Private Suits for Overcharges Under the Economic Stabilization Act

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In recent years, the use of private remedies to enforce regulatory statutes has received increasing attention. The Truth in Lending Act,¹ the Fair Credit Reporting Act,² and proposed consumer class action bills³ reflect the view that private remedies are needed both to reimburse persons harmed by unlawful activities and to dissuade potential offenders from violating the law. These restitutional and deterrent considerations were the basis for the inclusion of a private remedy provision in the 1971 Economic Stabilization Act amendments.⁴

In pertinent part, section 210 of the Act provides that "[a]ny person suffering legal wrong because of any act or practice arising out of [the Act], or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction . . . , and/or damages."⁵

Congress in enacting this section recognized that it would be inequitable to allow sellers charging an unlawfully high price to retain an overcharge and thus provided a means for reimbursing buyers. In addition, Congress apparently believed that section 210 could act as a "strong deterrent" to sellers who might weigh the risks of having their illegally high prices discovered against the economic gain of overcharges.⁶ The absence of any extensive governmental machinery to police and enforce price control regulations may have made private remedies appear especially desirable to Congress.

This article discusses certain important issues surrounding actions for overcharges under this private remedy section, including the sub-

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¹ 15 U.S.C. § 1640 (1970).

² 15 U.S.C.A. § 1681(o) (Supp. 1972).

³ See generally *Hearings on S. 984, S. 1222, and S. 1378 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. (1971).

⁴ See H.R. REP. NO. 92-714, 92d Cong., 1st Sess. 8 (1971); S. REP. NO. 92-507, 92d Cong., 1st Sess. 9 (1971).

⁵ § 210(a), 85 Stat. 743 (1971). The text of section 210 is set forth in an appendix to this article. Hereinafter only sections of the Act are cited.

⁶ H.R. REP. NO. 92-714, 92d Cong., 1st Sess. 8 (1971).

stantive elements of an action necessary for recovery and the procedural problems of suits brought under section 210. Finally, the article examines the wisdom of including a private remedy section in the Economic Stabilization Act. Since no judicial interpretations of the private remedy section have yet appeared,⁷ the article will examine analogous areas, such as private suits under the Truth in Lending Act and the antitrust laws, to analyze expected developments in section 210 suits.

I. SUBSTANTIVE ELEMENTS OF A SUIT UNDER SECTION 210

A. Strict Liability for an Overcharge

The essential element of any action for damages is an overcharge for goods or services, which occurs when a seller charges a price in excess of "the applicable ceiling under regulations" issued pursuant to the Economic Stabilization Act.⁸ Section 210 apparently makes the seller strictly liable to the buyer in a suit based on an overcharge. If a buyer can prove that he has paid a price exceeding that permitted by Price Commission regulations, he may recover from the seller in a suit for damages, even though the seller might have acted in a reasonable, non-negligent manner. Presumably, Congress decided that strict liability is warranted because it is more equitable to have the seller refund an overcharge than to let it profit from charging an unlawfully high price.⁹

B. Determination of an Overcharge

Even though price and rent controls were imposed during World War II and the Korean War,¹⁰ Phase II controls are unique in that the Price Commission has issued general regulations to control price increases rather than establishing a ceiling price on each item sold. Item-by-item controls were rejected by the Price Commission because of the large bureaucracy required to administer such a program and the resulting dislocations to the economy.¹¹ An item-by-item approach has the advantage of allowing buyers to determine without difficulty

⁷ This article is dated April 24, 1972.

⁸ §§ 210(b), (c).

⁹ Provisions similar to section 210 making a seller or lessor strictly liable as a result of an overcharge were included in legislation authorizing price and rent controls during World War II and the Korean War. Emergency Price Control Act of 1942 ch. 26, § 205, 56 Stat. 33 (1942), as amended, ch. 671, § 12, 60 Stat. 676 (1946); Housing and Rent Act of 1947 ch. 163, § 205, 61 Stat. 199 (1947); Defense Production Act of 1950 ch. 932, § 409, 64 Stat. 811 (1950), as amended, ch. 275, § 104(k), 65 Stat. 136 (1951).

¹⁰ See generally J.K. GALBRAITH, *A THEORY OF PRICE CONTROLS* (1952); Nelson, *OPS Price Control Standards*, 19 *LAW & CONTEMP. PROB.* 554 (1954).

¹¹ Address by Price Commission Chairman C. Jackson Grayson, Jr. to the Consumer Federation of America, Washington, D.C., Jan. 28, 1972, in Price Commission News Release No. 50, at 4 (Jan. 28, 1972).

whether a seller is charging a lawful price. Current price controls, in contrast, make the determination of an overcharge in a specific situation a complex matter; the sophistication and intricacies of Price Commission regulations often create considerable uncertainty in the calculation of a permissible ceiling price. To the degree that identification of violators is made difficult, private suits become ineffectual as a means of enforcement of price control regulations.

A manufacturer or service organization may raise its prices above Phase I freeze levels on the basis of certain increases in allowable costs, reduced to reflect gains in productivity, to the extent that the increased prices do not increase the firm's pretax profit margin over that which prevailed during the base period.¹² Thus, a lawful ceiling price is a function of allowable costs, productivity, and profit margin. None of these factors is susceptible to simple computation.

The Price Commission definition of allowable costs is at least as complicated as the concept of "ordinary and necessary expenses" under the Internal Revenue Code and Treasury Regulations.¹³ In addition to explicitly adopting this standard, the Price Commission has issued specific guidelines for treatment of certain cost items such as general and administrative expenses, marketing costs, and wage increases.¹⁴ For example, if marketing cost increases are the result of higher wages, materials, or advertising rates, they are allowable costs. Increased marketing costs resulting from expanded advertising "disproportionately high" to an increase in sales are not, however, allowable as a basis for a price increase.¹⁵

Because allowable costs must be reduced to reflect increases in productivity, measurement of productivity is essential in determining a ceiling price. Nevertheless, the Price Commission, by not specifying a precise standard of productivity (generally defined as output per man-hour) at the inception of Phase II, allowed firms some latitude in using a measure especially suited to a firm's particular operations.¹⁶ Even though the lack of consistent and reliable productivity standards has recently led the Price Commission to develop industrywide measure-

¹² 6 C.F.R. §§ 300.12-.14 (1972).

¹³ Compare Price Commission Instructions for the Preparation of Form PC-1, Request (Report) for Price Increase for Manufacturing, Service Industries and the Professions, 37 Fed. Reg. 3410-13 (1972) [hereinafter cited as Price Commission PC-1 Instructions], with Treas. Reg. §§ 1.162-1 *et seq.* (1972).

¹⁴ Price Commission PC-1 Instructions, *supra* note 13; IRS, Price Commission Ruling 1971-3, 36 Fed. Reg. 23661 (1971).

¹⁵ Price Commission PC-1 Instructions, *supra* note 13.

¹⁶ See generally, Kendrick, *The Productivity Factor in Phase II*, CONFERENCE BOARD RECORD, Mar., 1972, at 28.

ments,¹⁷ price increases put into effect in the first six months of Phase II were based on nonuniform calculations of productivity.

Similarly, it is difficult for a purchaser to determine whether he has been overcharged by a retailer or wholesaler. Under the markup control system governing retail and wholesale prices, a seller may raise its prices as long as its "customary initial percentage markup" is not increased over that in existence in a specified time period prior to November 14, 1971, and the effect of all price changes is not to increase its profit margin over that which prevailed during the base period.¹⁸ Since the Economic Stabilization Act provides that neither "customary initial percentage markups" nor the actual markups charged must be made public,¹⁹ a purchaser is unable to know whether he has been charged a lawful price. The IRS readily admits that the markup control system does not allow consumers to determine whether a retailer or wholesaler is complying with price controls.²⁰

The Price Commission has also introduced Term Limit Pricing (TLP), whereby manufacturers may in certain situations adjust individual product and product line prices without regard to increases in allowable costs of individual products, as long as the weighted average of a firm's prices do not increase more than 1.8 percent in a twelve-month period.²¹ In effect, the TLP approach allows a seller to use a price decrease on one product as a basis for a price increase on another product. As a result, a customer of a TLP company will have to know *all* its price changes, including both price increases and decreases, to determine whether the firm is complying with Price Commission regulations. Moreover, even if a TLP company exceeds its permissible level of price increases, it will be extremely difficult to allocate the overcharge to a specific product.

Furthermore, even the application of profit margin controls is uncertain at this time. As noted above, Price Commission regulations preclude a manufacturer, service organization, wholesaler, or retailer from charging a price in excess of the base price if the effect is to raise the firm's pretax profit margin above that which prevailed during the base

17 Price Commission News Release No. 87 (Apr. 5, 1972).

18 6 C.F.R. § 300.13 (1972).

19 See text and note at note 24 *infra*.

20 "Since [a consumer] does not have access to [a retailer's] actual costs during the [freeze] base period and currently, he is not able to compute for himself the business's customary markup then and now. The Internal Revenue Service has been given the task of enforcing the regulations and investigating complaints." IRS, Price Commission Ruling 1972-69, 37 Fed. Reg. 3996 (1972).

21 IRS, Price Commission Ruling 1972-40, 37 Fed. Reg. 3061 (1972); Price Commission News Release No. 72 (Mar. 15, 1972).

period.²² Accordingly, a plaintiff might contend that if the public financial statements of a firm show that it is exceeding its base period profit margin, any increased price is per se unlawful.

A company that has raised its prices and operates at a profit margin above base period levels is not automatically violating the profit margin test, however, if its profit margin increased for reasons other than higher prices, such as expanded volume or seasonal factors.²³ Thus, in a private suit for damages in which a plaintiff alleges an overcharge as a result of an excess profit margin, the causes of an increase in profits will be an issue.

In addition, a purchaser attempting to determine whether he has been overcharged will not be able to review his seller's submissions to the Price Commission. Information submitted to the Price Commission to justify price increases is generally not available to the public because section 205 of the Act makes proprietary financial data, such as a firm's customary markups and allowable costs, confidential.²⁴

The uncertainty of determining whether a seller has charged an unlawful price means that most private suits for damages will be brought and will be successful where the government has first publicly alleged that a firm has charged an unlawful price. When the government states that a firm has violated Price Commission regulations, purchasers are on notice that they have been charged an unlawful price, and a suit for damages will have a reasonable chance of success. Consequently, such a public announcement may result in actions for damages far in excess of the penalties that the government might seek to impose. The Cost of Living Council has announced that when an investigation results in court action or a "rollback" in prices, this fact and the substance of the complaint will be made available "in response to any inquiry" for such information. Moreover, the Council "may periodically release the results of investigations and court actions."²⁵ Under this policy, the Coun-

²² 6 C.F.R. §§ 300.12-14 (1972).

²³ See Price Commission News Release No. 81 (Mar. 22, 1972); IRS, Economic Stabilization Q&A No. 9 (Feb. 4, 1972), at 5.

²⁴ Section 205 makes confidential trade secrets and information referred to in 18 U.S.C. § 1905 (1970), including "confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association . . ." Price Commission forms contain a statement "request[ing] that the information submitted . . . be considered confidential within the meaning of section 205 . . . and section 1905." Price Commission Forms PC-1, PC-50, PC-51, 37 Fed. Reg. 3411, 3414, 3417 (1972). There appears to be no conflict between the confidentiality provision of the Economic Stabilization Act and the Freedom of Information Act. The latter Act exempts from public disclosure "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (1970).

²⁵ See Cost of Living Council News Release No. 73 (Feb. 17, 1972).

cil appears to be issuing press releases identifying specific defendants and the substance of complaints after suits have been filed by the government alleging violation of the Economic Stabilization Act.²⁶ In addition, the Price Commission has apparently adopted a disclosure policy of publicly releasing the names of firms it has ordered to rescind price increases.²⁷

C. Claim for a Refund

Section 210 requires that, except in the case of a willful overcharge, a purchaser demand a refund at least ninety days before he may institute a suit for damages.²⁸ Restitution by the seller of the amount of the overcharge precludes a cause of action under section 210.²⁹ This provision limits the amount of potential litigation without affecting the ability of purchasers to recover an overcharge or penalizing a seller for an unintentional violation of the Act.³⁰

If the seller has willfully violated price controls, however, a demand for a refund need not be made before a suit may be brought. For plaintiffs unwilling to undergo the ninety-day delay occasioned by such a demand, the question of whether a violation is willful is of utmost importance. Section 210 does not define "willful," but states that the term has the meaning of "willfully" appearing in section 208(a), the criminal penalty section of the Act. Section 208(a), however, also fails to define this term.³¹ By referring to the criminal section of the Act in section 210, Congress no doubt intended to apply the standard of willfulness that appears in many criminal statutes.³² It is difficult, however, to predict the precise meaning that federal courts will attach to the word "willful" in the Act since federal case law involving interpretation of this term merely reflects the state of confusion surrounding mens rea terminology in criminal law.³³

Some cases have taken a restrictive view of defenses provided by

²⁶ *E.g.*, Cost of Living Council News Release No. 89 (Mar. 28, 1972).

²⁷ *E.g.*, Price Commission Decision Report No. 72-35 (Feb. 24, 1972). FTC preadjudicatory disclosure of its complaints by press release has been sustained as not depriving respondents of due process. *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968).

²⁸ § 210(b).

²⁹ *Cf. Bostwick v. Cohen*, 319 F. Supp. 875 (N.D. Ohio 1970) (election of rescission precludes recovery under civil liability provisions of Truth in Lending Act).

³⁰ *See* 117 CONG. REC. S19985 (daily ed. Dec. 1, 1971).

³¹ "Whoever willfully violates any order or regulation under this title shall be fined not more than \$5,000 for each violation." § 208(a).

³² S. REP. NO. 92-507, 92d Cong., 1st Sess. 17 (1971); *see* 117 CONG. REC. H12244 (daily ed. Dec. 10, 1971).

³³ *See generally* MODEL PENAL CODE § 2.02 (Tent. Draft No. 4, 1955).

"willful," holding that the term means only that the defendant has committed a proscribed act intentionally or knowingly and that lack of awareness that he has violated the law is not a defense.³⁴ This standard would preclude few, if any, suits for overcharges under section 210 since almost all commercial transactions, including the price charged for a product or service, are the result of intentional acts. Other courts have interpreted willfulness in a criminal statute to require knowledge that the defendant is disobeying or disregarding the law.³⁵ Application of this standard would require a demand for a refund if a seller did not know that he was violating Phase II regulations and rulings.

A third line of cases, which appear to be the majority, hold that "willful" in a criminal statute requires either knowledge that an act violates the law or a reckless or careless disregard of the law by the defendant. In the leading case of *United States v. Murdock*,³⁶ for example, the Supreme Court, in reversing a conviction for willful failure to supply information during an income tax investigation, stated that "willful" "is . . . employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right so to act."³⁷ The *Murdock* concept of willfulness appears to have been adopted by courts construing the term in World War II and Korean War price control legislation.³⁸ In interpreting the Defense Production Act of 1950, for example, the Tenth Circuit affirmed a district court finding that a violation was willful because the owners of a business "failed to take any practical precautions against a violation" by seeking either legal or official advice with respect to the effect of increasing the price of their product.³⁹ In another case arising under the same Act, the defendant's failure to seek a written ruling on the lawfulness of a particular transaction after OPS price control officials had suggested that it obtain such a ruling was held

³⁴ E.g., *United States v. Carter*, 311 F.2d 934 (6th Cir. 1963) (ignorance that act violated Taft-Hartley Act no defense); *Schmeller v. United States*, 143 F.2d 544 (6th Cir. 1944) (proof of specific intent to interfere with war effort unnecessary under statute prohibiting production of defective war materiel).

³⁵ See, e.g., *United States v. Krosky*, 418 F.2d 65 (6th Cir. 1969) (conviction for willful failure to report for induction reversed); *Hargrove v. United States*, 67 F.2d 820 (5th Cir. 1933) (conviction for willful failure to file tax return reversed).

³⁶ 290 U.S. 389 (1933).

³⁷ *Id.* at 394-95; cf. *Brown v. Bullock*, 294 F.2d 415 (2d Cir. 1961) (willful violation of Investment Company Act of 1940).

³⁸ See *Nicastro v. United States*, 206 F.2d 89 (10th Cir. 1953); *Kempe v. United States*, 151 F.2d 680, 688 (8th Cir. 1945); *Rightmeyer v. Von Lengerke Buick Co.*, 116 F. Supp. 470 (D.N.J. 1953), *rev'd on other grounds*, 212 F.2d 622 (3d Cir. 1954).

³⁹ *Nicastro v. United States*, 206 F.2d 89, 92 (10th Cir. 1953).

sufficient to render "willful" its violation of the Act.⁴⁰ In contrast, a violation was held not willful where a landlord and his attorney believed in good faith that a tenant was not entitled to a refund.⁴¹

On the basis of these majority cases, it seems likely that under section 210 demand for a refund will be a prerequisite for a damage action unless the seller acted with knowledge or reckless or careless disregard that it was violating the law or, stated in reverse, where the seller reasonably believed its price to be lawful.

D. Damages

1. *Intentional Overcharge*. Section 210(b) provides that in an overcharge suit

the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than \$100 or more than \$1,000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge⁴²

Even a casual reading of section 210(b) indicates that its application to a situation involving an intentional overcharge is confusing. The problem in interpretation arises because it is unclear whether the language referring to the court's discretion applies to the amount of damages or the attorney's fees and costs.

If section 210(b) is read to emphasize the extent of the court's discretion, a court might award no damages or the greater of an amount as determined by subsections (1) and (2). Obviously, Congress did not intend that a plaintiff be awarded nothing where an overcharge was intentional. Such a result would conflict with the congressional intent of allowing purchasers to recover an illegal overcharge and deterring sellers from violating price controls.⁴³ Furthermore, such an interpretation would be inconsistent with the award of damages in the unintentional situation, where damages are set at the amount of the overcharge.⁴⁴

⁴⁰ *Rightmeyer v. Von Lengerke Buick Co.*, 116 F. Supp. 470, 472 (D.N.J. 1953), *rev'd on other grounds*, 212 F.2d 622 (3d Cir. 1954).

⁴¹ *Washington v. Robertson*, 227 F.2d 480 (7th Cir. 1955); *accord*, *McRae v. Creedon*, 162 F.2d 989 (10th Cir. 1947).

⁴² § 210(b).

⁴³ See H.R. REP. No. 92-714, 92d Cong., 1st Sess. 8 (1971).

⁴⁴ See note 45 *infra*.

Certainly, Congress contemplated that a greater amount be awarded where there was an intentional violation than where there was an unintentional one.

A more reasonable approach would be to read section 210(b) as giving the court discretion to award attorney's fees and costs, but requiring it to grant minimum damages as determined by the greater of subsections (1) and (2). This reading would establish minimum damages of at least one hundred dollars in the intentional violation situation and would give a court discretion to award up to one thousand dollars or three times the amount of the overcharge, whichever was greater. In this way, courts would promote the remedial and deterrent goals of the private remedy section and maintain a meaningful distinction between damages in the intentional and unintentional situations.

2. *Unintentional Overcharge.* Where the defendant can establish that "the overcharge was not intentional *and* resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error," a plaintiff may recover the amount of overcharge.⁴⁵ While it appears that Congress has attempted to provide some sort of good faith defense to reduce damages, use of this defense in specific situations may be extremely limited. Recent cases⁴⁶ involving the Truth in Lending Act,⁴⁷ which has a private remedy provision containing a good faith defense essentially identical to the defense limiting damages to the amount of the overcharge in the Economic Stabilization Act,⁴⁸ have confined application of the good faith defense to instances where a defendant violated the Act due to a clerical error.

This conclusion was first reached in the leading case of *Ratner v.*

⁴⁵ § 210(b) (emphasis added). This provision states that liability for unintentional overcharges is "limited to the amount of the overcharge." It appears that "limited to" in this context means that the amount of the overcharge shall be awarded. Since the language regarding damage awards for intentional violations sets damages in excess of the overcharge, "limited to" implies only that liability for an unintentional violation would be less than that for an intentional violation and not that the court has discretion to award up to the amount of the overcharge. Moreover, if Congress had intended to allow courts to award up to the amount of the overcharge for unintentional violations, it probably would have used the "not more than" language employed in describing liability for intentional violations.

⁴⁶ *Douglas v. Beneficial Fin. Co.*, 334 F. Supp. 1116 (D. Alas. 1971); *Buford v. American Fin. Co.*, 333 F. Supp. 1243 (N.D. Ga. 1971); *Ratner v. Chemical Bank N.Y. Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971).

⁴⁷ 15 U.S.C. § 1601 *et seq.* (1970).

⁴⁸ *Id.* § 1640(c) provides: "A creditor may not be held liable in any action brought under this section for a violation of this part if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

Chemical Bank New York Trust Co.,⁴⁹ which held that "[a] defendant invoking this excuse is required not merely to show the clerical error was unintentional, but also that due care has been taken to set up *procedures* to avoid it."⁵⁰ Moreover, the argument was specifically rejected that this defense would allow the defendant to show that on the advice of counsel it reasonably believed it was complying with the Truth in Lending Act.

F. Standing to Sue

As a result of the cost pass-through effect of Phase II price controls, there is some question whether a purchaser has standing to sue a seller that preceded the purchaser's immediate seller in the chain of distribution. Assuming a two-tier distribution system, for example, in which a manufacturer sells to a retailer who in turn sells to the ultimate consumer, an overcharge by the manufacturer might result in a higher price to the ultimate consumer since the retailer has the option of increasing its price to maintain its customary percentage markup.⁵¹ Similarly, where one manufacturer overcharges another for goods, the overcharge of the first may be reflected in higher prices charged by the second since manufacturers may use allowable cost increases to justify a price increase.⁵² This potential cause-and-effect relationship might be cited to support suits by any purchaser in the distribution chain against any seller whose overcharge may have resulted in the buyer paying a higher price.

The wording of section 210, however, seems to indicate that Congress intended to restrict the purchaser to an action against his immediate seller. The relevant part of this section states that a court may award damages "in any action . . . against any person . . . selling goods or services who is found to *have overcharged the plaintiff*"⁵³ It is awkward to contend that, simply because a manufacturer has overcharged the retailer, it has somehow "overcharged" the consumer; since they have not dealt with each other, the manufacturer has not charged the consumer any price. Thus, the term "overcharge" in the context of section 210 seems to contemplate a direct buyer-seller relationship. While it is true that the consumer might be damaged as a result of the

⁴⁹ 329 F. Supp. 270 (S.D.N.Y. 1971).

⁵⁰ *Id.* at 281. Two cases subsequent to the *Ratner* decision have adopted its holding that the good faith defense applies only to clerical errors. *Douglas v. Beneficial Fin. Co.*, 334 F. Supp. 1166 (D. Alas. 1971); *Buford v. American Fin. Co.*, 333 F. Supp. 1243 (N.D. Ga. 1971).

⁵¹ See text and notes at notes 18-20 *supra*.

⁵² See text and notes at notes 12-15 *supra*.

⁵³ § 210(b) (emphasis added).

manufacturer's illegal price, suits under section 210(b) are keyed to a seller overcharging a plaintiff and not injuries suffered by purchasers.⁵⁴

Furthermore, allowing any purchaser in the chain of distribution to recover for an overcharge by any previous seller would create the possibility of immense damages. In a sophisticated manufacturing and distribution process involving many levels of buyers and sellers, an overcharge by a seller might result in suits by purchasers on many levels. The potential damages in such suits might constitute an extraordinary penalty that Congress never intended to impose.⁵⁵

In theory, courts could reasonably limit the amount of damages by adopting defenses that would preclude recovery by a particular plaintiff purchaser where the defendant could demonstrate that the plaintiff paid no higher price as a result of an overcharge because the overcharge was absorbed by an intermediate seller or that the plaintiff used the overcharge to establish a higher price to his customers. As a practical matter, however, these types of defenses would compel courts to determine highly complex factual issues. The difficulty of tracing the effect of a particular overcharge has led the Supreme Court to restrict the "pass-on" defense in private antitrust damage suits.⁵⁶ On balance, the more practical and workable interpretation of section 210 appears to

⁵⁴ In contrast, private antitrust damages are based on injury to business or property. 15 U.S.C. § 15 (1970) provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . ." Even in antitrust litigation, however, a plaintiff might not recover from a defendant other than his immediate seller due to the complexities of proof of damages. See *Mangano v. American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971), *aff'g Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970) (purchasers of finished homes barred from recovering damages from manufacturers of plumbing fixtures).

Moreover, courts in private antitrust suits have limited standing to those in the target area of the conspiracy. Generally, a target is considered a person or business against whom an anticompetitive practice is aimed. *E.g.*, *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971). The "target" rationale "acknowledges that while many remotely situated persons may suffer damage in some degree as the result of an antitrust violation, their damage is usually much more speculative and difficult to prove than that of a competitor who is an immediate victim of the violation. Furthermore, if the floodgates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery, implemented by the availability of the class suit as facilitated by the amendment of Fed. R. Civ. P. 23, would result in an overkill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress." *Id.* at 1295.

⁵⁵ See text and notes at notes 42-45 *supra*.

⁵⁶ See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 487-94 (1968). "Since establishing the applicability of the passing-on defense would require a convincing showing of . . . virtually unascertainable figures, the task would normally prove insurmountable." *Id.* at 493.

be to limit standing to purchasers who have been overcharged by their immediate sellers.

G. Plaintiff's Violation as a Defense

At common law, the doctrines of *in pari delicto* and unclean hands were frequently employed to bar a plaintiff from recovering on an otherwise meritorious cause of action. Courts still apply these doctrines in varying situations to preclude recovery.⁵⁷ Technically, *in pari delicto* applies only where the plaintiff has participated equally with the defendant in the activity claimed as the basis of the action.⁵⁸ The broader unclean hands defense may be applied where the plaintiff's illegal or unethical conduct is only indirectly related to the conduct on which his suit is based.⁵⁹

In an overcharge suit under section 210, the defendant might be able to employ either *in pari delicto* or unclean hands as a defense if the plaintiff buyer knew that he had paid an unlawfully high price. Price Commission regulations prohibit a buyer from "knowingly pay[ing] a price with respect to any sale or lease of an item of property or a service for use in his trade or business which exceeds the . . . price authorized under [these regulations]." This provision is, however, expressly made inapplicable "to the sale . . . to any person under circumstances of economic or other coercion in which the buyer or lessee, because of his need for that property or service, had no reasonable alternative but to pay the illegal price, *and* he reports the sale or lease to the Internal Revenue Service for investigation as soon as is reasonably possible after it occurs."⁶⁰

Since this provision is limited to purchasers for use in trade or business and to situations where there is no economic coercion, in practice it might have somewhat limited applicability. In almost all situations, the only reason that a buyer would knowingly pay an unlawfully high price would be that a product or service was in short supply and the seller was the only available source.

Moreover, even if a court found a plaintiff's conduct in purchasing

⁵⁷ See *Sankin v. 5410 Conn. Ave. Corp.*, 281 F. Supp. 524, 557 (D.D.C. 1968), *aff'd*, 410 F.2d 1060 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1041 (1970) (recovery precluded by participation in stock fraud); *Mas v. Coca-Cola Co.*, 163 F.2d 505 (4th Cir. 1947) (patent enforcement suit dismissed because forged documents used to obtain patent); Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits*, 78 HARV. L. REV. 1241, 1242 (1965).

⁵⁸ 3 J. POMEROY, *EQUITY JURISPRUDENCE* §§ 940-42 (5th ed. 1941).

⁵⁹ 2 *id.* §§ 397-98.

⁶⁰ 6 C.F.R. § 300.11(b) (1972) (*emphasis added*).

goods or services to be unlawful under Price Commission regulations, it might refuse to apply in *pari delicto* or unclean hands in order to further the remedial purposes of the Economic Stabilization Act. Such an approach would be in line with the Supreme Court's recent narrowing of the in *pari delicto* defense in private suits under the antitrust laws.⁶¹ In 1968, the Court held in *Perma Life Mufflers, Inc. v. International Parts Corp.*⁶² that "the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."⁶³ The Court grounded its decision on what it found to be "the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes."⁶⁴ Nevertheless, the Court specifically reserved the question of whether an action would be barred where the plaintiff had been guilty of "truly complete involvement and participation in a monopolistic scheme . . . wholly apart from the idea of *in pari delicto* . . ."⁶⁵

Thus, where the buyer's conduct is particularly reprehensible, courts can be expected to invoke a traditional common law defense or to erect some other barrier to preclude recovery under section 210. Such an approach would be consistent with long-standing judicial aversion to allowing a plaintiff to benefit from his own wrongdoing.

E. Attorney's Fees

Even though section 210 states that award of reasonable attorney's fees and costs is discretionary,⁶⁶ two factors create an expectation that courts will usually award these amounts to the plaintiff in a successful suit for an overcharge. First, an examination of cases arising under other federal statutes providing for discretionary awards of attorney's fees and costs reveals that these items are usually awarded to successful plaintiffs.⁶⁷ Second, the Supreme Court in *Mills v. Electric Auto-Lite*⁶⁸

⁶¹ See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); cf. *Pearlstein v. Scudder & German*, 429 F.2d 1136 (2d Cir. 1970) (knowledge of Regulation T violation no bar to suit for damages).

⁶² 392 U.S. 134 (1968).

⁶³ *Id.* at 140.

⁶⁴ *Id.* at 138.

⁶⁵ *Id.* at 140.

⁶⁶ § 210(b).

⁶⁷ See, e.g., *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971) (equal employment); *Famous Music Corp. v. Seeco Records, Inc.*, 201 F. Supp. 560 (S.D.N.Y. 1961) (copyright); *Rose v. Bourne, Inc.*, 176 F. Supp. 605 (S.D.N.Y. 1959), *aff'd*, 279 F.2d 79 (2d Cir. 1960), *cert. denied* 364 U.S. 880 (1960) (copyright).

⁶⁸ *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

has recently expanded the instances in which attorney's fees are allowed in actions under federal statutes. In view of this development it seems doubtful that federal courts will take a restrictive view of their discretion to grant attorney's fees under the Act.⁶⁹

II. PROCEDURAL MATTERS

A. Jurisdiction

Federal courts have exclusive original jurisdiction over cases arising under the Economic Stabilization Act without regard to the amount in controversy. As a result, a suit may be brought in any federal court where there is proper venue and service.⁷⁰

B. Class Actions

Because individual claims may not be aggregated in class actions to comply with the requirements for diversity jurisdiction,⁷¹ consumer class actions for damages in federal courts have been infrequent.⁷² Since there is no jurisdictional limitation under section 210 based on the amount in controversy, class actions on behalf of all similarly situated consumers of a product or service may be permissible, assuming that the specific requirements of rule 23 of the Federal Rules of Civil Procedure are met. In light of the increasing interest in consumer class actions⁷³ and the rash of class actions under the Truth in Lending Act,⁷⁴ it can be expected that this procedural device will be attempted in suits for overcharges.

In determining whether a case may proceed as a class action, however, the question whether a violation is willful may be of utmost importance since the Act states that an action for an overcharge based on a non-willful violation may *not* be brought "*by or on behalf of any person unless such person*" has made a claim for refund, waited ninety days,

⁶⁹ See Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316 (1971).

⁷⁰ §§ 210(a), 211(a). See generally 1 J. MOORE, FEDERAL PRACTICE §§ 0.60[1], [10] (1964). Any court of competence may determine an issue involving the Economic Stabilization Act raised as a defense, except a defense based on the constitutionality of the Act or the validity of any action by any agency pursuant to the Act. § 211(a).

⁷¹ *Snyder v. Harris*, 394 U.S. 332 (1969).

⁷² Note, *Aggregation Doctrine Continues to Limit Class Actions*, 24 SW. L.J. 345 (1970).

⁷³ See, e.g., Dole, *The Emergence of Deceptive Advertising as a Group Tort: A Possible Consequence of the 1966 Federal Rule Amendment with Respect to Class Actions*, 62 NW. L. REV. 661 (1967); Ford, *Federal Rule 23; A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969).

⁷⁴ As of December 31, 1971, the Federal Reserve Board reported that it was aware of forty-nine cases brought as Truth in Lending class actions. FRB, ANNUAL REPORT TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1971, at 9 (1972).

and has not received payment.⁷⁵ This language seems to indicate that every member of a class must have unsuccessfully demanded a refund ninety days prior to institution of the action. If so, in the case of a nonwillful violation a large class action on behalf of all purchasers of a product or service would be difficult to bring because of the improbability that class members would have made individual demands for refunds.⁷⁶

Furthermore, the recent *Ratner* decision,⁷⁷ which denied class action status to a plaintiff alleging a violation of the Truth in Lending Act, suggests that the minimum damage and attorney's fee-cost provisions in section 210 in effect preclude many class actions. Relying on the requirement of rule 23(b)(3) that a class action be "superior to other available methods for fair and efficient adjudication of the controversy," Judge Frankel in *Ratner* held that "the allowance of this [suit] as a class action is essentially inconsistent with the specific remedy supplied by Congress and employed by plaintiff in this case."⁷⁸ In reaching this result, the court emphasized that the provision for a one hundred dollar minimum recovery and payment of costs and attorney's fees in the Truth in Lending Act removed the need for a class action to make the suit economically practical.⁷⁹ The same reasoning may be employed to defeat class actions under section 210 since damages for an intentional violation are set at a minimum of one hundred dollars and the court is given discretion to award attorney's fees and costs. Usually, these incentives will be sufficient to insure that meritorious claims are presented to a court.⁸⁰

Nevertheless, since damages are limited to the amount of the overcharge where "the overcharge was not intentional and resulted from a bona fide error"⁸¹ plaintiffs in section 210 suits may in some cases

⁷⁵ § 210(b) (emphasis added).

⁷⁶ In favoring expansion of class actions in securities cases, courts have, however, restricted the application of certain substantive elements such as reliance and in pari delicto in order not to frustrate commonality and thereby prevent recovery by the class. Comment, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337, 345-65 (1971).

⁷⁷ *Ratner v. Chemical Bank N.Y. Trust Co.*, Civil No. 69-4195 (S.D.N.Y., Feb. 14, 1972); accord, *Rogers v. Corburn Fin. Corp.*, Civil No. 1483 (N.D. Ga., Feb. 18, 1972).

⁷⁸ *Ratner v. Chemical Bank N.Y. Trust Co.*, Civil No. 69-4195, at 8 (S.D.N.Y., Feb. 14, 1972).

⁷⁹ *Id.* at 7-8. Moreover, the court felt that recovery of one hundred dollars for more than 130,000 class members "would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to the defendant." *Id.*

⁸⁰ See text and notes at notes 42-45 *supra*. While the plaintiff was awarded one hundred dollars in damages in the *Ratner* case, his attorney received twenty thousand dollars in fees and costs. *Id.* at 8.

⁸¹ § 210(b).

recover only the actual overcharge, thus making some of Judge Frankel's reasoning inapplicable. Ironically, a defendant might be put in a position of arguing that the overcharge was intentional in order to invoke the minimum one hundred dollar damage provision and thus avoid recovery by a large class.

C. Statute of Limitations

There is no statute of limitations in the Act. In similar situations where a federally created right is involved and there is no federal statute of limitations, federal courts apply the laws of the states where they sit to determine the applicable limitations periods.⁸² In so doing, federal courts have looked to state law to classify actions.⁸³ Because it is uncertain whether a suit for damages under the Act will be classified as one for a penalty, to which a relatively short limitations period is usually applicable, or as one remedial in nature, to which a longer period usually applies,⁸⁴ it is difficult to determine the time period in which an action must be brought. With respect to limitations periods, it is also significant to note that the Act states that its expiration shall not affect any action not finally determined on date of expiration or any action based on an act committed prior to May 1, 1973.⁸⁵

III. CONCLUSION—WISDOM OF A PRIVATE REMEDY SECTION

It is open to serious question on several grounds whether a private damage provision is appropriate, given the nature of current price controls, and whether the goals sought by Congress of restitution and deterrence can be accomplished through more efficient means. First, section 210 of the Economic Stabilization Act presupposes that the lawful ceiling price of a particular product or service is easily determinable, and accordingly, courts may simply compare the actual price charged to the ceiling price in overcharge suits. To the contrary, the Price Commission has adopted general regulations based on pass-through of cost increases and profit margin controls instead of the item-by-item controls employed in World War II and the Korean War.⁸⁶ As shown above, it is exceedingly difficult to determine whether a price

⁸² 2 J. MOORE, *supra* note 70, § 3.07[2]; Note, *Federal Statutes without Limitations Provisions*, 53 COLUM. L. REV. 68 (1953).

⁸³ 2 J. MOORE, *supra* note 70, § 3.07[2].

⁸⁴ Compare, e.g., *North Carolina Theatres, Inc. v. Thompson*, 277 F.2d 673 (4th Cir. 1960) (antitrust treble damage action is penal to which one-year North Carolina statute of limitation applies) with *Reid v. Doubleday & Co.*, 109 F. Supp. 354 (N.D. Ohio 1952) (antitrust action for treble damages is remedial rather than penal).

⁸⁵ § 218.

⁸⁶ See text and notes at notes 10-11 *supra*.

is unlawfully high without a detailed review of the company's records, and even then important questions (for example, whether the price increase caused the firm to exceed its profit margin level) may remain unanswered.⁸⁷ The sophisticated concepts of Phase II price controls seem to make the expert administrative agencies overseeing price controls, the Cost of Living Council and the Price Commission, the appropriate bodies to decide whether a seller has complied with the Act. Yet section 210 allows a plaintiff to make a federal district court the forum for this complex exercise. In light of the increasing case load of federal courts,⁸⁸ it is questionable whether the task of determining a ceiling price should be added to their dockets.

As noted above, plaintiffs are most likely to recover under section 210 where the government has filed a suit or ordered a "rollback" in prices.⁸⁹ In such cases, it would not have been necessary to require the purchaser to bring suit to recover the amount of the overcharge. Rather, Congress could have mandated that refunds be made where an appropriate agency had determined that a price was unlawful. By so doing, Congress would have insured that overcharging sellers would be deprived of the benefits of their unlawful acts without burdening federal courts.⁹⁰

The likelihood that private actions will be brought in most cases only after the government has acted against a seller means that private enforcement will not serve to police price regulations. Moreover, the additional deterrent effect of a private remedy provision is speculative. Certainly, in the case of an unintentional overcharge, section 210 does not increase the likelihood of compliance. Only in an instance where a seller actively weighs the risks of overcharge suits against the benefits of retaining an overcharge will the private remedy provision possibly affect his decision. Given criminal and civil sanctions⁹¹ combined with the harmful public relations impact of a publicly announced government suit or "rollback" order,⁹² the threat of private suits will probably be of marginal significance in most cases.

It is interesting to note that the legislative history of section 210 indicates that it was adopted with a minimum of discussion; the con-

⁸⁷ See text and notes at notes 12-24 *supra*.

⁸⁸ See Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 930 (1970).

⁸⁹ See text and notes at notes 25-27 *supra*.

⁹⁰ The Price Commission has recently ordered a refund of an overcharge to all purchasers of a product during the period of the overcharge. Price Commission Daily Decision Report No. 72-69, at 10 (Apr. 13, 1972).

⁹¹ § 208.

⁹² Cf. Rourke, *Law Enforcement Through Publicity*, 24 U. CHI. L. REV. 225 (1957).

gressional debates dealt primarily with minor details of language.⁹³ In light of the serious questions of practicality and impact that surround the private action provision, perhaps the most surprising aspect of section 210 is that it was passed almost without mention of the threshold issue of whether the Act should include a private remedy provision.

APPENDIX

SECTION 210 OF THE ECONOMIC STABILIZATION ACT

Suits for Damages or Other Relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than \$100 or more than \$1,000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided*, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

(c) For the purposes of this section, the term "overcharge" means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

⁹³ See 117 CONG. REC. H12244 (daily ed. Dec. 10, 1971); 117 CONG. REC. S19985-86 (daily ed. Dec. 1, 1971).