upon itself to supply a definition in the case of *Gokongwei, Jr. v. Securities and Exchange Commission*,[23] involving the acquisition of shares by a corporation engaged in a substantially similar business with the target company.[24] There, the Court was of the view that it constituted in "the concentration of business in the hands of a few ... [with] unified tactics with regard to prices."[25] As can be gleaned from these cases, the Supreme Court has generally been engaged in supplying or filling the gaps that existed in legislation in order to make our statutes more operative. Such has proven a fertile ground for the exercise of judicial discretion.

It is not only the courts, however, that have been supplying rules and supplementing the enforcement of laws. Administrative agencies and specialist bodies have also done the same through their implementing rules and regulations. To illustrate, the Energy Regulatory Commission, the quasi-judicial body entrusted by law to implement the antitrust provisions of

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19. An Act Deregulating the Downstream Oil Industry, and for Other Purposes [Downstream Oil Industry Deregulation Act of 1996], Republic Act No. 8180 (1996).

20. *Tatad*, 281 SCRA at 354-55, 362, & 370.

21. *Id.* at 358.

22. Current penal laws provide for the elements of the offense, but do not substantiate the offense beyond merely reiterating the given definition of the crime itself. *See* REVISED PENAL CODE, art. 186.

23. Gokongwei, Jr. v. Securities and Exchange Commission, 89 SCRA 336 (1979).

24. *Id.* at 376-78.

25. *Id.* at 376-77 (citing National Cotton Oil Company v. State of Texas, 197 U.S. 115, 129 (1904).

the Electric Power Industry Reform Act of 2001,[26] has formulated its own rules of procedure and adopted methods for estimating monopoly power when determining the allowance of rate hikes for power generation.[27] Conceivably, this is because the decisions of administrative agencies with respect to technical matters under their cognizance are accorded great respect by the courts when it pertains to the laws they are in charge of implementing.[28]

Indeed, it is well established that courts are proscribed from challenging the wisdom, but not the legality, of legislation. This was best illustrated in the case *Energy Regulatory Board v. Court of Appeals*,[29] where the Supreme Court struck down the decision of the Court of Appeals on the ground that the courts should not interfere with the decision of a regulatory body which has a recognized expertise in oil economics.[30] The very same contention was rejected in the second *Tatad v. Secretary of the Department of Energy*[31] case, where the Court pronounced that no school of sciences could claim infallibility, and that economic tests and theories have changed over time, falling into popularity or disgrace.[32] Indeed, they had reason to reiterate that

> [f]or this reason[,] we italicized in our Decision that the Court did not review the wisdom of [Republic Act] No. 8180 but its compatibility with the Constitution; the Court did not annul the economic policy of deregulation but vitiated its aspects which offended the constitutional mandate on fair competition.[33]

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26. An Act Ordaining Reforms in the Electric Power Industry, Amending for the Purpose Certain Laws and for Other Purposes [Electric Power Industry Reform Act of 2001], Republic Act No. 9136 (2001).

27. Energy Regulatory Commission, A Resolution Initially Setting the Installed Generating Capacity per Grid, National Grid and the Market Share Limitations per Grid and the National Grid for 2014, Resolution No. 3, Series of 2014 (Mar. 26, 2014).

28. Cosmos Bottling Corporation v. Nagrama, Jr., 547 SCRA 571, 586-87 (2008).

29. Energy Regulatory Board v. Court of Appeals, 357 SCRA 30 (2001).

30. *Id.* at 44-47.

31. Tatad v. Secretary of the Department of Energy, 282 SCRA 337 (1997).

32. *Id.* at 346-47 (citing FIDEL V. RAMOS, TO WIN THE FUTURE: PEOPLE EMPOWERMENT FOR NATIONAL DEVELOPMENT, A COLLECTION OF SPEECHES BY THE PRESIDENT OF THE REPUBLIC OF THE PHILIPPINES 91 (1993 ed.)).

33. *Id.* at 347.

Prior to the Philippine Competition Act, the following laws, among others, dealt with competition policy over the years, either directly or indirectly.

Figure 1. Philippine Laws Dealing with Competition Policy Prior to the Philippine Competition Act

Law	Provision	Year
Revised Penal Code	Article 186 makes certain anti-competitive acts criminal felonies, such as monopolies and restraints of trade.[34]	1930
New Civil Code	Article 28 allows for the recovery of civil indemnity from acts which constitute restraints of trade or unfair competition. Notably, it does not provide a definition for such acts.[35]	1950
Act No. 3247	The title of Act No. 3247 is "An Act to Prohibit Monopolies and Combinations in Restraint of Trade."[36]	1925
Republic Act No. 9136 (Electric Power Industry Reform Act of 2001)	Section 3 provides that "[t]his Act shall provide a framework for the restructuring of the electric power industry, including the privatization of the assets of [the National Power Corporation], the transition to the desired competitive structure, and the definition of the responsibilities of the various government agencies and private entities."[37]	2001
Republic Act No. 8479 (Downstream Oil Industry Deregulation Act of	This law provides for the deregulation of the downstream oil industry, leading to the abolition of government price subsidies and allowing new players to	1998

34. REVISED PENAL CODE, art. 186.

35. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 28 (1950).

36. An Act to Prohibit Monopolies and Combinations in Restraint of Trade, Act No. 3247 (1925).

37. Electric Power Industry Reform Act of 2001, § 3.

1998)	enter the market, formerly characterized by monopolistic competition.[38] Republic Act No. 8180, the predecessor law of Republic Act No. 8479, was struck down in *Tatad*.[39]	
Republic Act No. 7581 (Price Act)	This law penalizes hoarding, price manipulation, cartelization, and profiteering, which are all forms of anti-competitive behavior, and sets the penalties thereto.[40]	1992
Batas Pambansa Blg. 178 (Revised Securities Act) and Republic Act No. 8799 (The Securities Regulation Code)	This law contains provisions which define and prohibit insider trading and various forms of stock price manipulation, which are acknowledged as forms of anti-competitive behavior.[41]	1982, 2000

These laws all concerned or pertained to anti-competitive behavior, but in the absence of recognized standards, either legislative or judicial in nature, the enforcement and application of these laws were a difficult affair. This is due to the inherent vagueness in trying to determine the character of market conduct, compounded by a lack of specificity found in the laws. It is hornbook constitutional law that a law is vague in the legal sense when it does not inform a man of common and reasonable intelligence what form of conduct is prohibited.[42]

In this respect, the Supreme Court has not hesitated at times to occasionally borrow doctrines already established in other jurisdictions, most especially the United States (US). Illustratively, the case of *American Tobacco*

38. Republic Act No. 8479, § 2.

39. *Tatad*, 281 SCRA at 370.

40. An Act Providing Protection to Consumers by Stabilizing the Prices of Basic Necessities and Prime Commodities and by Prescribing Measures Against Undue Price Increases During Emergency Situations and Like Occasions [Price Act], Republic Act No. 7581, §§ 2, 5, 15, & 16 (1992).

41. *See generally* The Revised Securities Act [Revised Securities Act], Batas Pambansa Blg. 178 (1982) & The Securities Regulation Code [The Securities Regulation Code], Republic Act No. 8799 (2000).

42. Estrada v. Sandiganbayan, 369 SCRA 394, 439-40 (2001).

Co. v. United States[43] was cited in one ruling stating that intent is an element of monopoly in its complex form.[44] In another case, the Court, however, merely used it for definitional purposes and did not expressly state if intent was indeed an element of anti-competitive behavior.[45] Unlike in the Philippines, the body of case law concerning US antitrust policy has grown and evolved quite substantially over the decades.[46]

The passage of the Philippine Competition Act has thus served to reshape this complex agglomeration of legislative and judicial rules by creating the first comprehensive regulatory competition framework in the Philippines, and creating an agency which had competition enforcement as its primary objective.[47] Attempts to create such a framework to overhaul the patchwork of laws already in place had been percolating since the Eighth Congress,[48] but only in 2015 under the 16th Congress did such a law actually succeed in leaving the legislative mill and becoming a law, a nearly two-decade endeavor.[49] It thus remains to be seen if the new law will empower consumers to litigate actively in antitrust cases, or if they will remain passive observers in legal proceedings concerning competition.

II. THE NATURE OF ANTITRUST LAW

The term "antitrust" as a synonym for fair competition or competition regulation policy has its origins in the factual milieu and circumstances surrounding the passage of the very first comprehensive trust regulation laws. In the US, during the early 20th century, business trusts were the favored form and means of linking together corporate and business interests in order to establish agglomerations of resources and capital — the key requisites in establishing market power and, eventually, market dominance.[50]

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43. American Tobacco Co. v. United States, 328 U.S. 781 (1946).

44. Garcia v. Corona, 321 SCRA 218, 226 (1999) (citing *American Tobacco Co.*, 328 U.S. at 784-85).

45. Filipinas Compania de Seguros, et al. v. Mandanas, 17 SCRA 391, 395-97 (1966).

46. *See* The Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890).

47. Philippine Competition Act, § 5.

48. Senate of the Philippines (17th Congress), After Long Wait, Congress Ratifies Act Penalizing Cartels, Abuse of Dominant Positions, *available at* http://www.senate.gov.ph/press_release/2015/0611_aquino1.asp (last accessed Aug. 10, 2017).

49. *Id.*

50. MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 2 (1st ed. 2004).

Although market regulation in one form or another has always existed and governed commercial transactions within States, true antitrust policy in its modern form has its common ancestor in The Sherman Antitrust Act[51] (Sherman Act) of the US, a country which was then at the forefront of trust regulation. In this sense, it may be deemed as the "grandfather" of all present trust regulation laws.

The factual antecedents that gave rise to this formation may be broadly categorized as developments concerning (1) economies of scale and (2) economies of scope.[52] Collectively, these two factors led to the accretion of power in commercial entities which the Federal Government felt was substantial enough to merit regulation. Indeed, manufacturing improvements in both the US and industrialized Europe at the time led to the decline in the prices of manufactured goods[53] and the consequent viability of "price wars" as a market strategy.[54]

III. THE PURPOSE OF ANTITRUST REGULATION

In essence, the overarching purpose of the legal prohibitions on trusts is economic in nature. They stemmed from insights developed over the years by economists, which led to the conclusion that a competitive economy is more beneficial to the general public as compared to one which is concentrated in the hands of a few major players.[55] In this regard, a quote from Adam Smith, widely regarded as the founder of economics, is most apt — "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[56] Although perhaps an exaggeration, several criminal antitrust statutes may be said to view concerted market conduct along broadly the same viewpoint.

Thus, at the outset, the challenge of market regulation can be defined as the difficulty in implementing laws that challenge and impede anti-competitive conduct, while striving to implement rules concerning fair play,

51. The Sherman Antitrust Act, 15 U.S.C.

52. MOTTA, *supra* note 50, at 2.

53. *Id.* at 2-3.

54. *See* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1, 4 (1973).

55. George J. Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. REV. 1, 3, & 4 (1982).

56. 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 134 (1892).

and at the same time, balancing the need to prevent creating statutes that unduly restrict commercial conduct. Keep in mind that antitrust and market regulation laws in general are deviations from the principle that an "invisible hand" governs market conduct and that the market is a self-correcting and self-regulating entity.[57] Hence, any intervention must be undertaken with caution and under defined parameters. This dilemma is best articulated in an anecdote concerning a Philippine Senator. When he was informed that his proposal would not succeed because it went against the laws of supply and demand, he allegedly uttered, "Well, then, repeal the law on supply and demand!"[58]

As to objective, antitrust policy is understood to contemplate the means undertaken

> to assure a competitive economy based upon the belief that through competition[,] producers will strive to satisfy consumer wants at the lowest price with the sacrifice of the fewest resources. Competition among producers allows consumers to bid for goods and services and, thus[,] matches their desires with society's opportunity costs.[59]

IV. LEGAL BASES

A. Section 19, Article XII of the 1987 Constitution

The foundation of all antitrust policy in the country is the constitutional mandate located in the declaration of state policies pertaining to the national economy and patrimony found in Article XII of the Constitution. It is this provision that provides for the legal basis for the enactment of other laws regulating the economy from a competition standpoint, as the provision states that "[t]he State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed."[60]

This is not the first time such a provision has appeared in our organic law. It is merely a restatement with modification of a similar provision found in the earlier 1973 Constitution.[61] The key modification is the change of the

57. Stigler, *supra* note 55, at 3 & 4.

58. JUAN ARTURO ILUMINADO C. DE CASTRO, PHILIPPINE ENERGY LAW 11 (1st ed. 2012).

59. *Tatad*, 281 SCRA at 358 (citing WILLIAM KOVACIC & STEPHEN CALKINS, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 45 (Ernest Gellhorn ed., 1986)).

60. PHIL. CONST. art. XII, § 19.

61. 1973 PHIL. CONST. art. XIV, § 2 (superseded 1987).

term "private monopolies" in the old Constitution to simply "monopolies" in general, thereby expanding the scope to include public monopolies. As such, it is deemed as a codification of the public policy sentiment against monopolies in general,[62] premised upon the belief that competition allows consumers to bid for goods and services, allowing society to match their desires to extant opportunity costs.[63]

Thus, the existing proviso does not provide for a per se prohibition on monopolies. There must first be a satisfactory public interest that would demand nullification of contracts that allegedly offend such a prohibition. The Supreme Court had the opportunity to elaborate on this concept when it declared in *Avon Cosmetics, Incorporated v. Luna*[64] that "[e]ach contract must be viewed [vis-à-vis] all the circumstances surrounding such agreement in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[65] This implicitly makes the rule of reason test the general standard being applied in the Philippines insofar as ordinary contracts are concerned.

However, whilst monopolies are not per se prohibited, it appears that combinations in restraint of trade prohibited by the second sentence of the same provision in the Constitution.[66] This provides for some of the difficulties in implementing antitrust laws in the Philippines because the distinctions between the first sentence and the second sentence of Section 19, Article XII are not always clear and categorical.

B. The Philippine Competition Act

The Philippine Competition Act is a game changer in terms of antitrust policy. In addition to repealing the antitrust provisions of many of the previously mentioned laws,[67] the law completely overhauled the punishable offenses, the standards for determining anti-competitive conduct, and the exceptions to prohibited acts, and provided for the creation of the first comprehensive antitrust regulatory body in the Philippines.[68]

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62. BERNAS, *supra* note 9, at 1233.

63. *Tatad*, 281 SCRA at 358 (citing WILLIAM KOVACIC & STEPHEN CALKINS, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 45 (Ernest Gellhorn ed., 1986)).

64. Avon Cosmetics, Incorporated v. Luna, 511 SCRA 376 (2006).

65. *Id.* at 392.

66. PHIL. CONST. art. XII, § 19.

67. Philippine Competition Act, § 55.

68. *Id.* § 5.

In terms of punishable acts, the law enumerated two broad categories for prohibited conduct: (1) anti-competitive agreements,[69] and (2) abuse of dominant market position.[70] As to the first, the law specifically mentions price-fixing, bid-rigging, output restriction, and market allocation as being prohibited, but leaves a catch-all clause in the form of a proviso for analogous acts.[71] In terms of the second, however, the gravamen of the offense is the use of a dominant market position as defined by law in order to prevent or restrict competition in a relevant market.[72] It then proceeds with a non-exclusive enumeration intending to illustrate what manner of activities may also be deemed as an abuse of a dominant market position.[73] The law also provides for a Section regarding what factors the Court should consider in determining whether or not a dominant market position exists, such as the defendant's market share, its price-fixing ability, the existence of barriers to entry, and the strength of its competitors, among others.[74]

In addition, the law also provided for numerous exempting circumstances and justifications for what would otherwise be anti-competitive acts, as well as procedural devices unique in our legal system, such as the "binding ruling" and the rule on *nolo contendere* pleas.[75] The particulars of the competition law pertaining to private antitrust litigation will be discussed in greater detail in the succeeding Chapters.

V. RETAIL CONSUMER PLAINTIFF, PRIVATE PARTIES, AND THEIR ROLE IN ANTITRUST ENFORCEMENT

Private plaintiffs have a crucial role in the function of a regulatory body concerned with competition. Indeed, Lee Loevinger[76] has called private action as the "strongest pillar" of antitrust — without the ability of the

69. *Id.* § 14.

70. *Id.* § 15.

71. *Id.* § 14 (c).

72. *Id.* § 15.

73. Philippine Competition Act, § 15.

74. *Id.* § 26.

75. *Id.* §§ 36 & 37.

76. Lee Loevinger was a well-known antitrust lawyer and Justice from the United States; having served as a member of the Federal Communications Commission, a member of the antitrust division of the Department of Justice, and an Associate Justice of the Minnesota Supreme Court. John Files, *Lee Loevinger, 91, Kennedy-Era Antitrust Chief*, May 8, 2004, N.Y. TIMES, *available at* http://www.nytimes.com/2004/05/08/us/lee-loevinger-91-kennedy-era-antitrust-chief.html (last accessed Aug. 10, 2017).

private citizenry to participate — antitrust enforcement would be largely ineffectual.[77] He describes antitrust laws as generally resting upon three pillars, to wit: voluntary compliance, government enforcement, and private complaints.[78] In his view, the degree by which voluntary compliance can be relied upon is directly related to the degree by which thorough and resolute government enforcement can be expected, and where the government falls short, private complainants make up for the slack.[79]

To illustrate, in the US, while the Federal Trade Commission (FTC) (broadly analogous to the Philippine Competition Commission (PCC)), and the US Department of Justice's Antitrust Division (the equivalent of the Philippines' Office for Competition) handles the public prosecution of antitrust cases,[80] a great majority of antitrust litigation still stems from private complaints.[81] Indeed, as of 2013, the statistics show that of all the antitrust cases being handled by federal courts in the US, a staggering 98% were private in nature.[82]

VI. LIABILITY STANDARDS IN ANTITRUST LAW

The previous Sections have demonstrated the length and breadth of competition law in the country, and have established the prevalence of the rule of reason standard in terms of judicial decision-making prior to the Philippine Competition Act. However, it is also clear that "standards" do not exist as definitively in terms of criminal antitrust cases as they do with regular criminal cases in general, in that a greater portion of what constitutes a criminal "act" is left to the discretion of the judge as opposed to being defined by clearly delineated statutory elements. Hence, tackling the issue of what constitutes a "violation" is imperative, as the existence of a violation is

77. Lee Loevinger, *Private Action — The Strongest Pillar of Antitrust*, 3 THE ANTITRUST BULL. 167, 168 (1958).

78. *Id.*

79. *Id.*

80. *See* The United States Department of Justice Antitrust Division, About the Division, *available at* https://www.justice.gov/atr/about-division (last accessed Aug. 10, 2017).

81. Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI-KENT L. REV. 207, 210 (2003).

82. United States Courts, Federal Judicial Caseload Statistics 2013 Tables, Table C-2: U.S. District Courts — Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2012 and 2013, *available at* http://www.uscourts.gov/sites/default/files/statistics_import_dir/C02Mar13.pdf (last accessed Aug. 10, 2017).

an essential element for a private antitrust suit.[83] In this sense, the various standards that gradually evolved in different jurisdictions and narrowed down the scope of criminal antitrust conduct, most of which originated in the US,[84] are persuasive for the formation of a similar standard for determination of antitrust violations in the Philippines.

A. The Applicability of US Jurisprudence to the Philippine Scenario

Barring the effects of the historical divergence between the Philippines and the US in the mid-20th century, American antitrust jurisprudence is still broadly applicable to the Philippine setting insofar as current antitrust laws are concerned. This is reinforced by the pronouncement of the Philippine Supreme Court in *Avon Cosmetics, Incorporated*, quoting the much earlier case of *Ferrazzini v. Gsell*[85] —

> [T]here is no difference in principle between the public policy [ ] in the two jurisdictions ([US] and the Philippine Islands) as determined by the Constitution, laws, and judicial decisions.
>
> In the [US,] it is well settled that contracts in undue or unreasonable restraint of trade are [unenforceable] because they are repugnant to the established public policy in that country. Such contracts are illegal in the sense that the law will not enforce them.[86]

Likewise, in the same case, the Supreme Court also saw fit to quote the US case of *Oregon Steam Navigation Company v. Winsor*,[87] which declared that

> [c]ases must be judged according to their circumstances, and can only be rightly judged when reason and grounds of the rule are carefully considered. There are two [principal] grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; [ ] the other is, the injury to the party himself [or herself] by

83. Billy Baxter, Inc. v. Coca-Cola Company, 431 F.2d 183, 188 (2d Cir. 1970) (U.S.).

84. MOTTA, *supra* note 50, at 2.

85. Ferrazzini v. Gsell, 34 Phil. 697 (1916).

86. *Avon Cosmetics, Incorporated*, 511 SCRA at 392-93 (citing Ferrazzini v. Gsell, 34 Phil. 697, 712 (1916)) (emphases omitted).

87. Oregon Steam Navigation Company v. Winsor, 87 U.S. 64 (1873).

> being precluded from pursuing his [or her] occupation, and thus being prevented from supporting himself [or herself] and his [or her] family.[88]

The pronouncement in this case has not been overturned by any competing doctrines, which would allow us to determine the proposition that, as a general rule, monopolies are against public policy,[89] but are to be regulated only when the public interest so demands, and that such cases must be decided cautiously in order to avoid a scenario where a party himself or herself is wrongfully prevented from pursuing a lawful occupation.[90]

B. Per Se Offenses Under the Philippine Competition Act

Given this background of both local and foreign jurisprudence, it is understandable that the Legislature desired to eliminate any confusion as to which offenses are to be considered per se offenses and thus, absolutely prohibited, and which acts are to be subject to the rule of reason test.[91] Although the law does not categorically use such term in particular, the references in the law to circumstances which may justify otherwise prohibited acts clearly indicate that such a test is meant to be applied.[92]

The law itself lists only two acts as per se offenses: price-fixing and bid-rigging.[93] The said acts are classified as anti-competitive agreements between and among competitors.[94] In reality, denominating the latter as a per se offenses may not represent a substantial change in the application of antitrust laws, as bid-rigging is already punished as an offense under Article 186 of the Revised Penal Code.[95]

C. Rule of Reason Offenses Under the Philippine Competition Act

An examination of the law shows that numerous options are provided for a potential violator to demonstrate that an ostensibly illegal act is justifiable by reasonable circumstances.[96] Noting that general practice in antitrust law

88. *Avon Cosmetics, Incorporated*, 511 SCRA at 393 (citing *Oregon Steam Navigation Company*, 87 U.S. at 68).

89. BERNAS, *supra* note 9, at 1233.

90. *Oregon Steam Navigation Company*, 87 U.S. at 68.

91. *See* Philippine Competition Act, § 14 (a).

92. *Id.* § 14 (c).

93. *Id.* § 14.

94. *Id.* § 14 (a).

95. REVISED PENAL CODE, art. 186.

96. Philippine Competition Act, § 15.

categorizes offenses either as per se or rule of reason,[97] it can be surmised that the designation of certain offenses as per se leaves the rest as being subject to reasonable justification. The remaining prohibited acts not deemed as per se fall under two broad categories: anti-competitive agreements and abuse of dominant market position.[98] Under the first category, there are specific two acts: output restriction and market allocation; following these, there is also a catch-all provision for other agreements that have the object or effect of substantially preventing, restricting, or lessening competition.[99]

Under the second category, we have no less than nine acts: (1) selling below cost; (2) imposing barriers to entry or competition growth hindrance; (3) subjecting commercial transactions to conditions unrelated to a commercial purpose; (4) price and/or market discrimination; (5) exclusivity arrangements; (6) bundling; (7) predatory purchase pricing; (8) predatory selling pricing; and (9) output restriction.[100]

The applicability of the rule of reason test is apparent owing to the fact that each and every one of these acts is provided for with a justifying exemption. These are illustrated in the following table.

Figure 2. Acts Constituting Abuse of Dominant Market Position and Exemptions Provided under the Philippine Competition Act

Act	Exemption
Selling below cost	The price established was in good faith to meet or compete with the lower price of a competitor in the same market selling the same or comparable product or service of like quality.[101]
Imposing barriers to entry or competition growth hindrance	The barriers to entry developed in the market as a result of or arising from a superior product or process,

97. Fred S. McChesney, Antitrust, *available at* http://www.econlib.org/library/Enc1/Antitrust.html (last accessed Aug. 10, 2017).

98. Philippine Competition Act, §§ 14-15.

99. *Id.* § 14.

100. *Id.* § 15.

101. *Id.* § 15 (a).

	business acumen, or legal rights or laws.[102]
Price and/or market discrimination	Socialized pricing for the less fortunate sector of the economy; price differential which reasonably or approximately reflects differences in the cost of manufacture, sale, or delivery resulting from differing methods, technical conditions, or quantities in which the goods or services are sold or delivered to the buyers or sellers; price differential or terms of sale offered in response to the competitive price of payments, services, or changes in the facilities furnished by a competitor; and price changes in response to changing market conditions, marketability of goods or services, or volume.[103]
Exclusivity arrangements	Permissible franchising, licensing, exclusive merchandising, or exclusive distributorship agreements such as those which give each party the right to unilaterally terminate the agreement; or agreements protecting intellectual property rights, confidential information, or trade secrets.[104]
Bundling	Goods have a direct connection with the main goods or services to be supplied.[105]
Predatory purchase pricing	Prices are not unfairly low.[106]
Predatory selling pricing	Prices that develop in the market as a

102. *Id.* § 15 (b).

103. Philippine Competition Act, § 15 (d).

104. *Id.* § 15 (e).

105. *Id.* § 15 (f).

106. *Id.* § 15 (g).

	result of or due to a superior product or process, business acumen, or legal rights or laws.[107]
Output restriction	Limitations that develop in the market as a result of or due to a superior product or process, business acumen, or legal rights or laws.[108]

Having established that the law supports a rule of reason approach to determining the existence of an antitrust violation, it is now important to establish whether consumers have standing in cases involving such offenses.

VII. CONSUMER WELFARE AND CONSUMER STANDING

A. Consumers and the Free Market

Broadly speaking, the nature of the social science of economics can be deemed to consist of the allocation of resources and the ensuing management of "welfare" in a given economy. Welfare, in the sense understood by economists, may be defined as the enjoyment or gain enjoyed by a particular sector in the market, whether of the producer or the consumer.[109]

Markets thus are a mechanism by which the resources of a society are distributed according to their most productive or desired uses, generally to the persons or players who place the greatest value to any given item.[110] In this sense, decision-making at the market level may be deemed to be "democratic," with one dollar (or peso, as the case may be) equaling one vote in a nation's production priorities.[111]

Although there are as many schools of thought in economics as there are in any of the other social sciences, certain schools of thought stand out for their longstanding preeminence in the field. Chief among these is the

107. Philippine Competition Act, § 15 (h).

108. *Id.* § 15 (i).

109. *See* Organisation on Economic Co-operation and Development, Glossary of Statistical Terms: Consumer Welfare, *available at* https://stats.oecd.org/glossary/detail.asp?ID=3177 (last accessed Aug. 10, 2017).

110. Ernest Gellhorn, *An Introduction to Antitrust Economics*, 1975 DUKE L.J. 1, 1 (1975).

111. NEVA GOODWIN, ET AL., MICROECONOMICS IN CONTEXT 116 (2003).

neoclassical school of economics, which postulates that the key players in a market system and the economy itself will always have certain attributes. Firstly, resources are scarce. As a consequence, all societies must develop a social arrangement for the production and distribution of goods which responds to that scarcity. Secondly, in a market system, the prices are not set by any individual central planner or group, but rather are the net product of millions of small decisions made by both consumers and producers as they interact in the market, a concept known as the "price system." Thirdly, there is the principle of substitutability, which states that a market player can forgo some or all of a particular good in order to obtain more of another good or group of goods. Finally, there is the "theory of the firm," which in essence dictates that firms are profit-seeking entities and have but one key objective, the earning of profit — the so-called "profit motive."[112] These behavioral assumptions underpin economic analysis and, consequently, the principles upon which competition law are premised.

B. Welfare Loss Economics

The primary aim of economics in general and antitrust law in particular being the improvement of welfare, there is some disagreement among the various schools of thought regarding which standard of welfare should be made as the basis upon which competition policies should be premised.[113] The two standards that chiefly compete for this honor are the "aggregate welfare standard" and the "consumer surplus standard."[114]

The aggregate welfare standard takes into account the entirety of a market system's welfare, and as a consequence, the welfare of the consumer is set off against that of the producer in order to see if any efficiency gain ensues.[115] If a substantial efficiency gain exists, it will then be able to offset any consumer injury that may occur due to the existence of market power.[116] Examples of such efficiency gains include cost savings in the production process. As such, following this standard, an act will be deemed harmful to economic welfare only if the challenged conduct results in a

112. Gellhorn, *supra* note 110, at 1.

113. Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 312 (2006).

114. Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 336-38 (2010) [hereinafter Salop, *Question*].

115. *Id.*

116. *Id.*

decrease in the sum of the welfare of both the consumers and the producers, without regard to the effect of wealth transfers between the two.[117]

The alternative standard of consumer surplus, on the other hand, is viewed with a focus on the welfare of the consumer.[118] The gains from efficiency are also considered, but only insofar as they can be demonstrated to have benefits that pass on to consumers, such that when the producer and consumer surplus are compared, there is a gain on the part of the consumer.[119]

Significantly, both standards also differ in their treatment of damages towards market competitors.[120] Under the consumer surplus standard, harm suffered by other competitors — since they are "producers" as well — is immaterial in assessing whether the consumer has benefited.[121] An exception to this is when the conduct that harms competitors is likely to harm consumers as well.[122]

In contrast, if the aggregate welfare standard is used, harm inflicted to competitors is also harm to the overall welfare, as producer surplus declines when some of the competitors suffer injury.[123] In other words, the aggregate welfare standard places equal weight to the welfare of both the producer and the consumer, as opposed to the consumer surplus standard, which as its name implies, is predominantly concerned with consumer effect.[124]

C. Standards Employed in Other Jurisdictions

There appears to be compelling evidence that the US, from which many of the Philippines' early antitrust laws originated,[125] adheres to the consumer surplus standard. Certain scholars argue that the pattern of Supreme Court decisions points to an implicit if not express adherence to the notion that

117. *Id.*

118. *Id.*

119. *Id.*

120. Salop, *Question*, *supra* note 114, at 336-38.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. BERNAS, *supra* note 9, at 1233.

consumer protection, and not overall economic efficiency gain, is the primary objective of antitrust laws.[126]

According to a study of the legislative history of the Sherman Act, the Congress had a manifest focus on improving the consumer's welfare, as opposed to the broader goal of improving the efficiency of the economy as a whole, the common view of traditionalist economics.[127] Indeed, the namesake of the Sherman Act, Senator John Sherman, is quoted to have said that the overcharges that emerge from monopolies were, in essence, "extorted wealth."[128]

Indeed, numerous scholars in the field have expressed the view that despite the stated goal of antitrust law to improve overall economic efficiency,[129] the true, normative goal of such policies is consumer protection.[130] Thus, a judicial standard which considers consumer welfare loss as a mere "wealth transfer" — which is true in an economic sense — ignores the normative and political intent behind the framing of an antitrust law.[131]

Notable economist Philip Areeda[132] also states that the consumer protection orientation of antitrust law is beyond dispute —

> 'Consumer welfare' embraces what individual consumers are entitled to expect from a competitive economy. If the efficiency extremists insist that

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126. John B. Kirkwood, *Consumers, Economics and Antitrust*, 84 NOTRE DAME L. REV. 191, 192 (2008).

127. Robert H. Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631, 636 (1989).

128. *Id.* at 635-36.

129. *See, e.g.*, Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 361 (1993).

130. *See, e.g.*, Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7-48 (1966) & John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 192 (2008).

131. Robert H. Lande, *Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)*, 50 HASTINGS L.J. 959, 960 (1999).

132. Phillip Areeda, lawyer and Harvard Law School professor, was considered the United States' "foremost specialist on antitrust legislation." David Binder, *Phillip Areeda, Considered Top Authority on Antitrust Law, Dies at 65*, N.Y. TIMES, Dec. 27, 1995, *available at* http://www.nytimes.com/1995/12/27/us/phillip-areeda-considered-top-authority-on-antitrust-law-dies-at-65.html (last accessed Aug. 10, 2017).

> only their definition of consumer welfare is recognized by economists, we would answer that ours is clearly recognized by the statutes. The legislative history of the Sherman Act is not clear on much but it is clear on this.[133]

Looking beyond the consensus among scholars to a selection of actual decisions penned by the US Supreme Court itself, the conclusion that a consumer protection focus is present in the Judiciary is indeed supported, with certain cases providing an interesting insight into the Court's appreciation of the role of competition laws in the broader economy. Particularly, judicial decisions in the last 30 years have increasingly been conforming to a consumer welfare standpoint.[134]

For instance, in the case of *Federal Trade Commission v. University Health, Inc.*,[135] the Court stated the purpose of competition law in the context of health care. The proposed acquisition of certain hospitals in a particular geographic location was considered by the US FTC to be harmful to consumers because such "would so concentrate the market that consumers [would likely] suffer at the hands of the four remaining hospitals in the market, in which University Hospital would be the dominant participant."[136] Respondent countered by stating that firms subject to the prospective acquisitions were "weak firms."[137] This argument was rejected by the Court on the ground that the case did not prima facie adequately show that consumers were protected.[138] Namely, that to

> ensure that competition and consumers are protected, we will credit such a defense only in rare cases, when the defendant makes a substantial showing that the acquired firm's weakness, which cannot be resolved by any competitive means, would cause that firm's market share to reduce to a level that would undermine the government's prima facie case.[139]

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133. Salop, *Question*, *supra* note 114, at 338 (citing Philip Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L.J. 523, 536 (1983)).

134. Mark Geier, *United States v. Microsoft Corp.*, 16 BERKELEY TECH. L.J. 297, 304 (2001).

135. Federal Trade Commission v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991) (U.S.).

136. *Id.* at 1210.

137. *Id.* at 1221.

138. *Id.*

139. *Id.*

In contrast, in *United States of America v. Long Island Jewish Medical Center*,[140] which also involved a merger between two hospitals and health care providers in a particular geographic area,[141] the Court allowed such merger on the ground that it can be substantially proven that the merger between the two hospitals produced substantial efficiency gains, and that these gains would be beneficial to consumers because it could be reasonably presumed that the hospitals would pass on their cost savings to said consumers.[142] In both of these cases, consumer welfare can be inferred to be the overriding concern which governed the Court's decision making.

Such a view, according to certain scholars, is also echoed by the regulatory bodies responsible for enforcing merger guidelines in the US.[143] For instance, the FTC has stated in its 2010 Merger Guidelines that a merger generally raises costs, and that for the defense to invoke that efficiency gains can result from such a merger, it must be demonstrated that such cost savings and efficiency gains effectively "pass-through" to consumers as well.[144]

John B. Kirkwood[145] and Robert H. Lande[146] echo this view when they state that although the conventional wisdom dictates that overall economic efficiency should be the barometer for the success of antitrust policies, in actual practice and based on their own survey of existing antitrust jurisprudence, competition laws are actually treated as a form of consumer protection laws and are first and foremost concerned with safeguarding consumer welfare.[147] To argue this point, they show that no Court decision

140. United States of America v. Long Island Jewish Medical Center, 983 F. Supp. 121 (E.D.N.Y. 1997) (U.S.).

141. *Id.* at 125.

142. *Id.* at 148-49.

143. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1701-02 (1986).

144. United States Department of Justice Antitrust Division, Horizontal Merger Guidelines, *available at* https://www.justice.gov/atr/horizontal-merger-guidelines-0 (last accessed Aug. 10, 2017).

145. John B. Kirkwood is an American lawyer and Professor at the Seattle University School of Law. He specializes in antitrust law. American Antitrust Institute, John B. Kirkwood, *available at* http://www.antitrustinstitute.org/content/john-b-kirkwood (last accessed Aug. 10, 2017).

146. Robert H. Lande is an American lawyer who specializes in antitrust law, law and economics, and torts law. University of Baltimore, Robert H. Lande, *available at* http://law.ubalt.edu/faculty/profiles/lande.cfm (last accessed Aug. 10, 2017).

147. Kirkwood & Lande, *supra* note 130, at 219.

in recent memory, when faced with a choice between an "efficiency gain" for the economy and the protection of consumer welfare, has actually opted to decide in favor of efficiency gain.[148] In their view, there can be no doubt that the legislative intent is that "[i]n both sell-side and buy-side cases, ... the ultimate goal is the same[ ]—[ ]preventing firms that have unfairly acquired power from exploiting their trading partners, buyers[,] or sellers."[149]

This view, while commendable, is not universally shared. Robert H. Bork[150] is noted by many commentators to be the primary proponent of the contrary view that the effective enforcement of antitrust law will only be possible with a clear delineation of legislative intent.[151] In his own analysis of the Sherman Act's history in both the Congress and the courts, he presented a case that the unquestionable legislative intent behind the law was that the antitrust policies were enacted to promote economic efficiency, and consequently, only the aggregate welfare standard would be acceptable for the courts to enforce.[152]

Kirkwood and Lande proceeded to dissect Bork's basis for this conclusion. In their critique of Bork's work, they stated that Bork arrived at that finding by examining multiple congressional statements in the US Legislature stating that acquiring market power would give firms the ability to raise market prices.[153] He then demonstrated how an agglomeration of market power can result in "allocative inefficiency."[154] From this premise, Bork presented the view that since congressional concerns regarding harm to consumer welfare are actually based on harm stemming from an "inefficiency," it can then be reasonably surmised that the overall concerns of the Legislature were economic in nature and were oriented towards attaining an efficiency objective.[155] Furthermore, Bork was of the view that a legislative preoccupation towards consumer welfare to the derogation of the overall economic picture as a whole — that is to say, ignoring or

148. *Id.* at 191.

149. *Id.* at 193.

150. Robert H. Bork was an American federal judge and solicitor general who almost became a Justice of the United States Supreme Court. Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire,* Dec. 19, 2012, N.Y. TIMES, *available at* http://www.nytimes.com/2012/12/20/us/robert-h-bork-conservative-jurist-dies-at-85.html (last accessed Aug. 10, 2017).

151. Bork, *supra* note 130, at 7, 44 & 45 (1966).

152. *Id.* at 7.

153. Kirkwood & Lande, *supra* note 130, at 199 & 200.

154. *Id.* at 197-98.

155. *Id.* at 199.

diminishing the importance of the producer aspect of the economy — would be unconstitutional.[156]

Kirkwood and Lande's criticism is premised on socio-political and normative foundations.[157] They allege that Bork's view is overly concerned with wealth transfer and ignores important fundamental issues with regard to antitrust policy that is not merely the transfer of wealth from consumer to producer, but rather, that the wealth transfer is unfair and based upon the unequal power of the market participants.[158]

Lande summarizes the issues of legislative intent by narrowing the documented effects of cartelization and anti-competitive price behavior into two broad effects: economic efficiency-related effects and wealth transfers from consumers to producers.[159] Perusing the legislative records, he concludes that there can be no doubt that wealth transfer from consumers is by far the primary concern, with economic efficiency being merely an incidental or secondary concern.[160] He pointed to multiple statements by the legislators in the congressional record that likened the wealth transfer to robbery.[161] For example, it was said that companies which engaged in anti-competitive behavior

> ['] without rendering the slightest equivalent,['] have ['] stolen untold millions from the people.[' Another congressman] complained that the beef trust ['] robs the farmer on the one hand and the consumer on the other.['] [Another] declared that the trusts were ['] impoverishing['] the people through ['] robbery.[' Another] declared that monopolistic pricing was ['] a transaction the only purpose of which is to extort from the community ... wealth which ought to be generally diffused over the whole community.['] [Another] complained that ['they] aggregate to themselves great enormous wealth by extortion which makes the people poor.['][162]

Indeed, judicial decisions in the US which make reference to the legislative history of antitrust laws are unequivocal on this point. For instance, in *Associated General Contractors of California, Inc. v. California State*

156. *See* Kirkwood & Lande, *supra* note 130, at 199-201.

157. *Id.* at 197-201.

158. *Id.* at 199-201.

159. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 68-71 (1982).

160. *Id.* at 69.

161. *Id.* at 94-95.

162. *Id.*

Council of Carpenters,[163] the Court stated that "[a]s the legislative history shows, the Sherman Act was enacted to assure customers the benefits of price competition[.]"[164]

Likewise, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[165] the Court said that

> [t]he reason is that [the buyer] has paid more than he [or she] should and his [or her] property has been illegally diminished, for had the price paid been lower his [or her] profits would have been higher. ... As long as the seller continues to charge the illegal price, he [or she] takes from the buyer more than the law allows.[166]

Finally, in *In Re: Cardizem CD Antitrust Litigation. Louisiana Wholesale Drug Co. et al. v. Hoechst Marion Roussel, Inc.*,[167] the Court declared that "the very purpose of antitrust law is to ensure that the benefits of competition flow to purchasers of goods affected by the violation."[168] From all the foregoing, it is clear that notwithstanding the language of the law being concerned with overall economic efficiency, both legislative intent and judicial precedent definitively show that antitrust laws have consistently been interpreted with a focus on consumer protection, and therefore, the most acceptable standard for antitrust litigation is the consumer welfare standard.

D. Consumer Standing Premised on Consumer Welfare and Harm from Monopolies

Having surveyed the literature establishing that the overriding concern of antitrust law and policy is consumer protection, it is now pertinent to answer the question whether consumers are entitled to legal standing in antitrust litigations on the ground of alleged loss of consumer welfare. Under American jurisprudence, the answer is a resounding yes. This is most exemplified by the US case of *Reiter v. Sonotone Corp.*,[169] a case involving an alleged agreement among various manufacturers of hearing aids to fix prices

163. Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983).

164. *Id.* at 538.

165. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

166. *Id.* at 489.

167. In Re: Cardizem CD Antitrust Litigation. Louisiana Wholesale Drug Co. et al. v. Hoechst Marion Roussel, Inc., 332 F.3d 896 (6th Cir. 2003) (U.S.).

168. *Id.* at 904.

169. Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

for the devices and related services.[170] The premise of the plaintiff's case was that, through various forms of both horizontal and vertical price-fixing, the manufacturers succeeded in causing an antitrust injury to consumers.[171] This is pursuant to the wording of the Clayman Antitrust Act, specifically Section 15 (a) thereof, which specifically provides that —

> any person who shall be injured in his [or her] business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the [US] in the district in which the defendant resides[,] or is found[,] or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him [or her] sustained, and the cost of suit, including a reasonable attorney's fee.[172]

Consequently, plaintiff initiated a class action suit seeking to recover treble damages.[173] Notably, the plaintiff in this case is a classic "retail consumer plaintiff," one whose business is in no way connected to that of defendant's, and whose cause of action is a property interest premised solely on the fact that she had to pay more for the hearing aid owing to defendant's act.[174] This was the first "retail consumer" case to reach a federal court in the US.[175] The defendants moved to dismiss the case on the ground that plaintiff lacked standing pursuant to the guidelines laid down by the Federal Court of Appeals in *Billy Baxter, Inc. v. the Coca-Cola Company*,[176] which provided for a two-fold test for proximate causation.[177] Firstly, an antitrust violation must be proved.[178] Following this, two more requisites must be established: (1) that the violation caused the alleged injury and (2) that the alleged injury to business or property was of a type protected by the law.[179]

To wit, the question therefore actually devolves into whether paying an increased price for goods is an injury to "business" or "property" within the

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170. Washington University Law Review, *Consumer Standing in Antitrust Actions, Reiter v. Sonotone Corporation, 442 U.S. 330 (1979)*, 58 WASH. U.L. REV. 717, 723-24 (1980) (citing *Reiter*, 442 U.S. at 335).

171. *Id.*

172. The Clayton Act, 15 U.S.C. § 15 (a) (1914).

173. *Reiter*, 442 U.S. at 335.

174. *Id.* at 340.

175. Washington University Law Review, *supra* note 170, at 723-24.

176. Billy Baxter, Inc. v. Coca-Cola Company, 431 F.2d 183 (2d Cir. 1970) (U.S.).

177. *Id.* at 188.

178. *Id.* at 187 & Washington University Law Review, *supra* note 175, at 718-19.

179. *Id.*

purpose of the law, such being necessary to entitle a plaintiff to standing.[180] This question was finally decided by the US Supreme Court in *Chattanooga Foundry & Pipe Works v. Atlanta*,[181] a case that concerned a foundry whose anti-competitive conduct necessitated the city, which maintained its own water facilities, to purchase pipes at a higher cost.[182] The Court ruled that being compelled to purchase the pipes at a higher cost was tantamount to an injury to the city's property and property rights.[183] Pertinently, the Court declared that "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his [or her] property."[184]

With regard to the ruling in *Reiter*, the Court sided with the plaintiff on the matter of standing. This decision essentially opened up antitrust lawsuits to a much broader class of plaintiffs. The Court placed substantial emphasis on the fact that private suits are an absolute necessity for effectively enforcing antitrust laws, brushing aside contentions that such a ruling would encourage frivolous lawsuits or overburden the courts.[185] However, we must also note the pronouncement in *Blue Shield of Virginia v. McCready*,[186] where the Court declared the purpose and necessity of delimiting standing to sue in antitrust cases — "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action[.]"[187]

Subsequent cases then definitively lay down the rule that an overcharge sustained by the consumer is an injury for the purposes of antitrust laws. In *Thomsen v. Cayser*,[188] which concerned agreements to restrain competition

180. Washington University Law Review, *supra* note 175, at 717-18.

181. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906).

182. Washington University Law Review, *supra* note 175, at 721 (citing *Chattanooga Foundry & Pipe Works*, 203 U.S. at 395-96).

183. *Id.* The Court stated that

> [i]t was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his [or her] property. The transaction which did the wrong was a transaction between parties in different [States], if that be material.

Chattanooga Foundry & Pipe Works, 203 U.S. at 396.

184. *Id.*

185. Washingon University Law Review, *supra* note 175, at 725.

186. Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982).

187. *Id.* at 473.

188. Thomsen v. Cayser, 243 U.S. 66 (1916).

amongst a group of shippers, the Court ruled that the excess over the reasonable rate charged by the shipper constituted an element of the injury suffered.[189] Likewise in *Cleary v. Chalk*,[190] concerning securities trading by transit corporations with interlocking directorates, it was held by the Federal District Court that such rationale in treating the overcharging of goods as an injury was equally applicable to consumers of services as well, to wit — "We have no doubt that a consumer of service who is illegally overcharged sustains a property injury no less than a consumer of goods."[191] Indeed, as Herbert J. Hovenkamp[192] notes, the great majority of antitrust cases initiated in the US are by private consumer plaintiffs.[193] While this may, at first impression, seem to be a compelling reason to allow the same in the Philippines, it is imperative to note that the Philippine legal framework is not perfectly on all fours with that of the American antitrust enforcement system. The basis should be the underlying reasoning; it should not be mere rote replication.

E. State Standing Versus Private Standing for Lost Welfare

Having seen that the nature of a monopoly overcharge as an injury is not in dispute insofar as established jurisprudence is concerned, the question must now be posited — does the State have the personality to initiate a lawsuit for the purposes of recouping consumer welfare?

This was squarely the question resolved in *Hawaii v. Standard Oil Co. of California*,[194] which established several important principles concerning the economic application of antitrust laws. The case involved alleged anti-competitive behavior and various restraints in trade engaged in by the defendant oil companies for the purpose of raising the prices of refined petroleum products.[195] The State of Hawaii sought to obtain damages from said companies on the ground that their acts inflicted harm upon the economy of Hawaii.[196] Said harm was premised upon two thrusts: firstly,

189. *Id.* at 88.

190. Cleary v. Chalk, 488 F.2d 1315 (D.C. Cir. 1973) (U.S.).

191. *Id.* at 1319.

192. Herbert J. Hovenkamp is a "recognized expert and prolific author in the area of [a]ntitrust law." The University of Iowa, Herbert Hovenkamp, *available at* https://law.uiowa.edu/herbert-hovenkamp (last accessed Aug. 10, 2017).

193. HERBERT J. HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICES 543 (1994 ed.).

194. Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972).

195. *Id.* at 270.

196. *Id.* at 271.

that harm was inflicted upon the State of Hawaii itself for the petroleum products it had purchased and secondly, in a *parens patriae* capacity for the citizens of Hawaii, as well as in a representative capacity of the broader class of all citizens in Hawaii likewise affected by similar overcharges.[197]

Said claim was denied by the Court, on the ground that the State was not empowered to sue for damages proceeding from economic injury to its sovereign interests, as opposed to its propriety interests.[198] The Court rejected the claim that the difficulty of initiating antitrust suits would render private citizens impotent to sue and prosecute private antitrust actions.[199] The rationale for rejecting such a claim was premised upon the fact that allowing private citizens to prosecute claims for damages, and then allowing the State to recover damages to its economy in general would invariably result in a prohibited double recovery, regardless of the lengthiness or elaborateness of the trial.[200] As such, the Court provided that private initiative would be preferable over allowing the State to aggregate the claims of all of its citizens under the broad statement that its economy sustained damage, for in the end, "[a] large and ultimately indeterminable part of the injury to the ['']general economy,['] as it is measured by economists, is no more than a reflection of injuries to the ['']business or property['] of consumers, for which they may recover themselves[.]"[201] Proceeding from this view, it is not only desirable that consumers be given standing to sue in order to recover welfare, it is imperative as the State itself is not empowered to do so on behalf of the consumer.

VIII. PRIVATE ANTITRUST LITIGATION

A. The Elements of a Private Antitrust Suit

Fundamentally, a private antitrust suit has three basic elements: (1) a violation must have occurred; (2) injury must have been suffered by the

197. *Id.* at 270–71.

198. *Id.* at 272.

199. *Id.* at 262. The US Supreme Court declared that "[b]y offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.'" *Hawaii*, 405 U.S. at 262.

200. *Id.* at 264. Similarly, the US Supreme Court also stated that "[w]ere we, in addition, to hold that Congress authorized the State to recover damages for injury to its general economy, we would open the door to duplicative recoveries." *Id.* at 263–64.

201. *Id.* at 264.

plaintiff; and, (3) proximate causation between the violation and the injury must be proven.[202] As the element of "liability" has already been discussed in the previous Chapter, this Chapter will focus on the elements of "injury" and "causation."

B. Market Power

A key component in any successful antitrust prosecution is an assessment of the market power of the firm in question.[203] Market power, in its economic sense, is defined as the ability of a firm to set prices above the marginal cost of producing them.[204] In more simplified terms, it is merely the capability of sellers to set prices above the competition level before they start to experience substantial decreases in sales.[205] In a real world scenario, of course, all firms are expected to possess a certain amount of market power in varying degrees.[206] For the purposes of triggering antitrust liability, a firm must possess monopoly power, which corresponds to a high degree of market power.[207] Even in prosecutions of antitrust violations that are subject to a rule of reason test, a finding of some degree of market power is essential.[208] As a comprehensive assessment of the market power of firms can at times be very complex, a common indicator used in actual litigation to represent market power is market share, or that portion of a relevant market under the control of the defendant.[209] Thus, the practical appreciation of antitrust litigation in which market power is an issue commonly proceeds first from the definition of the relevant market; followed by the identification of the defendant's market share, or lack thereof; and, from there to create an inference of market power.[210] Although such procedure is

202. Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20 (5th Cir. 1974) (U.S.).

203. United States v. Grinnell Corp., 384 U.S. 563, 570 (1966).

204. Richard A. Posner & William M. Landes, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 939 (1980).

205. *Id.*

206. *See* Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L. J. 129, 131 (2007).

207. United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 620-21 (1977).

208. *Id.* at 620.

209. Daniel A. Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31, 34 (2014).

210. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 399-400 (1956).

not without criticism, its simplicity has been praised when compared to more sophisticated tests for determining market power.[211]

C. Treble Damages: A Peculiarity of Antitrust Laws

Generally, the manner in which cases proceed in the American system was that after a violation has been proved, the plaintiff need only present a reasonable estimate of the amount of damages resulting from the injury.[212] It has been immaterial in practice whether the plaintiff alleged a specific amount for each injurious act, or provided a lump-sum estimate of the total harm incurred.[213] However, in many recent cases, recovery has been denied to a plaintiff in an antitrust case on the ground that, having failed to specify and segregate the amount of damages claimed for each injurious act, any award of damages by the Court would be speculative in nature.[214] Thus, it becomes important to determine an appropriate judicial standard concerning up to what degree damages in such cases must be proven in order to allow recovery.[215] This is because a peculiar characteristic of antitrust laws in many jurisdictions is the inclusion of provisions mandating the trebling of damages awarded.[216]

Scholars have categorized the objectives of the treble damages provision as being two-fold: the goal of compensation and the goal of deterrence.[217] In terms of compensation, this is inherent in the concept of antitrust damages being in the nature of "actual" damages, designed to redress the injuries incurred by private plaintiffs.[218] The second reason for such a provision is to enhance the deterrent value of antitrust laws and make attempts to engage in such prohibited behavior much costlier than they would otherwise be, for if such were not the case, then the fullest objective of antitrust policy would not be achieved.[219] Admittedly, because of the tripling of damages awarded

211. Benjamin Klein, *Market Power in Antitrust: Economic Analysis after Kodak*, 3 SUP. CT. ECON. REV. 43, 77-78 (1993).

212. Charles N. Charnas, *Segregation of Antitrust Damages: An Excessive Burden on Private Plaintiffs*, 72 CAL. L. REV. 403, 403 (1984).

213. *Id.*

214. *Id.* at 403-04.

215. *Id.*

216. *Id. See also* Grason Electric Company, et al, v. Sacramento Municipal Utility District, 526 F. Supp. 276, 281 (E.D. Cal. 1981) (U.S.).

217. Charnas, *supra* note 212, at 405.

218. *Id.*

219. *Id.* at 406.

in such cases, the awards can reach exceptionally high amounts. Such was the case in *MCI Communications Corporation v. American Telephone and Telegraph Company*,[220] an antitrust case in which the plaintiff accused American Telephone and Telegraph Company of no less than 22 different types of anti-competitive behavior in the telecommunications sector, which eventually resulted in a favorable jury award of two billion dollars after the mandatory trebling.[221]

D. Injury: Proving Antitrust Damages

Injury in the context of antitrust cases is conceptually distinct from how it is used in other areas of law. An "antitrust injury" is one antitrust laws are designed to prevent.[222] In the process of antitrust damage recovery, establishing standing is but the first of multiple steps.[223] After standing is granted, the evidentiary question now progresses to proving the amount of damages alleged to have been incurred as a consequence of anti-competitive behavior.[224] In this regard, nearly a century of litigation and jurisprudence has created multiple methods of going about this step.[225] Ultimately, however, the measure of damages in antitrust cases has to be guided by a fundamental principle — that the damages for a particular act should be such as to make it unprofitable if the act is inefficient, but not if the act is efficient.[226] Many seemingly anti-competitive acts are actually economically efficient, while others have no redeeming value whatsoever.[227] Some would increase the market power of the actor but, at the same time, improve efficiency for the consumer.[228] A well-designed antitrust policy must make sure to condemn such acts only when the anti-competitive effect exceeds the social gain.[229] This doctrine was articulated in *Brunswick Corp. v. Pueblo*

220. MCI Communications Corporation v. American Telephone and Telegraph Company, 708 F.2d 1081 (7th Cir. 1983) (U.S.).

221. *Id.* at 1160-61.

222. Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 104 (1986).

223. *See* Herbert J. Hovenkamp, A Primer on Antitrust Damages (University of Iowa Legal Research Paper) at 56, *available at* http://ssrn.com/abstract=1685919 (last accessed Aug. 10, 2017) [hereinafter Hovenkamp, Primer].

224. *Id.*

225. *See generally* Hovenkamp, Primer, *supra* note 223.

226. Hovenkamp, Primer, *supra* note 223, at 2.

227. *Id.*

228. *Id.*

229. *Id.*

Bowl-O-Mat, Inc.,[230] a case which involved Brunswick Corporation (Brunswick), a manufacturer of bowling equipment that leased said equipment to bowling centers.[231] Specifically, the conduct in question was that the center bought out and began operating bowling centers which began to default in the lease payments.[232] The plaintiff in this case, Pueblo Bowl-O-Mat, Inc. (Pueblo), initiated the case on the ground that the actions of the leasing company were likely to create a monopoly.[233]

The factual milieu of the case, however, deserves special consideration. The failing bowling centers being acquired by the defendant were on the verge of closing down, a circumstance which would have undoubtedly benefitted Pueblo and increased its market power.[234] The intervention of the leasing company, however, kept the centers in operation and hence raised the overall level of competition in the bowling market.[235] In a landmark ruling, the Court denied Pueblo's claim for antitrust injury on the ground that, although individually Pueblo was in fact harmed, the case could not have been the injury contemplated by the law as the act of Brunswick actually increased competition in the industry.[236] Thus, the rule laid down was that plaintiff may not recover in antitrust litigation when the injurious act complained of actually benefitted the market as a whole by increasing competition, notwithstanding any individual injury suffered by said plaintiff.[237] Barring that exception, the general rule is that it will be sufficient for a plaintiff to recover if the evidence shows the extent of the damages as a matter of just and reasonable inference.[238] This is owing to the difficulty of actually adducing evidence to prove damages for such activities such as market exclusion, which are quite difficult to concretely quantify and are, in a sense, inherently subjective.[239] Indeed, expert testimony is not even

230. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

231. *Id.* at 479 & Hovenkamp, Primer, *supra* note 223, at 2.

232. *Brunswick Corp*, 429 U.S. at 479-80.

233. *Id.* at 480.

234. *Id.* at 488.

235. *Id.*

236. *Brunswick Corp.*, 429 U.S. at 488-89.

237. *Id.* at 487-88.

238. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 560-62 (1931).

239. Malcolm v. Marathon Oil Company, 642 F.2d 845, 858 (1981) (U.S.).

required for such purposes.[240] According to the Court in *Malcolm v. Marathon Oil Company*,[241]

> [e]ach sale and the amount of loss on the transaction need not be shown; averages may be used to show that the plaintiff generally lost money over a period of time. ... And a non-expert's testimony regarding the past sales volume and profit margin may be used to measure damages. ... The defendant is not relieved of liability just because the plaintiff does not show the exact volume and price figures possible within the damage period.[242]

E. Causation: A Qualification to Consumer Standing — Causality Tests

Despite showing that the consumer does in fact have proper standing in antitrust litigations, this is not to say that any plaintiff is given free rein to institute such actions on a whim. In fact, such is only the beginning of the battle, so to speak. Allowing consumer standing presents a formidable gauntlet of complications for the courts if not properly managed, with scholars naming double recovery,[243] ruinous recovery,[244] windfall or remote recovery,[245] speculative awards,[246] and frivolous lawsuits[247] as the evils arising from private consumer antitrust litigation. To that end, a successful causal link still needs to be established in order to allow such an action to prosper, and judicial practice in the US has evolved three distinct tests for this purpose: the direct injury test, the target area test, and the zone of interest test.[248] These will be discussed in order, along with their advantages and disadvantages.

F. The Direct Injury Test

The predominant test employed in earlier antitrust litigation in the US, this test is essentially concerned with delimiting the very broad wording of the Sherman Act, which provided a remedy for any party injured by any activity

240. *Id.*

241. *Malcolm*, 642 F.2d.

242. *Id.* at 858.

243. Kevin D. Gordon, *Private Antitrust Standing: A Survey and Analysis of the Law After Associated General*, 61 WASH. U.L.Q. 1069, 1077 (1984).

244. *Id.*

245. *Id.*

246. *Id.* at 1077-78.

247. *Id.* at 1078.

248. Richard B. Tyler, *Private Antitrust Litigation: The Problem of Standing*, 49 U. COLO. L. REV. 269, 270 (1978).

proscribed by the antitrust laws.[249] Essentially, the direct injury test was an offshoot of earlier jurisprudence concerning torts, particularly the concept of proximate causation.[250] Consequently, this test is the most restrictive of the standing tests because it denies standing to any party who is not in a direct relationship with the defendant.[251] This does not require privity of contract between the parties, but, nevertheless, results in problems in determining what injuries are sufficiently "direct" in courts of law.[252] Furthermore, in the direct injury test, remote or secondary effects are generally not considered.[253] For instance, in price-fixing cases, the Court allowed only direct purchasers to recover damages, notwithstanding the fact that individuals other than the direct purchasers may have incurred harm as a consequence of the increased prices being passed on.[254]

G. The Target Area Test

Because of the strictness inherent in the direct injury test, the courts eventually evolved a more liberal standard in the form of the target area test.[255] This test allows standing for a plaintiff "within the area of the economy endangered by the defendant's allegedly illegal acts."[256] It only adds the requirement that the defendant "aims" at the plaintiff, a requirement which has been poorly defined in jurisprudence.[257] In the first case to apply such a test, *Conference of Studio Unions v. Loew's Inc.*,[258] an association of movie producers, conspired to engage in anti-competitive conduct against independent film studios.[259] The plaintiff in this case, a labor union in the film industry, was denied standing on the ground that the conspiracy was not directed against it but against the independents.[260] This was justified on the ground that the laborers themselves were not in an area

249. *Id.*

250. *Id.* & Gordon, *supra* note 243, at 1073.

251. Gordon, *supra* note 243, at 1073-74.

252. *Id.* at 1075.

253. *See* Gordon, *supra* note 243, at n. 4.

254. *Id.* & *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720, 746-47 (1977).

255. Gordon, *supra* note 243, at 1075.

256. *Id.*

257. *Id.*

258. Conference of Studio Unions v. Loew's Inc., 193 F.2d 51 (9th Circ. 1952) (U.S.).

259. *Id.* at 52.

260. *Id.* at 54-55.

of the economy that was being threatened by a decrease in the overall competitive environment in the film industry.[261] However, in the subsequent case of *Karseal Corporation v. Richfield Oil Corporation*[262] involving a tying agreement at the retail level, the manufacturer who was separated from the retailer by one degree in the form of an intervening distributor was successfully granted standing.[263] From this judgment, the Court would later further articulate the target area test to allow it to cover the entire distribution chain in an industry.[264] An even more liberal variation of the target area test requires only that the prospective plaintiff be a "foreseeable" victim of anti-competitive conduct.[265] This so-called foreseeable target area test has also attracted its share of criticism for being both theoretically and practically infeasible.[266]

H. The Zone of Interest Test

The final test developed by jurisprudence, which emerged from a judicial adaptation of procedural rules provided for administrative agencies under The Administrative Procedure Act,[267] is the zone of interest test.[268] Under this test, for a plaintiff to have standing, he or she must show that he or she is suffering an injury falling within the zone of interests Congress sought to protect by the substantive statute.[269]

The US Supreme Court has not explicitly selected any of the tests as the controlling standard, opting instead to provide guidelines in *Associated General Contractors of California, Inc.*,[270] where certain factors were identified as important considerations when determining whether consumers should be

261. *Id.*

262. Karseal Corporation v. Richfield Oil Corporation, 221 F.2d 358 (9th Cir. 1955) (U.S.).

263. *Id.* at 364-65.

264. *Id.*

265. Gordon, *supra* note 243, at 1076. *See also* Carol Ann Petren, *Antitrust: Broadening of Standing in Private Litigation Under Malamud v. Sinclair Oil Corporation*, 10 VAL. U.L. REV. 355, 392 (1976).

266. *Id.*

267. The Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976).

268. Gordon, *supra* note 243, at 1078.

269. Association of Data Processing Service Organizations, Inc., et al. v. Camp, 397 U.S. 150, 153 (1970).

270. *Associated General Contractors of California, Inc.*, 459 U.S. at 525-26.

granted standing.[271] These factors include the nature of the plaintiff's injury, the directness of said injury, and the policy considerations germane to the law.[272] Nevertheless, scholars argue that the trend of jurisprudence supports the conclusion that the Court implicitly prefers the target area test.[273]

Having examined the various tests and standards employed in the US jurisdiction concerning private antitrust litigation, it now remains to be seen whether such principles find application in the Philippines' own regulatory framework.

IX. Retail Consumer Plaintiffs in the Philippine Scenario

A. Private Action

At the outset, for a proper contextualization, it becomes necessary to compare in full the legal bases for private antitrust lawsuits in the Philippines where the law is nascent, to those in the US where there is already a much-storied history of antitrust litigation. The legal authority for private litigation in the US is based on the Sherman Act. The Clayton Act, which supplements the Sherman Act,[274] states that

> any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the [US] in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.[275]

To this, we must contrast our own Philippine Competition Act, which provides for the authority for private parties to initiate civil actions under Section 45 thereof, which states: "Any person who suffers direct injury by reason of any violation of this Act may institute a separate and independent civil action after the [PCC] has completed the preliminary inquiry provided under Section 31."[276]

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271. *Id.* at 532-33.

272. *Id.*

273. *See* David B. Lytle & Beverly Purdue, *Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation*, 25 AM. U. L. REV. 795, 802-03 (1976).

274. Sarah Weckel Hays, *Commerce Requirements of the Clayton Act*, 36 LA. L. REV. 1040, 1040 (1976).

275. The Clayton Act, 15 U.S.C. § 15 (a).

276. Philippine Competition Act, § 45.

B. Treble Damages

It immediately becomes apparent that the Philippine statute did not provide for a trebling of damages in cases of private action, unlike the Sherman Act and the supplementary Clayton Act. This is not to say that trebling is not present in the law. However, the legislators merely saw it fit to limit the proviso on trebling of damages only to cases where the commodity subject to anti-competitive conduct is categorized as a basic necessity, to wit —

> Sec. 41. *Basic Necessities and Prime Commodities.* [—] If the violation involves the trade or movement of basic necessities and prime commodities as defined by Republic Act No. 7581, as amended, the fine imposed by the [PCC] or the courts, as the case may be, shall be tripled.[277]

This is notably a departure from the scenario provided for in Act No. 3247, "An Act to Prohibit Monopolies and Combinations in Restraint of Trade," which explicitly provided for treble damages as follows —

> Sec. 6. Any person who shall be injured in his [or her] business or property by any other person by reason of anything forbidden or declared to be unlawful by this Act, shall recover threefold the damages by him [or her] sustained and the costs of suit, including a reasonable attorney's fee.[278]

It is immediately evident that the previous statute is almost a word-for-word duplication of the Sherman Act's private litigation provision, and the implied repeal of this statute by the new competition law — which makes no mention of recovering treble damages for private actions — can leave no doubt that the Legislature has opted not to incorporate treble damages except for cases which involve basic necessities. Though it may also be argued that since Act No. 3247 has not been explicitly repealed by the new law, and that such provision for treble damages is not necessarily inconsistent with any provision of the Competition Act,[279] the fact that the proviso in the present law states that private plaintiffs may recover "damages sustained" and not "threefold the damages [ ] sustained" as in the Act No. 3427,[280] the implication may be drawn that Congress intended only for actual damages to be recovered.

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277. *Id.* § 41.

278. An Act to Prohibit Monopolies and Combinations in Restraint of Trade, Act No. 3247, § 6 (1925).

279. *See* Philippine Competition Act, § 55. *See* FRANCISCO E. LIM & ERIC R. RECALDE, THE PHILIPPINE COMPETITION ACT: SALIENT POINTS AND ISSUES 174 (2016) (arguing that there was no express or implied repeal of the old provision).

280. Philippine Competition Act, § 41 & Act No. 3247, § 6.

C. Efficiency Defense

As the case of *Brunswick Corp.* has earlier pointed out, a private antitrust action will not stand if substantial efficiency gains are realized in the broader market, notwithstanding any injury incurred by a private plaintiff.[281] The Philippine Competition Act acknowledges this by stating in its Preamble and Declaration of Policy the significance of efficiency in an economy, with Section 2 providing that "[t]he efficiency of market competition as a mechanism for allocating goods and services is a generally accepted precept."[282] The new law has also incorporated such a defense into our laws, with Section 14 (c) stating that the provision on prohibited acts does not apply to those agreements "which contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation of this Act."[283] Note that this particular provision did not explicitly use the term efficiency, but that is clearly connoted by the reference to improving production and distribution.

Furthermore, Section 21, the provision on prohibited mergers and acquisitions, clearly incorporates efficiency gains as a ground for exemption for a potentially anti-competitive merger.[284] The following Section then states that the burden of proof for proving efficiency realization falls upon the party seeking an exemption on the ground of efficiency.[285] However, the wording of what must be established is curious — "A party seeking to rely on the exemption specified in Section 21[ ](a) must demonstrate that if the agreement were not implemented, significant efficiency gains would not be realized."[286] It connotes that mere efficiency gain is not enough; the gains must be "significant" in nature. This is reiterated once more in Section 26 (b), which enjoins the PCC to determine, in assessing the existence of violations of the law, whether the act in question "outweighs the actual or potential efficiency gains that result from the agreement or conduct[.]"[287]

281. *Brunswick Corp.*, 429 U.S. at 487-88.

282. Philippine Competition Act, § 2.

283. *Id.* § 14 (c).

284. *Id.* § 21.

285. *Id.* § 22.

286. *Id.*

287. *Id.* § 26 (b).

D. Consumer Welfare Orientation

In addition, while it has been established through an examination of legislative history and judicial decisions that the Sherman Act has a consumer-oriented policy objective,[288] the Philippine Competition Act simplifies this question by deliberately stating that consumer protection is a key objective and incorporating the consumer into the definition of punishable acts. Section 14 also includes the statement "while allowing consumers a fair share of the resulting benefits" in the efficiency exemption to qualify the scenario wherein an efficiency defense will exempt an act which otherwise may be violative of the law.[289] In addition, while the Declaration of Policy does state the importance of efficiency as a goal of the law and a desirable public policy rooted in the Constitution, the same Section also expressly states that the purpose of the law is consumer protection as it provides that the government shall endeavor to "[p]enalize all forms of anti-competitive agreements, abuse of dominant position[,] and anti-competitive mergers and acquisitions, with the objective of protecting consumer welfare[.]"[290] By contrast, the same Section makes no comparable mention of producer welfare. This appears to establish explicitly that consumer welfare is a subject that this law aims to safeguard, something that was only implicit in the Sherman Act of the US.[291]

E. The Elements of a Private Antitrust Suit in the Philippine Context

The basic elements of a private antitrust suit are, with a few necessary changes, directly applicable to the private action provided for in the Philippine Competition Act. These elements are, as discussed in a previous Chapter: (1) a violation must have occurred; (2) injury must have been suffered by the plaintiff; and, (3) proximate causation between the violation and the injury must be proven.[292]

288. Kirkwood & Lande, *supra* note 130, at 221-22.

289. Philippine Competition Act, § 14 (c).

290. *Id.* § 2.

291. Kirkwood & Lande, *supra* note 130, at 960.

292. *Terrell*, 494 F.2d at 20.

1. Violation

The key difference is that, whereas in the US, a violation must have occurred, in the Philippines, a violation must have occurred *and* the PCC must have undertaken the necessary preliminary inquiry under Section 31[293] The PCC should have found a reasonable ground to believe that the defendant has committed anti-competitive acts or abuse of market power.[294] This explicitly being worded as a condition precedent, no case shall prosper without the approval of the PCC.[295] Naturally, this is cause for concern as it delimits the number of cases that can be brought to court for recovery of damages, but at the same time, it may prove beneficial in the sense that it will lessen the incidence of frivolous litigation. Nevertheless, as the particular concerns of competition law are highly technical and particular in nature, it appears apropos to retain such a requirement in order to allow specialized agencies to provide their factual findings beforehand, as such may be beyond the conception of the regular courts.[296] Furthermore, the factual findings and interpretation of the law given by the regulatory body tasked with its implementation are usually accorded great weight by the courts.[297]

2. Injury

As to the question of what form of injury is a recoverable injury for the purposes of the Act, the law is more specific than its US counterpart by stating that a private action may be maintained by any person suffering "direct injury."[298] In comparison, the Sherman Act's private antitrust provision only states that "any person who shall be injured in his [or her] business or property by reason of anything forbidden in the antitrust laws may sue therefor[,]"[299] which makes no reference to the injury being direct. It can be inferred from this that the Legislature opted to further delimit the private plaintiffs who could recover damages from anti-competitive activity in order to exclude private persons who suffered merely remote or secondary damage. A comparable principle can be found in the *Illinois Brick*

293. Philippine Competition Act, § 31.

294. *Id.* § 45.

295. 1997 RULES OF CIVIL PROCEDURE, rule 16, § 1 (j).

296. *See* Cosmos Bottling Corporation v. Nagrama, Jr., 547 SCRA 571, 586-90 (2008).

297. *See* City Government of Makati City v. Civil Service Commission, 376 SCRA 248, 265-67 (2002).

298. Philippine Competition Act, § 45.

299. The Sherman Antitrust Act, 15 U.S.C. §§ 1-7.

Co. v. Illinois[300] case in the US, where as previously noted, the US Supreme Court allowed only direct purchasers to recover damages, even when damage may have been transmitted by passing on costs further along into the economy.[301]

3. Causation

Given the limitations that exist in the law as a result of limiting private action to only those directly injured by anti-competitive acts, as well as the requirement of a prior finding of probable cause by the PCC, the question of causation under the new law is greatly simplified when compared to that of the US. In essence, the direct injury test of causation will be applicable, which reiterates the principle that direct injury in antitrust cases does not require privity of contract, it being sufficient that a direct relationship exists between plaintiff and defendant.[302] In the context of consumers, therefore, a purchaser will possess the requisite standing if the alleged violator is the seller. The only material question then will be whether the evidence adduced can prove the damages as a matter of just and reasonable inference.[303] Of course, the other tests of causation have much to commend themselves as well, particularly the target area test, as that would allow the consumer to recover as long as the offender was anywhere on the distribution chain.[304] However, the more restrictive wording of the competition law would make it a matter of judicial overreach to extend the coverage of the law to those not clearly intended to be covered by it. Furthermore, it can be argued that, since the term "direct injury" has a particular technical connotation in antitrust law, the Legislature intended such established technical meaning to be applied in accordance with general principles of statutory construction.[305] In this case, it would mean that the direct injury test is applied to the exclusion of other expanded tests of causation.

F. Penalties and Deterrence

Interestingly, the Legislature did not decide to use percentage of turnover as a basis for fines. Instead, they opted to provide for a fixed scale of penalties

300. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

301. *Id.* at 745-47.

302. Gordon, *supra* note 243, at 1073-75.

303. *Story Parchment Co.*, 282 U.S. at 560-62.

304. *Karseal Corporation*, 221 F.2d at 364-65.

305. *See* Philippine Long Distance Telephone Company v. Eastern Telecommunications Philippines, Inc., 213 SCRA 16, 26-27 (1992).

for administrative and criminal offenses. Said penalties range from ₱100-200 million for administrative offenses and ₱50-250 million for criminal offenses, as well as imprisonment.[306] This is noteworthy because of the deterrent role that antitrust laws play when it comes to anti-competitive behavior, as a penalty fixed to a certain range will be wholly ineffectual against anti-competitive acts which are highly profitable if the size and revenue of the firm reaches a certain threshold in relation to the penalty.[307] Fines at a monetary level are not likely to reach the desired level of deterrence if the activity is of the type that remains highly profitable if not detected easily.[308] Furthermore, some economists have argued that the theoretically optimal level of antitrust penalty that would ensure a very high degree of deterrent effect should be a fine approximating two years' worth of a particular firm's revenue in the relevant market where the offenses were committed.[309]

The trebling of damages for private antitrust suits was also intended to serve a deterrent function, such that the combined administrative and criminal fines as well as the private suits for damages were to constitute the deterrent.[310] In the case of the US, this was brought about partially by the fact that imprisonment as sanctioned by US antitrust laws was thought to be inefficient when compared to a monetary penalty,[311] and that imprisonment also imposed social costs upon the economy as a whole by depriving the economy of an individual capable of contributing.[312] Conversely, threats of incarceration also cause disturbances in the market by causing businessmen to engage in decisions guided by considerations other than economic.[313] Arthur Linman states that "[t]o the businessman, [ ] prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail."[314]

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306. Philippine Competition Act, §§ 29 & 30.

307. Richard A. Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193, 1201 (1985).

308. Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5 EUR. COMPETITION J. 19, 32 (2009).

309. *Id.*

310. *See* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 402-03 (1981).

311. *Id.* at 389.

312. Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410 (1980).

313. Donald I. Baker & Barbara A. Reeves, *The Paper Label Sentences: A Critique*, 86 YALE L.J. 619, 630-31 (1977).

314. *Id.*

G. Burden of Proof

It may be asked to what extent a plaintiff must prove his damages in order to recover under a private action, as this is not a question directly answered by the law itself. Although the administrative proceedings under the Philippine Competition Act require substantial evidence,[315] no such qualification is provided for the private action under Section 45. The law characterizes the action in question as "a separate and independent civil action,"[316] which will categorize the action together with Articles 32, 33, 34, and 2176 of the Civil Code, which are presently the only other independent civil actions under our law.[317] As all the existing independent civil actions require merely a preponderance of evidence in order to recover, this should be an applicable standard to the action engendered by Section 45.[318]

Having examined the provisions of the Philippine Competition Act relative to established jurisprudence and literature on the matter, it is now appropriate to conclude whether or not a private consumer has standing such as to allow him or her to recover in a private antitrust action, and to make recommendation pertaining thereto.

X. CONCLUSION

It has been said that the underlying basis for competition law is the belief that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress[.]"[319] Material progress and optimal allocation of resources are abstract concepts for the consumer, but lower prices and higher quality is certainly something that can be appreciated and observed at the end-user level. Proceeding from an examination of both the prior legal environment and the new regulatory framework which emerged from the passage of the Philippine Competition Act, it can now be stated with confidence that the consumer does possess standing to recover damages that result from anti-competitive acts. However, this is subject to multiple qualifications, which this Chapter will expound upon.

315. Philippine Competition Act, § 12 (d).

316. *Id.* § 45.

317. *See* Heirs of Eduardo Simon v. Chan, 644 SCRA 13, 27-30 (2011).

318. CIVIL CODE, arts. 32-34 & 2176.

319. Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958).

A. Determining the Elements of a Private Consumer Independent Civil Action

From the foregoing precepts in prior Chapters, the Author ventures to state that the following are the appropriate elements of the independent civil action by consumers provided for under Section 45 of the Philippine Competition Act: (1) there is a violation;[320] (2) there is direct injury;[321] (3) there is causation,[322] which means that there exists a direct relationship between plaintiff and defendant,[323] and that damages may not be deemed remote or secondary;[324] (4) there exists no off-setting efficiency gain;[325] and, (5) there has been the requisite preliminary inquiry as provided for under Section 45 in relation to Section 31, with said inquiry finding that reasonable ground exists to institute full administrative charges.[326] The aforesaid action shall be instituted in the Regional Trial Court.[327]

B. Fines, Penalties, and Damages

Unlike other jurisdictions that utilize percentage turnover for the purposes of setting fines,[328] the Philippine Competition Act simply provides for a range of penalties, depending on the particular offense and the frequency of such offense.[329] Such method will eliminate the difficulties of determining the appropriate amount to charge by percentage, as well as the danger that there will be abuse of discretion on the part of the PCC to fine excessively. However, this means that the question of proving damages is now devolved to the private plaintiffs in actions under Section 45. Nonetheless, unlike the administrative penalties, damages recoverable under such a private action are not capped by any limit other than what might be provable.

320. Philippine Competition Act, § 45.

321. *Id.*

322. *Terrell*, 494 F.2d at 20.

323. Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910) (U.S.).

324. *Illinois Brick Co.*, 431 U.S. at 746-47.

325. Philippine Competition Act, §§ 14 (c) & 26 (b).

326. *Id.* § 45.

327. *Id.* § 44.

328. Werden, *supra* note 308, at 29-31.

329. Philippine Competition Act, §§ 29 & 30.

C. Effective Deterrence

The decision to remove the trebling of damages from private actions as well as the standing restrictions serves to narrow down the number of plaintiffs who may engage in such actions. Coupling this with the fact that a range of fixed penalties is imposed instead of a particular percentage of revenue, concern may be raised that the deterrence value of the new law will be insufficient to restrain the largest market players. Nevertheless, it is conceivable that when sufficiently large numbers of private plaintiffs are injured and have successfully recovered under the law, private damages could greatly exceed the administrative fine. Such scenarios have, after all, already taken place in the US.[330]

Indeed, this only serves to enhance the significance of private litigation if the Philippine Competition Act is to be made comparable to those in other jurisdictions,[331] especially where the great majority of pending antitrust cases are private in origin.[332] Volume becomes particularly important as private plaintiffs will be less incentivized to initiate actions here in the Philippines due to the lack of mandatory damage trebling. Indeed, the US Congress itself acknowledges that one of the purposes of mandatory damage trebling was to encourage the proliferation of private suits.[333] It remains to be seen how the comparatively diminished penalties will affect the overall deterrent effect of the law.

D. Defenses Against Consumer Actions

Having established the existence of consumer standing and determined the elements thereof in a private case, it is also important to note that defenses

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330. *MCI Communications Corporation*, 708 F.2d at 1160-61.

331. *Compare* Philippine Competition Act *with* Loevinger, *supra* note 77, at 168.

332. United States Courts, *supra* note 82.

333. *Hawaii*, 405 U.S. at 262. The Court declared that

> [i]n enacting these laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.'

Id.

do exist for such an action. Notably, a consumer action will not necessarily be available for each and every violation of the Competition Act, and there exist certain violations that, by their definition, are consummated merely by the coming to an agreement concerning restricting the market.[334] As no consumer could be directly injured merely by the coming to such an agreement absent any other overt acts, it would be important to note that the type of violation which will be susceptible to a private consumer action will largely depend on the specific circumstances of such act. In cases where a private action would indeed be appropriate, the following have been determined to be valid defenses in antitrust cases:

(1) The efficiency defense, which will allege that overall efficiency gain to the market outweighs the injury to a private plaintiff;[335]

(2) The fact that the damages sought are speculative in nature and beyond what may be supported by a just or reasonable inference from the evidence presented;[336]

(3) The fact that there exists no direct relationship between plaintiff and defendant, such that any claimed damage is only remote or secondary to defendant's acts;[337]

(4) The fact that a prospective defendant has entered into a consent order with PCC, and complied with PCC's directives to prevent a finding of liability.[338] Note that this may entail the payment of damages to consumers despite the absence of a private suit;[339]

(5) The fact that the company has requested a binding ruling in order to prevent private litigation;[340] and,

(6) An allegation that the condition precedent of a preliminary inquiry under Section 31 has not been complied with, or

334. *See* Philippine Competition Act, § 14.

335. *Id.* at §§ 14 (c) & 26 (b).

336. *Farley Transportation Co., Inc.*, 778 F.2d at 1368.

337. *Illinois Brick Co.*, 431 U.S. at 746-47.

338. Philippine Competition Act, § 37 (c).

339. *Id.* § 37 (c) (3).

340. *Id.* § 37 (a).

> such did not find reasonable ground to initiate administrative proceedings.[341]

Note that these are not the only defenses available to actions under the Philippine Competition Act, which also includes such options as forbearance on the part of PCC,[342] taking part in the leniency program,[343] and a plea of *nolo contendere*.[344] However, as the law clearly provides that the action is under the cognizance of the regular courts of justice and that the action is an independent civil action, these defenses will not be available to defendants in a private suit under Section 45.[345]

It is clear then that, despite the novelty of the law, consumers will be able to prosecute a private action under the regulatory framework put forth by the Philippine Competition Act. Likewise apparent is the fact that companies, retailers, and sellers in general are provided with ample amounts of options and administrative remedies in order to ensure that non-adversarial options are possible, and when such proceedings do arise, there exist sufficient legal defenses to protect their property rights. In this regard, the Authors conclude that the new law is theoretically a substantial leap forward for the Philippines in terms of both modernizing our economic law and advancing the protection of consumer rights, although it remains to be seen how actual practice and implementation will affect the consuming public.

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341. *Id.* § 45.

342. *Id.* § 28.

343. *Id.* § 35.

344. Philippine Competition Act, § 36.

345. *Id.* § 45.