The Burger Court Opinion Writing Database

Illinois Brick Co. v. Illinois

431 U.S. 720 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

J

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 1, 1977

Re: 76-404 Illinois Brick Co. v. Illinois

Dear Byron:

I join.

Regards,

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 30, 1977

RE: No. 76-404 Illinois Brick Co. v. Illinois

Dear Potter:

In response to your circulation of March 29, I too am still inclined to adhere to my vote to affirm.

Sincerely,

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 31, 1977

MEMORANDUM TO THE CONFERENCE

RE: No. 76-404 Illinois Brick Co. v. Illinois

In my memorandum of March 30th, I said that I adhered to my vote to affirm. After reading the memoranda circulated regarding the case, I have become concerned lest we adopt what I consider to be an unrealistic approach to the question of "passing on" antitrust damages. Hence this memorandum in support of an affirmance.

As I understand the treble damage feature of the Clayton Act, it is intended both to compensate the victims of antitrust violations (the damage feature) and to provide an incentive to the injured private party to sue the violator (the trebling feature). By not allowing injured indirect purchasers to prove and recover damages, we would, in many instances, frustrate both objectives. The courthouse doors would be closed to the real victims of the illegal conduct in instances where the direct purchaser was successful in passing on the bulk of its increased costs, while the direct purchaser, who had suffered little injury, if any, would be entitled to recover a windfall. In addition,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 5, 1977

RE: No. 76-404 Illinois Brick Co. v. Illinois

Dear Harry:

I note that you, Thurgood and I are in dissent in the above. I'll be happy to undertake that dissent.

Sincerely,

Bill

Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 23, 1977

RE: No. 76-404 Illinois Brick Co. v. Illinois

Dear Byron:

In due course I shall circulate a dissent in the above.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 5/26/77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-404

Illinois Brick Company et al., Petitioners, *v.* State of Illinois et al. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1977]

MR. JUSTICE BRENNAN, dissenting.

Respondent, the State of Illinois, brought this treble-damage civil antitrust action under § 4 of the Clayton Act on behalf of itself and various local governmental entities in the Greater Chicago area charging that an overcharge in the price of concrete blocks used in the construction of public buildings was made by the petitioners, manufacturers and sellers of concrete block, pursuant to a price-fixing conspiracy in violation of § 1 of the Sherman Act, 15 U. S. C. § 1 (1970).[1] Section 4 broadly provides that "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained. . . ."

Decisions of the Court defining the reach of § 4 have been consistent with its broad objectives: to compensate victims of antitrust violations and to deter future violations. The Court has stated that § 4 "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . [but] is comprehensive in its terms and coverage, protecting all who are made vicitms of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc.* v.

[1] The blocks were sold to various general and special contractors who had successfully bid to construct public buildings. The State was thus an indirect purchaser of the blocks.

/—

See pp. 1, 3, 6, 17-18.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 6/3/77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-404

Illinois Brick Company et al., Petitioners, *v.* State of Illinois et al. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1977]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN join, dissenting.

Respondent, the State of Illinois, brought this treble-damage civil antitrust action under § 4 of the Clayton Act on behalf of itself and various local governmental entities in the Greater Chicago area charging that an overcharge in the price of concrete blocks used in the construction of public buildings was made by the petitioners, manufacturers and sellers of concrete block, pursuant to a price-fixing conspiracy in violation of § 1 of the Sherman Act, 15 U. S. C. § 1 (1970).[1] Section 4 broadly provides that "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained. . . ."

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[1] The blocks were sold to various general and special contractors who had successfully bid to construct public buildings. The State was thus an indirect purchaser of the blocks.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 6, 1977

RE: No. 76-404 Illinois Brick Co. v. Illinois

Dear Byron:

I too am grateful for your advance notice of the changes you have proposed for the opinion in this case. In response I shall add the following to the end of my footnote 24:

> "Although it is true, as the Court's opinion states, post, at 11 n. 14, that the post-enactment statements of 'particular legislators' who participated in the enactment of a statute cannot change its meaning, see Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974), quoting National Woodwork Manufacturers Assn. v. NLRB, 386 U.S. 612, 639 n. 34, in this case, the House and Senate Reports accompanying the amendments to Sec. 4 of the Clayton Act clearly reveal the 94th Congress' interpretation of that section as permitting the kind of consumer action which the Court now prohibits. Moreover, it is no answer to this to say that the new parens patriae provision will not in all cases directly compensate indirect purchasers, post, at 22 n. 31, for it is clear that despite the difficulty of distributing benefits to such injured persons the new Act authorizes recovery by the State on their behalf."

Sincerely,

Bill

Mr. Justice White

cc: The Conference

See p. 18

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

3rd DRAFT

From: Mr. Justice Brennan

Circulated: [redacted]

Recirculated: 6/7/77

SUPREME COURT OF THE UNITED STATES

No. 76-404

Illinois Brick Company et al., Petitioners, *v.* State of Illinois et al. — On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1977]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN join, dissenting.

Respondent, the State of Illinois, brought this treble-damage civil antitrust action under § 4 of the Clayton Act on behalf of itself and various local governmental entities in the Greater Chicago area charging that an overcharge in the price of concrete blocks used in the construction of public buildings was made by the petitioners, manufacturers and sellers of concrete block, pursuant to a price-fixing conspiracy in violation of § 1 of the Sherman Act, 15 U. S. C. § 1 (1970).[1] Section 4 broadly provides that "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained. . . ."

Decisions of the Court defining the reach of § 4 have been consistent with its broad objectives: to compensate victims of antitrust violations and to deter future violations. The Court has stated that § 4 "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . [but] is comprehensive in its terms and coverage, protecting all who are made vicitms of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc.* v.

[1] The blocks were sold to various general and special contractors who had successfully bid to construct public buildings. The State was thus an indirect purchaser of the blocks.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 29, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-404, Illinois Brick Co. v. Illinois

At our Conference I said that I would be willing to affirm the judgment in this case if, and only if, the Hanover Shoe case were read as limited to the type of product there involved. Byron White took the position that so to limit Hanover Shoe would be in effect to overrule it, which, I might say, was a not unreasonable position to take.

If Hanover Shoe is to be read as establishing a per se general rule that a producer cannot assert a "pass on" defense to a price fixing suit brought against him by his immediate customers, then I think the judgment in the present case must be reversed. If there are four others who read Hanover Shoe in that way and who agree that such a reading requires reversal of the present case, I am prepared to join them. In my opinion, this would be the most clear-cut and rational disposition of the case, and would have the further advantage of eliminating much future litigation as to what products and services are within, and which without, the rule of a more flexible Hanover Shoe rule.

P.S.

P.S.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 24, 1977

Re: 76-404, Illinois Brick Co. v. Illinois

Dear Byron,

I am glad to join the opinion you have written for the Court in this case.

Sincerely yours,

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 5-20-77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-404

Illinois Brick Company et al., Petitioners, *v.* State of Illinois et al. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May —, 1977]

Wait for dissent WJB

MR. JUSTICE WHITE delivered the opinion of the Court.

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), involved an antitrust treble-damage action brought under § 4 of the Clayton Act,[1] against a manufacturer of shoe machinery by one of its customers, a manufacturer of shoes. In defense, the shoe machinery manufacturer sought to show that the plaintiff had not been injured in its business as required by § 4 because it had passed on the claimed illegal overcharge to those who bought shoes from it. Under the defendant's theory, the illegal overcharge was absorbed by the plaintiff's customers—indirect purchasers of the defendant's shoe machinery—who were the persons actually injured by the antitrust violation.

In *Hanover Shoe* this Court rejected as a matter of law this defense that indirect rather than direct purchasers were the parties injured by the antitrust violation. The Court held

[1] Section 4 of the Clayton Act, 15 U. S. C. § 15, provides:

"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 United States 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."

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 6, 11, 13, 14, 16, 17, 19, 20, 22-24

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 6-7-77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-404

Illinois Brick Company et al., Petitioners, *v.* State of Illinois et al. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May —, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), involved an antitrust treble-damage action brought under § 4 of the Clayton Act [1] against a manufacturer of shoe machinery by one of its customers, a manufacturer of shoes. In defense, the shoe machinery manufacturer sought to show that the plaintiff had not been injured in its business as required by § 4 because it had passed on the claimed illegal overcharge to those who bought shoes from it. Under the defendant's theory, the illegal overcharge was absorbed by the plaintiff's customers—indirect purchasers of the defendant's shoe machinery—who were the persons actually injured by the antitrust violation.

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[1] Section 4 of the Clayton Act, 15 U. S. C. § 15, provides:

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P.11

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

3rd DRAFT

From: Mr. Justice White

Circulated: _____

Recirculated: 6-8-77

SUPREME COURT OF THE UNITED STATES

No. 76-404

Illinois Brick Company et al., Petitioners, *v.* State of Illinois et al. — On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 9, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), involved an antitrust treble-damage action brought under § 4 of the Clayton Act [1] against a manufacturer of shoe machinery by one of its customers, a manufacturer of shoes. In defense, the shoe machinery manufacturer sought to show that the plaintiff had not been injured in its business as required by § 4 because it had passed on the claimed illegal overcharge to those who bought shoes from it. Under the defendant's theory, the illegal overcharge was absorbed by the plaintiff's customers—indirect purchasers of the defendant's shoe machinery—who were the persons actually injured by the antitrust violation.

In *Hanover Shoe* this Court rejected as a matter of law this defense that indirect rather than direct purchasers were the parties injured by the antitrust violation. The Court held

[1] Section 4 of the Clayton Act, 15 U. S. C. § 15, provides:

"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 United States 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."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 27, 1977

Re: No. 76-404, Illinois Brick Co. v. Illinois

Dear Bill:

Please join me.

Sincerely,

TM

T. M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 30, 1977

Re: No. 76-404 - Illinois Brick Co. v. Illinois

Dear Potter:

This is in response to your circulation of March 29. I am still inclined to adhere to my vote to affirm.

Sincerely,

H

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 30, 1977

Re: No. 76-404 - Illinois Brick Co. v. Illinois

Dear Bill:

Please join me in your fine dissenting opinion. I may write separately a brief sentence or two.

Sincerely,

H.A.B.

Mr. Justice Brennan

cc: The Conference

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 30, 1977

Re: No. 76-404 - Illinois Brick Co. v. Illinois

Dear Bill:

Please join me in your fine dissenting opinion. I may write separately a brief sentence or two.

Sincerely,

H.A.B.

Mr. Justice Brennan

cc: The Conference

[note to WJB only]

Henry Putzel and I have a blood oath to fight "parameter" and "viability." Do you think the latter word could be replaced with something of greater integrity where it appears in the 9th line on page 3 and in the 6th line from the bottom on page 6?

H. A. B.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: MAY 31 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-404

Illinois Brick Company et al., Petitioners, v. State of Illinois et al. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1977]

MR. JUSTICE BLACKMUN, dissenting.

I regard MR. JUSTICE BRENNAN's dissenting opinion as persuasive and convincing, and I join it without hesitation.

I add these few sentences only to say that I think the plaintiffs-respondents in this case, which they now have lost, are the victims of an unhappy chronology. If *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), had not preceded this case, and were it not "on the books," I am positive that the Court today would be affirming, perhaps unanimously, the judgment of the Court of Appeals. The policy behind the Antitrust Acts and all the signs point in that direction, and a conclusion in favor of indirect purchasers who could demonstrate injury would almost be compelled.

But *Hanover Shoe* is on the books, and the Court feels that it must be "consistent" in its application of pass-on. That, for me, is a wooden approach, and it is entirely inadequate when considered in the light of the objectives of the Sherman and Clayton Acts. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 tells us all that is needed as to congressional intent. Nevertheless, we must now await still another statute which, as the Court acknowledges, *ante*, at 11 n. 14, the Congress may adopt. One regrets that it takes so long and so much repetitious effort to achieve, and have this Court recognize, the obvious congressional aim.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 6, 1977

Re: No. 76-404 - Illinois Brick Co. v. Illinois

Dear Byron:

Many thanks for your advance notice of the changes proposed for your opinion in this case. I am making one change in my short dissent, namely, that the third sentence in the third paragraph is changed to read: "The Hart-Scott-Rodino Antitrust Improvements Act of 1976 tells us all that is needed as to Congress' understanding of the Acts."

Sincerely,

Harry

Mr. Justice White

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

3rd DRAFT

Recirculated: JUN 7 1977

SUPREME COURT OF THE UNITED STATES

No. 76-404

Illinois Brick Company et al., Petitioners, *v.* State of Illinois et al. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June —, 1977]

MR. JUSTICE BLACKMUN, dissenting.

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But *Hanover Shoe* is on the books, and the Court feels that it must be "consistent" in its application of pass-on. That, for me, is a wooden approach, and it is entirely inadequate when considered in the light of the objectives of the Sherman and Clayton Acts. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 tells us all that is needed as to Congress' understanding of the Acts. Nevertheless, we must now await still another statute which, as the Court acknowledges, *ante*, at 11 n. 14, the Congress may adopt. One regrets that it takes so long and so much repetitious effort to achieve, and have this Court recognize, the obvious congressional aim.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 8, 1977

Re: No. 76-404 - Illinois Brick Co. v. Illinois

Dear Byron:

This will confirm the message we gave to John Spiegel this morning to the effect that I am inserting the word "present" in the 5th line from the bottom of my short dissent. This will be just before the word "understanding." This will affect, I believe, that portion of footnote 14 on page 11 of your recirculation of June 7.

Sincerely,

HAB.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 31, 1977

No. 76-404 Illinois Brick Company v. Illinois

MEMORANDUM TO THE CONFERENCE:

My tentative vote at the Conference was to affirm, provided an opinion for the Court could be written that substantially limits Hanover Shoe to its facts. I am not enthusiastic about per se rules, especially where the factual situations are susceptible of such wide variation. Given Hanover Shoe, I recognize that writing such an opinion - even if there were a Court supporting it - would not be easy.

I agree with Bill Rehnquist that a primary objective should be to assure that plaintiffs and defendants "are treated in an even-handed manner on the issue of damages" I also have noted Potter's memorandum to the Conference.

In view of the options that now appear to be open to us, I could join an opinion for the Court reversing the above case on the theory that the Hanover Shoe doctrine applies "both ways". There is certainly a good deal to Byron's view that proof of damages in these cases, absent a per se rule, will be protracted and speculative - with opportunities for unjust results. The lawyers frequently will benefit to a greater extent than the litigants.

In short, my first vote now is for reversal in accord with the view expressed by Byron. If a Court is not available for this view, I would confine Hanover Shoe to its facts (i.e., to the type of product there involved), and apply as a general rule the same principles of proof for both offensive and defensive use.

L.F.P.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 23, 1977

No. 76-404 Illinois Brick Company
v. State of Illinois

Dear Byron:

You have written a most convincing opinion that I am happy to join.

I would appreciate your taking a look at the language I mentioned with the view to making it somewhat less emphatic.

Sincerely,

Lewis

Mr. Justice White

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 29, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-404 - Illinois Brick Co. v. Illinois

I have read Potter's memorandum of March 29th, in which he appears to agree with the approach to this case taken by Byron at Conference. My first preference vote expressed at Conference, as I recall it, was in accord with Byron. I feel I could therefore subscribe to the general approach suggested in Potter's memorandum of March 29th, although I would want to see it written out before signing on the dotted line. My principal concern is that plaintiffs and defendants are treated in an even handed manner on the issue of damages; I would not at this time rule out some other approach which achieved that end.

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 23, 1977

Re: 76-404 Illinois Brick Co. v. Illinois

Dear Byron:

Please join me.

Sincerely,

WHR

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 31, 1977

Re: 76-404 - Illinois Brick Co. v. State of Illinois

Dear Byron:

Please join me.

Respectfully,

Mr. Justice White

Copies to the Conference