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An Analytical Framework for Antitrust Standing*

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Private treble damage actions now play a leading role in the enforcement of the federal antitrust laws.¹ Yet despite the widespread recognition of their compensatory and deterrent role by courts² and

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1. Private antitrust enforcement was much less significant than government enforcement in the 50 years of federal antitrust litigation that preceded World War II. The annual number of private antitrust suits grew markedly after the War, however, and is now over 10 times that of government actions. [1975] ANN. REP. OF DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS 212; Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 370-74 (1970). This increase in the private component of antitrust litigation is due largely to a series of landmark post-War Supreme Court decisions in which the Court liberalized traditional doctrines and statutory interpretations that would otherwise have acted as "barriers to relief" in "suits serving important public purposes." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968) (antitrust plaintiff may recover damages even if in *pari delicto* with defendant). *See, e.g.*, *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 320-21 (1965) (term "United States" includes Federal Trade Commission for purpose of Clayton Act § 5(b), 15 U.S.C. § 16(b) (1964) (current version at 15 U.S.C. § 16(i) (Supp. V 1975)), which tolls private action statute of limitations during pendency of proceedings instituted by "United States"); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-60 (1961) (no public injury requirement in suit under Clayton Act § 4, 15 U.S.C. § 15 (1958) (current version at 15 U.S.C. § 15 (1970)); showing of private injury sufficient); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-66 (1946) (antitrust damages need not be precisely ascertainable to be recoverable where defendant responsible for difficulty in ascertainment). Another impetus for post-War private antitrust enforcement was the 1966 revision of Rule 23 of the *Federal Rules of Civil Procedure*, which for the first time allowed binding adjudication of the damage claims of all members of a class of similarly situated plaintiffs. *See generally* Notes of Advisory Comm. on 1966 Amendment to Rules, FED. R. CIV. P. 23, reprinted in 28 U.S.C. app. at 7765 (1970). A final factor has been the growing economic strength of the plaintiff's antitrust bar in the post-War period, which has enabled plaintiffs to bring increasing numbers of damage actions independent of government suits.

2. *See, e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 696 (1977); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138-39 (1968); *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

commentators³ alike, the question of which parties have standing to maintain these suits remains unresolved.⁴ Without adequate guidance from the Supreme Court or from Congress, the lower federal courts have adopted disparate approaches to this question, resulting in sharply conflicting holdings and reasoning. Moreover, because each of these approaches lacks sound analytical underpinning, even courts employing the same approach often fail to dispose of cases in a consistent, rational manner.

This article proposes a new analytical framework for achieving a more systematic resolution of standing issues in private antitrust cases. Part I introduces the standing problem besetting the courts in private antitrust suits. Part II surveys and critiques the variety of doctrines currently shaping judicial decisions on antitrust standing. In Part III the policy considerations underlying the proposed approach are identified, and rules to apply and reconcile these considerations are articulated. Finally, Part IV demonstrates how the proposed approach would be applied in standing determinations in several classes of antitrust cases.

I. The Contours of the Standing Problem

The statutory basis for private antitrust damage actions is § 4 of the Clayton Act.⁵ That section confers the right to sue for treble damages on "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" On its face, this language seems to grant a private right of action to anyone who can prove that an injury to his "business or property" was caused by an antitrust violation.⁶ Yet the lower federal courts have created an

3. See, e.g., P. AREEDA, *ANTITRUST ANALYSIS* 68 (2d ed. 1974); M. HANDLER, H. BLAKE, H. GOLDSCHMIDT & R. PITOFKY, *TRADE REGULATION* 171 (1974); Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976); Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958); MacIntyre, *The Role of the Private Litigant in Antitrust Enforcement*, 7 ANTITRUST BULL. 113 (1962); Wham, *Antitrust Treble-Damage Suits: The Government's Chief Aid in Enforcement*, 40 A.B.A.J. 1061 (1954); Comment, *Antitrust Enforcement by Private Parties: Analysis of Development in the Treble Damage Suit*, 61 YALE L.J. 1010 (1952). But see Parker, *Treble Damage Action—A Financial Deterrent to Antitrust Violations?*, 16 ANTITRUST BULL. 483 (1971).

4. The term "standing" denotes the status of being a proper party to maintain a private antitrust action. See pp. 810-12 & note 8 *infra*. For the difference between antitrust "standing" and "standing" for constitutional purposes, see note 11 *infra*.

5. 15 U.S.C. § 15 (1970). The original version of § 4 was enacted as § 7 of the Sherman Act, ch. 647, 26 Stat. 210 (1890).

6. See *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292, 295 (2d Cir. 1958) (L. Hand, J.) (suggesting literal interpretation of § 4); *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487, 491 (2d Cir. 1948) (L. Hand, J.) (language of § 4 quoted as if

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antitrust standing requirement by interpreting the phrase “by reason of” to imply not only the *fact* of causation but also the presence of *legal* causation. In § 4 case law this legal causation requirement, like the proximate cause requirement in the law of torts,⁷ restricts the scope of a defendant’s liability and a plaintiff’s right to recovery. Although antitrust standing is analytically distinct from the statutory requirements of “injury” to “business or property,”⁸ causation in fact, and substantive protection, its precise definition remains elusive because of the inherent ambiguity of the concept of legal causation.

The sparse legislative history of § 4 hardly suggests a congressional

unambiguous in giving right of action to “any person” injured by antitrust violation). Cf. A. WALKER, HISTORY OF THE SHERMAN LAW 295 (1910) (predecessor of § 4 “so plain in all [its] parts, that [it] require[s] only to be attentively read by lawyers and judges to be uniformly understood”). But cf. *Pidcock v. Harrington*, 64 F. 821, 822 (C.C.S.D.N.Y. 1894) (quoted note 16 *infra*).

7. E.g., *Karsenal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955) (describing “target area” test for standing as a test of “proximate causation”). See W. PROSSER, HANDBOOK OF THE LAW OF TORTS 236-37, 244-46 (4th ed. 1971).

8. Some courts have discerned a standing limitation not in the phrase “by reason of” but in the terms “injury” or “business or property.” This has clouded the definition of antitrust standing still further. The Supreme Court’s decision in *Illinois Brick Co. v. Illinois*, 45 U.S.L.W. 4611 (U.S. June 9, 1977), epitomizes reliance on the statutory “injury” requirement of § 4 to erect a standing barrier. There the Court, despite a disclaimer that it was not addressing the standing question, *id.* at 4613 n.7, in effect decided that assumedly injured indirect purchasers in a chain of distribution do not have standing because they cannot, as a matter of law, suffer “injury” within the meaning of § 4.

On occasion courts have put the phrase “business or property” to similar use. Traditionally the question of what constitutes injury to “business or property” has arisen where the plaintiff had no existing business to be injured, but alleged that he would have gone into business but for a defendant’s antitrust violation. See, e.g., *Martin v. Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966); *Waldron v. British Petroleum Co.*, 231 F. Supp. 72 (S.D.N.Y. 1964). A number of courts, however, have denied standing in terms or in effect to economically injured plaintiffs on the ground that the injuries they alleged were not injuries to “business or property.” See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-64 (1972) (state cannot sue for injury to its “general economy” because such injury not to its “business or property”); *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 126 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973) (injury to governmental entities’ noncommercial interests held not to be injury to “business or property”); *Martens v. Barrett*, 245 F.2d 844, 845-46 (5th Cir. 1957) (corporate employees not injured in their “business or property” even though they may suffer economic injury in fact); *Weinberg v. Federated Dep’t Stores, Inc.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,250 (N.D. Cal. 1977), *appeal docketed*, No. 77-1547 (9th Cir. Jan. 26, 1977) (“business or property” does not include consumer pocketbook interests); *Walder v. Paramount Publix Corp.*, 132 F. Supp. 912, 916 (S.D.N.Y. 1955) (employment not “business or property”). But see *Reiter v. Sonotone Corp.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,360 (D. Minn. 1977) (“business or property” includes consumer pocketbook interests). Because the definition of “property” is essentially a prudential matter, a judicial decision as to whether an antitrust injury is an injury to “property” may often mask a policy decision as to which kinds of interests deserve protection from antitrust violations. See, e.g., *Maltz v. Sax*, 134 F.2d 2, 5 (7th Cir.), *cert. denied*, 319 U.S. 772 (1944) (interest in gambling equipment business held not an interest in “property” under § 4, because common law does not condone gambling).

mandate for the legal causation limitation that courts have imposed on the seemingly all-inclusive language of § 4.⁹ As Part II of this article explains, courts have created this limitation primarily out of concern about the excessive penalties that may be incurred because of the mandatory treble damages feature of the section. Despite the potential conflict with the compensatory and deterrent purposes of private antitrust litigation, many courts have denied standing on the grounds that treble damage recoveries by every person affected by an antitrust violation could exact duplicative or even ruinous recoveries from antitrust defendants. Other courts have used the antitrust standing doctrine to bar claims that they consider "speculative." Some courts, finally, have discerned a "windfall" element in treble damages awards and have denied plaintiffs standing for that reason. Underlying these standing decisions may be a concern of a completely different kind: denial of standing may be perceived as a means of easing the administrative burdens of antitrust actions.

The judicial concerns underlying the concept of antitrust standing are not without validity; indeed, several have a major place in the analytical framework this article proposes. The problem, rather, is that few courts have endeavored to balance the strength of these policies against the policies served by private antitrust actions.¹⁰ As a result, the body of antitrust standing law now displays a decaying

9. Both the Senate and the House debates on the Sherman Act recognized the important role of private damage suits in the enforcement of the antitrust laws. As far as can be discerned, however, Congress paid no attention to whether certain classes of plaintiffs would be denied standing to sue under the "by reason of" language of § 7 of the Sherman Act, the predecessor of § 4 of the Clayton Act. *See, e.g.*, 21 CONG. REC. 4098 (1890) (Sen. Morgan). In fact, the legislators seemed to assume that anyone injured by an antitrust violation would be able to sue. *See, e.g., id.* at 1767-68 (1890) (Sen. George) (assuming that injured consumers could sue, but concluding that such suits would be rare); *id.* at 2612 (Sens. Teller & Reagan).

Section 7 of the Sherman Act, which provided for private actions under the Sherman Act alone, was effectively superseded by § 4 of the Clayton Act, which provided for private actions under all the antitrust laws. (Section 7, accordingly, was repealed as superfluous in 1955. Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283.) The treble damages provision contained in § 7 of the Sherman Act was not substantively changed by § 4 of the Clayton Act. The thrust of congressional debate on the Clayton Act suggested strong support for enhanced private enforcement of the antitrust laws. *See, e.g.*, 51 CONG. REC. 9090 (1914) (Rep. Mitchell). The 1914 debates, like those of 1890, contain no intimations of a § 4 standing limitation. *See, e.g., id.* at 9185 (Rep. Helvering); *id.* at 12939 (Sen. Reed).

10. Regrettably, commentators on antitrust standing have failed to recognize that the balance among various standing policies must be struck according to the facts of particular cases. The commentators list the policies, but then proceed to analyze the case law using formal rules. *See, e.g.*, Lytle & Purdue, *Antitrust Target Area under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation*, 25 AM. U.L. REV. 795, 796-803 (1976); Pollock, *Standing to Sue, Remoteness of Injury and the Passing-on Doctrine*, 32 ANTITRUST L.J. 5, 9-10, 14-19 (1966); Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U. L. REV. 374, 405-07 (1976).

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formalism, characterized by contradictory, even arbitrary, applications of rigid rules to cases distinguished on tenuous grounds. Policy concerns often are adduced as makeweights; their real importance, both to the case before the court and to the deterrent and compensatory purposes of private antitrust litigation, is usually ignored.¹¹

II. The Current Approaches to Antitrust Standing

Since the early days of private antitrust litigation, the basic instrument of—or, as will become apparent, obstacle to—antitrust standing analysis has been the “direct injury” rule. As its name implies, this rule permits private actions to be maintained only by those plaintiffs whose injury is considered to be a “direct” or “proximate” result of prohibited anticompetitive activity. Those plaintiffs whose alleged injury is held to be an “indirect,” “remote,” “consequential,” “incidental,” or “derivative” result of an antitrust violation are turned away at the door.¹² The law of antitrust standing has developed largely by elaboration of the direct injury rule.

A. *The Evolution of the Direct Injury Rule*

The direct injury rule for antitrust standing is the illegitimate offspring of two early private antitrust cases, *Ames v. American Tele-*

11. Because the doctrine of antitrust standing reflects the special antitrust policy considerations mentioned above, its focus is somewhat different from that of standing doctrines familiar to constitutional lawyers. In constitutional litigation, the initial standing question is whether the claimant is alleging a “particular, concrete injury,” *United States v. Richardson*, 418 U.S. 166, 177 (1974), that gives him a “personal stake in the outcome” of the adjudication, *Baker v. Carr*, 369 U.S. 186, 204 (1962), and thereby meets the constitutional and prudential requirement of injury in fact. *See Warth v. Seldin*, 422 U.S. 490, 498-500 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 732-40 (1972); *Flast v. Cohen*, 392 U.S. 83, 99-103 (1968). Although such cases as *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *United States v. SCRAP*, 412 U.S. 669 (1973), lowered the standing barriers to those granted a statutory right of action and to those bringing an action in which many others had a similar stake, the threshold test has remained one of injury in fact. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975). *See generally Davis, The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 450-56 (1970).

Antitrust plaintiffs pass this constitutional threshold by alleging the statutorily required “injury in [their] business or property.” Since such economic injury satisfies the constitutional standing requirement of injury in fact, the antitrust standing inquiry is not concerned with whether the plaintiff has constitutional standing. *See Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1148 (6th Cir. 1975).

12. The use of the terms “indirect,” “remote,” and “consequential” to indicate lack of standing for want of a direct injury is illustrated in *Loeb v. Eastern Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910), a case decided under § 7 of the Sherman Act. The use of the terms “incidental” and “derivative” is illustrated in *Hoopes v. Union Oil Co.*, 374 F.2d 480, 485 (9th Cir. 1967). These terms are plainly synonymous for indirect injury. *See, e.g., Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

*phone & Telegraph Co.*¹³ and *Loeb v. Eastman Kodak Co.*¹⁴ The rule emerged from the special corporate law problems those cases presented. Plaintiffs in the two cases were shareholders in companies that were forced out of business by defendants' alleged antitrust violations. Relying on the traditional doctrine that only a corporation, and not its shareholders, may sue for injuries the corporation has suffered,¹⁵ the courts in both cases held that the stockholders lacked standing to sue for the diminished value of their shares.¹⁶ The application of the doctrine here was indisputably correct. In an antitrust context, as much as in any other corporate context, there is a need to prevent the double recoveries and multiple lawsuits that can result when stockholders sue to vindicate what are in reality corporate claims.¹⁷ Yet

13. 166 F. 820 (C.C.D. Mass. 1909).

14. 183 F. 704 (3d Cir. 1910).

15. See, e.g., *Green v. Victor Talking Mach. Co.*, 24 F.2d 378 (2d Cir.), cert. denied, 278 U.S. 602 (1928); 13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 5910-5911 (rev. perm. ed. 1975).

16. 183 F. at 709-10; 166 F. at 822-24. Before *Ames*, a number of stockholder antitrust plaintiffs had been denied recovery not on multiple recovery grounds, since they had sued derivatively, but on procedural grounds. The stockholders had brought their derivative suits in equity, the courts found, whereas the Sherman Act conferred a right to treble damages only in actions at law. See *Metcalf v. American School-Furniture Co.*, 108 F. 909 (C.C.W.D.N.Y. 1901), aff'd, 113 F. 1020 (2d Cir. 1902); *Block v. Standard Distilling & Distrib. Co.*, 95 F. 978 (C.C.S.D. Ohio 1899); *Pidcock v. Harrington*, 64 F. 821 (C.C.S.D.N.Y. 1894). Later decisions barring derivative damage suits at law were to render these holdings an absolute bar to derivative antitrust suits. See note 17 *infra* (citing cases).

Although based in principle on the traditional law-equity distinction, these opinions evinced considerable hostility to private treble damage actions. In *Pidcock*, for example, the court stated:

It is clear that the right to maintain . . . a suit [in equity] is not expressly conferred by the act. . . . If it were the intention of the lawmakers to vest in every irresponsible individual, who may deem himself aggrieved, the right to invoke the drastic and far-reaching remedies conferred by the act, is it not reasonable to suppose that they would have said so in unambiguous terms?

Id. at 822.

17. The barrier raised by the requirement that injured shareholders bring derivative rather than direct actions for antitrust relief was soon made absolute by other restrictive procedural rulings. In 1917, the Supreme Court held that derivative antitrust damage actions could not be brought at law because derivative suits, being equitable in nature, could be brought only in equity. *United Copper Sec. Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 264-65 (1917) (alternative holding). Yet the courts already had held that derivative antitrust damage actions could not be brought in equity, since § 4 only authorized damages at law. See *Fleitman v. Welsbach St. Lighting Co.*, 240 U.S. 27 (1916); *Corey v. Independent Ice Co.*, 207 F. 459, 460-61 (D. Mass. 1913) (citing cases); note 16 *supra* (citing cases).

Thus, prior to the merger of law and equity in 1938, stockholders effectively were denied any antitrust relief whatever when management, because of a conspiracy with defendants or for some other reason, declined to bring a § 4 damage action on behalf of the corporation. Derivative recovery has generally been permitted since 1938. See, e.g., *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F.2d 731 (2d Cir. 1953); *Rogers v. American Can Co.*, 187 F. Supp. 532 (D.N.J. 1960), aff'd, 305 F.2d 297 (3d Cir. 1962). See generally Blake, *The Shareholders' Role In Antitrust Enforcement*, 110 U. PA. L. REV. 143, 145-48 (1961).

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despite the adequacy of traditional corporate law for dealing with the problem of stockholder standing under § 4, the *Loeb* court added an alternative ground of decision. The plaintiff could not recover damages, said the court, because his injury as a shareholder was "indirect, remote, and consequential," the violation having been "directed at the corporation, and not the individual stockholder."¹⁸ Ironically, then, the direct injury rule for which *Loeb* is so often cited came into being as a test for antitrust standing in a case where applicable corporate law doctrine made the rule unnecessary.¹⁹

The direct injury test that *Loeb* applied to corporate shareholders was soon extended to corporate creditors²⁰ and has been applied to them with few exceptions ever since. Usually no reason other than remoteness of injury has been advanced for denying creditors relief when their corporate debtors were damaged by antitrust violations.²¹

18. 183 F. at 709. By advertng to an absence of "legal injury" in the stockholder, the *Ames* court also recognized a legal cause requirement in § 4. 166 F. at 822. This requirement, however, was rooted in corporate law doctrine and not in a separate concept of directness of causation.

19. Shareholders suing in their own right have almost uniformly been denied standing under § 4 on the basis of the *Loeb* "direct injury" rule. *See, e.g.*, *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 96-97 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976); *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) (also citing corporate law doctrine); *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893 (5th Cir. 1968); *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 10 (9th Cir. 1963); *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292 (2d Cir. 1958); *Peter v. Western Newspaper Union*, 200 F.2d 867, 872-73 (5th Cir. 1953); *Walder v. Paramount Publix Corp.*, 132 F. Supp. 912, 916 (S.D.N.Y. 1955). *But see* *Kolb v. Chrysler Corp.*, 357 F. Supp. 504, 506-07 (E.D. Wis. 1973) (stockholder may sue for "direct" injury *qua* stockholder; court stressed that stockholder was also franchisee and manager of corporation). The direct injury rule has been invoked even when the plaintiffs were the sole shareholders in the corporation injured by the antitrust violation. *See, e.g.*, *Martens v. Barrett*, 245 F.2d 844, 846 (5th Cir. 1957); *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401, 407 (S.D.N.Y. 1961); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956). A more appropriate ground for denying recovery in some of these cases would have been the rationale that shareholder recovery might prejudice creditors' rights.

General partners, like stockholders, have been denied standing under the direct injury rule. *E.g.*, *Coast v. Hunt Oil Co.*, 195 F.2d 870 (5th Cir.), *cert. denied*, 344 U.S. 836 (1952). Significantly, partners do not universally have legal capacity to sue derivatively under § 4. *Compare* *Leh v. General Petroleum Corp.*, 165 F. Supp. 933 (S.D. Cal. 1958) (partners may sue derivatively under federal law) *with* *Hauer v. Bankers Trust N.Y. Corp.*, 1975-1 Trade Cas. ¶ 60,142 (E.D. Wis. 1974) (partners may not sue derivatively under state law).

20. *Gerli v. Silk Ass'n of America*, 36 F.2d 959, 960 (S.D.N.Y. 1929) (employee-creditor without standing because not injured in his "business or property"). Indeed, the plaintiff in *Loeb* was a creditor as well as a shareholder, and the *Loeb* court assumed that the direct injury rule denied him standing in either capacity. 183 F. at 709.

21. *E.g.*, *Martens v. Barrett*, 245 F.2d 844, 846 (5th Cir. 1957); *Walder v. Paramount Publix Corp.*, 132 F. Supp. 912, 916 (S.D.N.Y. 1955) (quoting *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389, 391 (S.D.N.Y. 1939), *aff'd mem.*, 133 F.2d 114 (2d Cir. 1940) (dictum)). *But see* *Perkins v. Standard Oil Co.*, 395 U.S. 642, 649-50 (1969) (§ 4 suit by creditor and sole owner of corporation allowed without discussion of creditors' standing); *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 1974-1 Trade Cas. ¶ 74,974, at

At least one court, however, has noted that the important commercial policy against preferences to particular creditors²² provides a sufficient policy basis for denying private antitrust relief to creditors suing in their own right under § 4.²³

In the stockholder and creditor cases, the direct injury rule may be said to have been superfluous, for corporate and commercial law offered adequate grounds for barring recovery. The rule acquired a claim to independent status as an antitrust standing criterion, however, when it was first extended beyond the intracorporate context in the 1939 case of *Westmoreland Asbestos Co. v. Johns-Manville Corp.*²⁴ In *Westmoreland*, a real estate lessor lost property in a mortgage foreclosure caused by antitrust injuries to its lessee's business.²⁵ The court simply declared that, as a matter of law, the connection between the alleged antitrust violations and the admitted injury to the lessor was too "remote" for recovery.²⁶

Despite the *Westmoreland* case, the direct injury rule did not yet dominate the law of antitrust standing. During the 1940s corporation employees regularly overcame "remoteness of injury" arguments and recovered for loss of position and salary resulting from antitrust violations that had diminished their employers' sales. *Roseland v. Phister Manufacturing Co.*,²⁷ for example, held that a sales agent had standing to sue for commissions lost after his employer and two competitors conspired to fix prices and restrict sales in the plaintiff's sales territory. To the defendants' argument that a sales agent, even if injured, "was not within those to whom damages are granted,"²⁸ the *Roseland* court responded that the agent could sue because his claim fell within the

96,322 (S.D.N.Y. 1974), *rev'd on other grounds*, 534 F.2d 1036 (2d Cir. 1976) (employee who had guaranteed employer's obligations had standing; injury "more direct" than injury to non-creditor employee).

22. See Bankruptcy Act § 60(b), 11 U.S.C. § 96(b) (1970) (preferences generally voidable by bankruptcy trustee); V. COUNTRYMAN & A. KAUFMAN, *COMMERCIAL LAW* 195 (1971).

23. *Congress Bldg. Corp. v. Loew's, Inc.*, 246 F.2d 587, 591 (7th Cir. 1957) (dictum) ("direct recovery by the individual creditor would give him a preference over other creditors of the insolvent business and such recovery may act to thwart the policy of the bankruptcy laws").

24. 30 F. Supp. 389 (S.D.N.Y. 1939), *aff'd mem.*, 113 F.2d 114 (2d Cir. 1940).

25. *Id.* at 390-91.

26. *Id.* at 391 ("All elements considered, it seems to me that the claimed damages of [the lessor] are more remote than those held to be unrecoverable [in the stockholder cases].") See *United Copper Sec. Co. v. Amalgamated Copper Co.*, 232 F. 574, 577 (2d Cir. 1916) (dictum) ("One who had rented offices to corporations absorbed by an illegal combination could not recover for losing them as tenants") *But see* *Camrel Co. v. Paramount Film Distrib. Corp.*, 1944-45 Trade Cas. ¶ 57,233 (S.D.N.Y. 1944) (direct or indirect character of lessor's injury treated as factual question).

27. 125 F.2d 417 (7th Cir. 1942).

28. *Id.* at 419.

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plain meaning of § 4.²⁹ Similarly, in *Vines v. General Outdoor Advertising Co.*,³⁰ Judge Learned Hand found a legally cognizable injury to a sales agent who lost an account to his employer's co-conspirator in a market division scheme. Rejecting an indirect injury contention, Judge Hand held that the only relevant question under § 4, assuming an antitrust violation had occurred, was the factual existence of injury caused by that violation.³¹

The status of the direct injury rule as an independent test of standing, or legal causation, was further obscured during this early period by the tendency of certain courts to confuse causation in fact with causation in law.³² When some event intervened between the antitrust violator's actions and the plaintiff's injury, these courts, in denying relief, were often ambiguous as to whether the intermediate event had in fact caused the injury, or had simply made the chain of causation stemming from the violation too "indirect."³³ In *Westmoreland*, for example, the court not only held lessors too "remote" to recover;³⁴ it also suggested that because the mortgage foreclosure intervened between the lessee's loss of income that had been used to make rental payments and the lessor's loss of property, the lessor's injury could not be said to have been caused by the antitrust violation, but only by the foreclosure.³⁵ It was unclear, therefore, whether the court was holding that causation was too attenuated in a factual or a legal sense.³⁶

29. *Id.* The ruling in *Roseland* was followed by two courts which held that employees were directly injured by antitrust injuries to their employers. *Klein v. Sales-Builders, Inc.*, 1950-51 Trade Cas. ¶ 62,600 (N.D. Ill. 1950); *McWhirter v. Monroe Calculating Mach. Co.*, 76 F. Supp. 456, 460 (W.D. Mo. 1948) (manager paid by commission may sue).

30. 171 F.2d 487 (2d Cir. 1948).

31. *Id.* at 490.

32. See, e.g., *La Chappelle v. United Shoe Mach. Corp.*, 90 F. Supp. 721 (D. Mass. 1950); *Westor Theatres, Inc. v. Warner Bros. Pictures*, 41 F. Supp. 757 (D.N.J. 1941). Cf. W. PROSSER, *supra* note 7, at 244 (problem of fact of causation "often hopelessly confused" with problem of whether defendant "should be legally responsible for what he has caused") (emphasis added).

33. See, e.g., *Peterson v. Borden Co.*, 50 F.2d 644, 645-46 (7th Cir. 1931); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389 (S.D.N.Y. 1939), *aff'd mem.*, 113 F.2d 114 (2d Cir. 1940).

34. 30 F. Supp. at 391.

35. *Id.*

36. The reasoning of early standing cases like *Westmoreland* resembled that in early treble damage cases, which manifested an unrealistically narrow conception of causation in fact. See, e.g., *Turner Glass Corp. v. Hartford-Empire Co.*, 173 F.2d 49, 51-52 (7th Cir. 1949) (bankrupt plaintiff's injury not caused by admittedly illegal conspiracy); *Hart v. B.F. Keith Vaudeville Exch.*, 12 F.2d 341, 345 (2d Cir. 1926) (defendant's refusal to deal with plaintiff held due to plaintiff's "objectionable" behavior, rather than to illegal conspiracy); *Jack v. Armour Co.*, 291 F. 741 (8th Cir. 1923); *Noyes v. Parsons*, 245 F. 689, 696-97 (9th Cir. 1917) (failure of business held due to mismanagement, not to illegal merger, despite allegation that both merger and mismanagement were part of antitrust violation); *American Banana Co. v. United Fruit Co.*, 166 F. 261, 263-64 (1st Cir. 1908)

Thus, in the early 1950s, at the close of 60 years of private antitrust litigation, the direct injury rule was a rule of uncertain authority. In the stockholder and creditor cases brought under § 4, directness of injury had been a secondary and even unnecessary ground for decision. Employees had sued successfully to recover for injuries they had suffered as a result of harm to their corporate employers. And the cases confounding legal causation and factual causation made it doubtful that § 4 embodied any requirement other than causation in fact.³⁷ Yet notwithstanding the direct injury rule's unnecessary birth and ambiguous status as precedent, the lower federal courts began in the 1950s to treat directness of injury as the *sine qua non* of antitrust standing.³⁸ In 1955, for instance, the Second Circuit declared with apparent certitude that "[t]hose harmed only incidentally by anti-trust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed, or who have been directly harmed may recover."³⁹ Although the courts subsequently have been obliged to resolve standing issues in a variety of novel factual situations, the analysis of standing questions has, since the 1950s, con-

aff'd on other grounds, 213 U.S. 347 (1909) (dictum); *Ebeling v. Foster & Kleiser Co.*, 12 F. Supp. 489 (W.D. Wash. 1935); *Sullivan v. Associated Billposters & Distribs.*, 272 F. 323, 328 (S.D.N.Y. 1919); *Rice v. Standard Oil Co.*, 134 F. 464, 465 (D.N.J. 1905) (dictum). These causation-in-fact cases were often decided, like standing cases, on the pleadings; and later courts often cited them in finding a *legal* causation requirement under § 4. *See, e.g.*, *Gerli v. Silk Ass'n of America*, 36 F.2d 959, 960 (S.D.N.Y. 1929).

37. The pre-1950 cases interpreting the "by reason of" language of § 4 and not discussed above fall into two groups. In one group, courts held that a party injured as a result of damage to another could only recover for its own damage and not, say, for damages to the general public or to intermediate parties in a chain of causation. *See D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co.*, 236 U.S. 165, 174-75 (1915); *Tivoli Realty v. Paramount Pictures*, 80 F. Supp. 800, 806 (D. Del. 1948); *Westor Theatres, Inc. v. Warner Bros. Pictures Corp.*, 41 F. Supp. 757, 763 (D.N.J. 1941); *Folly Amusement Holding Corp. v. Randforce Amusement Corp.*, 32 F. Supp. 361 (S.D.N.Y. 1939); *Carbonic Gas Co. of America v. Pure Carbonic Co. of America*, 4 F. Supp. 992 (S.D.N.Y. 1933). In the other group, courts held that associations could not sue for antitrust injuries sustained by their members. *See Farmers Co-op Oil Co. v. Socony-Vacuum Oil Co.*, 133 F.2d 101 (8th Cir. 1942); *Alabama Indep. Serv. Station Ass'n v. Shell Petroleum Corp.*, 28 F. Supp. 386, 390 (N.D. Ala. 1939). Neither group of cases suggested any standing limitation under § 4; each reflected only the requirement of proof of injury.

38. The principal decisions promulgating the direct injury rule as the essential test of antitrust standing were *Bookout v. Schine Chain Theatres, Inc.*, 233 F.2d 292, 294-95 (2d Cir. 1958) (L. Hand, J.); *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956), *noted*, 69 HARV. L. REV. 575 (1956); and *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). These courts relied on pre-1950 cases that had used a directness of injury test. *See, e.g.*, *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956) (citing, *inter alia*, *Loeb and Westmoreland*).

39. *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

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sistently been carried out under the direct injury rule or some verbal variant thereof.⁴⁰

B. *Judicial Application of the Direct Injury Rule*

The direct injury rule, though easy to state, has in practice proven difficult to apply. The courts have struggled in vain to find a consistent method for deciding where in a chain of causation the line between direct and indirect injury should be drawn. Some courts have defined directness of injury as privity with an antitrust law violator.⁴¹ But most courts have rejected this approach because it denies standing to competitors⁴² and to indirect purchasers in a chain of distribution or supply.⁴³ Several other courts have sought to gauge directness by looking to the intent of the antitrust law violator.⁴⁴ The majority of courts faced with the standing question, however, have eschewed a priori definitions of directness. Instead, they have proceeded on the assumption that determinations of directness of injury must be made on a case-by-case basis and that "[n]o hard and fast rule" on directness of injury can be formulated.⁴⁵ Accordingly, in 1973 the Ninth

40. For discussion of the one significant doctrinal departure from the direct injury rule, see pp. 838-39 *infra*.

41. *E.g.*, *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Klein v. Lionel Corp.*, 237 F.2d 13, 15 (3d Cir. 1956); *City of Denver v. American Oil Co.*, 53 F.R.D. 620, 631 (D. Colo. 1971); *South Carolina Council of Milk Producers, Inc. v. Newton*, 241 F. Supp. 259, 263 (E.D.S.C. 1965), *rev'd*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

42. *E.g.*, *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 417 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 406 F. Supp. 224, 238 (S.D.N.Y. 1975), *rev'd on other grounds*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1116 (1977).

43. *E.g.*, *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582-83 (8th Cir.), *cert. denied*, 326 U.S. 734 (1949) (dictum); *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶ 74,680 (D. Conn. 1973); *Boshes v. General Motors Corp.*, 59 F.R.D. 589, 597-98 (N.D. Ill. 1973); *Missouri v. Stupp Bros. Bridge & Iron Co.*, 248 F. Supp. 169, 174 (W.D. Mo. 1965). It remains to be seen whether the Supreme Court's decision that indirect purchasers cannot sue under § 4, *Illinois Brick Co. v. Illinois*, 435 U.S. 26, 4611 (U.S. June 9, 1977), will give the privity doctrine a new lease on life outside chain-of-distribution cases.

44. *See, e.g.*, *Karscal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 365 (9th Cir. 1955) (plaintiff "was not only hit, but was aimed at"); *International Rys. of Cent. America v. United Brands Co.*, 358 F. Supp. 1363, 1372 (S.D.N.Y. 1973), *aff'd on other grounds*, 532 F.2d 231 (2d Cir. 1976) ("[t]he very concept [of 'target' of injury] implies intent"). *But see* *Midway Enterprises, Inc. v. Petroleum Marketing Corp.*, 375 F. Supp. 1339, 1342 (D. Md. 1974) (intent to injure particular plaintiff irrelevant in standing inquiry). As these cases suggest, inquiry into intent has been particularly prominent in the so-called "target area" cases, see pp. 830-32 *infra*—although intent is here part of a legal metaphor rather than a necessary element of a § 4 claim. *See* note 98 *infra*.

45. *Productive Investments, Inc. v. Trico Prods. Corp.*, 224 F.2d 678, 680 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956). *See, e.g.*, *Cromar Co. v. Nuclear Materials & Equip. Corp.*, 543 F.2d 501, 508 (3d Cir. 1976); *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312, 317 (E.D. Pa. 1953), *aff'd*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

Circuit, after an extensive review of the leading standing cases, concluded with some understatement that "no 'bright line' has yet emerged" to distinguish those with antitrust standing from those without it.⁴⁶

Although the courts generally have tried to conduct a case-by-case inquiry into antitrust standing, the cases have tended to rely on one or both of two broad approaches for ascertaining directness of causation. The first might be called the "categorization" approach, since under it plaintiffs are held to be directly or indirectly injured according to the descriptive category into which they fall. The second has been called the "target area" approach, since under it plaintiffs are held to be directly injured only if they are determined to be within the "target area" of the alleged antitrust violation. While it might appear that either approach would add refinement and certainty to antitrust standing decisions, each doctrine has been inconsistently, if not contradictorily, applied. Conflicts exist not only among courts using different approaches but also among courts using the same approach.

1. *The "Categorization" Approach to Direct Injury*

Under the "categorization" approach, the lower federal courts have decided standing questions by drawing analogies to plaintiffs in the early cases that held various categories of plaintiffs (*e.g.*, competitors and stockholders) either to have standing or to lack it. New cases are either fitted into the old categories or placed into newly created ones. Yet the standing of plaintiffs in these new categories is rarely determined by reference to the policy goals of § 4. Often, the courts inquire merely whether the new category "more nearly approaches" a category whose status is perceived as settled by prior cases.⁴⁷

The categorization approach has been plagued by two defects: first, inconsistencies in the characterization of similarly situated plaintiffs; second, disagreements among and within circuits over whether similarly characterized plaintiffs are directly injured. Two cases may be

46. *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 125 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). See *Cromar Co. v. Nuclear Materials & Equip. Corp.*, 543 F.2d 501, 508 (3d Cir. 1976) (cases to date "create no binding test that is determinative of standing in each particular case").

47. *Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos.*, 382 F.2d 925, 929 (10th Cir. 1967). See, *e.g.*, *Long Island Lighting Co. v. Standard Oil Co.*, 521 F.2d 1269, 1274 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976) (plaintiff's category "at least equally [as] remote as" previously established categories). For an early example of this analogical approach, see *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389, 391 (S.D.N.Y. 1939), *aff'd per curiam*, 113 F.2d 114 (2d Cir. 1940).

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taken to illustrate the first, or characterization, problem: *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*⁴⁸ and *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*⁴⁹ Plaintiffs in both cases were suppliers that were damaged by reduced sales to buyers operating in markets that the defendants had attempted to monopolize. In *Volasco*, the plaintiff supplied refined asphalt to a buyer in the roofing materials industry. The plaintiff was denied standing because its injury was “too far removed from the direct injury” to its buyer.⁵⁰ In *Bergjans Farm*, the plaintiff was a milk processor that supplied a milk distributor injured by a fellow distributor’s predatory pricing. The *Bergjans Farm* defendant happened to be an integrated concern involved in both milk distribution and milk processing.⁵¹ Although this fact was not a necessary element of the predatory pricing violation by the defendant distributor,⁵² the court was able to seize on it to characterize the plaintiff as a competitor of the defendant, rather than as a supplier to the injured milk distributor. Accordingly, the court granted the plaintiff standing in its capacity as competitor even though it would have lacked standing in its capacity as supplier.⁵³ But since verbal gymnastics could not alter the fact that the plaintiff-competitor was still a supplier, the *Bergjans Farm* court felt obliged to distinguish the status of the *Volasco* plaintiff. It characterized the *Volasco* plaintiff as a “raw material” supplier rather than as a “finished product” supplier⁵⁴—a distinction utterly lacking, of course, in anti-trust significance.

Problems of characterization have reached their zenith in employee standing cases. Standing determinations have often depended on whether plaintiffs could be characterized as independent businessmen or agents rather than as salaried employees of the defendants.⁵⁵ One

48. 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

49. 368 F.2d 679 (8th Cir. 1966).

50. 308 F.2d at 395.

51. See *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476, 478-81 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966).

52. The plaintiff proved that predatory pricing in sales made to retail stores by the defendant injured the plaintiff’s distributor and thereby the plaintiff itself. *Id.* at 479-88. This predatory pricing was indeed subsidized by the defendant’s lowered profit margins in milk processing, *id.* at 485, but the allegations of predatory pricing concerned the distribution level, and the fact of vertical integration was irrelevant to the illegality of that violation.

53. 368 F.2d at 688-89.

54. *Id.* at 688. The court also distinguished *Volasco* by noting that in *Bergjans Farm* the plaintiff’s processed milk was sold through a single distributor. *Id.*

55. Compare *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 97 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976) (corporate officer *qua* employee has no standing) and *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 730 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973) (salaried employees lack standing; not “quasi-businessmen”) with *Bravman v. Bassett Furniture*

court has even held that although an employee lacked standing *qua* employee, she could still recover "loss of salary and other employee benefits"⁵⁶ because she could be characterized in a completely different way. Finding that her loss of income impaired her potential success as an entrepreneur in another enterprise, the court held that she could recover her employee damages because she had standing in her " 'entrepreneurial' " capacity.⁵⁷

Conflicts among the circuits over directness of injury to similarly characterized plaintiffs are particularly numerous and irreconcilable. Illustrative of these conflicts are suits by employees, suits by lessors, and suits by parties in the chain of distribution and supply. Several circuits grant employees standing to sue for loss of income resulting from antitrust violations that diminish competition in their employers' industries. Other circuits, on similar facts, treat such employee injuries as too "remote" for recovery. An example of a case granting standing to an employee is *Dailey v. Quality School Plan, Inc.*,⁵⁸ where the Fifth Circuit held that a commissioned sales agent, fired after an illegal monopolistic acquisition of his employer, had standing to prove that his injury was caused by the acquisition, because his injury was "direct" rather than "incidental."⁵⁹ In contrast, in *Reibert v. Atlantic Richfield Co.*,⁶⁰ the Tenth Circuit ruled that employees were *not* directly injured when they were fired as a result of an allegedly illegal merger.⁶¹ Insofar as the plaintiffs in each case were sellers of labor to industries, and allegedly lost their jobs as a result of an illegal lessening of competition, their injuries were no less "direct" in one case

Indus., Inc., 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,300, at 70,971 n.7 (3d Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3780 (U.S. May 13, 1977) (No. 76-1597) (furniture manufacturer's sales representative has standing; characterized in dictum as more like agent than employee) and *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 486-87 (5th Cir. 1967) (commission sales employee has standing; court follows sales agent cases). But see *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 334 (7th Cir. 1967) (even if work is not "an independent business enterprise, . . . the interest invaded by a wrongful act resulting in loss of employment is so closely akin to the interest invaded by impairment of one's business as to be indistinguishable"). In *Reibert*, *Dailey*, and *Nichols* the characterization of the plaintiffs depended in part on whether their loss of employment was considered an injury to "business or property." Reliance on this language from § 4, however, was simply a standing determination under a different guise. See note 8 *supra*.

56. *Bowen v. Wohl Shoe Co.*, 389 F. Supp. 572, 579 (S.D. Tex. 1975).

57. *Id.* See *Broyer v. B.F. Goodrich Co.*, 415 F. Supp. 193, 196 (E.D. Pa. 1976) (no standing "*qua* employee," but finding standing because the injury alleged was "the termination of employment as a territory sales manager and the concomitant loss of commissions and bonuses") (footnote omitted).

58. 380 F.2d 484 (5th Cir. 1967).

59. *Id.* at 487-88.

60. 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973).

61. The court held that plaintiffs' injuries were "too indirect to allow standing." *Id.* at 732.

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than in the other. The Seventh Circuit follows the Fifth Circuit in allowing employee antitrust lawsuits,⁶² while district courts in the Second Circuit disagree on the antitrust standing of employees.⁶³ Thus, employee standing to seek redress for antitrust injuries is often a function of the fortuitous availability of different forums.⁶⁴

The categorization approach has produced similar inter-circuit conflict in suits by lessors. The question typically presented is whether a lessor has standing to sue a third party whose anticompetitive conduct has reduced the lessor's rentals by injuring his tenant. The Second and Third Circuits have labeled such rental-diminution injuries to lessors too "remote" for antitrust standing.⁶⁵ In *Harrison v. Paramount Pictures, Inc.*,⁶⁶ for example, a theater owner sued for a reduction in

62. See *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 334 (7th Cir. 1967).

63. Compare *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 1974-1 Trade Cas. ¶ 74,974 (S.D.N.Y. 1974), *rev'd on other grounds*, 534 F.2d 1036 (2d Cir. 1976) (corporate employee who was also guarantor of employer's obligations has standing) and *Vandervelde v. Put & Call Brokers & Dealers Ass'n*, 344 F. Supp. 118, 153-54 (S.D.N.Y. 1972) (president of securities firm has standing to recover salary loss as employee after he was illegally suspended by dealer association) with *Hans Hansen Welding Co. v. American Ship Bldg. Co.*, 1973-2 Trade Cas. ¶ 74,739 (S.D.N.Y. 1973) (executive officers of closely held corporation had no standing to recover lost salary and bonuses where it was "highly probable" that they would be compensated if employer recovered treble damages) and *Bywater v. Matshushita Elec. Indus. Co.*, 1971 Trade Cas. ¶ 73,759 (S.D.N.Y. 1971) (rank and file employees and labor union denied standing because their injuries were "incidental" and "remote"). In *Michelman*, the court remarked upon a "recent trend . . . to accord to corporate employees standing to sue for salary lost as the result of injury to their employers under the antitrust laws." 1974-1 Trade Cas. at 96,322. The trend is hard to discern.

64. For other, seemingly irreconcilable, categorization decisions in cases brought by employees following antitrust injury to their employers, see *Martens v. Barrett*, 245 F.2d 844, 846 (5th Cir. 1957) (dictum) (no standing); *Tugboat, Inc. v. Seafarers Int'l Union*, 1975-2 Trade Cas. ¶ 60,610 (S.D. Ala. 1975), *rev'd sub nom. Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176-77 (5th Cir. 1976) (determination of no standing reversed on appeal); *Freeman v. Eastman-Whipstock, Inc.*, 390 F. Supp. 685 (S.D. Tex. 1975) (dictum) (standing); *Vermilion Foam Prods. Co. v. General Elec. Co.*, 386 F. Supp. 255 (E.D. Mich. 1974) (no standing); *Wilson v. Ringsby Truck Lines*, 320 F. Supp. 699 (D. Colo. 1970) (standing); *Centanni v. T. Smith & Son*, 216 F. Supp. 330 (E.D. La.), *aff'd per curiam*, 323 F.2d 363 (5th Cir. 1963) (no standing); *Rossi v. McCloskey & Co.*, 149 F. Supp. 638 (E.D. Pa. 1957) (no standing); *Miley v. John Hancock Mut. Life Ins. Co.*, 148 F. Supp. 299, 303 (D. Mass.), *aff'd*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957) (no standing); and *Walder v. Paramount Publix Corp.*, 132 F. Supp. 912 (S.D.N.Y. 1955) (no standing). Cf. *Schroeter v. Ralph Wilson Plastics, Inc.*, 49 F.R.D. 323, 326 (S.D.N.Y. 1969) (determination of employee's standing as "victim" of violation must await development of facts at trial); *Data Digests, Inc. v. Standard & Poor's Corp.*, 43 F.R.D. 386 (S.D.N.Y. 1967) (same).

65. *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518, 519 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956) (per curiam); *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312, 317 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

66. 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

rentals under a percentage lease, alleging a conspiracy among movie distributors and, apparently, his tenant to deny first-run movies to the theater he leased. The Third Circuit reasoned that, as a matter of law, this injury was so "remote" and "uncertain" as to deny the lessor standing to recover damages.⁶⁷ The Seventh and Ninth Circuits have reached the opposite result. In parallel circumstances of conspiracy among distributors and non-defendant lessees to allocate first-run movies only to certain theaters, these courts have held that lessors of the disfavored theaters are directly injured and hence entitled to sue.⁶⁸ In *Congress Building Corp. v. Loew's, Inc.*,⁶⁹ for example, the Seventh Circuit flatly rejected the *Harrison* holding, treating directness of injury as a factual rather than a legal question.⁷⁰

67. *Id.* at 316-17. The *Harrison* opinion implies, but does not expressly state, that the tenant was an alleged co-conspirator. *See id.* (any rights of landlord injured by conspiracy "directed against or participated in by the tenant" were "remote" and "uncertain") (emphasis supplied). The court in *Congress Bldg. Corp. v. Loew's, Inc.*, 246 F.2d 587 (7th Cir. 1957), drew the same inference. *See id.* at 589. It is ironic that the *Harrison* rule barring suit by lessors as "remotely" injured parties apparently arose from a case in which the lessor had actually been "directly" injured by his lessee's anticompetitive conduct. In *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956) (per curiam), the plaintiff lessor's injury was likewise held to be indirect despite the alleged participation of his tenant, a defendant, in the alleged conspiracy. *See id.* at 519 (Biggs, C.J., dissenting from denial of rehearing).

68. *Congress Bldg. Corp. v. Loew's, Inc.*, 246 F.2d 587 (7th Cir. 1957); *Steiner v. 20th Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956). *See Sandige v. Rogers*, 256 F.2d 269, 277-78 (7th Cir. 1958) (Hastings, J., concurring) (standing of non-operating lessors acknowledged as law of Seventh Circuit).

69. 246 F.2d 587 (7th Cir. 1957).

70. *Id.* at 593-95. In *Steiner v. 20th Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956), the Ninth Circuit, holding on facts very similar to those in *Harrison* that a lessor had standing to pursue an antitrust claim, seemed to blur the distinction between legal and factual causation. *See id.* at 193 (distinguishing *Harrison* and similar cases on ground that *Steiner* lessor's complaint alleged wrongful acts that "operated directly upon the [plaintiff]").

The law of lessor's antitrust standing is further complicated by the Supreme Court's reversal of a lower court decision that an injured lessor lacked standing to sue because of his lessor status. In *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), the Court avoided any reference to the categorization problem in noting that the plaintiff, who leased property to his own closely held corporation, could sue for "competitive harm" caused by the defendant's admittedly illegal price discrimination. Without endorsing use of the direct injury rule, the Court simply indicated that the plaintiff's business interests fell within the direct injury rule that had been used by the court below. *Id.* at 649-50 (dictum) (construing opinion in *Standard Oil Co. v. Perkins*, 396 F.2d 809, 815-16 (9th Cir. 1967), *rev'd*, 395 U.S. 642 (1969)). Yet in subsequent rulings the lower federal courts have continued to deny standing to lessors on the ground that their injuries are categorically "too remote." *See, e.g., Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295-96 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

For other cases dealing with lessors' standing to sue for lessee-derived injuries, see *Lieberthal v. North Country Lanes, Inc.*, 221 F. Supp. 685 (S.D.N.Y. 1963), *aff'd*, 332 F.2d 269 (2d Cir. 1964) (alternative holding) (lessors lack standing); *Erone v. Skouras Theatres Corp.*, 166 F. Supp. 621 (S.D.N.Y. 1957) (lessor denied standing because only incidentally injured); and *Tower Bldg. Corp. v. Loew's, Inc.*, 1956 Trade Cas. ¶ 68,537 (N.D. Ill. 1956) (lessor granted standing on basis of entitlement to percentage of lessee's gross receipts).

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A third example of the failure of the categorization approach is the series of cases analyzing plaintiffs' recovery rights as they are affected by "passing-on" in chains of distribution and supply. Although the law in this area has been settled by the Supreme Court's decision in *Illinois Brick Co. v. Illinois*,⁷¹ an examination of its historical development underscores the problems inherent in the direct injury rule and provides the background for a critique of the *Illinois Brick* decision in Part IV.

Before the ascendancy of the direct injury rule, the problem of passing-on was thought to present only a factual question: Who had actually paid the illegal overcharge? In the *Oil Jobber Cases* of the 1940s, for example, gasoline distributors were denied recovery because they could not demonstrate that they had not passed on to their service station customers the defendant oil companies' conspiratorial price increases.⁷² The courts in these cases found, as a factual rather than legal matter,⁷³ that the plaintiffs' presumed passing-on of the price increases under guaranteed mark-up contracts negated the possibility of establishing injury, a required element of a private antitrust claim under § 4. The opinions also noted in dicta that more remote purchasers in the chain of distribution would have a right of action against the defendants if they could prove that they had paid higher prices without, in turn, passing them on.⁷⁴

Despite these and subsequent treatments of passing-on as a question

71. 45 U.S.L.W. 4611 (U.S. June 9, 1977).

72. *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941); *McCain v. Socony-Vacuum Oil Co.*, 64 F. Supp. 12 (W.D. Mo. 1945); *Clark Oil Co. v. Phillips Petroleum Co.*, 56 F. Supp. 569 (D. Minn. 1944), *aff'd*, 148 F.2d 580 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945); *Leonard v. Socony-Vacuum Oil Co.*, 42 F. Supp. 369 (W.D. Wis.), *appeal dismissed*, 130 F.2d 535 (7th Cir. 1942); *H.E. Miller Oil Co. v. Socony-Vacuum Oil Co.*, 37 F. Supp. 831 (E.D. Mo. 1941). See Comment, *Proof Requirements in Anti-Trust Suits: The Obstacles to Treble Damage Recovery*, 18 U. CHI. L. REV. 130, 136-38 (1950) (*Oil Jobber Cases* ignored potential volume losses and enforcement rationale of treble damages). In the one passing-on case decided prior to the *Oil Jobber Cases*, the question of passing-on was also treated as a matter of fact, not law. See *Straus v. Victor Talking Mach. Co.*, 297 F. 791, 800-04 (2d Cir. 1924).

73. See, e.g., *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967, 971 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944) (plaintiff "failed to prove any loss"); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747, 750-51 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941) ("failure to show lessened margins"); *McCain v. Socony-Vacuum Oil Co.*, 64 F. Supp. 12, 14 (W.D. Mo. 1945) (existence of injury "cannot be reached on a motion for a summary judgment").

74. See *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945) (§ 4 rights "not confined to persons in privity with the wrongdoer"); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967, 971 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944) (plaintiff need not sue the person to whom he has paid illegal prices and may recover from any defendant if he shows the conspiracy's direct effect is to injure him).

of fact for determination by trial courts,⁷⁵ many courts began in the 1960s to treat passing-on as a question of law. In two of the celebrated electrical equipment price-fixing cases of the early 1960s, electricity consumers were held to lack standing to seek passed-on damages from electrical equipment manufacturers. Their alleged injuries, suffered through rate increases by electric utility companies, were regarded as too "remote"⁷⁶ from the locus of the conspiracy.⁷⁷

The Supreme Court's 1968 passing-on decision in *Hanover Shoe*⁷⁸ increased the fact-law confusion. The Court held that a pass-on defense was unavailable as a matter of law against the so-called *direct* purchaser, the first purchaser in the chain of distribution.⁷⁹ The

75. See *Kidd v. Esso Standard Oil Co.*, 295 F.2d 497, 498 (6th Cir. 1961) (no proof of injury); *Miller Motors, Inc. v. Ford Motor Co.*, 252 F.2d 441, 448 (4th Cir. 1958) (no proof that volume reductions were caused by higher prices passed on to ultimate consumers); *Wolfe v. National Lead Co.*, 225 F.2d 427, 432-34 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955) (no proof of injury because higher prices passed on to ultimate consumers); *Banana Distribs., Inc. v. United Fruit Co.*, 162 F. Supp. 32, 47, 48 (S.D.N.Y. 1958), *rev'd on other grounds*, 269 F.2d 790 (2d Cir. 1959) (proof of lost profits and extent to which alleged overcharges were passed on are questions for jury); *Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors & Publishers*, 80 F. Supp. 888, 896 (S.D.N.Y. 1948) (no proof of failure by plaintiff to pass on).

76. *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564, 567 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963); *City of Philadelphia v. Westinghouse Elec. Corp.*, 1961 Trade Cas. ¶ 70,143, at 78,553 (E.D. Pa. 1961), *aff'd on other grounds sub nom. Philadelphia Elec. Co. v. Westinghouse Elec. Corp.*, 308 F.2d 856 (3d Cir. 1962), *cert. denied*, 372 U.S. 936 (1963). These courts noted, however, that state utility law provisions for refunds of excessive charges could be used by consumers to recover their share of any damages won by the utility companies in litigation against the equipment manufacturers. See, e.g., *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 207 F. Supp. 252, 254-56 (N.D. Ill. 1962), *aff'd*, 315 F.2d 564 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963).

Relying in part on these holdings, the courts denied the manufacturers' pass-on defense in suits brought by the utilities lest the manufacturers be insulated from all liability. See *Ohio Valley Elec. Corp. v. General Elec. Co.*, 244 F. Supp. 914, 951 (S.D.N.Y. 1965); *Public Utility Dist. No. 1 v. General Elec. Co.*, 230 F. Supp. 744, 747 (W.D. Wash. 1964); *Atlantic City Elec. Co. v. General Elec. Co.*, 226 F. Supp. 59, 70-71 (S.D.N.Y.), *appeal denied*, 337 F.2d 844 (2d Cir. 1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 225 F. Supp. 332, 335 (N.D. Ill. 1963), *aff'd*, 335 F.2d 203 (7th Cir. 1964).

77. Several chain-of-distribution cases at this time also created a potential for characterization confusion, of the sort described *supra* at pp. 820-22. Some held that intermediate purchasers that were "consumers" of one item in the course of manufacturing other items had standing; others characterized intermediate purchasers as "middlemen," i.e., resellers of the same product, and denied standing. Compare *Freedman v. Philadelphia Terminals Auction Co.*, 301 F.2d 830, 834 (3d Cir. 1962) (intermediate purchasers classified as middlemen without standing) with *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 185 F. Supp. 826, 831 (M.D. Pa.), *aff'd per curiam*, 281 F.2d 481 (3d Cir.), *cert. denied*, 364 U.S. 901 (1960) (intermediate purchaser classified as consumer with standing) and *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13, 28-29 (E.D. Pa. 1970), *aff'd per curiam sub nom. Mangano v. American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971) (intermediate purchasers characterized as consumers, not middlemen).

78. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

79. *Id.* at 489. The Court reasoned that the direct purchaser is injured as long as the price he pays the seller is illegally high: regardless of the steps he takes in response to

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decision was interpreted by a number of lower courts as implicitly denying standing to *indirect* purchasers. These courts denied standing because of concern that defendants might be found liable to both indirect and direct purchasers for injury suffered only by the former.⁸⁰ More recently, however, other courts refused to find an implied direct purchaser limitation in the language or holding of *Hanover Shoe* and treated passing-on in suits by ultimate consumers as a question of fact presenting solvable tracing problems.⁸¹ Where direct and indirect

the overcharges (e.g., increasing price to maintain profit margins), "his profits would be greater were his costs lower." *Id.* The Court also noted that, as a practical matter, the defendant would face "nearly insuperable difficulty" in demonstrating that the plaintiff would not have sold at the same price even if the cost of defendant's input had been lower. *Id.* at 492-93. *But cf.* *Minnesota v. United States Steel Corp.*, 438 F.2d 1380, 1382 (8th Cir. 1971) (passing-on, by state government to federal government, of defendant's illegal overcharge for highway steel presented mixed question of law and fact).

The *Hanover Shoe* decision left open the possibility that a pass-on defense might be permissible where an overcharged buyer had a "pre-existing 'cost-plus' contract" or similar arrangement with the seller. 392 U.S. at 494. *See* *Obron v. Union Camp Corp.*, 355 F. Supp. 902 (E.D. Mich. 1972), *aff'd per curiam*, 477 F.2d 542 (6th Cir. 1973) (passing-on defense allowed against a first purchaser whose profit margin was protected by seller-defendant's price list; reliance on *Hanover Shoe* exception for direct purchasers with cost-plus contracts).

80. *E.g.*, *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 481, 483-85 (S.D.N.Y. 1973) (indirect purchasers once removed could not sue); *In re Western Liquid Asphalt Cases*, 350 F. Supp. 1369, 1372 (N.D. Cal.), *rev'd*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974) ("immediate" but not "remote" purchasers may sue); *Balmac, Inc. v. American Metal Prods. Co.*, 1972 Trade Cas. ¶ 74,235 (N.D. Cal. 1972); *City of Akron v. Laub Baking Co.*, 1972 Trade Cas. ¶ 73,930 (N.D. Ohio 1972) (only direct purchasers in proposed class could sue); *Travis v. Fairmount Foods Co.*, 346 F. Supp. 679 (E.D. Pa. 1972); *City of Denver v. American Oil Co.*, 53 F.R.D. 620, 631 (D. Colo. 1971); *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13, 30 (E.D. Pa. 1970), *aff'd per curiam sub nom.* *Mangano v. American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971); *United Egg Producers v. Bauer Int'l Corp.*, 312 F. Supp. 319, 321 (S.D.N.Y. 1970).

A number of these courts, in denying standing to "indirect" purchasers, relied on Justice Holmes's dictum in *Southern Pac. Co. v. Darnell-Taenzler Lumber Co.*, 245 U.S. 531, 533-34 (1918), that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss." *See, e.g.*, *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 481, 484 (S.D.N.Y. 1973). *Darnell-Taenzler*, however, was decided under the Interstate Commerce Act's special provisions for reparations to shippers, at a time when privity was generally required for tort liability. Most courts have declined to accord either the case, or the now-discredited privity doctrine, any significance in interpretations of § 4 of the Clayton Act. *E.g.*, *Boshes v. General Motors Corp.*, 59 F.R.D. 589, 594-95 (N.D. Ill. 1973). *See* Comment, *Mangano and Ultimate-Consumer Standing: The Misuse of the Hanover Doctrine*, 72 COLUM. L. REV. 394, 410 n.95 (1972). *But see* note 43 *supra*.

81. *E.g.*, *Illinois v. Ampress Brick Co.*, 536 F.2d 1163, 1166-67 (7th Cir. 1976), *rev'd sub nom.* *Illinois Brick Co. v. Illinois*, 45 U.S.L.W. 4611 (U.S. June 9, 1977); *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *Carnivale Bag Co. v. Slide-Rite Mfg. Corp.*, 395 F. Supp. 287 (S.D.N.Y. 1975); *National Auto Brokers Corp. v. General Motors Corp.*, 376 F. Supp. 620, 632 (S.D.N.Y. 1974); *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶ 74,680 (D. Conn. 1973); *Boshes v. General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973). For pre-*Hanover* opinions taking

purchasers sued simultaneously, these courts avoided duplicative recoveries by direct purchasers simply by requiring an apportionment of damages among the different plaintiffs.⁸²

Owing to this division of views over the correct interpretation of *Hanover Shoe*,⁸³ the standing of indirect purchasers to seek antitrust damages in the period before the *Illinois Brick* decision exhibited the same syndrome of hopelessly contradictory holdings apparent in the other standing categories.⁸⁴ Standing was denied to consumers who bought bread from supermarkets that in turn had bought from the defendant conspirators.⁸⁵ Yet standing was granted to state governments that bought door hardware through construction contractors, who had bought from hardware distributors, who had in turn bought from the defendant manufacturers.⁸⁶

The Supreme Court's ruling in *Illinois Brick* has brought to a close the controversy over the standing of purchasers in the chain of distribution. Despite its recognition that all purchasers may well suffer injury, the Court held that, with minor exceptions, indirect purchasers as a matter of law lack "injury" within the meaning of § 4.⁸⁷ Yet this

this approach, see *Armco Steel Corp. v. North Dakota*, 376 F.2d 206, 210-11 (8th Cir. 1967) (injury to indirect purchaser a factual question); and *Missouri v. Stupp Bros. Bridge & Iron Co.*, 248 F. Supp. 169, 177 (W.D. Mo. 1965) (passing-on a factual issue not affecting standing). Cf. *West Virginia v. Chas. Pfizer, Inc.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) (consumer recovery approved where single intermediate purchaser used percentage mark-up system).

82. *E.g.*, *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 201 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974).

83. The split in the circuits over the standing of indirect purchasers under § 4 was noted in *Illinois Brick Co. v. Illinois*, 45 U.S.L.W. 4611, 4613 n.8 (U.S. June 9, 1977).

84. This disagreement over the applicability of an immediate purchaser barrier to proof of damage claims based on alleged passing-on survived the Supreme Court's 1969 decision in *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969). There the Court ruled that no "artificial limitation" should preclude the plaintiff from showing that discriminatory prices had been passed through three levels of distribution in order to favor his competitors in violation of the Robinson-Patman Act. *Id.* at 648.

Fewer than half of the post-*Perkins* cases cited in note 81 *supra* referred to *Perkins* in granting or denying standing to indirect purchasers. The reason why *Perkins* was not conclusive as to the standing of plaintiffs injured by passing-on is that the case arose under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), rather than under § 4. 395 U.S. at 644, 646.

85. *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 481 (S.D.N.Y. 1973).

86. *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶ 74,680 (D. Conn. 1973). For an example of similar contradiction in a different factual context, compare *In re Antibiotics Antitrust Actions*, 333 F. Supp. 310 (S.D.N.Y. 1971) (standing of remote purchasers—buyers of finished animal feed products containing antibiotic drug—denied as a matter of law) with *In re Antibiotic Antitrust Actions*, 333 F. Supp. 313 (S.D.N.Y. 1971) (standing of remote purchasers—health insurers and others similarly situated—to be decided only after full development of facts).

87. The Court retained a single, narrow class of exceptions to its exclusion of indirect purchasers: such purchasers may sustain § 4 injuries if they purchase through "cost-plus" contracts or through other arrangements between the direct purchaser and subsequent purchasers that supersede "market forces." 45 U.S.L.W. at 4615 & n.16.

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decision only perpetuates the arbitrariness of the results flowing from a categorization test for purchasers at different levels in a chain of distribution. Those consumers who buy directly from antitrust violators⁸⁸ will still be able to recover for their injuries, while those buying through intermediaries will not. Indeed, the *Illinois Brick* decision creates distinctions among direct and indirect purchasers situated at any given level in a chain of distribution, irrespective of the relative size of their injuries.⁸⁹ Although the endorsement of a direct purchaser category in *Illinois Brick* gives this area of antitrust standing the guise of consistency, in fact it serves only to maintain the familiar arbitrary disparities.

Thus, in suits by indirect purchasers in chains of distribution, as in suits by employees and lessors, the treatment of similarly situated plaintiffs is erratic.⁹⁰ The circuits are in open conflict; in some cases,

88. *E.g.*, *Weinberg v. Federated Dep't Stores, Inc.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,250 (N.D. Cal. 1977), *appeal docketed*, No. 77-1547 (9th Cir. Jan. 26, 1977) (consumers buying from retail department stores; standing denied on other grounds).

89. In the *Illinois Brick* case itself, for example, some end-purchaser governmental plaintiffs purchased bricks directly, others indirectly. 45 U.S.L.W. at 4613 n.6. For other cases in which the *Illinois Brick* holding would bifurcate the class of plaintiffs, see *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 194-95 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974) (direct and indirect governmental purchases of asphalt by some plaintiffs); and Complaint at ¶ 14, *Rochdale Village, Inc. v. Arabian-American Oil Co.*, No. 75-C-135, and Complaint at ¶ 16, *Lefrak v. Arabian-American Oil Co.*, No. 74-C-1700, *consolidated in Lefrak v. Arabian Am. Oil Co.*, 405 F. Supp. 597 (E.D.N.Y. 1975) (on file with *Yale Law Journal*) (direct and indirect purchasers of heating oil in consolidated companion suits).

90. Numerous other "categories" of antitrust plaintiffs exist, in addition to employees, lessors, and indirect purchasers, and the standing of plaintiffs in some of these categories admits of no greater certainty than that in the categories discussed in text. The following sample is representative: (i) *Patentees*: see *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956) (patentee had no standing to recover from licensee's competitor for loss of royalties on sales that licensee might have made but for competitor's alleged antitrust violations); *Moraine Prods. v. Atlas Chem. Indus., Inc.*, 1972 Trade Cas. ¶ 73,807 (N.D. Ill. 1971) (standing); *SCM v. Radio Corp. of America*, 276 F. Supp. 373 (S.D.N.Y. 1967), *aff'd*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969) (no standing); *La Chappelle v. United Shoe Mach. Corp.*, 90 F. Supp. 721 (D. Mass. 1950) (standing). (ii) *Other licensors*: see *Schwartz v. Broadcast Music, Inc.*, 180 F. Supp. 322 (S.D.N.Y. 1959) (copyright holders had standing to press some claims but not others). (iii) *Franchisors*: see *Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos.*, 382 F.2d 925 (10th Cir. 1967) (franchisor had no standing to recover for insurance companies' alleged restraint of trade in sponsoring certain appraisers to exclusion of franchisees); *Plum Tree, Inc. v. Rouse Co.*, 58 F.R.D. 373 (E.D. Pa. 1972) (*dicta*) (no standing). (iv) *Suppliers of injured parties*: see *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963) (supplier of asphalt to roofing materials company had no standing to recover damages resulting from antitrust injuries to its customer); *Al Barnett & Son v. Outboard Marine Corp.*, 64 F.R.D. 43 (D. Del. 1974) (no standing); *Minersville Coal Co. v. Anthracite Export Ass'n*, 335 F. Supp. 360 (M.D. Pa. 1971) (no standing); *Denver Petroleum Corp. v. Shell Oil Co.*, 306 F. Supp. 289, 309 (D. Colo. 1969) (no standing); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956) (no standing).

they are beset with internal strife. And even where a seeming consistency has been impressed on the law, the practical results under the "categorization" approach are likely to remain contradictory.

2. *The "Target Area" Approach to Direct Injury*

Perhaps as a reaction to the arbitrariness that the categorization approach has fostered, a number of courts have adopted what has been called the "target area" test of directness of antitrust injury.⁹¹ Plaintiffs who are held to be "targets" of a violation, or to be within its "target area," are granted standing to sue, while those not "targets," or outside the "target area," are precluded by indirectness from proving their claims.⁹² Although this test is often said to be distinct from the direct injury rule,⁹³ in practice most courts treat the target area rubric as a test for directness of injury.⁹⁴

The target area approach is riddled with inconsistencies. Originally, a § 4 plaintiff was held to lie within the target area of an antitrust violation if he was within "that area of the economy which is endangered by a breakdown of competitive conditions in a particular

(v) *Associations suing for their own damages*: see *Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co.*, 497 F.2d 1151 (2d Cir.), *cert. denied*, 419 U.S. 968 (1974) (unincorporated association had no standing to recover for decrease in membership and dues suffered as a result of defendants' allegedly illegal termination of contracts with insurance agents); *Esposito v. Mister Softee, Inc.*, 1976-1 Trade Cas. ¶ 60,786 (E.D.N.Y. 1976) (no standing); cf. *Buckley Towers Condominium, Inc. v. Buchwald*, 533 F.2d 934 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 1611 (1977) (standing doctrine confused with real party in interest rule). (vi) *Purchasers from companies illegally acquired in violation of § 7 of the Clayton Act*: see *Rayco Mfg. Co. v. Dunn*, 234 F. Supp. 593 (N.D. Ill. 1964) (no standing).

91. See, e.g., *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 127-29 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973) (collecting target area cases and calling target area approach superior to categorization approach, which is "unsatisfactory insofar as it transforms judicial inquiry into a mere search for labels"); *Midway Enterprises, Inc. v. Petroleum Marketing Corp.*, 375 F. Supp. 1339, 1343 (D. Md. 1974) (target area test "far more logical and flexible" than direct injury categories, which exalt "form over substance").

92. See *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955).

93. See, e.g., *Sherman*, *supra* note 10, at 382-91; *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 126-29 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *Midway Enterprises, Inc. v. Petroleum Marketing Corp.*, 375 F. Supp. 1339, 1341-44 (D. Md. 1974).

94. See, e.g., *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1148 (6th Cir. 1975); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 418 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); *Reiter v. Sonotone Corp.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,360, at 71,268 (D. Minn. 1977). The Ninth Circuit originally developed the target area concept as a test for directness of injury. See *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955); *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

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industry.”⁹⁵ Perhaps not surprisingly, the effort to ascertain which parties are actually within the “endangered” area has spawned numerous reformulations of the target area test, for any person in any market who is in fact adversely affected by an antitrust violation is arguably within a sector threatened by a “breakdown of competitive conditions.”⁹⁶ The extrapolative possibilities of the ballistic metaphor, of course, are almost limitless, and the courts have not been lax in exploring them. Judicial reformulations of the test have generated holdings that a party was “‘hit’ . . . squarely” and not merely “sideswiped or struck by a carom shot;”⁹⁷ plaintiffs also have been held to be “not even on the firing range” of the alleged violation.⁹⁸ In the Ninth Circuit, the test has often been restated as an index of foreseeability: a § 4 plaintiff is within the target area of a violation if he is “in the area which it could reasonably be foreseen would be affected” by an antitrust salvo.⁹⁹

Interchangeable use by some courts of the terms “target” and “target area,”¹⁰⁰ as well as suggestions that an actual “target” must be “aimed

95. *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

96. *See International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n*, 483 F.2d 384, 397-98 (3d Cir. 1973), *amended*, 494 F.2d 1353 (3d Cir. 1974) (“the ‘target’ theory logically can encompass any claim of damage” in the area affected by the conspiracy).

97. *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073, 1076 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

98. *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 129 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). *See Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1361 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 1108 (1977) (“One need not be sitting on the bull's-eye in order to be within the target area”); *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10, 19 (S.D.N.Y. 1975), *aff'd on other grounds*, 550 F.2d 68 (2d Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3734 (U.S. Apr. 12, 1977) (No. 76-1403) (plaintiff “in the direct line of fire”); *International Rys. of Cent. America v. United Brands Co.*, 358 F. Supp. 1365, 1370 (S.D.N.Y. 1973), *rev'd on other grounds*, 532 F.2d 231 (2d Cir. 1976) (“The rifle range metaphor certainly excludes the shotgun, but does it always also exclude the rifleman who shoots in an arc aiming at more than one person?”). The language of “aim” and “target aimed at” may suggest misleadingly that proof of actual intent to injure the plaintiff is relevant to the “target area” standing inquiry. The courts, however, consistently have approached the question as one of law rather than of fact, treating the concept of “aiming” as part of a metaphor rather than as a requirement of volition. *See, e.g., Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073, 1076 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

99. *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 220 (9th Cir. 1964), *quoted in Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073, 1076 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971) and *Hoopes v. Union Oil Co.*, 374 F.2d 480, 495 (9th Cir. 1967). *See Blankenship v. Hearst Corp.*, 519 F.2d 418, 425-26 (9th Cir. 1975); *Isidor Weinstein Inv. Co. v. Hearst Corp.*, 303 F. Supp. 646, 650 (N.D. Cal. 1969). *But see Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1296 n.2 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) (rejecting foreseeability test as too broad).

100. *See, e.g., Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975) (referring to targets and target areas in successive sentences as seemingly the same); *Cal-*

at,"¹⁰¹ have created uncertainty about this potentially broad standing test.¹⁰² Although most courts permit anyone within the "target area" to sue, whether or not they can be identified as targets, some courts grant standing only to parties who are unambiguously objects of a violation.¹⁰³ Even among courts adopting the target area test, the periphery of the target area remains ill-defined. Some courts have considered the target area to embrace effects in sectors of the economy located two distinct markets away from the market in which the violation occurred.¹⁰⁴ Other courts have drawn the perimeter of the target area narrowly, confining it to markets in which the defendant is situated and thus in effect creating a "competitors only" standing rule.¹⁰⁵ One court has even implied that a target could be outside the target area and thus without standing to sue.¹⁰⁶

derone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295, 1296 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) (treating "targets" as parties identified by "target area" test).

101. *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.* 454 F.2d 1292, 1296 & nn.2 & 3 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *see Kemp Pontiac-Cadillac, Inc. v. Hartford Automotive Dealers' Ass'n*, 380 F. Supp. 1382, 1386-87 (D. Conn. 1974). Courts that narrowly construe the "target area" test as a "target" test seem to have relied in part on the categorization approach to determining direct injury. *See, e.g., Long Island Lighting Co. v. Standard Oil Co.*, 521 F.2d 1269, 1274 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976) (combining target area language with observation that plaintiff utilities were "at least equally remote" from antitrust violation as, *e.g.*, landlords, suppliers, employees, and consumers); *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1297 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) (combining target area language with categorization approach to lessor cases).

102. *See, e.g., South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 418-19 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966) (suggesting an expansive conception of "target area"); *Midway Enterprises, Inc. v. Petroleum Marketing Corp.*, 375 F. Supp. 1339, 1343-45 (D. Md. 1974) (same).

103. *Compare Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967) (owner of gasoline station granted standing even though exclusive dealing restraint was directed at gasoline wholesalers) *with Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1296 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) (non-operating lessor of movie theater denied standing since not target of block-booking conspiracy "aimed" at exhibitors and distributors).

104. *E.g., South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966) (milk producers selling through intermediate market level have standing to sue franchised retail grocery stores).

105. *See, e.g., Campo v. National Football League*, 334 F. Supp. 1181, 1186-87 (E.D. La. 1971) (court apparently considered "area . . . endangered by a breakdown in competitive conditions" to be industry in which defendant operated). The categorization approach too has been criticized for tending to deny standing to all but competitors. *Cromar Co. v. Nuclear Materials & Equip. Corp.*, 1975-1 Trade Cas. ¶ 60,373, at 66,627-28 (M.D. Pa. 1975), *rev'd*, 543 F.2d 501 (3d Cir. 1976).

106. *See Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 188-89 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971). The court denied standing to the plaintiff franchisor on the ground that the target area of the defendant franchisors' alleged anticompetitive acts was the marketing of bottled beverages and plaintiff's involvement with its franchised

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Because of these ambiguities, the target area test for direct injury has not reduced the level of contradiction in the law of antitrust standing. Indeed, inconsistent applications of this test can be discerned among different circuits and even within the same circuit. In *Karseal Corp. v. Richfield Oil Corp.*,¹⁰⁷ for example, the Ninth Circuit ruled that a franchisor-manufacturer, whose franchised distributors sold his products to retailers, was within the target area of an exclusive dealing agreement between retailers and a distributor of another manufacturer's brand of the same product.¹⁰⁸ In *Billy Baxter, Inc. v. Coca-Cola Co.*,¹⁰⁹ however, the Second Circuit ruled that a plaintiff franchisor, injured by an alleged conspiracy among competing franchisors to foreclose his franchised soft drink bottlers from selling plaintiff's brand of soft drinks to retailers, was not within the target area. The *Billy Baxter* court implied that the plaintiff's franchisees alone lay within the target area and that the franchisor lacked standing because of his nominal involvement in their day-to-day business.¹¹⁰

The status of *Billy Baxter* is somewhat unclear even in the Second Circuit, however. In *Sulmeyer v. Seven-Up Co.*,¹¹¹ a district court in the Southern District of New York recently held that a supplier of soft drink concentrates to franchised bottlers was within the target area of an alleged conspiracy among soft drink franchisors to preclude the plaintiff's product from access to retail markets. The *Sulmeyer* court distinguished *Billy Baxter* on the unconvincing ground that whereas the franchisor in *Billy Baxter* had had only a limited role in

bottlers was insufficiently close to bring it within the target area. "Yet in any case," the court went on to suggest,

even if the [defendants] violated the law to help themselves or their franchisees at the expense of [plaintiff's franchisees], while knowing that this would also be an effective way of depriving a rival franchisor of royalties, the causal link between the type of violation alleged and an appropriate plaintiff would still be lacking in this suit. *Id.* at 189. The court's conclusion seems to be that even had it been a target, the plaintiff could not have been within the target area.

107. 221 F.2d 358 (9th Cir. 1955).

108. *Id.* at 364-65.

109. 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

110. *Id.* at 189. For a similar view of contradiction between these two cases, see Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 27-28 (1971). For other instances of conflicting holdings on similar facts under the "target area" test, compare *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971) (licensor had standing) with *Fields Prods., Inc. v. United Artists Corp.*, 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd mem.*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971) (licensor lacked standing); and compare *Isidor Weinstein Inv. Co. v. Hearst Corp.*, 303 F. Supp. 646 (N.D. Cal. 1969) (employee had standing; complaint dismissed on other grounds) with *Bywater v. Matshushita Elec. Indus. Co.*, 1971 Trade Cas. ¶ 73,759 (S.D.N.Y. 1971) (employees lacked standing).

111. 411 F. Supp. 635 (S.D.N.Y. 1975).

its franchisees' businesses, the *Sulmeyer* franchisor's "substantial assistance" to its franchisees brought it within the target area of the conspiracy.¹¹²

The ambiguities inherent in the target area approach, and the inter- and intra-circuit conflicts those ambiguities have wrought, are not the only shortcomings of the target area test. An additional problem is that many of the holdings rendered under it contradict at least some rulings rendered under the categorization approach to direct injury. The two approaches, for example, have produced disparate results in suits brought by employees¹¹³ and by lessors,¹¹⁴ notwithstanding that the cases presented similar facts. There appears to be no principled argument that can reconcile these holdings.

112. *Id.* at 638 & n.4. In particular, the court noted that the *Sulmeyer* franchisor allegedly not only franchised bottlers and supplied concentrate to them but also manufactured concentrates, "supplied advertising and promotional material, offered substantial assistance to its franchisees, and was actively involved in supervising the work of the franchisees." *Id.* at 638. The court therefore concluded that the plaintiff's injury was less "remote" than that of the *Billy Baxter* franchisor, which apparently had not engaged in these additional activities. *Id.* at 638-39.

The Ninth Circuit also seems to be on the verge of intra-circuit conflict over the application of the target area test. Some panels in the circuit have invoked the foreseeability formulation of the test to grant plaintiffs standing. *See, e.g., In re Western Liquid Asphalt Cases*, 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974) (indirect purchaser in chain of distribution foreseeably injured by price-fixing conspiracy); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 220 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964) (plaintiff within area "which it could reasonably be foreseen would be affected" by defendant's actions). Significantly, discussion of foreseeability has been notably absent from Ninth Circuit opinions denying standing. *See, e.g., In re Multi-district Vehicle Air Pollution*, 481 F.2d 122, 129 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973) (denying standing to farmers suing for crop damage due to conspiracy to suppress automotive antipollution devices; no discussion of foreseeability). This may be attributable to the difficulty of placing bounds on "foreseeable" injuries. *See Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1296 n.2 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) ("foreseeability" test . . . would permit anyone to sue"). Whether some Ninth Circuit panels denying standing can continue to ignore other panels' foreseeability formulation remains to be seen.

113. Target area cases granting standing to employees, *e.g., Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176-77 (5th Cir. 1976); *Isidor Weinstein Inv. Co. v. Hearst Corp.*, 303 F. Supp. 646 (N.D. Cal. 1969), conflict with categorization cases that deny it on similar facts, *e.g., Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976). By the same token, categorization cases granting standing to employees, *e.g., Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967), conflict with target area cases that deny it on similar facts, *e.g., Hans Hansen Welding Co. v. American Ship Building Co.*, 1973-2 Trade Cas. ¶ 74,739 (S.D.N.Y. 1973); *Bywater v. Matshushita Elec. Indus. Co.*, 1971 Trade Cas. ¶ 73,759 (S.D.N.Y. 1971).

114. Target area cases granting standing to lessors, *e.g., Johnson v. Ready Mix Concrete Co.*, 318 F. Supp. 930 (D. Neb. 1970), conflict with categorization cases that deny it on similar facts, *e.g., Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954). Similarly, categorization cases granting standing to lessors, *e.g., Congress Bldg. Corp. v. Loew's, Inc.*, 246 F.2d 587 (7th Cir. 1957), conflict with target area cases that deny it on similar facts, *e.g., Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

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Thus, the target area test, in its attempt to explicate the direct injury standard, has produced only greater uncertainty. In view of the inherent variability in the test's scope, it seems unlikely that any single formulation of the test—were it to emerge—would yield uniformity in the treatment of similarly situated plaintiffs. The “endangered area” formulation offers no sure guide. As noted above,¹¹⁵ it can readily include *any* plaintiff, and therefore fails to provide workable rules for defining a subset of antitrust plaintiffs with standing to invoke the treble damage remedy of § 4. Nor does the foreseeability analogy from tort law serve as an adequate explication of the target area test. The concept of foreseeability is arguably irrelevant, for all antitrust injuries are intentionally rather than negligently inflicted.¹¹⁶ Foreseeability, moreover, is highly susceptible to contradictory judicial interpretations.¹¹⁷ Only actual intent to injure particular plaintiffs would provide a definite guide for determining who were the targets of a violation. Yet under this criterion, standing not only would be fortuitously governed by the difficulty or ease of proof of intent in particular cases but also would be contrary to substantive antitrust law, which has dispensed with the element of specific intent.¹¹⁸ In sum, the target area test of direct injury is no more capable than the categorization approach of achieving the desired goal of the direct injury rule: to carve out from the universe of persons injured by antitrust violations those who are to be protected under § 4.¹¹⁹

C. *Antitrust Standing and Substantive Antitrust Protection*

In recent years a number of judicial opinions have failed to distinguish between antitrust standing and the scope of protection under substantive antitrust law. The distinction, however, is critical. When

115. See p. 831 *supra*.

116. Antitrust violations are intentional even if all the resulting injuries are not, and under well-established tort law principles they would generate liability for all of their provable consequences. See *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487, 491-92 (2d Cir. 1948) (L. Hand, J.) (antitrust violation a tort). See generally Note, *Intentional Tortfeasors*, 14 STAN. L. REV. 362 (1962). Accordingly, to the extent that antitrust courts use a tort analogy to define the scope of § 4, it would be appropriate for them to look to the broad scope of liability recognized for intentional torts rather than the narrower scope of liability associated with negligent torts.

117. Handler, *supra* note 110, at 28-31. See note 112 *supra*.

118. The substantive rule is that the harmful effect of an antitrust violation on economic welfare is sufficient to give rise to antitrust liability. See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953). Cf. *Coleman Motors Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975) (evidence of predatory practices sufficient for finding of intent to monopolize).

119. Enthusiasts of the target area test have been able to offer only a hope that in the future it might be “pragmatically applied.” Sherman, *supra* note 10, at 406.

an antitrust violation occurs, it causes injury, whether directly or indirectly, to a class of persons who are entitled to the protection of the antitrust laws. The standing doctrine is designed to narrow this broad class of injured persons to a subclass of plaintiffs who are deemed proper parties to sue. The scope of antitrust standing should be determined by reference to the special problems created by treble damage actions, such as ruinous or duplicative recoveries. The scope of substantive protection should be determined in each case by analysis of pertinent *substantive* antitrust policies.

Whether a party's interests are protected by antitrust policy and whether that party has standing are thus discrete questions. Confusion of these questions may or may not alter the outcome in a particular case. But the law of standing is bound to be distorted if courts overlook the doctrinal confusion of earlier cases and rely in their standing decisions on holdings that were really grounded in judgments about substantive protection. Regardless of the practical effects of this confusion in a given case, the misconceived equation of antitrust standing and antitrust protection may lead some courts to expand unduly the scope of standing and others to constrict unduly the scope of protection.

The confusion is exemplified in *Southern Concrete Co. v. United States Steel Corp.*,¹²⁰ where the plaintiff challenged certain tying and exclusive dealing practices.¹²¹ The plaintiff was not in fact protected against these practices under the antitrust prohibition against tying, since it was neither a foreclosed seller of the tied product nor the coerced purchaser of the tying product.¹²² The court so held; but it also stated that since the plaintiff was not protected by the antitrust laws' prohibition of tying arrangements,¹²³ the plaintiff was outside

120. 535 F.2d 313 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 1113 (1977).

121. *Id.* at 315. The plaintiff was a competitor of one of the defendants in the ready-mix concrete business. The plaintiff alleged that United States Steel, as a supplier of cement to concrete producers, had illegally conditioned favorable credit terms on the defendant competitor's purchase of all its cement needs from USS. The favorable financing obtained from USS, the plaintiff charged, had enabled its competitor to drive it and other firms out of the ready-mix concrete business. *Id.*

122. *See* *United States v. Loew's Inc.*, 371 U.S. 38, 44-45 (1962); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 326-27 (1961); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953).

123. Besides alleging tying arrangements in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. V 1975), and exclusive dealing arrangements in violation of § 3 of the Clayton Act, *id.* § 14 (1970), the plaintiff alleged monopolization of the ready-mix concrete market in violation of § 2 of the Sherman Act, *id.* § 2 (Supp. V 1975). 535 F.2d 315-16 & nn.2, 4. The trial court had granted the defendant's motion to dismiss the first two allegations, but had held that the plaintiff stated a cause of action with respect to the third. *Southern Concrete Co. v. United States Steel Corp.*, 394 F. Supp. 362, 378-80 (N.D. Ga. 1975), *aff'd*, 535 F.2d 313 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 1113 (1977).

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the target area of the violation.¹²⁴ Thus, the court seemed to suggest that the target area of the violation was coextensive with the scope of substantive antitrust protection.¹²⁵

A similar confusion underlies the opinion in *Kemp Pontiac-Cadillac, Inc. v. Hartford Automobile Dealers' Ass'n*.¹²⁶ In that case, an automobile dealer alleged price fixing by a group of conspiring competitors. In rejecting the plaintiff's claim on the grounds that he was not a target of the alleged conspiracy, the court seemed to rely on a determination that the plaintiff-competitor was not protected by substantive antitrust law because he could not have been injured by the conspiracy to raise prices.¹²⁷ *Southern Concrete* and *Kemp* present a scenario that commonly leads courts astray. Where an antitrust violation has occurred and the plaintiff alleges an injury against which third parties, but not he, are protected by the antitrust laws, the court may say that the plaintiff lacks standing instead of saying that he lacks protection.

The mistaken equation of standing and substantive protection also has arisen occasionally in merger cases. Mergers typically cause numerous economic dislocations and injuries, only some of which will flow from any anticompetitive aspects the merger may have. For example, an illegal "deep-pocket" merger may keep alive a failing company and thus injure its competitors only in a procompetitive way, by depriving them of prospective business, or it may injure competitors in an anticompetitive way if the merged company's deep pocket is exploited. The Supreme Court has recognized that whether a party injured by a merger can sue is often a question of substantive antitrust policy and depends on whether the injury flows from an aspect of the merger

124. 535 F.2d at 316-17 ("the area of the economy threatened with a breakdown of competitive conditions because of a tying agreement is the market for the tied product").

125. This suggestion is puzzling, since the court relied on target area cases that considered the directness of the plaintiff's injury while assuming the existence of antitrust protection. *Id.* at 316 (citing *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975); and *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 487-88 (5th Cir. 1967)). For other recent cases confusing standing and substantive protection, see *Bowen v. New York News, Inc.*, 522 F.2d 1242, 1255-56 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976); and *Industria Siciliana Asfalti v. Exxon Research & Eng. Co.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,256, at 70,779-80 (S.D.N.Y. 1977).

126. 380 F. Supp. 1382 (D. Conn. 1974).

127. *Id.* at 1386-87 & n.6, 1388 n.8. As the court pointed out, the plaintiff failed to allege conspiratorial predatory pricing, the only form of price fixing that could have injured him. *Id.* at 1388. Unfortunately, the court, like other courts that have confused substantive protection and standing, succumbed to the temptation to use the target area terminology in expressing its conclusion that the plaintiff was beyond the scope of substantive protection. *Id.* at 1385-86 & n.6.

that contravenes the procompetitive policy of § 7 of the Clayton Act.¹²⁸ Lower federal courts unfortunately have not drawn the distinction between antitrust standing and the substantive law. The Ninth Circuit, for example, in an opinion denying standing to private anti-merger plaintiffs on the grounds that they lay outside the target area of the merger, stressed that the plaintiffs' alleged injuries were not caused by any anticompetitive aspects of the merger.¹²⁹ Since, like *Southern Concrete*, the merger opinions implicitly or explicitly equate antitrust standing with antitrust injury,¹³⁰ they likewise conflict with the reasoning of standing opinions that use the categorization and target area concepts to create a subset of protected plaintiffs who may sue.

A related source of confusion between the scope of antitrust standing and of the substantive law is the importation from administrative law of the "zone of interests" test for standing to challenge administrative agency action. In *Malamud v. Sinclair Oil Corp.*,¹³¹ the Sixth Circuit held that anyone "arguably . . . within the zone of interests protected" by the antitrust laws had standing to sue under § 4.¹³² By referring to the "interests" to be protected, the *Malamud* court invited attention to the reach of the underlying policies sought to be enforced, not to whether the antitrust plaintiff was injured with sufficient directness to enforce them. In effect, the court repudiated any

128. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 695-97 (1977) (construing § 7 of the Clayton Act, 15 U.S.C. § 18 (1970)). The *Brunswick* plaintiff was a bowling center operator whose principal competitor in several geographical markets had been saved from going out of business by an allegedly illegal deep-pocket asset acquisition by the defendant. The plaintiff sought damages in the amount of profits it would have earned had the acquisition not kept its competitor alive. 97 S. Ct. at 694. The Supreme Court held that the plaintiff's lost profits did not amount to "antitrust injury" under § 7, reasoning that the plaintiff's injury flowed only from the procompetitive preservation of its competitor. *Id.* at 696-97.

129. *John Lenore & Co. v. Olympia Brewing Co.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,353 (9th Cir. 1977). See *Kirihara v. Bendix*, 306 F. Supp. 72, 88-91 (D. Hawaii 1969).

130. See, e.g., *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752, 759 (2d Cir. 1972), cert. dismissed, 413 U.S. 901 (1973) (GAF held to have suffered no antitrust damages; "[t]hus, whether GAF is viewed as not having 'standing to sue' for these alleged violations of the antitrust laws, or, is viewed as not having sustained anticompetitive damages from the particular acts alleged, the result under § 4 is the same . . .").

131. 521 F.2d 1142 (6th Cir. 1975).

132. *Id.* at 1152 (citing *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970)). In *Data Processing*, the Court held that one "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" had standing to seek judicial review of agency action under 5 U.S.C. § 702 (Supp. IV 1968) (current version at 5 U.S.C.A. § 702 (West Supp. 1977)). 397 U.S. at 153. See generally Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1671, 1725-34 (1975).

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proximate cause limitation on antitrust standing and required only that a party be protected by the substantive law.¹³³

In the cases discussed above, the courts either explicitly, as in *Malamud*, or by negative implication, as in *Kemp* and *Southern Concrete*, expanded the perimeters of antitrust standing by suggesting that if a party is protected he has standing. The confusion, of course, can work in reverse. Some courts have suggested, contrapositively, that plaintiffs who lack standing are unprotected. *Billy Baxter, Inc. v. Coca-Cola Co.*¹³⁴ provides an example. In that case a franchisor that was injured through predatory pricing by its franchisees' competitors was held to be outside the target area of the violation.¹³⁵ Yet the court also intimated that indirectly injured suppliers of competitors were simply not protected by the prohibition against predatory pricing.¹³⁶ This holding is at odds with substantive antitrust policy, which protects against both directly and indirectly caused injuries to economic welfare. Indeed, courts have permitted "indirectly" injured plaintiffs, without standing to sue for damages, to seek injunctive relief under § 16 of the Clayton Act.¹³⁷ Thus, the *Billy Baxter* decision, despite its invocation of substantive policy considerations, was effectively a standing decision, one that redefined substantive policy to limit antitrust protection to "directly" injured plaintiffs.¹³⁸

The mingling of doctrines concerning antitrust standing and antitrust protection is a development that gives cause for concern. Not

133. For similar use of the "zone of interests" test, see *Leeward Petroleum, Ltd. v. Mene Grande Oil Co.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,423, at 71,569 (D. Del. 1976). See also *E.A. McQuade Tours, Inc. v. Consolidated Air Tours Manual Comm.*, 467 F.2d 178, 183-85 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973) (antitrust injury said to confer standing to sue).

134. 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

135. *Id.* at 188, 189.

136. *Id.* at 188.

137. See *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 130 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *Nader v. Air Transport Ass'n of America*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,280, at 70,882-83 (D.D.C. 1977). But see *Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co.*, 497 F.2d 1151, 1154 n.4 (2d Cir.), *cert. denied*, 419 U.S. 968 (1974). There is no more basis for a direct injury restriction in the legislative history of the substantive sections of the antitrust laws than in that of § 4.

138. *Billy Baxter* is not the only instance where a narrow interpretation of antitrust standing apparently led to a narrow definition of antitrust protection. See *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 730-32 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973) (employee fired in allegedly illegal merger both indirectly injured and outside scope of antimerger policy's protection, which extends only to "suppliers"). Compare *Fields Prods., Inc. v. United Artists Corp.*, 318 F. Supp. 87, 88 (S.D.N.Y. 1969), *aff'd mem.*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971) (narrow view of standing; substantive protection confined to traditionally protected plaintiffs) with *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073, 1076 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971) (broad view of standing leads to broader scope of substantive protection than in *Fields*).

only may it exacerbate the confusion over standing, but, as *Billy Baxter* demonstrates, it may also lead to distortion of applicable substantive law. Even more ominous, perhaps, is the danger that substantive antitrust law may fall heir to the conflicts that have plagued, and continue to plague, the house of antitrust standing.

D. *The Unhappy State of Antitrust Standing Law*

The decisional morass reviewed in the preceding sections demonstrates that the direct injury rule, whether implemented through the categorization test or the target area test,¹³⁹ is an unsatisfactory guide to the scope of private antitrust standing. The uncertainty generated by the rule not only encourages inconsistent treatment of similarly situated plaintiffs but also frequently occasions massive expenditures of resources merely to litigate the standing issue.¹⁴⁰ There is, moreover, an emerging realization among courts and commentators that the law of antitrust standing currently lacks an analytical framework that could make order out of the chaos.¹⁴¹

139. Although the target area test is now used more frequently than the categorization test, no circuit court uses either test exclusively. The Second, Fifth, and Ninth Circuits for the most part can be denominated as target area courts, while in the First, Sixth, and Tenth Circuits the categories of directly and indirectly injured plaintiffs predominate, or have until recently predominated. See *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 127 n.7 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973) (collecting cases through 1973). The Sixth Circuit has apparently switched from the direct injury test to the "zone of interests" test used to determine standing in administrative review cases. See *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975); p. 838 & note 132 *supra*. In the Third Circuit the law is now quite unclear. This court in the past has employed both the categorization test, *Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976), and the target area test, *International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n*, 483 F.2d 384 (3d Cir. 1973), *amended*, 494 F.2d 1353 (3d Cir. 1974). It now apparently uses *both* the direct injury rule and a policy analysis. See *Bravman v. Bassett Furniture Indus., Inc.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,300, at 70,974 (3d Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3780 (U.S. May 13, 1977) (No. 76-1597) (there is "no talismanic test capable of resolving all § 4 standing problems" but directness of injury is one factor in balancing test); *Cromar Co. v. Nuclear Materials & Equip. Corp.*, 543 F.2d 501 (3d Cir. 1976) (retaining direct injury rule as part of policy analysis). In the Fourth Circuit, an admixture of the categorization and target area approaches can be found. See *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 417-20 (4th Cir. 1966). The Seventh Circuit now seems to employ both the "zone of interests" and the target area tests. See *Illinois v. Ampress Brick Co.*, 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom. Illinois Brick Co. v. Illinois*, 435 U.S.L.W. 4611 (U.S. June 9, 1977). The most recent standing pronouncement from the Eighth Circuit refers to both categorization and target area tests with approval. See *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679 (8th Cir. 1966). The District of Columbia Circuit apparently has not yet confronted the antitrust standing issue.

140. See Klingsberg, *Bulls Eyes and Carom Shots: Complications and Conflicts on Standing to Sue and Causation Under Section 4 of the Clayton Act*, 16 ANTITRUST BULL. 351, 353 (1971) ("The prospect of expensive and time-consuming motion practice on [standing] may deter private enforcement.")

141. The courts have expressed increasing dissatisfaction with the current state of

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The absence of a coherent analytical framework for antitrust standing may be traced to four factors. First, although the legislative history of § 4 is broadly favorable to private enforcement actions,¹⁴² Congress gave no consideration to the potential conflict between the aims of compensation and deterrence and the existence of competing policies, such as that against ruinous damage awards, that on occasion may militate against private recovery. Lacking congressional guidance as to how to strike an appropriate balance,¹⁴³ it is perhaps not surprising that the judiciary adopted the legalistic direct injury rule of antitrust standing. The rule may well owe its currency to the inertia of stare decisis.¹⁴⁴

Second, while the Supreme Court has had numerous opportunities to resolve the competing interests that enter into a standing determi-

the law. *See, e.g.,* *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1147-51 (6th Cir. 1975) (asserting that both "direct injury" and "target area" approaches go beyond proper function of standing doctrine, and adopting "zone of interests" test); *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1252, 1298 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) (Levet, J., dissenting) ("judicial requirements of directness and the 'target area' test have frequently been imprecisely defined and applied"; such "labels" should be subordinated to "fundamental purpose of the antitrust laws"); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 191 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) (Waterman, J., dissenting) (use by courts in antitrust analysis of "inherited decisional labels obfuscate[s] the position of some plaintiffs"); *International Rys. of Cent. America v. United Brands Co.*, 358 F. Supp. 1363, 1370 (S.D.N.Y. 1973), *aff'd on other grounds*, 532 F.2d 231 (2d Cir. 1976) (antitrust standing "policy considerations are not necessarily an ingredient of logical analysis"); *Wilson v. Ringsby Truck Lines, Inc.*, 320 F. Supp. 699, 701 (D. Colo. 1970) ("antitrust standing cases more than a little confusing and certainly beyond our powers of reconciliation").

The commentators have been no less critical. *See, e.g.,* Handler, *supra* note 110, at 24-31; Klingsberg, *supra* note 140, at 353-55; Note, *Standing to Sue for Treble Damages under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 586-88 (1964); Comment, *Standing under Clayton § 4: A Proverbial Mystery*, 77 DICK. L. REV. 73, 83-87 (1972) (but considering *Billy Baxter* a resolution to the conflict).

142. *See* note 9 *supra*; pp. 845-46 *infra*.

143. Some courts have inferred, from the silence of successive post-1890 Congresses, an implied congressional endorsement of the judicially created standing doctrine and the various tests established under it. *E.g.,* *National Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos.*, 382 F.2d 925, 929 (10th Cir. 1967); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956); *see* *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292, 294 (2d Cir. 1958) (L. Hand, J.) (1914 enactment of Clayton Act to be interpreted in light of 1910 direct injury ruling in *Loeb*). This inference of implied congressional approval of current antitrust standing law is tenuous at best, for Congress has never given the standing doctrines even the bare consideration that would render failure to change the doctrines an implied endorsement of them. Indeed, considering the contrariety of approaches and results in existing antitrust standing law, it is difficult if not impossible to know which, if any, standing doctrines recent Congresses could be said to have endorsed implicitly.

144. *See, e.g.,* *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292, 295 (2d Cir. 1958) (L. Hand, J.) ("[a]s a new question it might perhaps be argued" that shareholder has separate cause of action under antitrust laws, but "this has not been the course of the decisions"); *Minersville Coal Co. v. Anthracite Export Ass'n*, 335 F. Supp. 360, 365-66 (M.D. Pa. 1971) (declining to deviate from direct injury precedents).

nation,¹⁴⁵ it has thus far refrained from taking advantage of them outside the area of chain-of-distribution cases. Even in the recent *Illinois Brick* decision, establishing that indirect purchasers cannot sue under § 4, the Court explicitly declined to articulate any principles to guide standing determinations.¹⁴⁶ And although the Court has often spoken of the importance of the policies underlying private antitrust enforcement,¹⁴⁷ it has offered no guidance on how to deal with the countervailing consideration of burdensome damages, a problem that has troubled the lower courts.

Third, the growing confusion between antitrust standing and substantive antitrust protection seems to arise from a failure to distinguish two analytically distinct types of standing. The first is that commonly found in antitrust cases, namely, the direct injury restriction on who may recover for injuries against which substantive antitrust law otherwise offers protection. The second type is the traditional notion that a person, even if injured, may not complain of an unlawful act against which only others are protected.¹⁴⁸ In cases where the substantive law safeguards specified injured parties, as, for example, in the case of exclusionary tying practices, it is both necessary and proper to examine the scope of the substantive law to ascertain whether the plaintiff is entitled to protection from the offense. Yet it is necessary to recognize, as is currently recognized in other contexts,¹⁴⁹ that an inquiry into plaintiff's entitlement to substantive protection is fundamentally an inquiry into the merits of his claim for relief.¹⁵⁰ In assessing the merits of that claim, the "target area" standing terminology is both inapposite and misleading.

The fourth and most important cause of the analytical impoverishment of antitrust standing law is the direct injury rule itself. The rule is inherently unworkable. The distinction between direct and indirect injury is arbitrary, even metaphysical, since all antitrust injuries

145. See, e.g., *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968); *Radovich v. National Football League*, 352 U.S. 445 (1957). Moreover, the Court has denied certiorari in standing cases employing all the different approaches to antitrust standing, thus declining to lend the weight of its authority to any one approach. See, e.g., notes 98, 101 & 138 *supra* (citing cases).

146. 45 U.S.L.W. at 4612, 4613 n.7 (right of indirect purchasers to recover under § 4 treated as question of "injur[y] within the meaning of § 4"; standing issue "not address[ed]").

147. See, e.g., *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972) (dictum).

148. See *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975).

149. See, e.g., *Davis*, *supra* note 11, at 453, 463.

150. Thus, the invocation of the "arguably protected" standard from administrative law in *Malamud*, see 521 F.2d at 1151-52, is perhaps best seen as providing an opportunity beyond the pleading stage for the introduction of facts sufficient to carry out an informed inquiry into the merits of a claim of substantive antitrust protection.

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are "direct" to a greater or lesser degree. The line between direct and indirect injuries must inevitably be drawn in different places by different courts, often depending on little more than the court's sense of whether the plaintiff deserves antitrust protection. Standing determinations thus function as policy judgments but masquerade as inquiries into legal causation. And the categorization and target area tests, being mere verbal formulae for implementing the direct injury rule, are equally unreliable as constructs for standing determinations. Even if courts reached a consensus on the standing of familiar categories of plaintiffs, the emergence of "new" categories would inevitably engender renewed disagreement. Likewise, even if the target area test were eventually disengaged from the direct injury approach, the inherent elasticity of its core concept of "endangered" area would preclude the test from renouncing its legacy of arbitrariness and indeterminacy.

Not every court applies the direct injury rule mechanically. Some courts have gone so far as to assert that it incorporates antitrust policy considerations by drawing a meaningful line between windfall or ruinous recoveries and recoveries that serve the purposes of § 4.¹⁵¹ This assertion is ill-founded. The manipulability of the direct injury approach is conducive to avoidance rather than assessment of competing policy considerations. It is not mere coincidence that courts finding injury to be "direct" invariably cite policies favoring private enforcement¹⁵² and courts finding an injury to be "indirect" invariably cite policies opposing private enforcement.¹⁵³ The rigidity of the direct-indirect dichotomy also contributes to the inability of the direct injury approach to take account of antitrust policy. The approach could be made responsive to such policy issues as "overkill" liability only if courts were willing arbitrarily to find plaintiffs who were in fact directly injured to be indirectly injured where a real danger of "over-

151. See, e.g., *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

152. E.g., *Bravman v. Bassett Furniture Indus., Inc.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,300, at 70,974 (3d Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3780 U.S. May 13, 1977) (No. 76-1597); *Hoopes v. Union Oil Co.*, 374 F.2d 480, 485 (9th Cir. 1967); *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 688-89 (8th Cir. 1966).

153. E.g., *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 130 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

kill" existed, and indirectly injured ones to be directly injured where such a danger did not exist. Yet in order to determine whether a real danger exists, a court would have to engage in precisely the sort of factual inquiry normally precluded by the direct injury standing barrier. A policy-oriented direct injury approach, in short, is virtually a contradiction in terms.

Yet a way out of the morass may be found. What is needed is an approach that openly balances the various interests and policies underlying the treble damage action, and that does so without the rigidifying overlay and the disingenuous manipulation of the direct injury rule and its attendant tests.¹⁵⁴ Adoption of such an approach would end the anomalous situation in which a policy approach, embracing both economic and social policies, is used in almost every aspect of substantive antitrust law¹⁵⁵ and of private antitrust enforcement,¹⁵⁶ save standing.¹⁵⁷ In the remainder of this article, therefore,

154. The authors recognize that "balancing" is a much criticized approach to constitutional adjudication. See, e.g., Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975). We recognize as well that criticism of balancing as an ad hoc and even subjective form of decisionmaking may apply to balancing approaches in any area of the law. Yet balancing of competing policy considerations is peculiarly appropriate in an area of the law that consciously seeks to promote economic policy. The procompetitive value system embodied in the antitrust laws helps frame conflicting interests for evaluation and reconciliation. Indeed, it is incongruous that courts now look to the procompetitive policies of the antitrust laws in making substantive determinations as to the existence of a violation, but often ignore policy considerations in standing decisions that determine when private enforcement of these substantive determinations shall occur.

155. The courts have long viewed the highly general phrases of the antitrust laws' substantive provisions as a "charter of economic liberty" that is to be liberally interpreted and applied by the judiciary to fulfill the antitrust laws' underlying purposes. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). See *Perkins v. Standard Oil Co.*, 395 U.S. 642, 647 (1969); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 348-52 (1968); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963); *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 600 (1936); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933). Cf. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690 (1977) (policy analysis of Clayton Act § 7 in interaction with § 4).

156. See, e.g., *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 492-94 (1968) (interpreting injury requirement of § 4 in light of deterrence policy); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138-39 (1968) (same); *Radovich v. National Football League*, 352 U.S. 445, 454 (1957) (because of important public purposes of antitrust laws, private litigants should not be burdened by artificial barriers to recovery not specifically established by Congress); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946). Cf. *J.I. Case Co. v. Borak*, 377 U.S. 426, 430-35 (1964) (private right of action found implied in securities antifraud statute because of need for effective enforcement).

157. The Third Circuit has recently modified the direct injury rule by treating it as only one of several "factors" to be considered in determining standing. See *Bravman v. Bassett Furniture Indus., Inc.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,300 (3d Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3780 (U.S. May 13, 1977) (No. 76-1597); *Cromar Co. v. Nuclear Materials & Equip. Corp.*, 543 F.2d 501, 506 (3d Cir. 1976). Unfortunately these opinions not only fail to indicate how much weight directness of injury is to be given but also introduce some criteria, such as the nature of the industry involved, that would seem generally irrelevant to standing. E.g., *id.* Indeed, the judicial

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a fresh approach to antitrust standing is proposed, one that breaks decisively with tradition by making policy analysis the basis of standing determinations under § 4.¹⁵⁸ Patterns of causation remain relevant in such an inquiry, of course, but only insofar as they implicate relevant policies.

III. A Policy Approach to Antitrust Standing

The formulation of a policy approach to antitrust standing begins with the identification of all relevant public policies—those that prompted congressional enactment of the private antitrust remedy, those reflected in the antitrust laws generally, and those embodied in the common law of damages. The identification of the policy interests that should inform an antitrust standing decision makes it possible to articulate practical rules for implementing a policy-based standing inquiry. These rules help determine whether there is an actual conflict between policies when a case implicates two or more seemingly contradictory ones. They also help strike the appropriate balance when a given case presents genuinely conflicting policies.

A. *The Policies Relevant to Antitrust Standing*

The private treble damages remedy was enacted to achieve two great public purposes: compensation for private harm and enforcement of the national economic policy in favor of competition. Originally passed in 1890 as § 7 of the Sherman Act, the damages provision was a response to Congress's concern that an antitrust weapon be "available to the people,"¹⁵⁹ particularly consumers and "small men engaged in competition,"¹⁶⁰ who were seen as prime victims of the trusts. The debates over the Sherman Act manifest Congress's interest in creating a meaningful compensatory remedy¹⁶¹ as well as an effective enforcement device.¹⁶² The same dual objectives were prominent

manipulation that has colored the history of the direct injury rule is discernible even here, for the Third Circuit failed in *Cromar* to mention its direct injury holding a year earlier in *Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976). Yet despite their shortcomings, *Bravman* and *Cromar* are promising, albeit hesitant, departures from the monism of the direct injury approach.

158. A policy analysis, of course, is also desirable in the determination of standing to seek injunctive antitrust relief under Clayton Act § 16, 15 U.S.C. § 26 (1970), but special considerations are relevant to that context and will not be developed here. For a discussion of the law of § 16 standing and of the relevant policy variables, see *Nader v. Air Transp. Ass'n of America*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,280 at 70,882-83 (D.D.C. 1977). See generally P. AREEDA, *supra* note 3, at 57.

159. 21 CONG. REG. 3146 (1890) (Sen. Reagan).

160. *Id.* at 3147, 3150 (Sen. George).

161. See, e.g., *id.* at 2558 (Sen. Pugh); at 2615 (Sen. Coke); *id.* at 3147 (Sen. Reagan).

162. See, e.g., *id.* at 2571 (Sen. Hiscock); *id.* at 3146 (Sen. Hoar). Indeed, Congress decided to raise Senator Sherman's proposed double damage recovery to treble damages.

in congressional deliberations nearly a quarter of a century later, when the Clayton Act was passed to strengthen the Sherman Act. Section 4 of the Clayton Act, which superseded § 7 of the Sherman Act, was intended to open "the door of Justice to every man, whenever he may be injured by those who violate the antitrust laws"¹⁶³ and, in tandem with other provisions, to make "the business public . . . allies of the Government in enforcing the antitrust laws."¹⁶⁴ Congress reaffirmed these two basic purposes of § 4 during its consideration of the Antitrust Improvements Act of 1976.¹⁶⁵ They represent the major policy considerations favoring a broad conception of standing and are hereinafter referred to as the "positive policies" relevant to antitrust standing.¹⁶⁶

The compensation policy argues for an expansive scope of § 4 standing. Insofar as the antitrust laws were intended to provide comprehensive protection against diminutions in economic welfare resulting from artificial restraints on free competition,¹⁶⁷ anyone injured by such restraints is an intended beneficiary of the compensation policy.¹⁶⁸ Not only competitors¹⁶⁹ fall within the ambit of this policy, but

Compare id. at 2901 (bill as reported from Senate Judiciary Committee containing treble damages provision subsequently enacted as § 7 of Sherman Act) *with id.* at 2455 (earlier version of bill containing double damages provision).

163. 51 CONG. REC. 9073 (1914) (Rep. Webb).

164. *Id.* at 16319 (Rep. Floyd).

165. Pub. L. No. 94-435, [1976] U.S. CODE CONG. & AD. NEWS (90 Stat. 1394) (to be codified in principal part at 15 U.S.C. §§ 15a-15h, 18a). *See* S. REP. NO. 803, 94th Cong., 2d Sess. 2, 38, 165 (1976) [hereinafter cited as SENATE REPORT]; H.R. REP. NO. 499, 94th Cong., 1st Sess. 19 (1976) *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2589 [hereinafter cited without parallel citation as HOUSE REPORT] ("The antitrust laws clearly reflect the national policy of encouraging private parties (whether consumers, businesses, or possible competitors) to help enforce the antitrust laws in order to protect competition through compensation of antitrust victims, through punishment of antitrust violators, and through deterrence of antitrust violations.")

166. These compensatory and deterrent policies are generally similar to those served by private tort litigation. *See* Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 35 (1975).

167. *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."); SENATE REPORT, *supra* note 165, at 9 ("The Sherman and Clayton Acts represent the basic guardians of our free enterprise system.")

168. *See* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (holding that complaint stated cause of action for treble damages: "The [Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.") For more recent declarations by the Supreme Court recognizing the compensatory purpose of § 4, *see, e.g.,* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 97 S. Ct. 690, 696 (1977); Radovich v. National Football League, 352 U.S. 445, 453-54 (1957).

169. The compensation policy's protection extends not only to competitors whose vitality is essential to the maintenance of a competitive market structure but also, in some cases, to competitors whose injuries do not impair competition generally. *Compare*

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also consumers¹⁷⁰ and suppliers.¹⁷¹ "Indirect" injury no less than "direct" injury implicates the compensation policy; it is the adverse impact on economic welfare, not the mode or distance of transmission, that supports compensation.

The retrospective character of the compensation policy is particularly significant in the context of antitrust standing, for detection of illegal anticompetitive activities frequently occurs only after they have been underway for a number of years.¹⁷² At this point a plaintiff is most in need of reparation for injuries already suffered; neither the

Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) ("Congressional concern was with the protection of *competition*, not *competitors*") (emphasis in original) *with id.* at 344 ("we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses"). In particular, the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1970), was intended to prohibit practices perceived as harmful to small businesses even though the practices might not be systemically anticompetitive. *See* C. EDWARDS, *THE PRICE DISCRIMINATION LAW* 13 (1959) (Act passed "to cope with price discrimination that had significant effects on business opportunities, whether or not these effects changed the vigor of market competition or increased the probability of monopoly").

170. *See, e.g.*, 21 CONG. REC. 2457 (1890) (Sen. Sherman); *id.* at 2558 (Sen. Pugh); *In re Ampicillin Antitrust Litigation*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,434 (D.D.C. 1977) (rejecting argument that individual, noncommercial consumers lack injury to "business or property" under § 4); *Reiter v. Sonotone Corp.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,360 (D. Minn. 1977) (consumer has suffered injury to "business or property" when overcharged on retail item). *But see* *Weinberg v. Federated Dep't Stores, Inc.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,250 (N.D. Cal. 1977), *appeal docketed*, No. 77-1547 (9th Cir. Jan. 26, 1977) (denying consumer § 4 standing for lack of injury to "business or property"). *See generally* M. FORKOSCH, *ANTITRUST AND THE CONSUMER* 406-07 (1956).

Congress seemed to assume a consumer right to recover under § 4 during its consideration of the Antitrust Improvements Act. *See* HOUSE REPORT, *supra* note 165, at 3-8. Congress's interpretation of § 4 in this regard may not, however, be definitive. *See* *Illinois Brick Co. v. Illinois*, 45 U.S.L.W. 4611, 4614-15 n.14 (U.S. June 9, 1977); note 211 *infra*.

171. The monopsonistic power of the trusts to control wages and prices was noted during the congressional debates in 1890. *See* 21 CONG. REC. 2456, 2457 (1890) (Sen. Sherman). Courts have granted § 4 standing to suppliers of goods, *see, e.g.*, *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948), and to suppliers of labor, *see, e.g.*, *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176 (5th Cir. 1976). The antitrust exemption of labor unions, 15 U.S.C. § 17 (1970), has been interpreted not to bar suits by employees complaining of antitrust injuries by their employers. *See* *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 884-89 (S.D.N.Y. 1975); *Cordova v. Bache & Co.*, 321 F. Supp. 600, 605-07 (S.D.N.Y. 1970).

172. Former Assistant Attorney General Donald Baker recently remarked that the detection rate of antitrust violations is much lower than that of other crimes because an antitrust violation "is usually a concealed crime and there is rarely an identifiable victim who is aware of the violation." Statement before the Tenth New England Antitrust Conference, Nov. 20, 1976, *reprinted in* 790 ANTITRUST & TRADE REG. REP. (BNA) D-1 (1976). Indeed, one of the objectives of the supporters of the Antitrust Improvements Act was to strengthen the investigative authority of the Department of Justice in light of the congressional finding that there was a "remote possibility of antitrust violators getting caught" because of "the inadequacy of existing investigatory" capabilities. SENATE REPORT, *supra* note 165, at 1. *See id.* at 10-12 (referring to Senate version of provisions eventually enacted in substance and to be codified at 15 U.S.C. §§ 1311-1314).

issuance of an injunction nor the imposition of criminal penalties suffices. The damages remedy is especially appropriate where an infusion of funds is essential to restore a plaintiff's competitive position and thereby bolster a competitive market structure.¹⁷³ Even in the absence of these special circumstances, however, consideration of the compensation policy in standing determinations serves congressional purposes as well as general remedial principles.¹⁷⁴

The importance of the deterrence policy of § 4 has been stressed repeatedly by courts¹⁷⁵ and commentators.¹⁷⁶ The status of the treble damage award as "the principal existing sanction"¹⁷⁷ among the anti-trust penalties derives from both its impact and its availability. The impact of a treble damage recovery exceeds that of the criminal penalties normally imposed in government antitrust suits.¹⁷⁸ Plaintiff recoveries in major private antitrust actions—including ones that have been settled—generally far exceed the government's maximum criminal fine.¹⁷⁹ In practice, the criminal fines that are imposed tend to be

173. Damage awards might have served a competition-restoring function in such cases as *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969) (independent gasoline distributor forced to sell business to major oil company as result of antitrust violations that impaired his competitiveness); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) (independent franchisor of soft drink bottlers allegedly driven out of business by anticompetitive practices of major franchisors); and *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 417 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966) (milk producers allegedly forced to sell milk at "destructively low prices" because of anticompetitive pricing policies of wholesaler and its chain of franchised grocery stores).

174. *See Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."); *Straus v. Victor Talking Mach. Co.*, 297 F. 791, 802 (2d Cir. 1924) ("The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done.")

175. *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261-62 (1972); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 136, 139 (1968); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *Monarch Life Ins. Co. v. Regal Protective Life Ins. Co.*, 326 F.2d 841, 845 (2d Cir. 1963).

176. *See, e.g., Handler, Antitrust—Myth and Reality in an Inflationary Era*, 50 N.Y.U.L. REV. 211, 239 (1975); note 3 *supra* (citing commentators).

177. DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (I)*, 1976 A.B.F. RESEARCH J. 1023, 1025.

178. The superior impact of the treble damage remedy is partly a function of its correlation, albeit inexact, with the amount of profits derived from the antitrust violation giving rise to the private action. The statutory limitations on criminal fines, *see* note 179 *infra*, restrict government penalties without regard to the profits the prosecuted antitrust violator has reaped.

179. The maximum criminal fine was recently raised from \$50,000 for all persons to \$1 million for corporations and \$100,000 for all other statutory persons. 15 U.S.C. §§ 1-3 (Supp. V 1975). Plaintiff treble damage recoveries in private suits have frequently far exceeded these limits. *E.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 323-25 (1971) (\$19-million judgment); *Perkins v. Standard Oil Co.*, 395 U.S. 642, 644, 650 (1969) (remanding for reinstatement of award of \$1.3 million); *Armco Steel Corp. v. North Dakota*, 376 F.2d 206, 207-08 (8th Cir. 1967) (affirming recovery of \$775,000). Re-

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quite low;¹⁸⁰ indeed, they are sufficiently low to be absorbed easily by the convicted corporation (or by the insured corporate executive).¹⁸¹ Finally, the deterrent effect of imprisonment for antitrust offenders is undermined by the shortness of the sentences and the infrequency of their imposition.¹⁸²

The availability of the treble damage award as a supplement to government suits also enhances the effectiveness of antitrust deterrence. Because of budgetary considerations, the government must concentrate its resources on a few antitrust cases each year, and it must seek consent decrees rather than penalties in nearly all other cases.¹⁸³ In contrast, the prospect of treble damages encourages private parties to bring some of the suits not brought by the government. Moreover, consent decrees are often the precursor of private suits,¹⁸⁴

coveries in settled suits are comparably large. *E.g.*, *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 453-54 (2d Cir. 1974) (approving \$10 million settlement in class action); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 341 F. Supp. 1077, 1079-80 (E.D. Pa. 1972), *vacated on other grounds*, 487 F.2d 161 (3d Cir. 1973) (separate class recoveries of \$1 million, \$2 million, \$1.75 million, and \$26 million); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 47 F.R.D. 557, 558 (E.D. Pa. 1969) (\$22 million class recovery).

180. See Baker & Reeves, *The Paper Label Sentences: Critiques*, 86 YALE L.J. 619, 623 (1977) (fines actually imposed for antitrust violations over the past five years "were little more than license fees when compared with the benefits realizable from price fixing").

181. See Liman, *The Paper Label Sentences: Critiques*, 86 YALE L.J. 619, 631 & n.3 (1977).

182. See Baker & Reeves, *supra* note 180, at 623 n.16 ("No one convicted of antitrust violations received prison sentences during fiscal 1962-1968 From 1969 to the present, fewer than a dozen individuals have received prison sentences of more than 30 days.") (citing Antitrust Division data); 805 ANTITRUST & TRADE REG. REP. (BNA) A-21, A-22 (1977) (quoting Justice Department brief in support of motion to dismiss antitrust indictment in light of *nolo contendere* plea: "[O]ne day of incarceration constitutes more time in jail than served by the vast majority of persons actually convicted of antitrust violations." (emphasis in original)). Conflicting views on the effectiveness of imprisonment as a general deterrent to antitrust violators were aired in a recent symposium, *Reflections on White-Collar Sentencing*, 86 YALE L.J. 589 (1977).

In practice, the Justice Department restricts its criminal prosecutions to those anti-competitive practices that are per se offenses or are otherwise willful or knowing violations. Baker & Reeves, *supra* note 180, at 623-24. As a result, treble damage actions are the chief deterrent of most rule-of-reason offenses. Treble damage actions avoid the unfairness of subjecting defendants to criminal liability for acts whose illegality may have been uncertain at the time of commission. At the same time, treble damage actions encourage the development of new theories of liability, and thereby lay the foundation for more effective government enforcement. *E.g.*, *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (§ 4 suit in which Supreme Court held for first time that resale price maintenance through "consignment" agreements violated antitrust laws). See Comment, *supra* note 3, at 1061.

183. In fiscal 1962-1974, an average of 68.7% of the civil suits instituted and eventually terminated by the Justice Department were settled by the entry of consent decrees. Handler, *supra* note 176, at 240 n.149 (citing Antitrust Division data). In fiscal 1962-1972, an average of 73.8% of the criminal prosecutions instituted and eventually terminated by the Justice Department were concluded by the acceptance of *nolo contendere* pleas. *Id.* at 247 n.177 (citing Antitrust Division data).

184. See M. HANDLER, H. BLAKE, H. GOLDSCHMIDT & R. PITOFKY, *supra* note 3, at 164.

suggesting that the treble damage award may be the most effective and available enforcement mechanism even when the government does take the initiative. Finally, criminal sanctions are inapplicable to several classes of antitrust offenses for which treble damages are awarded.¹⁸⁵ Thus, the deterrence policy promoted by § 4 should be a primary consideration in a court's antitrust standing inquiry.

The positive policies of compensation and deterrence are not the only policies that courts should—or do—take into account in § 4 standing determinations. Not infrequently, courts deny standing because the recoveries sought are deemed duplicative,¹⁸⁶ ruinous,¹⁸⁷ “wind-fall,”¹⁸⁸ or speculative.¹⁸⁹ Less explicitly, courts may also take into account the administrative costs that typical antitrust cases impose on the judicial system.¹⁹⁰ Although these policies—hereinafter called “countervailing policies”—are rarely articulated clearly by the courts, some are relevant policies for standing determinations and therefore warrant examination.

The policy against duplicative recoveries derives from the traditional legal rule against recovery more than once for the same injury, a rule magnified in importance in the antitrust context because double liability for treble damages might oblige the defendant to pay six-fold damages.¹⁹¹ The policy comes into play in two types of cases: those in which the plaintiff may recover damages in another, simultaneous

185. Conspiracies or combinations unreasonably to restrain trade and monopolization or attempted monopolization can be punished by criminal sanctions, 15 U.S.C. §§ 1-3 (Supp. V 1975), but violations in the form of unlawful price discrimination, exclusive dealing, mergers, and interlocking directorates (except among common carriers) cannot, 15 U.S.C. §§ 13, 14, 18-20 (1970), unless they are part of a criminal antitrust violation.

186. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-64 (1972); *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 481, 484 (S.D.N.Y. 1973).

187. *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

188. *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956).

189. *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 97 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976); *Long Island Lighting Co. v. Standard Oil Co.*, 521 F.2d 1269, 1273-74 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

190. See *Reiter v. Sonotone Corp.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,360, at 71,268 (D. Minn. 1977) (referring briefly to standing as means of limiting case-load). The relevance of *Illinois Brick Co. v. Illinois*, 45 U.S.L.W. 4611 (U.S. June 9, 1977), to this concern is discussed *infra* at pp. 855-57. See *Lytle & Purdue*, *supra* note 10, at 801; *Sherman*, *supra* note 10, at 403 (arguing that judicial administration interests militate against broad standing grants).

191. *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13, 30 (E.D. Pa. 1970), *aff'd per curiam sub nom. Mangano v. American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971); *Ames v. American Tel. & Tel. Co.*, 166 F. 820, 823 (C.C.D. Mass. 1909); see *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 481, 484 (S.D.N.Y. 1973).

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suit, and those in which multiple plaintiffs' injuries are so inseparable that one plaintiff is likely to recover damages for injuries actually suffered by another. An example of the first type is *Pitchford v. PEPI, Inc.*,¹⁹² in which the court denied a shareholder standing, relegating him to a corporate suit to repair the injury done to the business, and thereby to the value of the shares.¹⁹³ An example of the second type is *Hawaii v. Standard Oil Co.*,¹⁹⁴ in which the Court denied Hawaii standing to bring suit for injury to "the general economy" of the state allegedly resulting from the defendants' anticompetitive activities.¹⁹⁵ It reasoned that most of a recovery for injury to the state's general economy would duplicate recoveries that individual consumers and businesses might obtain under § 4.¹⁹⁶

Avoidance of duplicative recoveries is a sound policy consideration, but denial of standing is too blunt an instrument to promote this interest sensitively. As Congress recently observed, courts have a number of ways, short of denying standing, by which to eliminate the possibility that plaintiffs may enjoy multiple recoveries.¹⁹⁷ Usually the problem can best be assessed—and resolved—after the litigants have had the opportunity to present their case on the merits.¹⁹⁸

The policy against ruinous recoveries is related to, but distinguishable from, the policy against duplicative recoveries. The ruinous recoveries policy is pertinent when discrete injuries are so numerous that nonduplicative treble damages recoveries for all of them would heavily burden, or perhaps even bankrupt, one or more defendants.¹⁹⁹ This policy is usually referred to as a policy against "overkill" liability.²⁰⁰ It has so far been applied only to the potential cumulative

192. 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976).

193. *Id.* at 96-97.

194. 405 U.S. 251 (1972).

195. *Id.* at 262-64.

196. *Id.*

197. SENATE REPORT, *supra* note 165, at 44-45 (explaining purpose of Antitrust Improvements Act provisions precluding duplicative liability; endorsing duplication avoidance techniques described in *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974)). These alternative means of avoiding duplicative recoveries are discussed *infra* at pp. 862-63.

198. See *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶ 74,680, at 94,978-79 (D. Conn. 1973).

199. Recovery for numerous discrete injuries, whether to many parties individually or to a single party through repeated violations, may have a ruinous effect. In practice, the problem has been raised only where many parties have been injured. In these cases courts have used standing to bar certain plaintiffs from suing rather than releasing certain individual defendants from liability. *E.g.*, *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 125, 129-31 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

200. *E.g.*, *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

effects of separate recoveries by "remotely" injured plaintiffs, though it is theoretically applicable to a very large recovery by a single "directly" injured plaintiff. In contrast to the policy against duplicative recoveries, whose concern is whether one injury results in multiple recoveries, the policy against ruinous recoveries is concerned with the total impact of a damage award, whether or not it is duplicative. The two policies may reinforce each other in certain cases, but one may be implicated without the other; for instance, duplication does not necessarily result in overkill.

To date, courts have expressed a general but uncritical concern about "overkill" in private antitrust suits.²⁰¹ They apparently have not recognized the relation of the ruinous recoveries policy to the tenets of substantive antitrust law. Ruinous damages imposed on a number of small competitors may significantly increase concentration in an industry, to the detriment of consumers, suppliers, and other beneficiaries of competitive markets.²⁰² A court is justified in seeking ways, including denial of standing, to mitigate these anticompetitive effects.²⁰³ In the absence of likely anticompetitive impact, however, concern over the extent of an antitrust defendant's total liability represents no more than unwarranted solicitude for the alleged antitrust violator. Accordingly, the ruinous recoveries policy should only carry weight in standing determinations when long-term injuries to competition are demonstrably likely to result from the granting of standing to a particular plaintiff.²⁰⁴

201. See, e.g., *Calderone Enterprises v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1296 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). Commentators have also failed to examine the scope and applicability of the overkill policy carefully. See, e.g., Sherman, *supra* note 10, at 398-99.

202. To avoid such an effect, the Second Circuit recently approved on appeal a small settlement with a nearly insolvent defendant, thereby permitting it to remain in the market. Interview with H. Laddie Montague, Jr., counsel for plaintiff, *In re Master Key Antitrust Litigation*, No. 76-7356 (2d Cir. filed Sept. 17, 1976), in Philadelphia (Apr. 4, 1977).

203. For a discussion of various means of avoiding "overkill" damages, see pp. 863-64 *infra*.

204. The Justice Department has taken a parallel approach to the ruinous recovery problem in recommending penalties for antitrust violators. The Department has stated that since every fine hurts the defendant somewhat, it will recognize the ruinous recovery defense only when the defendant meets the "heavy burden" of showing that a fine "would effectively remove it from the market as a viable competitor." Antitrust Division Memorandum on Guidelines for Sentencing Recommendations in Felony Cases Under the Sherman Act (Feb. 24, 1977) (on file with *Yale Law Journal*), excerpted in 45 U.S.L.W. 2419, 2420 (Mar. 8, 1977).

This standard finds further support in the legislative history of the Antitrust Improvements Act of 1976. A principal purpose of the *parens patriae* provisions of the Act is to prevent antitrust violators from being "unjustly enriched" by their antitrust violations. See, e.g., HOUSE REPORT, *supra* note 165, at 3. Opponents of the Act objected to these

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The policy against windfall recoveries is in part an outgrowth of the duplicative recoveries policy, for those receiving multiple recoveries for a single injury are properly regarded as recipients of windfalls.²⁰⁵ But some lower federal courts have suggested another meaning of windfall recovery in the antitrust standing context—a meaning fundamentally different from the traditional meaning of recovery for injury that is already compensated or never took place. Although never clearly articulated, this conception of windfall recovery appears to be that plaintiffs with injuries that are discrete and provable, but too incidentally caused, simply are not entitled to recover under § 4.²⁰⁶ At times the courts ascribe to Congress this conception of windfall recovery. Congress, it is said, could not have intended that the supra-compensatory sums authorized under a treble damages scheme be awarded to “remotely” injured plaintiffs; therefore, recoveries by such plaintiffs are windfalls.²⁰⁷ At other times, the courts holding this view seem to reason that “strangers” to a commercial relationship²⁰⁸ would be recipients of windfalls if awarded treble damages, because only parties in a “direct” commercial relationship with the defendant have a legitimate expectation of protection from the defendant’s antitrust violation.²⁰⁹

provisions as threatening business with “ruinous liability” and proposed limiting liability to single damages. An amendment to this effect was rejected in committee. *See, e.g.,* SENATE REPORT, *supra* note 165, at 45. The committee also rejected arguments equating any liability with ruinous liability, noting the similarity of these arguments to those propounded in opposition to the passage of the Sherman Act in 1890:

“Many suggestions were made in argument based upon the thought that the Anti-Trust Act would in the end prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions.”

Id. at 7 (quoting *Northern Sec. Co. v. United States*, 193 U.S. 197, 351 (1904)).

205. *Cf. Ames v. American Tel. & Tel. Co.*, 166 F. 820, 823 (C.C.D. Mass. 1909) (barring recovery by stockholder for injury to the corporation without a showing of special injury to the individual because of fear of duplicative recovery).

206. *See Conference of Studio Unions v. Loew’s Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

207. *See Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295-96 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). In *Calderone*, the court attributed to Congress the view that treble damages would be a windfall to “remotely” injured plaintiffs, without any citation to the legislative history. *Id.* at 1296. For an indication of Congress’s actual intent, see pp. 845-46 *supra*.

208. *P. AREEDA, supra* note 3, at 72.

209. *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 394-95 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963) (supplier is “too remote” to recover when antitrust violation was directed at supplier’s customer); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956).

Neither of these lines of reasoning supports a distinct conception of windfall in the antitrust context. As the earlier review of the legislative history of § 4 indicated,²¹⁰ Congress in 1890 and in 1914 seemed primarily interested in permitting all beneficiaries of the competitive market system to bring private suits for treble damages. Recent congressional pronouncements should put to rest any doubts about the present intentions of Congress in this regard.²¹¹ Similarly, the view that treble damages are a windfall for "remotely" injured plaintiffs because their injury is unforeseeable is not a tenable basis for denying standing. Section 4 is a remedial statute²¹² designed to compensate victims of illegal acts that are inherently intentional rather than negligent. General principles of tort law thus suggest that the foreseeability aspect of the windfall policy is irrelevant to antitrust standing.²¹³ Therefore, except insofar as the windfall recoveries policy is synonymous with the duplicative recoveries policy, it should have no impact on antitrust standing determinations. And, insofar as it is synonymous, it offers no independent ground for denying standing.

The policy against speculative recoveries has been mentioned only occasionally as militating against grants of antitrust standing.²¹⁴ If considered properly, the policy should play no part whatsoever in the standing inquiry. To deny standing on grounds of speculative injury is to prejudge the merits of the plaintiff's claim for damages, for speculativeness of injury implies inability to prove that injury exists. But issues of adequacy of proof are ordinarily handled through motions for summary judgment or for directed verdict.²¹⁵ An antitrust plaintiff

210. See pp. 845-46 *supra*.

211. "Under Section 4 of the Clayton Act, any person, including any consumer, who can prove he was injured by price-fixing or any other antitrust violation, has a cause of action." HOUSE REPORT, *supra* note 165, at 6. See note 165 *supra* (citing Senate Report). But see *Illinois Brick Co. v. Illinois*, 45 U.S.L.W. 4611, 4614 n.14 (U.S. June 9, 1977) (barring indirect purchasers from bringing actions under § 4 despite congressional support for such actions reflected in legislative history of Antitrust Improvements Act: Act "did not alter the definition of which overcharged persons were injured within the meaning of § 4").

212. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 696 (1977).

213. See W. PROSSER, *supra* note 7, at 32-34 (transferred intent rule: if defendant acts with intent to injure another, he is liable for unforeseen injury to third parties).

214. See, e.g., *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 97 (3d Cir.), cert. denied, 426 U.S. 935 (1976); *Reiter v. Sonotone Corp.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,360, at 71,268 (D. Minn. 1977); *Al Barnett & Son v. Outboard Marine Corp.*, 64 F.R.D. 43, 53 (D. Del. 1974); *Plum Tree, Inc. v. Rouse Co.*, 58 F.R.D. 373, 376 n.2 (E.D. Pa. 1972).

215. See FED. R. CIV. P. 41(b), 50(a). Rule 41(b) provides for a motion for dismissal at the close of the plaintiff's presentation of evidence in a non-jury trial. Rule 50(a) provides for a similar motion in a jury trial. See 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 2371, 2524 (1971) (citing cases).

Pre-trial summary judgment is available when it appears that a plaintiff will be unable to produce credible evidence of injury. FED. R. CIV. P. 56(e). See 10 C. WRIGHT & A. MILLER,

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should not be denied an opportunity to present all its evidence on causation and extent of injury before the court rules on whether its allegations are sufficient as a matter of law; indeed, such a denial is contrary to accepted notions of civil procedure.²¹⁶ Because the problem of speculative recoveries is irrelevant to the legal issue of which parties may bring an antitrust claim to trial, it will not be considered further in this formulation of a policy approach to standing.²¹⁷

The most difficult countervailing policy to evaluate is that against burdening the courts with typically long and complex antitrust litigation. This policy is likely to receive greater attention in light of the Supreme Court's opinion in *Illinois Brick*, which stressed the difficulties of proving passing-on of overcharges in the course of holding that indirect purchasers could not recover treble damages under § 4.²¹⁸ Nevertheless, the implications of *Illinois Brick* for standing determinations are far from clear. The Court noted that it was not reaching its result on standing grounds.²¹⁹ Moreover, chain-of-distribution cases presented special problems of proof, because in suits involving several levels in the chain all but ultimate purchasers had to establish not only their payment of supra-competitive prices but also their failure to pass-on the overcharges.

Illinois Brick thus does not foreclose the question whether judicial burdens, at least outside chain-of-distribution cases, might be eased as

supra § 2712, at 370-84 (1973) (summary judgment is procedural device intended to weed out unfounded claims). Compare *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321, 1324-25 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1973) (conclusory affidavits alleging conspiracy to refuse to deal insufficient to raise genuine issue of fact) with *Ovitron Corp. v. General Motors Corp.*, 295 F. Supp. 373, 379 (S.D.N.Y. 1969) (where plaintiff produces affidavits establishing genuine issue of fact about existence of damages, summary judgment cannot be granted on ground that extent of damages is speculative).

216. Cf. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (complaint should not be dismissed for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to relief"). A standing barrier based on potential speculativeness of injury would conflict with the Supreme Court's liberal view of the quantum of evidence needed to go to the jury on questions of injury and damages. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931).

217. It should be noted that even if speculative recoveries were relevant to the standing inquiry, the categorization and target area approaches would be inadequate. Some courts have supposed that direct injury tests provide a "fair and easily identifiable cutoff point where dangers move from the ascertainable to the speculative." *Plum Tree, Inc. v. Rouse Co.*, 58 F.R.D. 373, 376 (E.D. Pa. 1972). To the contrary, neither approach provides a reliable means of determining whether damages are too speculative to warrant recovery; either may eliminate some plaintiffs with ascertainable damages and retain others with speculative ones. Cf. P. AREEDA, *supra* note 3, at 75 (recognizing that some plaintiffs barred by the direct injury doctrine have injuries not "unduly speculative").

218. *Illinois Brick Co. v. Illinois*, 45 U.S.L.W. 4611, 4614, 4615-16 (U.S. June 9, 1977).

219. *Id.* at 4613 n.7.

well by expanding the scope of antitrust standing as by narrowing it. Remarking on the liberalization of standing outside the antitrust context, Professor Davis has argued that "opening the doors to anyone 'injured in fact' will not appreciably increase the number of parties who seek to litigate. It will cause an enormous drop in the huge volume of litigation in the federal courts about the complexities of the law of standing."²²⁰ The same might hold true in the context of antitrust standing: liberalization might simply shift the existing judicial workload from decisions on standing to decisions on the merits.

Even if the judicial burdens policy could be conclusively identified as militating against grants of standing, analysis reflecting this policy would remain problematical. Neither the legislative history of § 4 nor judicial opinions in § 4 cases suggest how much weight should attach to this policy.²²¹ The *Illinois Brick* decision, for example, though informed by a concern for adjudicatory problems in chain-of-distribution cases, seemed to view these problems more as burdens on plaintiffs than as burdens on courts.²²² Furthermore, the Court in

220. Davis, *supra* note 11, at 471.

221. The framers of the Sherman and Clayton Acts evidently did not foresee that their statutes would engender problems of judicial administration. If anything, they were concerned that the Sherman Act would not adequately promote the bringing of suits by private plaintiffs. See, e.g., 21 CONG. REC. 2569 (1890) (Sen. Sherman); *id.* at 2571 (Sen. Hiseock); *id.* at 3146 (Sen. Reagan). The collateral estoppel provisions of the Clayton Act, 15 U.S.C. § 16(a) (1970), were enacted in large part to enhance private participation in antitrust enforcement. See, e.g., 51 CONG. REC. 9090 (1914) (Rep. Mitchell) ("travesty" that victims of government-proven monopolization unable to maintain own suits).

Full discussion of the problem of judicial administration of antitrust litigation is notably absent from court opinions in § 4 standing cases. For a rare passing reference, see *Reiter v. Sonotone Corp.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,360, at 71,268 (D. Minn. 1977) (§ 4 standing limitation "necessary to keep the caseload and the fact situations of the cases within manageable bounds"). (The Supreme Court's ambiguous comments about judicial administration in *Illinois Brick* are discussed *infra* at note 222.)

The lack of discussion does not mean that courts are unaware of the problem of judicial administration; indeed, most defendants in § 4 suits make pointed references to burdensome litigation in their briefs. E.g., Defendants' Memorandum in Support of Motion to Dismiss at 17, *Weinberg v. Federated Dep't Stores, Inc.*, 5 TRADE REG. REP. (CCH) (1977-1 Trade Cas.) ¶ 61,250 (N.D. Cal. 1977), *appeal docketed*, No. 77-1547 (9th Cir. Jan. 26, 1977) (on file with *Yale Law Journal*) (allowing consumer class actions would "present enormous administrative problems for the courts"); Memorandum in Support of Mobil's Motion to Dismiss at 5, *Lefrak v. Arabian Am. Oil Co.*, 405 F. Supp. 597 (E.D.N.Y. 1975) (on file with *Yale Law Journal*) (allowing suit would "set in motion the costly and time consuming processes of complex litigation").

222. *Illinois Brick* stated that *Hanover Shoe's* rejection of the pass-on defense was grounded in concern for the "costs to the judicial system" incurred in attempts to "reconstruct [price and output] decisions in the courtroom." 45 U.S.L.W. at 4614. Yet in setting forth its own rationale for barring offensive use of pass-on arguments, the *Illinois Brick* Court seemed to shift its emphasis to the costs that complex antitrust litigation imposes on plaintiffs. If offensive pass-on arguments were permitted, the Court reasoned, the consequent multiplicity of indirect purchasers litigating and sharing in

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Illinois Brick, by holding that the entire category of indirect purchasers could not recover treble damages under § 4, sidestepped a fundamental dilemma facing courts that must apply the judicial burdens policy in areas where neither Congress nor the Supreme Court has set absolute rules. If courts under these circumstances are to apply the policy to case-by-case standing determinations, they must assess how a given quantum of judicial resources should be rationed among the substantive claims of the various plaintiffs appearing before them. Understandably, the Supreme Court itself has expressed reluctance to engage in the claim-ranking that would necessarily underlie such resource allocation decisions.²²³

The allocation of judicial resources is more properly a matter of legislative competence and prerogative. Although Congress has not expressly confronted these issues in the context of private antitrust litigation, it has recently stressed the importance of such litigation in deterring potential antitrust violators and compensating the victims of antitrust violations.²²⁴ Since Congress's pronouncements came at a time when the burdens borne by the courts were well publicized,²²⁵ one might infer that Congress did not consider those burdens to be a significant countervailing policy. In any event, given the inequities and impracticalities of balancing substantive claims against administrative costs, courts would be well advised to avoid using standing determinations as cost-cutting devices. In another context, the Supreme Court has remarked that the adoption of straightforward rules

antitrust claims, as well as the evidentiary obstacles facing direct purchasers seeking to disprove passing-on, might discourage direct purchasers from bringing § 4 suits at all. *Id.* at 4617-18. This in turn would "undermine [the] effectiveness" of treble damage actions as an "important weapon of antitrust enforcement." *Id.* at 4615, 4618. Thus the Court's reasoning forced it into the anomalous position of drastically reducing the number of potential antitrust plaintiffs in order to promote deterrence of antitrust violations. In the process, unfortunately, the Court left unclear how the policy against burdening the *judicial* system is related, if at all, to fostering deterrence and what weight the former should be given in its own right. Other aspects of the *Illinois Brick* opinion are examined *infra* at pp. 872-78.

223. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 (1975) (if courts were to determine which parties in which suits should be awarded attorneys' fees for acting as private attorneys general, courts would have "to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases").

224. See note 165 *supra* (citing congressional documents concerning Antitrust Improvements Act of 1976).

225. Perhaps the most salient proponent of congressional action to ease judicial workloads has been Chief Justice Burger. See *Chief Justice Burger Issues Yearend Report*, 62 A.B.A.J. 189, 190 (1976) ("judges can do nothing [but] wait on Congress and urge prompt action"); *Chief Justice Burger Calls for Action on Several Proposals*, 61 A.B.A.J. 303, 304 (1975) (reviewing various means of solving "the dilemma of an ever-increasing [judicial] workload").

of decision would alleviate the difficulties of deciding antitrust cases.²²⁶ Analogously, the rules proposed in the next section may facilitate standing determinations and might reduce the judicial burdens associated with typical antitrust cases.²²⁷

B. *A Framework of Rules for Implementation and Accommodation*

The preceding discussion of positive and countervailing policies lays the groundwork for the proposed analytical framework. The next step is to articulate rules for implementing these policies in standing

226. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963) (referring to § 7 of Clayton Act: "in any case in which it is possible, without doing violence to the congressional objective . . . , to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration").

227. There is one additional source of countervailing policies that should be noted. In some cases an otherwise suitable antitrust claimant may be denied standing because of a conflict between § 4 and another legal regime, be it derived from equity, common law, or statutory law. For example, prior to the Supreme Court's decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), the equitable doctrine of *in pari delicto* was frequently invoked to deny standing to plaintiffs that participated in the defendant's antitrust violation (e.g., through acceptance of franchise restraints). Thus, in a case where an anticompetitive course of conduct had injured several persons, some of the victims might have been denied standing to sue under § 4 because of the conflict between the literal statutory provision affording standing to "[a]ny person . . . injured" and the body of traditional equitable principles. (Since the *Perma Life* decision disapproving the *in pari delicto* defense in most antitrust cases, the doctrine has been applied more sparingly. See, e.g., *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 279 (9th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3774 (U.S. May 31, 1977) (*in pari delicto* defense unavailable where plaintiff's participation was not essential to formation of illegal conspiracy).)

Similarly, if a corporation that has been found liable for treble damages in a § 4 suit were to bring a treble damage action derivatively against its management, alleging that the losses incurred by the corporation represented injuries to business or property "by reason of" acts by the management that are prohibited by the antitrust laws, the managers would find themselves facing a claim for nine times the damage caused by the antitrust violation they committed. See *Blake*, *supra* note 17, at 157-58 n.63. A court would almost certainly deny standing to the plaintiff in such a case, and properly so given the importance in corporate law of the delicate balance between fiduciary duty and managerial discretion. Cf. *Langsam v. Beam*, 1975-2 Trade Cas. ¶ 60,552, at 67,419-20 (E.D.N.Y. 1975) (holding that corporation has no cause of action under § 4 to recover from management amount of treble damages paid by corporation; § 4 does not "regulate the relation between a company and its management").

A final illustration of this type of countervailing policy can be drawn from *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973), in which several plaintiffs sued the major automobile manufacturers for conspiring to forestall development of air pollution control devices. If the court in this case had determined that awarding treble damages would impose such losses on the manufacturers that they would be likely to reduce their research and development expenditures, it might have decided to mitigate the defendants' liability by denying standing to one or more plaintiffs. Such a denial of standing would avoid a conflict between § 4 and the environmental statutes' promotion of pollution control.

Of course, § 4 may be complementary to other legal regimes in certain situations. In *Multidistrict Vehicle Air Pollution*, for example, an award of treble damages might have furthered environmental as well as antitrust policies in the absence of adverse research and development effects on the defendants.

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decisions and, in particular, for accommodating to the greatest extent possible pertinent policies that are in genuine conflict.²²⁸

Application of these rules presupposes that the plaintiff's allegations, if proven, would invoke the protection of the antitrust laws in his favor. This presupposition is warranted for standing purposes because the breadth of the compensation policy assures that it will be implicated by virtually any injury causally linked to an antitrust violation.²²⁹ Therefore, as long as the plaintiff alleges injury flowing from defendant's anticompetitive acts, it is appropriate to assume, as in the traditional direct injury inquiry, the applicability of the substantive law. Of course, the assumption that the plaintiff is within the substantive protection of the antitrust laws for purposes of standing does not determine whether he is entitled to antitrust protection on the merits; that question is decided only after appropriate development of the legal and factual bases of the claim being presented.²³⁰ But since injury in fact generally invokes the compensation principle, substantive antitrust policy should not be injected into the standing inquiry.

228. The case-by-case approach suggested here for applying the positive and countervailing policies implicit in § 4 parallels that adopted in the rule-of-reason cases for determining whether restraints of trade violate § 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. V 1975). In *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360-61 (1933), for example, the Court noted that in applying § 1 "a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. . . . The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions." By its explicit attention to the policies implicated by § 4, the suggested approach also responds to Judge Learned Hand's celebrated injunction to "remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

229. The one court that has considered at length the distinction between the threshold question of standing and the ultimate resolution of the merits has concluded that allegations bringing plaintiff "arguably within the zone of interests to be protected" by the antitrust laws were sufficient to state a claim of substantive protection for standing purposes. *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1152 (6th Cir. 1975) (quoting *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)). For a broad formulation of the scope of antitrust protection afforded by § 2 of the Sherman Act, 15 U.S.C. § 2 (Supp. V 1975), for purposes of standing, see *Cromar Co. v. Nuclear Materials & Equip. Corp.*, 543 F.2d 501, 509 (3d Cir. 1976) (any "producer-participant" in industry allegedly sought to be monopolized has standing under § 2 of Sherman Act).

230. The question of protection on the merits ordinarily cannot be decided on a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6); due to the covertness and complexity of many antitrust offenses, discovery is usually necessary to develop fully the facts establishing a violation against which the plaintiff is protected. Hence, a decision on the merits can rarely be made before summary judgment is appropriate under Fed. R. Civ. P. 56, and often must await trial. Cf. *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962) (summary judgment procedures "should be used sparingly in complex antitrust litigation where motive and intent play leading roles").

Rule 1: *Where no countervailing policy against a particular plaintiff's antitrust action is implicated, the court should grant standing no matter how "remote" the alleged injury.* This rule essentially provides that standing to obtain private antitrust relief shall, wherever possible, be coextensive with the substantive protection of the antitrust laws.²³¹ A principal basis for the rule is the compensation policy, which by itself is equally compelling whether injury is "direct" or "remote," and whether the victim is inside or outside a "target area." The deterrence policy also strongly supports this rule. Denial of standing in the absence of countervailing policies would undermine the deterrent effect of private actions.

Rule 1 typically would apply in cases where only one or a few parties have sustained injuries and sued.²³² In such cases, there is virtually no possibility that the policy against ruinous recoveries will be implicated, because "overkill" normally results only when numerous plaintiffs recover.²³³ Similarly, there is only a slight possibility of duplicative recoveries and, therefore, windfalls, where only one or a few injured parties sue.²³⁴ Hence, in these cases, a court following the proposed approach would ascertain whether any countervailing policies applied and, in the likely event that none did, it would grant antitrust standing under Rule 1.²³⁵

Rule 2: *Where there is a potential conflict between the positive and*

231. The rule's broad conception of standing complements the Supreme Court's willingness to interpret various substantive provisions of the antitrust laws in the spirit of the procompetitive purposes for which Congress enacted them. *See Perkins v. Standard Oil Co.*, 395 U.S. 642, 647-48 (1969); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 348-52 (1968). *Cf. D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co.*, 236 U.S. 165, 174 (1915) (dictum) ("founded upon broad conceptions of public policy, . . . not only the prohibition of the [Sherman Act] but the remedies which it provided [are] co-extensive with such conceptions").

232. Rule 1, for example, would call for a different result in *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir.), *cert. denied*, 401 U.S. 923 (1970), where a sole plaintiff was denied standing. This case is discussed further *infra* at pp. 879-80.

233. *See* note 199 *supra*.

234. Even a single-party suit, of course, may be duplicative if it ultimately develops that the relief being sought is for injury suffered by another person. In such a case the proper procedure is a directed verdict at trial for failure to prove injury. If a single-party plaintiff does prove injury, his recovery would represent a windfall only if his injury could not be distinguished from that suffered by others and, therefore, his damages could not be apportioned fairly. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-64 (1972) (since § 4 permits state to sue in proprietary capacity and its citizens to sue for injury to business or property, to permit state to recover damages for injury to its general economy "would open the door to duplicative recoveries").

235. Because overkill possibilities often become apparent only when liability is determined at trial, it sometimes may be necessary to defer standing determinations to the trial stage of antitrust litigation, rather than make them during the pre-trial stage as is commonly done. For examples of cases in which the standing determination has been deferred to trial, see *Schroeter v. Ralph Wilson Plastics, Inc.*, 49 F.R.D. 323 (S.D.N.Y. 1969); and *Data Digests, Inc. v. Standard & Poor's Corp.*, 43 F.R.D. 386 (S.D.N.Y. 1967).

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the countervailing policies, the court should investigate the factual circumstances of the case to determine whether there is a genuine conflict between them. If there is no genuine conflict, then Rule 1 applies: standing should be coextensive with the substantive protection of the antitrust laws. This rule reflects the desirability of resolving standing issues with minimum infringement of the values embodied in each of the pertinent policies, whether positive or countervailing. The rule calls for eschewing unnecessary balancing of strong policies in areas of false conflict.²³⁶ When the facts of a case do not create genuine conflict among the pertinent policies, then injury in fact should confer standing under the compensation policy.

Rule 2 would frequently be applicable where the policies against overkill and duplicative recoveries appear to be relevant. If, for example, a private antitrust defendant asserts that a particular plaintiff's claims would result in ruinous recoveries (presumably, in conjunction with all other suits then pending or possible), the court should inquire whether the defendant can establish that his diminished ability to compete would represent an injury to the relevant market's competitive structure. There is no genuine conflict between the two positive policies of § 4 and the overkill policy if a defendant cannot make this showing of injury to competition. Such a showing would be particularly unlikely where several major injured parties are barred from suit by the statute of limitations.²³⁷

Similarly, in suits by "incidentally" injured plaintiffs, the policy against windfall recoveries does not conflict with the compensation and deterrence policies unless there is a potentially duplicative recovery by a single plaintiff. As was argued earlier, only a plaintiff who has suffered no injury receives a windfall by treble damage recovery. Thus, in this example, as in the previous one, the lack of genuine conflict between the countervailing policies against overkill and duplicative recovery, and the positive policies favoring compensation and

236. The approach advocated here has a parallel in conflict-of-laws analysis. Where the policies of one jurisdiction seem to conflict with those of another, courts tend to scrutinize the policies to ensure that full realization of the first jurisdiction's policies is not sacrificed unless the second jurisdiction's policies are actually implicated. See A. von MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 327-40 (1965); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178.

237. The statute of limitations in ordinary private antitrust litigation is four years. 15 U.S.C.A. § 15b (West Supp. 1977). In private lawsuits based on government actions, the limitations period is one year from the date of termination of the government action if the government action is terminated more than four years after the private cause of action accrued. *Id.* § 16(i). At least one court has noted the effectiveness of the statute of limitations in disposing of potential duplication problems. See *Boshes v. General Motors Corp.*, 59 F.R.D. 589, 596 (N.D. Ill. 1973).

deterrence would result in the application of Rule 1 and a grant of standing.

Rule 3: *In cases of genuine conflict between positive and countervailing policies, the court should explore all available techniques for eliminating the conflict.* This rule encourages courts to canvass procedural alternatives short of a denial of standing in order to reconcile the conflicting policies. This process ensures that all the relevant standing policies will be vindicated to the fullest extent possible.

Rule 3 is particularly pertinent to suits implicating the policies against duplicative and windfall recoveries. The courts can employ a host of techniques to prevent a private damage claim from leading to recovery for someone else's injury or for injury already compensated. Where parties at different levels in a chain of distribution sue the same defendant, fears of duplicative or windfall recoveries may be allayed at times by apportionment of damages at trial.²³⁸ Where only one of several injured parties in a chain of distribution has filed suit and others in the wings are not barred by the statute of limitations, a variety of procedural devices may be used in particular cases to bring in parties with duplicative claims and apportion damages among them.²³⁹ In cases not involving chains of distribution, existing remedies may help avoid duplicative recoveries. For example, the derivative suit for antitrust damages suffered through corporate injury serves to block

238. Apportionment of damages to different levels of purchasers can be accomplished in various ways. When the only purchasers suing are businesses, courts can use the so-called "yardstick" technique of determining damages suffered. This technique compares the plaintiffs' allegedly reduced profit levels with those of unaffected but otherwise comparable firms in the same industry. *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). An alternative technique, which is essential where all businesses in an industry have been affected, compares pre- and post-violation profit levels for each level of business purchasers. *Pacific Coast Agr. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1206-07 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). Both of these techniques reveal how much of an alleged overcharge is absorbed at each intermediate level in the chain of distribution, thereby preventing duplication in different levels' recoveries.

If non-business levels, such as ultimate consumers, also sue, the yardstick and before-and-after techniques remain useful. The damage suffered by ultimate consumers is at least the amount of the initial overcharge that is not absorbed by intermediate levels in the form of diminished profits. (The same techniques, applied to the defendants' prices, can be employed to estimate the initial overcharge.) Ultimate consumers may have suffered damages in excess of the unabsorbed portion of the initial overcharge if the defendants or intermediate purchasers used a percentage mark-up pricing system, which magnifies the overcharge at subsequent purchaser levels.

239. The majority in *Illinois Brick* broadly discounted the capacity of procedural devices to overcome the possibility of duplication in chain-of-distribution recoveries. *See* 45 U.S.L.W. at 4614 n.11, 4615-16. The Court's generalizations seem unwarranted, however; a case-by-case analysis of the value of various procedures would seem preferable to abandonment of them. *See* pp. 873-78 *infra* (discussing procedures for avoiding duplicative recoveries in chain-of-distribution cases).

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separate recoveries by a corporation and its shareholders; it should continue to be required in lieu of direct shareholder suits.²⁴⁰

The problem of duplicative recoveries from consumer and *parens patriae* antitrust suits has been virtually eliminated by the provisions of the Antitrust Improvements Act of 1976.²⁴¹ The Act contemplates the bringing of private consumer actions and state *parens patriae* actions for the same violations,²⁴² but it guards against consequent duplicative recoveries in two ways. First, it bars private relitigation of all § 4 claims already adjudicated in a *parens patriae* suit.²⁴³ Second, the Act excludes from recovery through *parens patriae* actions any damages already awarded to the injured parties in private suits.²⁴⁴ Henceforth, courts entertaining private consumer actions can avoid conflicts between positive and countervailing standing policies simply by determining which claims have been foreclosed by prior *parens patriae* litigation. They need not be concerned that future *parens patriae* litigation will entail duplicative recoveries.

To the extent that ruinous liability in a given case is a function of duplicative recoveries, the techniques already mentioned should

240. See pp. 813-15 *supra* (discussing early antitrust cases denying standing to shareholders). Suits by closely held corporations and their officers may be thought to present special duplication problems, for officers of such corporations are often the principal or only shareholders and could recover the same damages twice if both they and their alter ego corporations recover those profits that go to salaries. But if such officer-shareholders are granted standing in their employee capacity, no problem of duplicative recoveries need arise. If the employees win the suit, their recovery for salaries they have lost can simply be taken into account in computing (*i.e.*, reducing) the corporation's lost profits or diminished going-concern value. See *Vandervelde v. Put & Call Brokers & Dealers Ass'n*, 344 F. Supp. 118, 154 (S.D.N.Y. 1972). But see *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 97, 109 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976) (in computing corporate profitability as basis for damage award, court required deduction of salary as cost of operations, but denied employee-shareholder standing as employee). Denial of standing to employee-shareholders in the former capacity not only results in a less than fully compensatory recovery for them but also makes their degree of compensation depend arbitrarily on the portion of profits they elected not to withdraw as salary.

241. 15 U.S.C.A. §§ 15c-15h (West Supp. 1977).

242. See *id.* § 15c. The Act in effect overrules the result in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), in which a state *parens patriae* suit was barred on the ground that duplicative recoveries might result if private suits were also brought.

In the wake of the Supreme Court's decision in *Illinois Brick* barring indirect purchaser suits, the viability of *parens patriae* actions brought on behalf of the many consumers who are indirect purchasers is problematical. See 45 U.S.L.W. at 4614 n.14 (stating that *parens patriae* amendments to Clayton Act gave consumers no new substantive rights under § 4). *Parens patriae* actions on behalf of consumers who are direct purchasers would seem to survive the decision.

243. See 15 U.S.C.A. § 15c(b)(3) (West Supp. 1977). Where state *parens patriae* suits and private consumer suits are brought simultaneously, the Act avoids duplicative recoveries by allowing consumers to opt out of the *parens patriae* action, *id.* § 15c(b)(2), and by making any adjudication in the *parens patriae* suit *res judicata* for any private plaintiff who fails to opt out, *id.* § 15c(b)(3).

244. *Id.* § 15c(a)(1)(A).

mitigate that countervailing policy. Overkill problems not stemming from duplication may also be ameliorated by procedural adjustments. Some courts have employed installment payment plans to ease the burden of substantial damage awards.²⁴⁵ Dismissal of the most economically vulnerable defendants may be warranted, but only as a penultimate resort.²⁴⁶ Although a drastic measure, it is preferable to the alternative of denying standing to certain plaintiffs, for it serves the policy against anticompetitive ruinous recoveries with less sacrifice of compensation and deterrence objectives.²⁴⁷

Rule 4: *Where a genuine conflict between positive and countervailing policies cannot be mitigated, the court should make a standing determination based on the policies' relative strength in light of the facts before it.* As this rule suggests, the countervailing policies on occasion may require that the scope of antitrust standing be narrower than the scope of substantive protection. For example, potential recoveries may be so large as to have a significant anticompetitive effect on an industry, one that cannot be alleviated adequately through either delayed payments or selective exemptions from liability. The policies of compensation and deterrence should then be frustrated in order to serve the overriding statutory purpose of preserving a com-

245. See *Langsam v. Beam*, 1975-2 Trade Cas. ¶ 60,552, at 67,418 (E.D.N.Y. 1975) (describing installment payment of \$18 million treble damage award in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971)); Interview with Steven Goldman, accountant for plaintiffs in charge of settlement in *City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971), in *Philadelphia* (Aug. 3, 1976) (stating that installment payments had been negotiated in settlement of case). Cf. *EEOC v. Steamfitters' Local 638*, 542 F.2d 579, 592 (2d Cir. 1976), cert. denied, 97 S. Ct. 1186 (1977) (suggesting that if total award for back pay in Title VII suit proved "too great for the union to pay," it might be possible "either to modify the award on a pro rata basis or to provide for payments in installments," but reserving decision on question). Selective low settlements with weak defendants are another means of overkill avoidance. See note 202 *supra*.

246. In some cases it may be desirable to delay standing determinations until trial, so that the facts about the alleged overkill effect can be developed. See note 235 *supra*; *EEOC v. Steamfitters' Local 638*, 542 F.2d 579, 592 (2d Cir. 1976), cert. denied, 97 S. Ct. 1186 (1977) (stating that overkill avoidance before relief stage would be "premature").

247. Excusing insolvent or nearly insolvent defendants on policy grounds would be analogous to the "failing company" doctrine applied in cases decided under § 7 of the Clayton Act, 15 U.S.C. § 18 (1970). That doctrine has been held to justify mergers that could normally be found illegal, on the theory that the anticompetitive effect of the merger would probably be less than the anticompetitive effect of one company failing entirely. See *United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 555 (1971) (setting out "failing company" test). The "failing company" doctrine arguably finds support in the "substantially to lessen competition" requirement for a § 7 violation; there is no literal support for a failing defendant exception in the language of § 4. Nevertheless, the firm establishment of the overkill policy in standing cases, see, e.g., *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972), and the antitrust laws' concern for maintaining competitive markets argue in favor of such an exception.

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petitive market structure. In such instances, the court should estimate the damages of the plaintiffs and the highest nonruinous level of aggregate recovery at a point in the litigation when an informed assessment is possible. It should then dismiss the actions of a number of otherwise suitable plaintiffs so that the total claim equals the nonruinous level ascertained. Since, for a given level of recovery, the identity of the plaintiffs is critical for the compensation policy, and not for the deterrence policy,²⁴⁸ the court should deny standing to those plaintiffs whose injury is less severe.²⁴⁹

Similarly, where duplicative recovery appears unavoidable in a particular chain-of-distribution case because of the infeasibility of such mitigating procedures as apportionment of damages, the court should determine the nonduplicative aggregate level of liability and deny standing to the less severely injured among the plaintiffs. If severity of injury cannot be evaluated because of the complexity of the facts, the court could deny standing to those plaintiffs least likely to be able to substantiate their damage claims.²⁵⁰

The balance sometimes should be struck in favor of compensation and deterrence in spite of an applicable countervailing policy. For example, where the damage claim of a competitor, severely injured by an antitrust violation, raises an unmitigable risk of overkill, the court should grant the plaintiff standing nevertheless. If the competitive strength of one of the firms in a market must be impaired, it should be that of the antitrust perpetrator, not that of the antitrust victim. A denial of standing in this situation would not only thwart compensation for injuries but also encourage antitrust violators to engage in practices that devastate their competitors.

In sum, an antitrust standing inquiry informed by the four rules proposed in this Part is rooted in careful analysis of the policy considerations implicated by the facts of the particular case. Only after such analysis is it possible for a court to identify the policies relevant to the standing determination and to assess the possibilities for accommodating those policies that conflict.

248. As Justice Brennan noted in his *Illinois Brick* dissent, "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation." 45 U.S.L.W. at 4621. Justice Brennan's observation was quoted with approval by the majority. *Id.* at 4618.

249. Because the compensation policy responds to the severity of an injury, not its directness, denial of standing to avoid duplicative recoveries should not be based on the directness of the plaintiff's injury. *See* pp. 846-47 *supra*.

250. Courts should refrain from transforming particular denials of standing because of difficulties of proof into standing barriers applicable to entire classes of antitrust victims. Such policy decisions should be left to Congress. *See* p. 878 *infra*.

IV. The Policy Approach Applied: A Typology of Antitrust Standing Cases

The implications of the proposed framework for antitrust standing can be elucidated by focusing on four classes of antitrust standing cases, grouped for heuristic purposes only. Each class involves a particular combination of standing policies and each presents unresolved and controversial standing issues. The discussion demonstrates how the framework can help ensure more systematic standing decisions in these classes of cases than has heretofore been the norm.

The four classes of cases may be called multiple effect cases, chain-of-distribution cases, ripple effect cases, and merger cases. The first class of cases involves illegal exercises of market power that result in discrete anticompetitive effects in different markets in which the violator buys or sells. The second class involves the transmission ("passing on") of the effects of illegal market power forward or backward through chains of purchase or sale. The third involves injuries arising from economic relations outside a chain of distribution that typically appear to ripple outward from the initial impact of the violation. Mergers, the fourth class of cases, do not fit neatly into any one of the above classes but may involve some of the standing problems of all three.

A. *Multiple Effect Cases*

Multiple effect cases typically arise from the exercise of very substantial amounts of market power. The exercise of this power may be characterized as a single massive antitrust violation or as a complex of several antitrust violations. In either view, the distinguishing mark of these cases is that they are brought by parties that have suffered a variety of discrete economic injuries as a result of the defendant's anticompetitive conduct in several markets.

The famous *Alcoa* case²⁵¹ is illustrative. The defendant had attempted to monopolize the aluminum industry through various anticompetitive practices. In the early period of its activities, Alcoa entered into cartel arrangements with foreign aluminum producers that limited aluminum imports into the United States;²⁵² it also developed exclusive dealing contracts with power companies that denied potential competitors access to the large amounts of electric power required

251. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (L. Hand, J.).

252. *Id.* at 422.

in the production of aluminum.²⁵³ Meanwhile, the company developed a monopoly of aluminum production, which it maintained by blocking entry through anticipatory increases in capacity²⁵⁴ and by acquiring control of virtually all sources of bauxite, the ore from which aluminum is made.²⁵⁵ Later, Alcoa integrated forward into fabrication of finished aluminum products and through its monopolization of these products, squeezed non-integrated fabricators.²⁵⁶

Thus, at the time of the government's lawsuit, Alcoa, in addition to enjoying illegal monopoly power in the production of aluminum, was found to be engaging in: (1) the destruction of potential competitors (through its exclusive dealing contracts with power companies and its other entry barriers); (2) the squeezing of non-integrated fabricators (through manipulation of the price charged for finished aluminum); and (3) monopolization of the retail market in fabricated aluminum (through its power over the amount of independent fabrication).²⁵⁷ All three of these abuses flowed from the market power Alcoa wielded by reason of its monopoly over aluminum production.²⁵⁸ Alcoa's conduct typifies the way multiple violations in several markets lead to multiple effects. Each violation affected different parties—potential competitors, non-integrated fabricators, purchasers, and others—in distinct ways. Under such circumstances, the proposed framework would suggest that each of the injured parties has standing to complain of the violation that injured him, despite the risk of ruinous recoveries due to the number of plaintiffs. Otherwise, discrete injuries to competition in several different markets would go uncompensated in situations—cases of massive monopolization—in which compensation to the injured parties is likely to help restore competition.²⁵⁹

Moreover, there is another reason for granting standing to all those injured in an *Alcoa* situation. If standing were denied, extensions of monopoly power over several markets, such as Alcoa's, would be

253. *Id.*

254. *Id.* at 430-31.

255. *Cf. id.* at 432-34 (discussing whether Alcoa's purchase of all available bauxite supplies manifested anticompetitive intent).

256. *Id.* at 436-38. Fabricators were "squeezed" between the prices Alcoa charged for the raw material (ingots) and the finished product (rolled sheets). *Id.* at 437.

257. The illegal import-restricting arrangements with foreign producers had presumably been terminated, pursuant to an earlier consent decree, at the time of the monopolization suit. *See id.* at 422.

258. *See id.* at 431, 437, 438.

259. In *Alcoa*, compensation might have helped restore competition by strengthening the squeezed independent fabricators and the excluded potential competitors in finished aluminum production (if the latter could have proved damages). *See* *Baugh Mach. Tool Co. v. Aluminum Co. of America*, 79 F.2d 217 (2d Cir. 1935) (remanding for retrial suit brought by independent fabricators).

deterred less effectively than concentrations of monopoly power in a single market. A monopolist like Alcoa would be relatively secure in pursuing exclusive dealing arrangements and other extensions of market power, even though it would risk enormous treble damages liability if it extracted all possible monopoly profit from its buyers alone.²⁶⁰

Of course, the risks of overkill are increased where multiple effects engender many independent injuries. But an overkill defense cannot be permitted to prevail in antitrust standing decisions when great market power causes numerous simultaneous injuries, lest a defendant be effectively shielded from liability because of the outrageous scope of his own misconduct. Such a result would contradict both the deterrent and the compensatory purposes of the antitrust laws. Accordingly, in multiple effect cases there is an especially compelling need to use procedural devices to confine the overkill policy to its narrowest possible scope: that is, to emphasize deferred damage payments and limited reductions in liability, in lieu of denying standing to particular plaintiffs.

Multiple effects can arise not only from attempts to monopolize but also from conspiracies in restraint of trade. Anticompetitive actions taken by colluding oligopolists can, for example, have both monopolistic and monopsonistic effects simultaneously. The standing problems this situation raises are illustrated in *In re Multidistrict Vehicle Air Pollution*.²⁶¹ The defendant automobile manufacturers had allegedly engaged in a conspiracy to suppress development and installation of automobile air pollution control systems.²⁶² This conspiracy allegedly included both an illegal joint refusal to deal with independent makers of air pollution control devices²⁶³ and an illegal restraint on competitive technological innovation.²⁶⁴ Suit was brought by the independent device makers for loss of profits, and by farmers for crop damage due to the adverse environmental effects of unabated automotive air pollution. The latter were held to lack standing on

260. The deterrence policy also argues against such disparities in § 4 enforcement because extensions of monopoly power may help to consolidate the monopoly in its original market. Although there is debate over the efficacy of market extension practices in increasing monopoly power, it is clear that they can be used effectively under some circumstances—as in the case of the Alcoa exclusive dealing contracts and independent fabricator squeezes—to reduce competition outside the market that is the source of the monopoly power. See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMM. TO STUDY THE ANTITRUST LAWS 146-47 (Gov't Printing Office 1955) (exclusive dealing).

261. 481 F.2d 122 (9th Cir.), cert. denied, 414 U.S. 1045 (1973).

262. *Id.* at 124.

263. *Id.* at 129.

264. *Id.* at 129 n.10.

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the ground that the conspiracy had been directed only against the independent device makers and that the crop farmers were merely its incidental victims.²⁶⁵

Under the proposed framework for standing analysis, the independent injury to competition worked by the conspiracy to suppress development of pollution control devices would have warranted grants of standing to the injured crop farmers. Independent liability for the separate violation against the farmers would serve an important deterrent function. Conspiracies to suppress development of pollution control technology will not be deterred effectively unless forced to bear the costs of the substantial environmental damage that results. Furthermore, compensation for each of the multiple effects would be unnecessarily incomplete if the court denied the farmers standing without exploring means of mitigating potential conflicts among antitrust policies. The danger of ruinous liability for certain of the defendants in the *Air Pollution* case, for example, could have been averted at trial by exemption of the weak defendants in the name of preserving competition in the auto industry. This approach would have been far less drastic than the denial of standing to the large class of allegedly injured plaintiffs.

Multiple effect cases are especially susceptible to confusion of the issues of antitrust standing and substantive protection. In a typical multiple effect suit arising from, say, three separate antitrust violations, a plaintiff injured by one of the violations frequently alleges injury as well from the other two. Often the antitrust laws do not protect him against these other violations. In such a case the court, though correctly regarding the plaintiff as unable as a matter of substantive law to assert the latter claims, errs by holding that the plaintiff was not directly injured and therefore lacks *standing* to recover for those injuries. The court then compounds its error by overlooking the violation that was properly the subject of the plaintiff's complaint. Thus, the plaintiff's expansive pleadings and the court's misdirected analysis conspire to deprive the antitrust victim of any recovery.

The seminal target area case of *Conference of Studio Unions v. Loew's Inc.*²⁶⁶ exemplifies the multiple effect cases in which this problem has arisen. An association of labor unions and their members alleged a conspiracy between a cartel of movie producers and the actors' unions that were the major suppliers of labor to the cartel's only competitors, certain independent movie producers.²⁶⁷ The defendant car-

265. *Id.* at 129-30 & n.10.

266. 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

267. *Id.* at 52-53.

tel agreed to hire only the defendant unions' members in return for the unions' promise not to deal with the independent producers or to deal with them only on a discriminatory basis.²⁶⁸ In effect, each of the co-conspirators harnessed the market power of the others in a bilateral refusal to deal that produced substantial anticompetitive effects in the motion picture industry's labor market and product market.

The Ninth Circuit's view of the case was myopic. Overlooking the bilateral character of the challenged practices, the court focused on the role of the union-producer cartel in injuring the cartel's competitors. In that light, the court held that the plaintiffs could not recover under § 4 because it was the independent movie producers, not the plaintiffs, that had suffered a cognizable injury.²⁶⁹ The opinion reflects confusion over standing and substantive protection: standing language about incidental injury and endangered area is juxtaposed with substantive language about stating a cause of action under the anti-trust laws.²⁷⁰ In the midst of the confusion, the court lost sight of the other half of the conspiracy, the major movie producers' agreement to deal exclusively with the defendant unions. Had the court realized that the case involved two alleged violations it would, in the absence of countervailing policies, have granted the plaintiffs standing and faced the underlying substantive question which, in focusing on standing, it failed to consider: whether a labor agreement with anticompetitive effects gives rise to an antitrust claim by employees boycotted by the conspiring firm.²⁷¹

268. *Id.*

269. *Id.* at 54. The court disposed of some claims by relying on *Schatte v. International Alliance of Theatrical Stage Employees*, 182 F.2d 158 (9th Cir. 1950). 193 F.2d at 53-54. In *Schatte* some of the individual and union plaintiffs in *Studio Unions* alleged that the conspiracy between major movie producers and defendant unions violated the labor laws and also gave rise to an antitrust violation by forcing the independent movie producers to hire less efficient members of the defendant unions instead of the plaintiffs. 182 F.2d at 162-63. The Ninth Circuit dismissed the complaint on all counts. *Id.* at 167. The court held that the antitrust claim failed to state a cause of action under the doctrine of *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), that an antitrust violation must damage "'commercial competition in the marketing of goods or services.'" 182 F.2d at 167 (quoting *Apex Hosiery*, 310 U.S. at 495). In *Studio Unions* the plaintiffs attempted to circumvent the *Schatte* decision by alleging, *inter alia*, that the conspiracy resulted in an additional anticompetitive consequence: the boycott of plaintiff unions' members by the major studios. 193 F.2d at 53 (*cf. Schatte*, 182 F.2d at 167 (no allegation that boycott violated antitrust laws)).

270. 193 F.2d at 54.

271. Unless one of the countervailing policies was demonstrably implicated, plaintiffs should also have had standing to sue had they alleged attenuated but provable employment effects of the defendant unions' boycott of the independents.

For other examples of cases in which the existence of several violations in the course of one exercise of market power was confused with issues of antitrust standing, see *Radio Corp. of America v. SCM, Inc.*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969);

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B. Chain-of-Distribution Cases

When price fixing or other restraints of trade occur in one stage of a product's transformation from raw material to finished good or its subsequent distribution as a finished good, the first party that purchases from the antitrust violator may pass on to the party to which it sells the higher costs created by the illegal overcharge; the latter party may in turn do the same to its purchasers. Part or all of the adverse effect of the initial party's anticompetitive conduct may thus be transmitted down the chain of distribution. This passing-on process frequently gives rise to suits against the antitrust violator by both the first, or direct purchaser, and subsequent, or indirect, purchasers that have been overcharged. These suits form a controversial class of standing cases. Because of the multiplicity of parties affected by the overcharge and the complexity of proving the extent to which supra-

and *NAACP v. New York Clearing House Ass'n*, No. 77-Civil-881 (S.D.N.Y. filed May 13, 1977). In *SCM*, *RCA*, after finding no additional licensees for a copying process, alleged that *SCM* had used its dominant position in the copying market both to forestall entry by competitors and to attempt to coerce lower royalties to *RCA*. The court ruled that only *SCM*'s potential competitors, which of course had not sued, would have standing, and that *RCA* lacked standing as a non-competitor patentee. 407 F.2d at 168-71. This ruling overlooked the plaintiff's allegation of not only "horizontal" monopolization that was injuring competitors but also "vertical" monopolization that was monopsonistically injuring a supplier. *SCM* is thus a case in which the same illegal acts of the defendants constituted two independent violations, but were perceived as only one violation because of the blinders of the categorization approach. See *id.* at 172-73 (Timbers, J., dissenting).

NAACP v. New York Clearing House Ass'n was a class action for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26 (1970), but it illustrates the § 4 standing confusion because the court expressly adopted a § 4 standing analysis to determine whether the plaintiffs could maintain their suit. Opinion at 7-9. The plaintiffs included three women, one of whom was black, who had been denied employment or advancement by several New York City banks. *Id.* at 1-3. The plaintiffs alleged that the banks had conspired to use their monopoly power over "specialized financial or data processing services" to force the city to abandon the affirmative action requirements it normally imposed on city contractors. *Id.* at 2. The court denied the three women standing, in an opinion that borrowed from both target area and categorization tests. The court held that the alleged conspiracy was "aimed at" the city of New York, not at the present or prospective employees of the defendants. *Id.* at 11. The area endangered by the violation, the court suggested, was commerce in financial services, and the plaintiffs were "neither suppliers nor consumers" of those services. *Id.* The court also analogized the plaintiffs to employees suing for antitrust damages to their employers; that category, the court held, lacks antitrust standing. *Id.* at 12.

By viewing the banks' actions as a direct injury to the city and only an indirect one to the plaintiffs, the court overlooked the possibility that an alleged conspiracy to avoid hiring on the basis of race and sex could be characterized as a labor boycott in itself violating the antitrust laws. Insofar as the plaintiffs' allegations were an attempt to state a claim of injury from such a boycott, the court should have permitted the plaintiffs to amend their complaint so that they could frame the substantive protection issues. Instead, by disposing of the case on standing grounds, the court failed to confront the underlying issues of antitrust protection and of Title VII's implied supersession of discriminatory boycott claims made under the antitrust laws.

competitive prices were passed-on, chain-of-distribution suits may pose sharp conflicts between the positive policies of compensation and deterrence and the countervailing policies against duplicative and windfall recoveries.²⁷²

The value of a policy approach to standing is precisely that it helps identify and reconcile these conflicts. Unfortunately, the Supreme Court has failed to take a policy approach to standing in the two landmark chain-of-distribution cases that have come before it. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,²⁷³ the Court barred anti-trust violators from raising the defense that the plaintiff purchasers had completely or partially passed-on their overcharges and therefore had not sustained antitrust injuries. The Court held that a direct purchaser could sue for the full amount of the overcharge it had paid, whether or not passing-on had occurred.²⁷⁴ The result was a boon to the deterrent function of treble damage actions where only the direct purchaser sues, but it raised serious risks of duplicative recoveries where both direct and indirect purchasers sue. Although the Court's subsequent decision in *Illinois Brick Co. v. Illinois*²⁷⁵ was a self-conscious attempt to be consistent with *Hanover Shoe*,²⁷⁶ the holding seemed to swing the pendulum in the opposite direction: by barring all indirect purchasers from suing for passed-on overcharges and permitting the direct purchaser to sue for the entire overcharge, the Court sacrificed compensation and, arguably, deterrence²⁷⁷ at the altar of the countervailing policies.

272. The circumstances that give rise to windfall recoveries and those that give rise to duplicative recoveries are identical, with one exception. If only one purchaser, having passed-on at least part of the overcharge it has paid, successfully sues for treble damages on the entire overcharge, it will enjoy a windfall. Congress has given implicit approval for windfall recoveries in this context, concluding that disgorgement of illegal gains serves a deterrence purpose even if allocation of the recovery to the victims is impractical. See HOUSE REPORT, *supra* note 165, at 13-17. Furthermore, among direct purchasers this nonduplicative windfall is likely to be a commonplace in the wake of *Illinois Brick*. See note 277 *infra*. The discussion below disregards this exception, and subsumes windfall recoveries under duplicative recoveries.

273. 392 U.S. 481 (1968).

274. *Id.* at 494. The Court noted that a pass-on defense might be permitted if the suing "overcharged buyer [had] a pre-existing 'cost-plus' contract" with the next purchaser in the chain, and thus passed-on the complete overcharge. *Id.*

275. 45 U.S.L.W. 4611 (U.S. June 9, 1977).

276. See *id.* at 4614-15.

277. See note 222 *supra*. The *Illinois Brick* Court suggested that if direct purchasers had to share the aggregate recovery for an illegal overcharge with the indirect purchasers to which the overcharge had been passed-on, the direct purchasers would have so little incentive to litigate their own claims that they would decide not to sue. 45 U.S.L.W. at 4617-18. The Court therefore barred indirect purchasers from suit in order to give direct purchasers the maximum incentive to litigate their own claims.

The Court's behavioral assumption about direct purchasers is questionable. A party normally is motivated to recover his own damages even without the treble damage

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The nascent controversy over the *Illinois Brick* decision signals the need for a reconsideration of the law of standing in chain-of-distribution cases. A fresh analysis can best proceed if the veneer of the *Hanover Shoe* doctrine and its *Illinois Brick* extension is stripped away, so that the class of cases can be examined without judicially imposed barriers to defensive and offensive pass-on claims. The policy analysis that follows explores the chain-of-distribution cases with an eye to reconciling genuinely conflicting policies on a case-by-case basis rather than rejecting one or another policy absolutely.

For a policy analysis that seeks to balance the risk of duplicative recoveries against the deterrence of antitrust violations and the compensation of overcharge victims, chain-of-distribution cases pose three basic difficulties: the risk of inconsistent judgments in suits by different levels, the complexity of litigation involving large numbers of potential plaintiffs, and the complexity of proof of passing-on. The three difficulties are closely related. The problems of complexity, both as to numbers and as to proof, are mainly engendered by attempts to mitigate the risk of duplicative recoveries from inconsistent judgments.

The basic strategy for adjusting the conflicting policies implicated by chain-of-distribution suits is twofold. The first tack is to identify instances of false conflict by recognizing that in a given case the potential for inconsistent judgments may not exist because suits by non-suing levels of purchasers are legally barred or are practically infeasible.²⁷⁸ The second tack, taken when simultaneous suits raise a real potential for inconsistent judgments, is to minimize the risk of duplicative recoveries by consolidating the claims of litigating plaintiffs before a single trier of fact.²⁷⁹ This facilitates both the determination and the apportionment of damages, so that no wrongdoer pays more than once for the harm he has caused and no victim is overcompensated.

Where all direct and indirect purchasers sue together, no exotic

incentive. *Commissioner v. Obeir-Nester Glass Co.*, 217 F.2d 56, 61-62 (7th Cir. 1954), *cert. denied*, 348 U.S. 952 (1955). The inducement is amplified by the treble damage award, which was described by the Court earlier this year as designed to counterbalance "the difficulty of maintaining . . . private suit[s]." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 696 n.10 (1977) (quoting Senator Sherman's remarks about the original treble damage provision in the Sherman Act).

278. For example, if a level in the chain of distribution consists of many purchasers, it may not be feasible to bring a class action in its behalf. *See Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974) (massive class action by investors unmanageable because of size).

279. This strategy parallels the procedure contemplated and endorsed by Congress when it enacted the *parens patriae* class action provisions of the Antitrust Improvements Act. *See HOUSE REPORT*, *supra* note 165, at 13-17.

procedural techniques need be employed. If the suits are not brought jointly or are not filed in the same district, then consolidation pursuant to Rule 42(a) of the *Federal Rules of Civil Procedure*²⁸⁰ or interdistrict transfer pursuant to the statutory provisions on venue²⁸¹ and multidistrict litigation²⁸² can serve to bring all plaintiffs, regardless of their level in the chain, into the same action. Once this is done, duplicative recoveries can occur only if juries bring in awards to different levels of purchasers that are inconsistent. This possibility can be handled through various modes of judicial supervision such as jury instructions or, if necessary, remittitur.²⁸³ Thus, when all levels in the chain bring suit, mitigation of duplicative recovery risks is straightforward, and standing should be granted to all.

Where not all the potential plaintiffs sue, the possibility of subsequent suits by plaintiffs waiting in the wings presents a more serious risk of duplicative recoveries. This risk rarely warrants denial of

280. "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions [and] it may order all the actions consolidated" Fed. R. Civ. P. 42(a).

Defendants may prefer to avoid consolidation of suits by different levels of purchasers in order to advance a pass-on defense against direct purchasers and a no-pass-on defense against indirect ones. Although Rule 42(b) grants trial courts broad discretion to separate cases to avoid "prejudice," antitrust violators should not be permitted separate trials in order to assert inconsistent pass-on defenses and thereby possibly avoid any liability despite proof of an illegal overcharge. Rather, in consolidated proceedings a defendant should be able to assert passing-on or absorption of overcharges by direct purchasers in accordance with its evidence and trial strategy.

281. See 28 U.S.C. § 1404(a) (1970) (court may transfer civil action to any other district where it might have been brought "in the interest of justice" and for convenience of parties).

282. See *id.* § 1407, as amended, 28 U.S.C.A. § 1407 (West Supp. 1977) (judicial panel on multidistrict litigation may transfer cases for coordinated pre-trial proceedings to promote "just and efficient conduct of such actions"). Following transfer for coordinated pre-trial proceedings under § 1407, *id.*, the transferee court may order a change of venue for the transferred actions under 28 U.S.C. § 1404(a) (1970) so as to retain jurisdiction over all of them for trial purposes. See *In re Aircrash near Duarte, Cal.*, 357 F. Supp. 1013, 1015-16 (C.D. Cal. 1973) (citing cases).

283. Where a jury verdict is wholly unsupported by the evidence introduced, the defendants would be entitled to a new trial. See *Wood v. Holiday Inns, Inc.*, 508 F.2d 167, 175 (5th Cir. 1975) (new trial may be granted where verdict inconsistent on its face or jury "obviously confused"). In lieu of a new trial, the plaintiffs may consent to a remittitur of excess damages, in an amount computed by the court. See, e.g., *Treadway Cos. v. Brunswick Corp.*, 364 F. Supp. 316, 324-26 (D.N.J. 1973), *rev'd on other grounds sub nom.* NBO Indus. *Treadway Cos. v. Brunswick Corp.*, 523 F.2d 262 (3d Cir. 1975), *vacated and remanded sub nom.* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 97 S. Ct. 690 (1977).

Notably, even if the *Hanover Shoe* doctrine were applied to bar the defense of passing-on where all purchasers sue, the problem of inconsistent judgments would be avoidable. Defendants would not be prejudiced by lack of a pass-on defense against the direct purchasers because the indirect purchasers' proof of passing-on, which is essential to their claims of injury, effectively would extinguish duplicative liability to the direct purchasers.

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standing, however. The risk of duplicative recoveries in the context of chains of distribution is no greater than the ordinary risk of inconsistent judgments concerning conflicting claims to a common fund.²⁸⁴ If antitrust victims were denied standing whenever there was a mere prospect of excessive recoveries against violators, the deterrent and compensatory purposes of § 4 would be thwarted, and antitrust violators would escape liability altogether whenever one level did not sue. Furthermore, the drastic step of outright dismissal of some or all claims may be wholly unnecessary in the context of typical chain-of-distribution cases.

A more tempered judicial response to the risk of subsequent duplicative recoveries would be to ascertain, as an initial matter, how great the risk actually is. In some cases the statute of limitations may have run by the time of the standing determination, thereby precluding further suits.²⁸⁵ Where the statute has not run, there may still be no risk of duplicative recoveries. Should other purchasers file timely suits, the court can exercise its authority to consolidate these suits with the action before it at any time prior to final judgment.²⁸⁶ Only rarely should this procedure prove impossible, for the lengthy duration of antitrust suits makes it highly unlikely that a suit on the same cause of action could be brought after entry of final judgment in an earlier suit and before the statute of limitations bars the action.

Even if a defendant remains concerned by the slight possibility of subsequent inconsistent judgments or settlements, denial of standing should be a last resort. A number of procedural techniques can be employed by defendants to reduce the risk of duplicative recoveries still further. Pre-trial joinder of all levels of suing and non-suing purchasers pursuant to Rule 19(a)(2)(ii)²⁸⁷ is not necessary. Pursuant to Rules 19(b) and 62(h) a court can stay execution of judgment in the interest of avoiding duplicative judgments until the statute of limita-

284. See, e.g., *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108-09 (1968) (potential conflicting claims against insurance fund did not justify dismissal under Rule 19(b) of *Federal Rules of Civil Procedure*).

285. The statute of limitations for § 4 actions is generally four years from the time the cause of action arises, except that private suits based on government actions may be brought within one year of the termination of those actions. See note 237 *supra*. Other antitrust commentators, though noting that antitrust claims may be filed shortly before the statute of limitations runs, have acknowledged that the temporal bar can solve problems of subsequent inconsistent judgments. See Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 86 YALE L.J. 626, 650-51 (1976).

286. See FED. R. CIV. P. 42(a) (quoted note 280 *supra*).

287. FED. R. CIV. P. 19(a)(2)(ii) (joinder required if disposition in absence of party would "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest").

tions has run.²⁸⁸ Alternatively, a defendant seriously concerned can await the outcome of the action before the court and then, if adjudged liable, can interplead any non-suing parties that are not yet barred by the statute of limitations.²⁸⁹

The *Illinois Brick* Court suggested that statutory interpleader might effectively be unavailable in many cases because "a condition precedent for invoking statutory interpleader is the posting of a bond for the amount in dispute."²⁹⁰ This requirement, however, is not the insurmountable obstacle portrayed by the Court. First, the amount of the bond need not be equal to the defendant's treble damage liability; a bond for an amount deemed "proper" by the court is sufficient.²⁹¹ Second, when interpleader is postponed until all appeals are exhausted, the bond would be no greater than the amount that the defendant would otherwise have to pay the plaintiffs.²⁹² Thus, in those few cases that reach judgment before the bar of the statute of limitations, statutory interpleader seems to provide a workable means of minimizing the risk of duplicative recoveries.²⁹³

To the extent that consolidation of plaintiffs' claims resolves the problem of inconsistent judgments leading to multiple liability, it raises another issue on which the *Illinois Brick* Court expressed considerable concern: the complexity of the multiparty litigation that

288. FED. R. CIV. P. 62(h) (court may stay enforcement of final judgment). See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 115 (1968) (payment of judgment can be withheld pending further suits).

289. See 28 U.S.C. § 1335(a), (b) (1970). For a discussion of statutory interpleader as an alternative to Rule 19(b) dismissal, see 7 C. WRIGHT & A. MILLER, *supra* note 215, § 1608, at 74-75 (1972).

290. 45 U.S.L.W. at 4616 n.20 (citing 28 U.S.C. § 1335(a)(2) (1970)).

291. 28 U.S.C. § 1335(a)(2) (1970).

292. Two additional points about the interpleader procedure are worth noting in the context of duplicative recoveries. First, the interpleader statute allays defendants' fears of lack of personal jurisdiction over absent plaintiffs by providing for nationwide service of process. See *id.* § 2361. Second, the interpleader procedure can solve the problem of inconsistent judgments even under the *Hanover Shoe* doctrine. In the absence of pass-on defenses, the direct purchaser is more likely to recover supra-compensatory sums, and therefore there is a greater risk that subsequent suits brought by indirect purchasers will result in an excessive aggregate recovery. But this higher risk is different only in degree, not in kind, from the ordinary risk of inconsistent judgments. Thus it too can be mitigated by the interpleader procedure, which brings for resolution before a single court the conflicting claims of direct and indirect purchasers. See note 283 *supra*.

293. Ironically, consolidation alone would have sufficed to mitigate duplicative recoveries in the *Illinois Brick* case, for both direct and indirect purchasers had sued at the same time in the same district. See 45 U.S.L.W. at 4613. Although the direct purchasers had settled with the defendants, *id.* at 4613 n.5, the resulting risk of duplicative recovery in the indirect purchaser suit did not warrant barring the latter. If a defendant could ensure dismissal of subsequent § 4 suits by early settlement of one, it would settle with the level of purchasers suffering the least damages, thereby frustrating the compensatory and deterrent purposes of § 4.

might ensue if indirect purchasers were permitted to sue.²⁹⁴ A policy analysis recognizes this concern, but it also suggests that barring suits by indirect purchasers as a way of reducing the complexity is a cure more debilitating than the disease. A case-by-case evaluation is essential; dismissal of a plaintiff's claim due to potential complexity of the action is rarely necessary. In some cases, there may be only a few potential plaintiffs, because of the operation of the statute of limitations, the small number of levels involved in the distribution network, or the small number of purchasers in each level. Or there may be only a few plaintiffs at trial, because the defendant is awaiting a finding of liability before interpleading other prospective claimants. In other cases, where many parties have sued, the complexity of the litigation may be mitigated by various procedural devices or by the particular circumstances of the case. For example, adjudication of claims by consumers in chains of distribution can be expected to be far simpler than before, because the Antitrust Improvements Act provides for representation of consumer interests in *parens patriae* suits brought by state attorneys general.²⁹⁵ Thus, in most cases consolidation of plaintiff claims should not engender such unmitigable complexity as to warrant dismissal of suits.

Once the conflicting claims of litigating plaintiffs have been consolidated, it is necessary to apportion damages fairly among them. Since the apportionment should depend on which levels in the chain of distribution suffered the most injury, proof that one or another level passed-on its overcharges is critical. The *Illinois Brick* Court stressed the difficulties of proving passing-on, given the theoretical assumptions and empirical demonstrations that must generally be made.²⁹⁶ The difficulties are real, but they should not be overestimated. As the Court noted, percentage mark-up pricing, which facilitates computation of passing-on, is prevalent in "many sectors of the American economy."²⁹⁷ In cases arising from transactions involving this form of pricing, proof of passing-on involves simply the computation of the elevation in prices caused by one level's application of a percentage mark-up to the increased costs stemming from the prior level's overcharge.²⁹⁸ Percentage mark-up pricing thus makes it pos-

294. *Id.* at 4615-16.

295. 15 U.S.C.A. § 15c(a)(1) (West Supp. 1977).

296. 45 U.S.L.W. at 4616-17.

297. *Id.* at 4617.

298. Although determinations of volume reductions due to price increases are also necessary to compute intermediate purchaser profit losses, such determinations have been carried out by courts in the past. *See, e.g., Richfield Oil Corp. v. Karseal Corp.*, 271

sible to compute passed-on damages where an indirect purchaser buys a good untransformed by an intermediate purchaser or even, as in *Illinois Brick* itself, where an indirect purchaser buys a finished product with a component whose price includes a passed-on overcharge.²⁹⁹

Of course, not every case may involve percentage mark-up pricing, and the problems of proof may consequently be more difficult. In each case, however, the court should inquire into those problems to determine whether proof of passing-on is truly infeasible.³⁰⁰ Only then does the conflict between the positive and countervailing policies in chain-of-distribution cases become irreconcilable. Under such circumstances it may be appropriate to permit only the direct purchasers or only the indirect purchasers to sue, to dismiss the other plaintiffs, and to preclude a pass-on defense in order to ensure that the deterrent purpose of § 4 is not undermined.

The decision on how to deal with those chain-of-distribution suits that create genuine, unmitigable policy conflicts should perhaps be left to the legislative rather than the judicial branch. The decision should depend on Congress's assessment of the compensation needed and deterrence achieved by direct and indirect purchasers in general, which in turn depends on the extent of passing-on in the economy. The crucial point from a policy perspective is that chain-of-distribution cases do not invariably present genuine, unmitigable policy conflicts; on a case-by-case basis, there is much that courts can do, short of denying standing to entire classes of antitrust victims, to resolve the problems identified by the *Illinois Brick* Court. Neither worst-case analyses nor generalizations about intractability serve the purposes of § 4.

C. *Ripple Effect Cases*

The "ripples" generated by an antitrust violation, or a complex of antitrust violations, may be transmitted via economic transactions to

F.2d 709, 714 (9th Cir. 1959), cert. denied, 361 U.S. 901 (1960). Furthermore, as the Supreme Court acknowledged in *Illinois Brick*, no volume reduction effects need be taken into account in computing end-purchaser damages. 45 U.S.L.W. at 4617 n.27.

299. The *Illinois Brick* Court failed to realize that the pass-on case before it presented relatively tractable matters of proof. Plaintiffs had purchased buildings through a bidding process that itemized the costs to them and their construction contractors of an illegally overpriced component of the purchased final product. See *Illinois v. Ampress Brick Co.*, 536 F.2d 1163, 1164 (7th Cir. 1976), rev'd sub nom. *Illinois Brick Co. v. Illinois*, 45 U.S.L.W. 4611 (U.S. June 9, 1977). Accordingly, it was only necessary to determine the extent of passing-on of the defendants' overcharges by wholesalers who had sold the defendants' product to the building contractors. In those instances where the building contractors purchased directly from the defendants, see *id.*, no pass-on computation was apparently necessary.

300. For other means of computing passing-on, see note 238 *supra*.

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a variety of parties beyond the market in which the violation has its initial impact. The injuries thus sustained by parties outside the antitrust violator's chain of distribution give rise to an important class of antitrust cases. Ripple effect plaintiffs may be businesses whose sales to other businesses are diminished as a result of a defendant's restraints on the activity of those businesses.³⁰¹ Or they may be purchasers from defendant's non-conspiring competitors, sellers that have been able to charge a higher price as a result of the defendant's violation.³⁰² These kinds of factual patterns create a number of commonly misunderstood standing issues.

Under a direct injury regime, many plaintiffs injured by ripple effects would be considered "incidentally injured" and therefore denied standing. The proposed analytical framework suggests, however, that such plaintiffs should not be denied standing as a matter of course, because the countervailing policies may well be inapplicable or mitigable. The pass-on questions characteristic of chain-of-distribution cases are not present in ripple effect suits because the latter involve injuries to parties not related to one another through a single chain of distribution. Therefore, ripple effect suits do not threaten duplicative or windfall recoveries for injury not in fact suffered. Furthermore, ripple effect suits raise only the possibility, not the inevitability, of overkill recoveries. Parties who are most immediately affected by an antitrust violation may well not sue because of their stake in an ongoing commercial relationship with the violator. The aggregate claims of other parties actually suing or likely to sue may not be so large as to have anticompetitive impact if recovered. Unless the policy against overkill recoveries is actually implicated, standing is as appropriate for ripple effect plaintiffs as for "directly" injured plaintiffs: ripple effect plaintiffs are no less appropriate beneficiaries of the compensation policy than those injured by a less circuitous route. The compensatory purpose of § 4 is especially important where ripple effect victims have been weakened as competitors in their own markets.

A typical example of a ripple effect case is *Billy Baxter, Inc. v. Coca-Cola Co.*³⁰³ The *Billy Baxter* plaintiff, a soft-drink franchisor, was allegedly injured through loss of royalties and syrup sales, because the bottlers it franchised and supplied (which were also franchised and

301. See, e.g., *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679 (8th Cir. 1966).

302. See, e.g., *Washington v. American Pipe & Constr. Co.*, 280 F. Supp. 802 (D.C. 9th Cir. 1968), noted, 82 HARV. L. REV. 1374 (1969).

303. 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971).

supplied by defendants) were foreclosed from selling the Billy Baxter label by the defendant franchisors' predatory activities.³⁰⁴ If the *Billy Baxter* court's characterization of the plaintiff as a non-competitor of the defendants³⁰⁵ is accepted, then the injury it suffered was a ripple effect injury—an injury in the form of lost sales to the parties, its franchisees, that were “directly” affected by the antitrust violation. Although the *Billy Baxter* court denied standing on the ground that Billy Baxter was not an “appropriate plaintiff,”³⁰⁶ a policy analysis would have led to the opposite result.

The assumedly illegal destruction of the competing line of bottled and canned soft drinks diminished demand for Billy Baxter syrups. This diminution in demand in the soft drink syrup market was the type of artificial restriction on competitive markets that the antitrust laws are designed to prohibit. Therefore, Billy Baxter was within the scope of the substantive protection of the antitrust laws. Since Billy Baxter was clearly injured, indeed, driven out of business, the compensation policy was triggered. At the same time, no counter-vailing policy was implicated. Although consumers as well as plaintiff's franchisees had been injured, no potentially duplicative or ruinously large suits by consumers had been or were likely ever to be filed. No consumer could sue successfully because he would not be able to prove anything other than nominal damages from the unavailability of Billy Baxter's product. Similarly, the plaintiff's franchisees, since they were bottlers for the defendants as well as the plaintiff,³⁰⁷ were unlikely to sue lest they jeopardize an ongoing commercial relationship with the defendants. Under these circumstances, there could be no overkill recovery. Since the plaintiff's injuries certainly warranted compensation if its allegations were true,³⁰⁸ it should have had standing under an analysis of the relevant policy considerations. The possible restoration of a competitor in the soft drink syrup industry would have been an additional policy reason for standing in this case.³⁰⁹

304. *Id.* at 185-86.

305. *Id.* at 188-89; *cf. id.* at 194-95 (Waterman, J., dissenting) (contending that alleged conspiracy was designed to eliminate plaintiff's brand-name products as competitors of defendants' brand-name products).

306. *Id.* at 189.

307. *Id.* at 194-95 (Waterman, J., dissenting).

308. *See id.*; *cf. Handler, supra* note 110, at 26 (“difficult to understand why, as a matter of antitrust policy, the franchisor [Billy Baxter] should not be permitted to sue”).

309. Another important form of ripple effect injury is that suffered by lessors whose lessees suffer antitrust injuries. Standing to sue for such an injury traditionally has depended on whether the lessee participated in the illegal antitrust activity. *Compare* Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957) (lessee allegedly co-

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D. *Merger Cases*

The chief policy issue in § 4 suits brought to recover damages from mergers is typically not standing, but the existence of a cognizable injury under § 7 of the Clayton Act, which is usually invoked when a merger is potentially, rather than presently, anticompetitive.³¹⁰ Nonetheless, in merger suits by certain plaintiffs, courts have perceived standing problems that prove illusory when scrutinized in a policy analysis.

A typical merger may cause injuries associated with multiple effects (*e.g.*, monopolistic production cutbacks causing both higher prices and refusal to deal with certain suppliers), chains of distribution (*e.g.*, where merger defendants sell through distributors rather than directly to consumers), and ripple effects (*e.g.*, where an acquiring company refuses to deal with its acquired company's customer, causing him to pay higher prices elsewhere³¹¹). Whether one, some, or all of these types of injury are present, the policy-based inquiry remains exactly the same: If there is a possibility of duplicative recovery, can it be avoided at trial? If there is a possibility of overkill, is it of anticompetitive proportions (particularly against a merger-strengthened competitor)? Finally, does the compensation policy outweigh applicable countervailing policies because of a need to protect competition in a plaintiff's industry? Even where injury appears on its face to be entirely prospective, a policy approach would not rule out a damage action. The court should consider whether an injunctive remedy would provide complete relief from the alleged injury to competition and should generally afford the plaintiff an opportunity to prove present damages.

The application of the proposed framework to merger cases may be illustrated by suits brought by customers and former employees of a newly merged firm. Where employees sue for lost salary after a post-

conspirator; lessor has standing) *with* *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) (lessee not alleged to be co-conspirator; lessor lacks standing). In contrast, a policy analysis would recognize that the lessor's interest in compensation for antitrust losses is the same regardless of whether there is an intervening non-defendant. *Cf.* *Washington v. American Pipe & Constr. Co.*, 280 F. Supp. 802 (D.C. 9th Cir. 1968) (identity of party as defendant or intermediary "irrelevant" where plaintiffs' purchase price "affected by elimination of competition"). Lessors' antitrust suits should be blocked on standing grounds only if one of the countervailing policies is applicable.

310. 15 U.S.C. § 18 (1970). *See* *Acreda*, *supra* note 3, at 1128-30. A private antitrust plaintiff must allege that he is presently being injured by an illegal merger. *See* *Gottesman v. General Motors Corp.*, 414 F.2d 956, 961 (2d Cir. 1969), *cert. denied*, 403 U.S. 911 (1971); *Acreda*, *supra* note 3, at 1130 n.20.

311. *See, e.g.*, *Rayco Mfg. Co. v. Dunn*, 234 F. Supp. 593, 595-96 (N.D. Ill. 1964) (merged company allegedly breached franchise agreement because franchisee refused exclusive dealing arrangement).

merger layoff, there is usually no question of ruinous recovery because provable damages are limited³¹² and because the merged defendant's financial strength is presumably enhanced. Furthermore, the duplication and windfall policies are not usually implicated unless separate purchaser suits by persons in the chain of distribution also challenge the merger. In such circumstances, the chain-of-distribution policy analysis is apposite. Finally, where suits are brought by every victim of the merger, including foreclosed or overcharged customers of a merged defendant, the standing question is whether the ripple, consumer, and supplier plaintiffs have claimed such substantial overall damages that there is an unmitigable risk of overkill. In the absence of such risk, employees and customers should have standing to seek compensation for their injuries. Ordinarily, then, the real questions in a § 4 merger suit should be factual and substantive legal ones: Was the merger rather than, say, business fluctuations, the actual cause of the layoffs or customer foreclosures?³¹³ Was the merger actually a violation if economies of scale were the demonstrable reason for the layoffs?³¹⁴ These questions are not, of course, appropriate for the standing inquiry; usually they can be answered only after trial.

Conclusion

Courts and commentators agree that the literal language of § 4 of the Clayton Act should not define the scope of the private treble damage remedy in every case; it should be qualified by an additional requirement concerning a private litigant's standing to sue. Yet existing approaches to antitrust standing are notably unsatisfactory. The direct injury rule and its attendant tests are presently employed in a virtual analytical void and have proven to be incapable of yielding

312. Most employees suffer only limited injury because they can find employment elsewhere.

313. Where damages are only partially caused by an event not part of the antitrust violation, "damages for the antitrust wrong will be accordingly diminished." See *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073, 1075 n.3 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971) (two legal causes of injury). In *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973), the court erroneously held that employees laid off after a merger could not, as a matter of law, show that their firing was due to the merger, reasoning that layoffs would occur whether the merger was legal or illegal. The court ignored the right of action accruing for layoffs caused by those mergers that are illegal. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 698 n.15 (1977) (dictum) (plaintiff could challenge anticompetitive aspect of merger).

314. It is not clear under current law whether economies of scale are a justification for otherwise anticompetitive mergers. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); Scherer, Book Review, 86 YALE L.J. 974, 975-76, 986 (1977).

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consistent results. The current law even reflects a basic uncertainty as to the purpose of a standing doctrine.

The judicial concern that § 4 not become a vehicle for unreasonable damage awards can provide a rational basis for limiting the scope of § 4 only if considered in tandem with the important compensatory and deterrent purposes of the private action and in light of the circumstances of each particular case. Only an analytical framework focusing on policies provides a systematic way to analyze standing problems in the typically complex factual contexts of antitrust cases. A policy approach would determine in a given case whether there is a genuine policy conflict and, if there is, whether that conflict is mitigable through traditionally available procedures, thus making resort to standing denials unnecessary. In so doing, the proposed approach would not only enable courts and potential litigants—for the first time—to analyze standing issues with reason and reliability. It would also offer the hope of reconciling, at long last, the congressional commitment that inspired § 4 and the judicial concern that has restricted it.

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