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Clarifying the Rights of Farmers  
to Seek Damages in Antitrust Actions

by

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This statement was presented as testimony on S.2835, "A Bill to Amend the Clayton Act to Allow Certain Sellers of Agricultural Products to Bring Antitrust Actions," before the Subcommittee on Administrative Practice, U.S. Senate Committee on the Judiciary, September 24, 1984.

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STATEMENT

OF

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BEFORE

THE

COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON ADMINISTRATIVE  
PRACTICE AND THE JUDICIARY

CONCERNING

S. 2835, A BILL TO AMEND THE  
CLAYTON ACT TO ALLOW CERTAIN SELLERS  
OF AGRICULTURAL PRODUCTS TO BRING  
ANTITRUST ACTIONS

SEPTEMBER 24, 1984

Mr. Chairman and members of the Committee. It is a pleasure and honor to be invited to appear before this Committee to testify on S. 2835. I favor enactment of this bill which would amend the Clayton Act to allow producers of certain agricultural products to maintain antitrust actions against downstream indirect buyers of their commodities. This amendment responds to the Supreme Court's decision in Illinois Brick.<sup>1/</sup> That decision prevents plaintiffs from establishing injury when that injury has been passed on to them as a result of an alleged antitrust violation. In the present context it means that farmers and ranchers do not have standing to sue for damages if their damages have been passed back to them as a result of, say, a price fixing conspiracy among food distributors.<sup>2/</sup> I maintain that Illinois Brick unfairly affects agricultural producers because it ignores dramatically different competitive structures in the food system. It is also unfair because the policies motivating Illinois Brick are not of overriding significance given alternative ways of satisfying these concerns and when compared with the costs to producers of not being able to sue for damages.

#### Market Structures and Antitrust in the Food System

These are difficult times for many farmers and ranchers. High interest rates, an overvalued dollar, and farmers' inherent inability to adjust rapidly their supply to current demand conditions all combine to depress farm income.

Farm income is often further adversely affected by the competitive environment in which farmers operate. It is generally acknowledged that agriculture is the only large segment of the economy that is perfectly competitively structured. This means that producers have no control over the prices they pay for their supplies or receive for their products. If

the input supply and output processing sectors of agribusiness were similarly competitive, farmers would never be overcharged in buying supplies or underpaid in selling their raw products. But the farmer lives in a different world.

In contrast to agricultural production, however, industries involved in processing and distributing food products are imperfectly structured. Food processing industries are more concentrated than is the average for all manufacturing industries. Moreover, whereas the average level of market concentration in all manufacturing industries has not risen appreciably since World War II (Table 1), concentration in food manufacturing industries has increased persistently and substantially since 1947 (Tables 2-4). Whereas today there are 19,000 corporations engaged in food manufacturing, a mere 100 control over 75 percent of all assets of food manufacturing firms (Table 5). These corporations are huge conglomerates that occupy leading positions in numerous food and non-food products (Table 6). These competitive characteristics take a large toll from farmers and consumers. Researchers estimate that the market power of food processors, as a group, enables them to increase their margins between \$10 billion and \$15 billion (1975 dollars) annually.<sup>3/</sup> Like food manufacturing, food wholesaling and retailing has experienced a persistent upward trend in concentration.<sup>4/</sup> And with similar results: prices and profits are significantly higher in concentrated retail markets than in competitively structured ones.<sup>5/</sup>

If the input and output sectors of agribusiness were structured similarly to agricultural production, I would not be here today. Farmers would never be overcharged on the supplies they purchase or underpaid for the commodities they produce. But this is not the case. As my brief

review of the structure of food manufacturing and distribution indicates, farmers sell their products in a largely oligopolistic procurement-processing-distribution system. Even in the absence of antitrust violations such as price fixing agreements depressing farm receipts, farmers often do not get a fair shake in the marketplace.

These developments have significant implications for S. 2835. Their high market concentration makes the food processing and distributing industries especially prone to collusive behavior and other antitrust violations. This is borne out by antitrust enforcement patterns. During the 1960s and 1970s the antitrust agencies devoted roughly 25 percent of their resources to cases in the food industries. The 896 cases brought by the federal agencies during 1950-1984 ranged over many sectors of these industries and charged numerous antitrust violations (Tables 7 and 8).

Given the concentrated market structures in food manufacturing and distribution and the historic evidence of antitrust violations, I conclude that as a matter of public policy we must take seriously the threat that various downstream anticompetitive tactics can result in farmers being underpaid for their production. Federal antitrust might reduce some of this threat. The evidence indicates, however, that federal antitrust enforcement in the food system has fallen off considerably in recent years (Table 7). Private enforcement is the remaining protection available to agricultural producers. But Illinois Brick denies farmers the opportunity to maintain private damage actions against all but first handlers of farm products.

Senate Bill 2835 would give agricultural producers the right to protect themselves. It provides that actions taken to recover "damages resulting from any underpayment received on the sale of cattle, hogs,

sheep, grains, or soybeans shall not be barred solely because the person seeking such damages did not sell such products directly to the defendant ...". This language would permit farmers to bring treble damage actions against anyone in the procurement-distribution chain who reduced farm prices as a result of violating the antitrust laws.

The objectives underlying the Clayton Section 4 authorization for private damage actions include enforcement of the antitrust laws, deterrence of anticompetitive conduct, and deprivation of fruits obtained through unlawful conduct. The main objections to overruling Illinois Brick are that this would frustrate the section 4 objectives by diminishing deterrence, by increasing the potential for multiple liability, and by complicating damage measurements. I shall address each of these concerns in turn, showing that they are not of compelling significance when applied to agricultural industries.

#### The Deterrent Effect of Permitting Farmers to Act as Private Attorneys General

American antitrust policy has long depended on private parties to enforce the antitrust laws. This is reflected in the large numbers of private actions brought annually. During the 1970s, private parties brought an average of 1,300 cases per year compared to an average of only 53 cases brought by the two federal antitrust agencies.<sup>6/</sup> Congress has encouraged private parties to act as private attorneys general by providing that those injured by antitrust violations be awarded treble the damages actually incurred. Another reason for trebling damages was to deter future violations by imposing penalties exceeding the benefits received by law violators.

In Illinois Brick, the Supreme Court reasoned that the deterrent effect of private enforcement would be greatest if only those parties

directly affected by an antitrust violation were permitted to sue for treble damages. Landes and Posner are among the most ardent proponents of the view that the Illinois Brick rule maximizes the deterrent value of private actions. Their analysis leads them to conclude that

allowing indirect purchasers to sue would probably retard rather than advance antitrust enforcement. The basis for this conclusion lies in the detrimental impact that allowing<sup>7</sup> a passing-on defense would have on enforcement by direct purchasers.

This conclusion follows from their belief that direct purchasers are the most efficient enforcers of the antitrust laws; that permitting indirect purchasers to sue reduces everyone's incentive to sue; and that by dividing the damages among parties diminishes everyone's incentive to sue.

Whether the Landes and Posner argument is valid is an empirical matter. While the evidence for some industries may support the Landes-Posner claims, I do not believe this is true in the food industries. The main defect in their argument is that they ignore the fact that many private parties are reluctant to sue an antitrust violator.<sup>8/</sup> Based on my study of the food industries, I believe this is an especially serious factor in these industries. The following situations come to mind.

1. Often, agribusiness firms have established long-term, ongoing business relationships that discourage legal actions on any kind.
2. Many food processors face powerful wholesale and retail buyers upon whom they depend for shelf space.<sup>9/</sup> In these circumstances a processor would be reluctant to offend a potential buyer because doing so could affect relations in the future.
3. When large food manufacturing and distributing conglomerates meet one another in competitive or buyer-seller relationships in many markets they are inclined to engage in a reciprocal exchange of favors leading to a live and let live attitude in all their relations.<sup>10/</sup>
4. In some circumstances the affected party may himself be engaged in an independent violation of the law and would be unwilling to expose himself to broad civil discovery.
5. Some affected businesses may be disinclined to bring an antitrust action because by passing back the lower price to farmers, they have not actually been injured.



The presence of any one of the above factors in the processor-distribution chain will result in less than optimum private antitrust enforcement.

Significantly, farmers and ranchers do not have the above reasons for failing to bring a private damage action. In fact, in a recent article that characterizes the role of the private attorney general as increasing the penalty associated with violating the antitrust laws but rarely increasing detection of such violations, three of the five exceptions cited to this phenomenon involved the food industry. Two of those suits were initiated by producers.<sup>11/</sup> Moreover, the prevalence of farmer associations and trade groups might provide an effective vehicle for more concerted investigations into possible antitrust violations than is now the common practice in most industries. Thus, reestablishing the right of agricultural producers to sue indirect buyers promises more, not less, effective enforcement of the antitrust laws. Both consumers and farmers would benefit from greater activity.

#### Multiple Liability

With respect to multiple liability, Justice Brennan's dissent in Illinois Brick points out that this problem will arise only when suits by direct and indirect purchasers are pending in different courts at the same time or when additional suits are filed after an award of damages resulting from the same violation has already been granted.<sup>12/</sup>

In the case of simultaneously pending suits, a number of procedural mechanisms exist to reduce the prospect of multiple liability. When several different actions are pending in different courts against the same defendant, judges may transfer them to a single district, or coordinate their pretrial proceedings. Also, the Judicial Panel on Multidistrict Litigation can transfer cases to a single district for coordinated pretrial

proceedings, and then cases may be transferred to and consolidated in the same district for trial.<sup>13/</sup>

Other procedural provisions that can be utilized to bring the adjudication of all parties' rights into a single trial include compulsory joinder, intervention of right, and permissive intervention. If there are potential plaintiffs who have not asserted their claims, defendants can ensure that all potential plaintiffs litigate their claims inter se by utilizing statutory interpleader provisions. Once cases are consolidated, damages may be allocated among the parties.<sup>14/</sup> When direct and indirect purchasers have presented their claims before a single court a bifurcated approach (in which the question of whether there is an antitrust violation is litigated separately from the amount of damages incurred by plaintiffs) can and has been used.<sup>15/</sup>

When the case involves a class action suit, defendants can bar claimants from bringing independent suits if they have not filed timely requests for exclusion from the class. Given the usual duration of antitrust litigation and the four year statute of limitations for private antitrust actions, it is not likely that there will be many, if any, prospective plaintiffs who would wait until previous cases are finished before filing a suit.<sup>16/</sup>

Multiple liability theoretically might arise if defendants settle a suit to avoid further litigation. To prevent the prospect of multiple recovery by new parties initiating a suit, courts may postpone judgment until the statute of limitations has expired or require that judgments be kept in an interest-bearing escrow account until the statute of limitations has expired. Similarly, courts could require that the original claimant post bond to meet any future actions by indirect purchasers until the statute of limitations has expired.<sup>17/</sup>

Despite the availability in Illinois Brick of these various procedural devices, the Supreme Court felt that the risk of multiple liability was unacceptable. It is interesting that between 1968, the year of Hanover Shoe, and 1977, when Illinois Brick was decided, there was not a reported case in which the defendant claimed to have suffered multiple liability. This is not surprising in light of the various procedural mechanisms that had become available as a result of the electrical conspiracy cases<sup>18/</sup> and the desire and ability of the courts to utilize these procedures to protect defendants.

If there is any doubt that existing procedural mechanisms might be inadequate, S. 2835 has the added safeguard of precluding the recovery "for any amount of underpayment that has been passed on to other persons, who themselves are entitled to recover damages...." In conjunction with existing procedural rules, this should be more than adequate to prevent the already rare possibility of multiple liability.

#### Added Complexity in Calculating Damages

There can be no dispute that the Illinois Brick rule simplifies the calculation of damages. A relevant question is whether justice should be sacrificed on the altar of simplicity. Although there are situations where such a trade-off may be justified, I do not believe it should or need be in the agricultural products covered by S. 2835, especially if the deterrence and multiple liability issues are dealt with satisfactorily as explained above.

The Court believed in Illinois Brick that it often was very difficult if not impossible to trace through the effects of an overcharge on several different levels in the manufacturer-retailer-consumer distribution network. Economists have developed the relevant theory to make the

necessary calculations.<sup>19/</sup> And based on my personal experience it often is quite easy to determine when a price overcharge has been passed on.<sup>20/</sup> Even the Court's majority recognized that there are certain situations in which the measurement process is manageable, and some segments of the agricultural economy appear to exemplify the examples cited.<sup>21/</sup> The Court was reluctant, however, to carve out exceptions for industries based on their manageability. Adoption of S. 2835 would settle this problem by designating particular agricultural industries. In enacting such legislation the Congress can be assured that it is identifying for special treatment products that lend themselves to practical analysis of pass on issues. Economists have shown that the ability of a direct purchaser to pass on an overcharge for a product depends on the relative elasticities of supply and demand<sup>22/</sup> as well as on the institutional procedures used in establishing transfer prices. Without going into the details of the economic models demonstrating the significance of supply and demand elasticities, suffice it to say that the damage allocation problem can become quite complex in some situations. Fortunately, however, economic theory suggests and business experience verifies that price reductions by downstream processors or distributors often will be fully or largely passed back to farmers. For example, when supply is highly inelastic, as is nearly always true of farm products in the short run, farmers receive all or practically all of the impact of downstream price reductions.<sup>23/</sup>

Damage authorities have identified the factors that should be considered when estimating the rate of passing on. As we consider the application of several of these factors to agricultural products, it should be emphasized that, "In any specific case, one or more of these factors may be determinative in the sense that the outcome will be certain whatever the

nature of the other factors."<sup>24/</sup> Application of these factors to agricultural products indicates that they generally are sold under conditions that enable one to determine whether lower prices are passed back to farmers. Here I touch on several especially relevant factors.

Frequency of Price Changes. Passing on can be expected to occur most rapidly when intermediary industries experience frequent price changes. Clearly, agricultural prices change much more frequently than do most non-agricultural products.

Consistency of Pricing Practices. It is much easier to determine the pass on rate when businesses use a standard pricing formula. This condition is met, of course, in all agricultural industries using formula pricing procedures.

Directness of Costs. "The more the [undercharge] affects direct costs, the sooner the pass on will occur, and the higher the rate of passing on will be."<sup>25/</sup> Since all agricultural products are direct costs of food processors and distributors we may always expect passing on to occur.

Industry Production Technology. The greater the uniformity of technology, the higher the probability that a monopoly undercharge will be passed on. Again, most agricultural marketing firms in an industry use common technology.

Industry Elasticity of Supply. "The less elastic the [supply] curve of the industry (of direct purchasers), the higher will be the rate of passing on. The fewer the readily available substitutes ... the less elastic [supply] will be."<sup>26/</sup> As mentioned earlier, the supply of agricultural products generally are highly inelastic in the short run -- defined here as up to two years. I would expect that conspirators would be

especially inclined to depress artificially farm prices during periods when agriculture is experiencing widespread depressed conditions; in such periods farm supply curves are more inelastic and remain so for longer periods of time because farmers have fewer alternative uses for their resources.

This is an impressive list of factors predisposing marketing intermediaries to pass back to farmers the lower prices paid to them by others. In the aggregate, they argue persuasively that farmers are likely to be victimized by price reductions caused by price fixers in the agricultural marketing system. These factors also assure that the food industries covered by S. 2835 would not involve complex litigation of the incidence of damages.<sup>27/</sup> Failure to permit farmers to sue in these circumstances causes a grave injustice.

Consider the hypothetical example where grain elevators sell to traders who conspire to fix the purchase price of grain. I believe the elevator operators would simply pass back the lower prices to grain farmers. Under the Illinois Brick rule, however, only the grain elevator operators could sue for treble damages despite the fact that they were not damaged. The effect would be unjustly to enrich the elevator operators at the expense of farmers. Had farmers been permitted to sue they could have demonstrated quite readily that the elevator operators "passed back" the lower prices to farmers. The same situation also exists in the livestock industry when meat packers pass back to farmers the lower prices they are paid by their customers. Not only is the short-run supply of livestock very inelastic, but meat packers generally use the prices they receive for dressed meat at wholesale to determine the prices they pay for live animals.<sup>28/</sup>

In sum, I believe S. 2835 would help farmers and ranchers obtain fair treatment under the law while at the same time increasing the deterrent effect of private antitrust enforcement in the food system. These results can be accomplished without the threats of multiple liability and excessively complex legal proceedings.

# Footnotes

- 1/ Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
- 2/ See, e.g., Meat Price Investigators Ass'n v. Safeway Stores, Inc., No. 83-962, U.S. Sup. Ct. cert. denied, 2/21/84.
- 3/ Parker and Connor, "Estimates of Consumer Loss Due to Monopoly in the U.S. Food Manufacturing Industries," 61 Am. J. Agri. Econ., 628-39 (1979).
- 4/ Marion, Mueller, Cotterill, Geithman and Schmelzer, The Food Retailing Industry: Market Structure, Profits and Prices, Praeger, 1979.
- 5/ Id. at 131.
- 6/ Clabault and Black, Sherman Act Indictments, 1955-1980, 1981 at 678.
- 7/ Landes and Posner, "Should Indirect Purchasers have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule in Illinois Brick," 46 U. Chicago L. Rev. 602, 604 (1979).
- 8/ See, e.g., Cooper, "Effective Enforcement of the Antitrust Laws," Hearings before the Subcommittee on Monopolies and Commercial Law. House of Representatives, 95th Congress, September 9, 16 and 22, 1977.
- 9/ Hamm, "The Impact of Food Distribution Procurement Practices on Food System, Structure and Coordination," Working Paper #58, NC117, Studies in the Organization and Control of the U.S. Food System, University of Wisconsin, October 1981.
- 10/ Mueller, "Conglomerates: A Non-Industry," in Adams (ed.), The Structure of American Industry, 1982 at 464-68.
- 11/ Coffee, "Rescuing the Private Attorney General: Why the Model of the Lawyer as a Bounty Hunter is Not Working," 42 Maryland L. Rev. 215, 223, n. 18 (1983).
- 12/ Illinois Brick 431 U.S. at 762.
- 13/ See 1 Moore's Federal Practice Manual for Complex Litigation, Sections 5.20-5.40. It is interesting to note that the Multidistrict Litigation Act of 1968 28 U.S.C. Sect. 1407(1970) was adopted to facilitate the courts dealing with complex litigation after Hanover Shoe, the decision which initially cites this problem, was decided.
- 14/ See, e.g., W. Va. v. Chas. Pfizer & Co., Inc., 440 F.2d 1079 (2d Cir. 1971).
- 15/ See, e.g., Sugar Indus. Antitrust Litigation, 73 F.R.D. at 335.
- 16/ Illinois Brick, 431 U.S. at 764 (Brennen dissenting).



- 17/ McGuire, The Passing on Defense and the Right of Remote Purchasers to Recover Treble Damages Under Hanover Shoe, 33 University of Pittsburgh L. Rev. 177, 198-99 (1971). And when a defendant has paid full recovery to an indirect purchaser, it might be possible to prevent new suits by the direct purchaser under the doctrine of collateral estoppel. See Blonder-Tungue Laboratories, Inc. v. Univ. of Ill., 402 U.S. 313 (1971).
- 18/ United States v. General Electric Co., 1977-2 Trade Cases (CCH) ¶ 72,717 (E.D. Pa 1977).
- 19/ Schaefer, "Passing-on Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis," 16 William and Mary Law Review, 881, 934 (1975); and Harris and Sullivan, "Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis," 128 U. Pa. L. Rev. 269 (1979).
- 20/ See e.g., the affidavit of Willard F. Mueller as reported by the court in Master Key Litigation, 1973-2 Trade Cases at 94, 981.
- 21/ Illinois Brick, 431 U.S. at 734-44.
- 22/ See note 19 supra.
- 23/ Commentators also have found that price fixing is more likely to occur for a product with an inelastic demand. Schaefer, supra note 19 at 898.
- 24/ Harris and Sullivan, supra note 19, at 317.
- 25/ Id. at 318.
- 26/ Id. at 319. Here and elsewhere the references by Harris and Sullivan are to the character of demand rather than supply because their models apply to situations of passing on downstream toward consumers rather than passing back upstream toward farmers.
- 27/ The food industries, more than most others, demonstrate the wisdom of Harris and Sullivan's observation that "reasonable estimation of passing on which will closely approximate the truth in the majority of cases requires no mystical powers or elaborate, extensive economic analysis." Id. at 315.
- 28/ National Commission on Food Marketing, Organization and Competition in the Livestock and Meat Industry (Technical Study No. 1, June 1966); Clement E. Ward, Slaughter-Cattle Pricing and Procurement Practices, (Agricultural Information Bulletin No. 432, ESCS, U.S. Department of Agriculture, December 1979).

TABLE I

Table 1. Average Unweighted Four-Firm Concentration Ratios by Degree of Product Differentiation for 165 U.S. Manufacturing Industries, 1947-1977

	Total Industries <sup>a/</sup> (165)	Producer Goods (95) $\overline{A/S} = 0.1\% \frac{b/}{A/S}$	Consumer Goods: Degree of Differentiation			
			All (70) $\overline{A/S} = 2.3\% \frac{b/}{A/S}$	Low (21) $\overline{A/S} = 0.3\% \frac{b/}{A/S}$	Moderate (33) $\overline{A/S} = 1.6\% \frac{b/}{A/S}$	High (16) $\overline{A/S} = 6.4\% \frac{b/}{A/S}$
	(1)	(2)	(3)	(4)	(5)	(6)
1977	42.3	42.1	42.5	27.6	42.3	62.4
1972	41.8	42.0	41.4	27.0	41.4	60.6
1967	41.1	42.1	39.7	25.2	39.2	59.9
1963	41.0	42.3	39.3	24.8	39.6	57.8
1958	39.8	42.3	36.3	22.7	36.7	53.4
1954	39.8	42.5	36.0	23.8	35.9	52.3
1947	40.4	43.8	35.7	26.0	36.2	47.7
Change 1947-1977	+1.9	-1.7	+6.8	+1.6	+6.1	+14.7

<sup>a/</sup> These industries are all those manufacturing industries that had comparable data for the period 1947 to 1977.

<sup>b/</sup> This is the average advertising-to-sales ratio for all industries in this group. This includes advertising expenditures for eight measured media in 1967.

SOURCE: Willard F. Mueller and Richard T. Rogers, "Changes in Market Concentration of Manufacturing Industries," Review of Industrial Organization, Spring 1984 at 3a.

TABLE 2

## U.S. Manufacturing Companies, Census Years 1947-77.

Year	Number of Companies <sup>a</sup>		Average Compounded Annual Change from Previous Year (percent)	
	Food	Rest of Manufacturing	Food	Rest of Manufacturing
1947	42,469 <sup>E</sup>	183,482 <sup>E</sup>	—	—
1954	38,557 <sup>E</sup>	220,279 <sup>E</sup>	-1.37	+2.65
1958	36,545	232,961	-1.33	+1.41 <sup>b</sup>
1963	32,617	252,530	-2.25	+1.63
1967	26,549	242,722	-4.84	-0.99
1972	22,172	245,254	-3.68	+0.21
1977	20,616	279,777	-1.44	+2.67
1947-77	—	—	-2.38	+1.42

Source: Connor (1982b).

E = Estimated.

— = Not available.

<sup>a</sup>From 1947 to 1963, the number of different legal entities (corporations, partnerships, proprietorships, cooperatives, trusts, and others) owning one or more plants in any one of 47 SIC food industries; companies with plants in two food industries are double counted. From 1967 on, the table shows the number of unduplicated companies. Duplication was 947, 1154, and 1416 in 1967, 1972, and 1977, respectively. Food manufacturing is adjusted upward to reflect the number of fluid milk companies and of unrefined fats and oils companies excluded from manufacturing prior to 1958.

<sup>b</sup>Part of this increase is due to the redefinition of logging camps from forestry to the manufacturing sector in 1958.

TABLE 3

## Classification of National Food and Tobacco Product Classes by Bain's Concentration Types, 1958, 1967, and 1977. (percent)

Bain's Concentration Type <sup>a</sup>	1958		1967		1977	
	Product Classes	Value of Shipments	Product Classes	Value of Shipments	Product Classes	Value of Shipments
I. Highly concentrated oligopolies	22.2	19.6	21.3	16.3	29.4	24.4
II. High-moderate concentrated oligopolies	20.4	14.2	25.0	21.6	25.2	26.1
III. Low-grade oligopolies	34.3	34.6	38.0	35.7	32.8	25.6
IV. Unconcentrated	23.1	31.6	15.7	26.4	12.6	23.9

Source: Bureau of the Census (1977c).

<sup>a</sup>Bain's (1968:124-133) concentration categories are as follows: type I,  $CR8 \geq 85$  or  $CR4 \geq 65$ ; type II,  $70 \leq CR8 < 85$  or  $50 \leq CR4 < 65$ ; type III,  $45 \leq CR8 < 70$  or  $35 \leq CR4 < 50$ ; and type IV,  $CR8 < 45$  and  $CR4 < 35$ . In each year SIC 20999, other food preparations not elsewhere classified, was omitted.

TABLE 4

## Average Unweighted and Weighted Four-firm Concentration Ratios by Categories of Advertising Intensity for Eighty-five U.S. Food and Tobacco Product Classes, 1958 to 1977.

		Advertising-to-Sales Ratio Category <sup>a</sup>			
	All Product Classes N = 85	0% (0) N = 29	0% to 1% (0.5%) N = 21	1% to 3% (1.7%) N = 20	> 3% (6.25%) N = 15
Year					
Average Unweighted Four-Firm Concentration Ratio					
1977	50.3	42.8	41.9	58.5	65.8
1972	49.0	42.7	40.1	56.6	63.4
1967	47.4	43.0	38.5	53.7	60.0
1963	46.4	42.9	36.9	51.3	60.0
1958	46.5	44.7	36.7	52.0	56.3
Change <sup>c</sup> 1958-77	+ 3.8	- 2.0	+ 5.2	+ 6.6	+ 9.5

Source: Connor, Rogers, Marion, and Mueller, *The Food Manufacturing Industries, Structure, Strategies, Performance, and Policies*. Lexington Press 1984

TABLE 5

## Aggregate Concentration among the Largest Food Manufacturing Companies, Selected Years 1947-81.

Sectors	Number of Firms	Year							
		1950	1954	1958	1963	1967	1972	1977	1981
		<i>Percent of Assets<sup>a</sup></i>							
1. Food manufacturing	100	46.3	—	—	53.9	67.4	68.5	74.4	75.1
2. Food manufacturing	200	60.0	—	—	67.9	73.4	76.7	81.1	81.5
		<i>Percent of Value Added<sup>b</sup></i>							
3. Food manufacturing, excluding alcoholic beverages	100	—	41.9	43.1	45.8	49.0	51.2	53.0	—
4. Food manufacturing, excluding alcoholic beverages	200	—	48.7	50.1	53.5	58.2	62.9	64.4	—
5. Food and tobacco manufacturing	100	—	—	—	—	50.8	53.2	54.9	—
6. Food and tobacco manufacturing	200	—	—	—	—	59.8	63.0	65.3	—

— = Not available.

<sup>a</sup>Connor (1982b:38). Estimates shown for last four years actually are for years 1969, 1974, 1978, and 1981.<sup>b</sup>Data from special Census tabulations, Bureau of the Census (1977c), and NCFM (1966i).

TABLE 6

## Top-Four Positions Held by the 100 Largest Food Manufacturers, by Concentration Level, 1967, 1972, and 1977.

Concentration Ratio (CR4)	Number of Product Classes			Percent of Top-Four Positions Held by Top 100		
	1967	1972	1977	1967	1972	1977
≥ 80	13	12	11	67.3	81.2	79.5
70-79	7	5	11	71.4	75.0	75.0
60-69	7	18	14	64.3	68.1	66.1
50-59	22	24	25	79.5	78.1	73.0
40-49	18	18	17	63.9	55.6	57.4
30-39	27	28	24	63.9	52.7	59.4
< 30 <sup>a</sup>	17	15	15	54.4	56.7	48.3
National markets	112	121	118	66.5	65.1	65.0
Local markets	16	23	23	76.6	70.7	71.7
Total	128	144	141	67.8	66.0	66.1

Source: Rogers (1984a).

<sup>a</sup>Product class SIC 20999, other food preparations not elsewhere classified, was omitted from each year because the CR4 is meaningless for this miscellaneous-products class. Therefore the sum of product classes will appear as one less than the national total.Source: Connor, Rogers, Marion, and Mueller, The Food Manufacturing Industries, Structure, Strategies, Performance, and Policies, Lexington Press, 1984

TABLE 7

## FTC and Department of Justice Antitrust Cases in the Food System by Statute, 1950-84.

Period	Clayton Act				FTC Act	Sherman Act				Total <sup>a</sup>	Actual Cases <sup>b</sup>
	\$2	\$3	\$7	\$8		\$1		\$2			
						Civil	Criminal	Civil	Criminal		
1950-55	48	1	3	2	51	19	32	10	9	175	158
1956-60	210	1	18	0	38	11	19	2	0	299	290
1961-65	47	0	11	0	39	14	21	5	5	142	130
1966-70	15	0	14	0	24	10	11	1	0	75	70
1971-75	7	1	16	2	72	33	26	3	0	160	152
1976-80	1	1	18	0	19	15	17	0	0	71	64
1981-84 <sup>c</sup>	0	0	6	0	9	10	9	0	0	34	32
Total 1950-84	328	4	86	4	252	112	135	21	14	956	896

Source: Compiled from Commerce Clearing House *Trade Regulation Reporter* and *Blue Book*.

<sup>a</sup>This column, a horizontal sum of the columns to its left, gives the total number of times all statutory provisions shown have been alleged for the indicated time period. This column is to be contrasted with the column giving the total number of actual cases. The differences between the two columns stem from cases alleging more than one statutory violation.

<sup>b</sup>This column shows the total number of complaints, consent orders, and indictments. The totals given for the Clayton Act derive from Department of Justice cases and FTC complaints and consent orders. The Department of Justice often institutes both civil and criminal actions in the same facts. Hence two complaints may correspond to what is really one set of facts, particularly for Sherman Act section 1 cases.

<sup>c</sup>Through May 15, 1984.

TABLE 8

## FTC and Department of Justice Cases in the Food System by Leading Industry and Statute, 1950-84.

Statute	Bakery Products	Beer and Liquor	Milk and Dairy Products	Fish and Seafood	Fruits and Vegetables	Tobacco and Tobacco Products	Total
Clayton Act							
Section 2	3	4	18	32	111	10	178
Section 3	1	0	3	0	0	0	4
Section 7	8	16	11	1	3	3	42
Section 8	1	0	0	0	0	0	1
FTC Act							
Section 5	19	5	35	10	14	28	111
Sherman Act							
Section 1	42	42	43	15	18	17	177
Section 2	2	0	9	3	7	2	23
Total <sup>a</sup>	76 86 (79)	67 (67)	119 (104)	61 (57)	153 (145)	60 (59)	536 546 (511)

Source: Compiled from Commerce Clearing House *Trade Regulation Reporter* and *Blue Book*.

<sup>a</sup>If a complaint or indictment challenged a firm on several statutory provisions, each provision has been entered separately. For this reason, a vertical summation of the cases for an industry may exceed the total number of cases in the industry; the actual number of cases in an industry is given in parentheses.

<sup>b</sup>Because other products are also involved, this column does not equal totals given in table 8-1.

Source: Connor, Rogers, Marion, and Mueller, *The Food Manufacturing Industries, Structure, Strategies, Performance, and Policies*, Lexington Press, 1984.