Antitrust Standing, Antitrust Injury, and the Per Se Standard

In 1970, a district court observed: "We must confess at the outset that we find antitrust standing cases more than a little confusing and certainly beyond our powers of reconciliation."[1] The court could hardly have been faulted, for the confusion it noted has been endemic to these cases since the creation of the treble-damages action. Courts have never read section 4 of the Clayton Act[2] literally to allow treble damages to every plaintiff able to attribute an economic loss to an antitrust violation.[3] This unwillingness to recognize every such injury is fully consistent with the essential principle of antitrust law—that the antitrust laws protect competition as a whole, not individual competitors.[4] Instead of relying upon this substantive principle, however, courts have often used common-law rules of proximate cause to restrict the number of potential plaintiffs. These rules of tort have produced results inconsistent with the goals of antitrust law and have been responsible for much of the confusion in standing case law.[5]

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1. Wilson v. Ringsby Truck Lines, 320 F. Supp. 699, 701 (D. Colo. 1970).

2. Section 4 of the Clayton Act provides, *inter alia*: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1982).

This Note will not address standing to sue for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26 (1982). Standing under § 16 may be available to plaintiffs who lack standing to sue for treble damages under § 4. *See In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1167 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); Mid-West Paper Prods. v. Continental Group, 596 F.2d 573, 589-94 (3d Cir. 1979). Section 16 has been applied more expansively than § 4 both because its language is less restrictive—requiring merely a showing of "threatened loss or damage" rather than injury to "business or property"—and because multiple suits under § 16 against the same defendant do not pose the dangers of duplicative recovery and overdeterrence that multiple suits under § 4 might threaten. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 260-62 (1972).

3. *See In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 125 (9th Cir.) ("Read literally, [section 4] could afford relief to all persons whose injuries are causally related to an antitrust violation. Recognizing the nearly limitless possibilities of such an interpretation, however, the judiciary quickly brushed aside this construction."), *cert. denied*, 414 U.S. 1045 (1973).

4. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977). Although some controversy remains among scholars as to whether the antitrust laws should be concerned only with furthering consumer welfare in a strictly economic sense, *see* Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977), the Supreme Court has recently described the Sherman Act as a "consumer welfare prescription," Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting R. BORK, THE ANTITRUST PARADOX 66 (1978)), and has condemned only those practices that "tend to restrict competition and decrease output," *see* Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20 (1979). This Note takes no position on this controversy; it merely seizes upon the Court's most systematic assertions of purpose and attempts to build a coherent approach to standing consistent with substantive antitrust law.

5. The high cost of litigation makes this confusion especially expensive and the need for a coherent standing doctrine particularly great. *Cf.* Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979) (danger of "vexatious litigation" counsels summary disposition of antitrust cases when permissible).

This Note argues that the application of tort analysis to questions of standing under section 4 has stemmed from a failure to recognize the nature of the per se standard in antitrust law. Once the limited scope of that standard is appreciated, a standing doctrine more consistent with the concerns of substantive antitrust law can be developed. The standing approach this Note endorses—one that looks to market effects rather than to the peculiar circumstances of a plaintiff's injury—is hardly novel; indeed, one of its chief virtues is that it draws support from several recent Supreme Court cases. By discussing the interplay between standing and substantive antitrust law, however, this Note supports and extends recent moves toward doctrinal clarity.

I. Toward a Market-Based Approach to Antitrust Standing

Every plaintiff seeking treble damages forces the court to answer two questions: First, what is the purpose of the antitrust laws? And, second, who is entitled to vindicate that purpose? If the plaintiff endeavors to show that the defendant's conduct towards him was "unreasonable," the very form of his case answers those questions. In contrast, if he alleges that the defendant's conduct was per se illegal, the truncated inquiry of that standard makes more difficult a court's adherence to the principles of substantive antitrust law.

A. *The Per Se Standard*

Although courts have, on occasion, considered such subsidiary goals as protecting independent businessmen and preventing large aggregations of capital,[6] they have generally held the promotion of free competition to be the primary concern of the antitrust laws. This focus upon consumer welfare, more pronounced in recent years, has been expressed in the Supreme Court's assertion that the rule of reason is the "prevailing standard" of antitrust law.[7] Under the rule of reason, the legality of a practice is judged, not by its effect upon any individual in the marketplace, but rather by its effect generally upon competition in a particular market.[8]

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6. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323-24 (1897); Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 Mich. L. Rev. 325, 333-34 (1968).

7. Continental T.V. v. GTE Sylvania, 433 U.S. 36, 49 (1977); *see* Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 Sup. Ct. Rev. 319, 330-32.

8. Justice Brandeis gave the standard its most famous expression:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.

The rule of reason, however, is not the sole standard by which courts judge allegedly anticompetitive conduct. The Supreme Court has classified certain practices as per se illegal, conclusively presuming them unreasonable.[9] The per se standard has been applied to price fixing,[10] horizontal allocations of markets,[11] group boycotts,[12] and tying arrangements.[13] When a defendant is found to have engaged in one of these practices, a court will hold him liable without inquiring whether that conduct has actually had any disruptive effect upon competition.

As merely a "special case" of the rule of reason,[14] the per se standard is not intended to condemn conduct that the rule of reason would not bar. Nonetheless, the per se rules have often operated to expand the scope of antitrust liability.[15] In part, this expansion has been caused by the questionable validity of the presumptions made by certain per se rules. Expectations that vertical price fixing[16] and certain kinds of boycotts[17] will in-

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Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); *see* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687–91 (1978) (tracing rule of reason's development and adhering to Justice Brandeis' formulation); Continental T.V. v. GTE Sylvania, 433 U.S. 36, 49 (1977) (under rule of reason, "factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition") (citing *Chicago Bd. of Trade*).

9. In Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982), Justice Stevens explained the rationale underlying the per se rules:

> The costs of judging business practices under the rule of reason . . . have been reduced by the recognition of *per se* rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable . . . . For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.

Id. at 343–44.

10. *See* Catalano, Inc. v. Target Sales, 446 U.S. 643, 647 (1980) (per curiam); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

11. *See* United States v. Topco Assocs., 405 U.S. 596, 608 (1972); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 244 (1899).

12. *See* United States v. General Motors Corp., 384 U.S. 127, 145–47 (1966); Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959).

13. Strictly speaking, the rule against tying arrangements is not a per se rule: It does not presume that *every* tie-in will unreasonably restrain competition in the tied product market. Once certain standards for amount-in-commerce and market power in the tying product's market are satisfied, however, such an arrangement is deemed unreasonable without any inquiry into whether it actually has had adverse effects upon competition. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 52 U.S.L.W. 4385, 4388 (U.S. Mar. 27, 1984); Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 VA. L. REV. 1235 (1980). Where those requirements are not met, a plaintiff complaining of a tie-in is free to pursue his claim under the rule of reason. *See* Fortner Enters. v. United States Steel, 394 U.S. 495, 499–500 (1969); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614–15 (1953); Warner Management Consultants, Inc. v. Data Gen. Corp., 545 F. Supp. 956, 966–67 (N.D. Ill. 1982).

14. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 196 (1977); *see also* Redlich, *The Burger Court and the Per Se Rule*, 44 ALB. L. REV. 1 (1979) (criticizing Burger Court for its exclusive concern with economic efficiency in applying per se standard).

15. This expansion goes beyond the expected error costs that will always accompany a per se rule. *See* United States v. Container Corp., 393 U.S. 333, 341 (1969) (Marshall, J., dissenting) (noting losses characteristic of per se rules).

16. *See* R. BORK, *supra* note 4, at 280–98 (arguing that all vertical restraints, including resale

variably disrupt competition may well be unfounded. The leverage theory, which underlies the per se rule against tying arrangements and argues that a firm can use its power in one market to force its way into another market, has been especially criticized.[18] By freezing certain theories into mechanically applied rules and by obstructing further analysis, the per se standard may condemn conduct that would have passed muster under the rule of reason.[19] Even if the government were the sole enforcer of the antitrust laws, this overbreadth would impose a cost on defendants in the form of increased liability, and on society by deterring socially efficient activities. The existence of the private action for treble damages, however, has created a second, less noticed, cost of the per se standard.

B. *Standing and the Per Se Rules*

The broad principle of compensation that section 4 of the Clayton Act enunciates appears inconsistent with antitrust law's focus upon competition in particular markets rather than upon the interests of individual competitors. Through the network of relationships based upon custom and contract that link various actors in the marketplace, a single antitrust violation may inflict economic losses upon a host of individuals in a variety of markets.[20] The causal connection of an individual's injury to an illegal practice, however, is no guarantee that competition in the individual's market has been affected in the least.[21] This tension between the goals of substantive antitrust law and those of the private treble-damages action has been resolved rather easily in cases decided under the rule of reason. Courts have required the plaintiff in such cases to relate his private injury to a more public wrong—a threat to competition in his own market.[22] Recent cases brought under the rule of reason have conditioned a plaintiff's standing upon his ability to define his market, to indicate how that market was affected by the conduct he challenges, and to attribute his

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price maintenance, should be lawful because they serve distributive efficiency without restricting output and thereby promote consumer welfare).

17. *See* Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979) (noting overbreadth of per se condemnation of boycotts).

18. *See* R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 171–78 (1976).

19. *See* Gerhart, *supra* note 7, at 322–30.

20. *See* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970) (noting "any antitrust violation disrupts the competitive economy to some extent and creates entirely foreseeable ripples of injury which may be shown to reach individual employees, stockholders, or consumers"), *cert. denied*, 401 U.S. 923 (1971).

21. That a firm has lost profits because an antitrust conspiracy forced one of its customers out of business gives no indication of whether the firm's own market was affected.

22. *See* Northwest Power Prods. v. Omark Indus., 576 F.2d 83, 88–90 (5th Cir. 1978) (drawing distinction between private concerns of unfair competition law and public concerns of antitrust law), *cert. denied*, 439 U.S. 1116 (1979).

injury to those effects.[23] Because these cases focus so clearly upon a particular market, courts can bar suits by a plaintiff who is not a participant in that market with little analysis.[24] The simplicity of standing analyses in cases under the rule of reason—as well as the relative infrequency with which plaintiffs rely exclusively upon the rule of reason[25]—probably explains why so few courts have examined standing in this context.

The per se standard, in contrast, severs the connection between plaintiff and market that simplifies standing under the rule of reason. The absence of any requirement that a per se plaintiff make specific market allegations[26] creates the danger that an unwary court might allow a plaintiff in a market unlikely to have been affected by the practice he challenges to pursue a treble-damages claim. Such errors permit the per se standard to impose greater penalties on a defendant than those he would have suffered had his practice been judged by the rule of reason. The consequences of such errors are especially great because of the extent to which plaintiffs rely upon per se theories and the ease with which arguably per se practices often can be identified.[27] Courts can avoid this danger by recognizing

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23. *See, e.g.*, Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 892 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981); Havoco of Am., Ltd. v. Shell Oil Co., 626 F.2d 549, 554 (7th Cir. 1980); Gough v. Rossmoor Corp., 585 F.2d 381, 385 (9th Cir. 1978), *cert. denied* 440 U.S. 938 (1979). *See generally* Comment, *Applying the Rule of Reason: A Survey of Recent Cases and Comment*, 17 SAN DIEGO L. REV. 335, 341-48 (1980) (discussing focus upon anticompetitive effects by courts in recent rule of reason cases).

24. Standing under § 4 has correctly been denied to employees challenging monopolization or mergers alleged to affect a product, rather than a labor, market, *see, e.g.*, Thomsen v. Western Elec. Co., 680 F.2d 1263, 1267 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982); Solinger v. A&M Records, Inc., 586 F.2d 1304, 1311-12 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979), and to plaintiffs who have exited from the market in which they allege competition to be endangered, *see, e.g.*, Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1235 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981); A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753 (1st Cir. 1980); Synco, Inc. v. Penn Cent. Corp., 551 F. Supp. 949 (E.D. Pa. 1982). *See generally* Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1156-65 (1982) (arguing that take-over target should not be permitted to sue under § 4 because target is beneficiary, not victim, of diminished competition).

25. As one commentator noted in 1977: "The content of the Rule of Reason is largely unknown; in practice, it is little more than a euphemism for nonliability." Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 14 (1977). Prior to *Sylvania*, the rule of reason was "used primarily as a rationale for dismissing complaints." Comment, *supra* note 23, at 340.

26. In Havoco of Am., Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980), the court observed:

> The only exception to the requirement of an allegation of anticompetitive effects in a Section 1 Sherman Act complaint occurs in the narrow category of *per se* cases. This follows not from the fact that anticompetitive effects need not exist to establish the elements of a *per se* offense, but rather from the fact that the type of conduct complained of in a *per se* action is so destructive of free competition that deleterious effects will be conclusively presumed.

Id. at 555; *see* Almeda Mall, Inc. v. Houston Lighting & Power Co., 615 F.2d 343, 351 (5th Cir.) (where per se practice is alleged, "injury to the public interest and competition is inherent in the charges"), *cert. denied*, 449 U.S. 870 (1980).

27. Although certain per se illegal practices, such as price fixing, might be much more difficult for a victim to detect than, say, a tying arrangement, many antitrust actions employing per se theories are not based upon the plaintiff's own identification of the violation. Prior government actions—or even

that each per se rule presumes a particular practice harms particular markets, and by then permitting only plaintiffs within those markets to pursue per se claims.

The failure of many courts to appreciate this limited nature of the per se standard accounts for much of the confusion that has long plagued standing doctrine in antitrust cases. Reluctant to permit treble-damage actions by all individuals able to attribute an economic loss to a per se violation, but apparently unwilling to directly link standing to substantive antitrust law, those courts have often turned to tort law for principles to limit antitrust standing.

II. Diverse Lower-Court Approaches to Standing

Since the early years of the treble-damage action, antitrust standing analyses have relied—at least in part—upon principles of tort law. Those difficult standing questions most likely to inspire doctrinal pronouncements in the lower courts have arisen in the course of per se claims, and it is in applying this standard that courts are most likely to turn to proximate cause as a limiting principle.

A. *The Direct Injury Test*

Despite the absence of any explicit indication that Congress had intended to limit the scope of section 4,[28] the sweeping promise of that provision has never been realized. Just as many courts decided that Congress had meant to condemn only "unreasonable" restraints of trade,[29] so too they turned to the common law of torts for guidance in interpreting the

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prior actions by other private parties—often alert potential plaintiffs to actionable injuries. *See infra* note 37.

28. While courts have frequently asserted that Congress must have intended that the same limiting principles used in tort law be applied to suits under § 4, *see, e.g.*, Associated Gen. Contractors v. California State Council of Carpenters, 103 S. Ct. 897, 906 (1983); Calderone Enters. Corp. v. United Artists Theater Circuit, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972), the record is bare of any evidence of those intentions. Senator Sherman himself delineated the broad compensatory purpose of the first statutory authorization of the private action for treble damages, Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890) (current version at 15 U.S.C. § 15 (1982)). *See* 21 Cong. Rec. 2569 (Mar. 24, 1890) (statement of Sen. Sherman). The legislative history of § 4 of the Clayton Act, ch. 323, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15 (1982))—whose language was taken from § 7 of the Sherman Act but expanded to include the offenses newly condemned by the Clayton Act—similarly fails to reveal any intent to limit antitrust standing. *See, e.g.*, 51 Cong. Rec. 12,939 (July 29, 1914) (statement of Sen. Reed) (§ 4 "means, for all practical purposes, that every man who is hereafter injured by any concern violating the antitrust statutes can bring suit"); 51 Cong. Rec. 9185 (May 6, 1914) (statement of Rep. Helvering) ("It must be plain that few corporations will care to run the risk of pursuing illegal methods knowing that they will make themselves liable, not merely to dissolution, but for the payment of damages to all parties injured.").

29. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); United States v. Addyston Pipe & Steel Co., 85 F. 271, 283 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

statutory standing provision. Defendants were held liable only for those injuries of which they were the "proximate" or "direct" cause.[30]

This "direct injury" rule first emerged as a corollary of the traditional doctrine that only a corporation, and not its shareholders, may recover for injuries the corporation has suffered.[31] It became the prevailing approach to antitrust standing at least until the early 1950's and, in some circuits, into the 1960's.[32] Courts adhering to the doctrine of direct injury concentrated upon whether the plaintiff stood in some relationship to the alleged antitrust conspirators or upon whether his injury had been intentionally inflicted. But this vague test of circumstantial relationship could yield inconsistent results, with the flagrancy of a violation often becoming a significant analytical factor.[33]

B. *The Emergence of the Target Test*

Though the direct injury approach failed to provide a clear and consistent method of distinguishing cognizable from non-cognizable injuries, courts did not seriously consider any alternative during the first sixty-odd years of the Sherman Act's existence, perhaps because of the rarity of private antitrust actions during this period.[34] The 1950's, however,

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30. For discussions of the considerations that frequently affect determinations of proximate cause in tort cases, see L. GREEN, RATIONALE OF PROXIMATE CAUSE (1927); W. PROSSER, THE LAW OF TORTS §§ 41-45, at 236-90 (4th ed. 1971).

31. *See* Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910) (stockholder suffered no "direct injury"); Ames v. American Tel. & Tel. Co., 166 F. 820, 824 (C.C.D. Mass. 1909) (noting that if both stockholder and his corporation were allowed to recover treble damages, defendant would, in effect, have to pay sextuple damages for same unlawful act); *see also* Kauffman v. Dreyfus Fund, 434 F.2d 727, 734-37 (3d Cir. 1970) (discussing distinction between derivative actions and suits in shareholder's own name), *cert. denied*, 401 U.S. 974 (1971). Both *Loeb* and *Ames* construed § 7 of the Sherman Act, the similarly worded precursor to § 4 of the Clayton Act, and were subsequently followed in § 4 cases. *See* Martens v. Barrett, 245 F.2d 844, 846 n.5 (5th Cir. 1957); Gerli v. Silk Ass'n, 36 F.2d 959, 960 (S.D.N.Y. 1929).

32. *See, e.g.*, Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395 (6th Cir. 1962) (barring suit by supplier of customer injured by antitrust violation because supplier "too remote and too far removed from the direct injury"), *cert. denied*, 372 U.S. 907 (1963); Westmoreland Asbestos Co. v. Johns-Manville Corp., 30 F. Supp. 389, 391 (S.D.N.Y. 1939) (barring suit by lessor injured when antitrust violation led to foreclosure on lessee's property), *aff'd per curiam*, 113 F.2d 114 (2d Cir. 1940).

33. In one instance, circuits split on whether standing should be allowed to a theater lessor alleging that an illegal conspiracy among various film exhibitors, including his own lessees, to divide up the exhibition market caused the lessor to lose profits on a percentage lease. *Compare* Harrison v. Paramount Pictures, 115 F. Supp. 312, 317 (E.D. Pa. 1953) (barring lessor's suit because he was "too remote" from motion picture business and his injury was "indirect"), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954) *with* Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587, 594-95 (7th Cir. 1957) (explicitly rejecting *Harrison* and basing standing on fact that defendants were "direct and proximate cause" of lessor's "not unforeseeable" injury).

For a discussion of the various judicial applications of the direct injury rule, see Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 819-35 (1977), and cases cited therein; *see also* Note, *Antitrust Injury and Standing: A Question of Legal Cause*, 67 MINN. L. REV. 1011, 1015-17 (1983) (collecting cases).

34. *See* Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST

brought a flood of private actions.[35] Not only did an expansion of substantive antitrust law broaden the range of prohibited practices,[36] but vastly increased activity by the Department of Justice provided litigation victories upon which plaintiffs could "piggyback."[37] In the face of these developments, the Ninth Circuit originated a new, "target area" test in *Conference of Studio Unions v. Loew's, Inc.*:[38]

> [I]n order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry.[39]

This formulation shifted the focus slightly, from how the plaintiff had

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BULL. 5, 5 (1959) (only 175 reported private cases between 1890 and 1940). Moreover, courts dismissed many claims not on standing grounds but rather as presenting excessively speculative theories of causation, or as involving no injury to "business or property" within the meaning of the statute. *See* Note, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1016–19 (1952) [hereinafter cited as *Antitrust Enforcement by Private Parties*]; *see also* Note, *Fifty Years of Sherman Act Enforcement*, 49 YALE L.J. 284, 298 (1939) (surveying various challenges that could be made to a § 4 complaint and noting: "Under the circumstances it is not at all surprising that prospective litigants hesitate to take the risk.").

35. *See* Bicks, *supra* note 34, at 5–6.

36. *See Antitrust Enforcement by Private Parties*, *supra* note 34, at 1011–13 (noting, in 1952, "[r]ecent expansion of the substantive law of antitrust violations").

37. *See* Bicks, *supra* note 34, at 5–9. Once the illegality of a defendant's practice has been proven in a suit by either the Justice Department or a private plaintiff, the defendant may be estopped from relitigating significant aspects of his case in subsequent § 4 suits by private parties. 15 U.S.C. § 16(a) (1982). Successful actions by the Justice Department have traditionally provided the basis for a large proportion of private treble-damage actions. *See* Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 372 (1970) (of 880 reported § 4 suits in the period 1961–1963, 759 were preceded by judgment in suit brought by Justice Department).

After a government action against motion picture distributors ended in a decree against the defendants' illegal practice of limiting competition for first-run films, United States v. Paramount Pictures, 66 F. Supp. 323 (S.D.N.Y. 1946), 70 F. Supp. 53 (S.D.N.Y. 1947), *aff'd in part and rev'd in part*, 334 U.S. 131 (1948), plaintiffs—mostly exhibitors, but also including theater lessors—had a field day. Of the 367 private antitrust suits pending in 1951, 129 were against the movie industry. *See Antitrust Enforcement by Private Parties*, *supra* note 34, at 1043 n.219.

Many of the leading standing decisions address actions brought in the wake of government enforcement victories, which act as beacons for all private parties injured by the condemned practice, regardless of whether or not those injuries are cognizable. *See, e.g.*, Ostrofe v. H.S. Crocker Co., 670 F.2d 1378, 1380 & n.1 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 1244 (1983) (following United States v. H.S. Crocker Co., 1978-1 Trade Cas. (CCH) ¶ 61,883 (N.D. Cal. 1976) and United States v. H.S. Crocker Co., 1975-2 Trade Cas. (CCH) ¶ 60,615 (N.D. Cal. 1975)); Fields Prods., Inc. v. United Artists Corp., 318 F. Supp. 87, 88 (S.D.N.Y. 1969) (brought in wake of consent decree against defendant, *see* 318 F. Supp. at 88), *aff'd per curiam*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971); Harrison v. Paramount Pictures, 115 F. Supp. 312, 315 (E.D. Pa. 1953) (plaintiff relying on decree in United States v. Paramount Pictures, 66 F. Supp. 323 (S.D.N.Y. 1946), 70 F. Supp. 53 (S.D.N.Y. 1947), *aff'd in part and rev'd in part*, 334 U.S. 131 (1948)), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954) .

38. 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

39. *Id.* at 54–55.

been injured—directly or as a consequence of some other injury—to the "area of the economy" allegedly endangered, accenting the public nature of the antitrust laws.

Tort principles nonetheless continued to permeate lower courts' discussions of standing even as those courts applied the target test. An example of the Ninth Circuit's approach illustrates how that court's concern with foreseeability and intent operated to enlarge the scope of liability under the per se standard beyond that which a rule of reason analysis would have produced. In *Mulvey v. Samuel Goldwyn Productions*,[40] the plaintiff alleged that his right to receive royalties from several films was impaired, and his income thereby diminished, by the defendant-distributor's practice of "block booking" those films with other, less popular films.[41] The Ninth Circuit held that the plaintiff had standing to sue for his "foreseeable" injuries.[42] The distributor's privity with the plaintiff-producer suggests that the injury in *Mulvey* was indeed foreseeable. That injury, however, was not caused by any disruption of competition in the producer's market. He had not lost profits because of a competing film's undeserved advantage; he suffered because his contracting partner—the distributor—had disfavored his interest.[43] Since the plaintiff made no effort to satisfy the elements of a rule of reason case, the court should not have permitted him to proceed.

By not recognizing the limited nature of the per se rule's presumptions, the Ninth Circuit thus allowed a plaintiff's invocation of that standard to circumvent a systematic standing analysis more consistent with substantive antitrust law. In contrast, several other circuits applied the target area test more "narrowly."[44] Although they seemed to require a plaintiff to allege

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40. 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

41. Block booking has been condemned as per se illegal because it is a kind of tying arrangement, in which the market power derived from desirable titles (the tying products) is employed to force exhibitors to accept less popular titles (the tied products). *See* United States v. Loew's, Inc., 371 U.S. 38, 49 (1962); United States v. Paramount Pictures, 334 U.S. 131, 156–59 (1948).

42. The court concluded:

> [Defendant] directed his activities at the means of distributing films in order to affect their individual revenue-producing potentials—the target area. [Plaintiff's] films are within this target area. Consequently, it is entirely foreseeable that [defendant's] block booking could impair the profit potential of [plaintiff's] films, thus depreciating the value of [plaintiff's] contractual interest in the films' revenue.

433 F.2d at 1076.

43. *See* 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, 817–18 (1976) (criticizing *Mulvey* court for recognizing plaintiff's "incidental" injury); *see also* Klingsberg, *Bull's Eyes and Carom Shots: Complications and Conflicts on Standing To Sue and Causation Under Section 4 of the Clayton Act*, 16 ANTITRUST BULL. 351, 356 (1971) (*Mulvey* "provides little in the way of analysis to delineate the area of the economy which the prohibition against block booking is designed to protect").

44. *See* GAF Corp. v. Eastman Kodak Co., 519 F. Supp. 1203, 1221 (S.D.N.Y. 1981) ("Second Circuit appears to have adhered to the narrower target area test for standing in its recent opinions");

that he was the "object" or "target" of the defendant's per se illegal practice,[45] they required no showing of specific intent.[46] Rather, they allowed per se claims only by those plaintiffs whose markets were presumed by a particular per se rule to be threatened.[47]

Though this conflict among the circuits applying the target test persisted into the 1970's, with other circuits devising their own idiosyncratic standing doctrines,[48] the Supreme Court gave the lower courts little guid-

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see also Lytle & Purdue, *supra* note 43 (applauding narrow target test). The Tenth Circuit also seems to have employed the narrow test. *See* Comet Mechanical Contractors, Inc. v. E.A. Cowen Constr., Inc., 609 F.2d 404 (10th Cir. 1980) (barring price-fixing claim by party not shown to be buyer in affected market).

45. *See, e.g.*, Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269, 1274 (2d Cir. 1975) (plaintiffs lack standing because they "were not the objects of the alleged antitrust violation"), *cert. denied*, 423 U.S. 1073 (1976); Reading Indus., Inc. v. Kennecott Copper Corp., 631 F.2d 10, 12 (2d Cir. 1980) (*Long Island* continues to express circuit approach), *cert. denied*, 452 U.S. 916 (1981). In the wake of Associated Gen. Contractors v. California State Council of Carpenters, 103 S.Ct. 897 (1983) (*see infra* pp. 1326–28), the Second Circuit has retreated from this approach. *See* Crimpers Promotions Inc. v. Home Box Office, Inc. 724 F.2d 290, 293 (2d Cir. 1983).

Although the Seventh Circuit has long been reluctant to accept the target area approach, *see* Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1168–69 (7th Cir. 1978) (noting, without explicit endorsement, trial court's use of target area test), *cert. denied*, 440 U.S. 982 (1979); *In re* Uranium Antitrust Litig., 473 F. Supp. 393, 401 n.5 (N.D. Ill. 1979) (noting "doctrinal void" in Seventh Circuit as to standing questions), several of its more recent decisions have made greater use of the narrow version of that test, *see In re* Industrial Gas Antitrust Litig. (Bichan v. Chemetron), 681 F.2d 514, 517–19 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983); Warner Management Consultants v. Data Gen. Corp., 545 F. Supp. 956, 963 (N.D. Ill. 1982).

46. *See* Schwimmer v. Sony Corp., 637 F.2d 41, 47 (2d Cir. 1980) ("we do not conclude that a requirement of specific intent should be read into the 'target area' test"), *cert. denied*, 103 S. Ct. 362 (1982); GAF Corp. v. Eastman Kodak Co., 519 F. Supp. 1203, 1221 (S.D.N.Y. 1981) (following *Schwimmer*).

47. The Second Circuit approved this approach in Fields Prods. Inc. v. United Artists Corp., 432 F.2d 1010 (2d Cir. 1970) (per curiam), *aff'g* 318 F.Supp. 87 (S.D.N.Y.), *cert. denied*, 401 U.S. 949 (1971), and affirmed a trial court's denial of standing to a plaintiff much like the producer in *Mulvey*. After discussing the rationale underlying the prohibition of block booking, the trial court had held: "It is thus the television stations and the other distributors who are in the 'target area.' If the block booking in fact causes any injury to the producer [recipient of royalties] of the pictures which are thus block booked, that injury is only incidental." 318 F. Supp. at 88. *See also* Long Island Lighting Co. v. Standard Oil, 521 F.2d 1269, 1274 (2d Cir. 1975) (limiting standing to challenge boycott to those parties with whom conspirators refused to deal), *cert. denied*, 423 U.S. 1073 (1976).

It should be noted that the use of the target test has hardly been restricted to cases involving per se allegations. It has also been used in monopolization and merger cases. *See, e.g.*, Thomsen v. Western Elec. Co., 680 F.2d 1263, 1267 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982); Solinger v. A&M Records, Inc., 586 F.2d 1304, 1311–12 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979). However, the clear focus upon market effects inherent in a rule of reason analysis, *see supra* at pp. 1312–13, has ensured the consistency with substantive antitrust principles of target analyses in these cases. This Note has therefore concentrated upon per se cases, where such consistency has been less certain.

48. The Third Circuit abandoned target terminology and instead looked to the "particular factual matrix presented" by each case. *See* Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 506 (3d Cir. 1976) (factors in factual matrix include "the nature of the industry in which the alleged antitrust violation exists, the relationship of the plaintiff to the alleged violator, and the alleged effect of the antitrust violation upon the plaintiff"). The Sixth Circuit drew upon the Supreme Court's leading administrative law standing case—Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970)—to formulate a broader standing test. The Circuit held that a § 4 plaintiff must allege an "injury in fact" (a real economic loss) to an "interest . . . arguably within the zone of interests to be protected or regulated" by the antitrust laws. Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151 (6th Cir. 1975) (quoting *Data Processing*, 397 U.S. at 153). The *Malamud* court appar-

ance.[49] In *Hawaii v. Standard Oil Co.*,[50] it merely remarked: "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."[51] Since the Court in *Hawaii* merely addressed the capacity of a state to sue under section 4 for injuries to its sovereign interests, it did not adopt any of the standing approaches used in the various lower court opinions it cited. Lower courts, however, subsequently cited *Hawaii* as an indication of the Supreme Court's approval of, or at least acquiescence in, their respective approaches.[52]

III. The Progress Away from Tort Doctrine in Standing: Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.

A. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. *and Antitrust Injury*

Although the Supreme Court did not explicitly address antitrust standing until 1982, several of its decisions in the late 1970's—especially *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[53]—enunciated an approach to private actions that allowed a more rigorous definition of the injuries cognizable under section 4. In *Brunswick*, several bowling centers challenged the acquisition—arguably in violation of section 7 of the Clayton Act[54]—of several of their competitors by a larger national firm with considerable market power. Though the plaintiffs alleged that the acquiring firm had used predatory practices, they could prove only that the acquisitions had deprived them of profits they would have made if the acquired

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ently thought this zone quite large. It observed: "The antitrust laws were enacted to preserve competition and thereby to protect the individual plaintiff and the consuming public from the effects of any combinations or conspiracies in restraint of trade." 521 F.2d at 1152. For one criticism of this approach, see Sherman, *Antitrust Standing: From* Loeb *to* Malamud, 51 N.Y.U. L. Rev. 374 (1976).

49. In Perkins v. Standard Oil Co., 395 U.S. 642 (1969), where an independent wholesale and retail distributor of gasoline claimed to have been injured by his supplier's price discrimination, the Court upheld plaintiff's recovery of, *inter alia*, losses he suffered in his capacity as a gas station lessor. The Court found that the plaintiff was "no mere innocent bystander; he was the principal victim of the price discrimination practiced by [the defendant]. Since he was directly injured and was clearly entitled to bring this suit, he was entitled to present evidence of all of his losses to the jury." *Id.* at 649-50. Though the Court did not address whether the plaintiff would have had standing if his only relation to the illegal conduct had been as a lessor, its liberal language implied that such a suit would have been allowed if the lessor could allege that defendant had intended to harm him. Despite the absence of any explicit discussion of antitrust standing, *Perkins* thus seemed to support the tort law approaches in the area.

50. 405 U.S. 251 (1972).

51. *Id.* at 263 n.14.

52. *See, e.g.*, Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 17 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980); *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 126-27 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

53. 429 U.S. 477 (1977).

54. 15 U.S.C. § 18 (1982) (prohibiting acquisitions whose effects "may be substantially to lessen competition, or to tend to create a monopoly").

centers had closed.[55] The Supreme Court held that the plaintiffs' "lost" profits, caused by increased rather than decreased competition, were not "of 'the type that the statute was intended to forestall.'"[56] Emphasizing that causal linkage to an antitrust violation is not enough, the Court demanded that a plaintiff suing under section 4 prove "*antitrust* injury" and relate his loss to the procompetitive policies expressed in the antitrust laws.[57]

Brunswick thus authoritatively gave greater precision to the principle that underlay the narrow target area approach: Even if the plaintiff can show an antitrust violation, courts should allow treble damages only for injuries reflecting a disruption of competition in the plaintiff's market.[58] *Brunswick* and *J. Truett Payne Co. v. Chrysler Motors Corp.*[59]—another damage measurement case in which the Court applied its principle of "antitrust injury"—were expressions of the same concern for "*competition*, not *competitors*"[60] that underlay the Court's recent reassertion of the primacy of the rule of reason.[61]

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55. *Brunswick*, 429 U.S. at 490 & nn.15-16.

56. *Id.* at 487-88 (quoting Wyandotte Transp. Co. v. United States, 389 U.S. 191, 202 (1967)). The *Brunswick* Court's citation of *Wyandotte* reveals the continuing influence of tort law on the Court's interpretation of § 4. In *Wyandotte*, the Court had followed a "general rule of the law of torts,"—for which it cited the RESTATEMENT (SECOND) OF TORTS § 286 (1965)—and implied a right of action from a criminal statute because plaintiff's interest "fell within the class that the statute was intended to protect" and "the harm that had occurred was of the type that the statute was intended to forestall." 389 U.S. at 202.

57. 429 U.S. at 489 (emphasis in original). For discussions of "antitrust injury," see Calvani, *The Mushrooming* Brunswick *Defense: Injury to Competition, Not to Plaintiff*, 50 ANTITRUST L.J. 319, 325-28 (1982); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 476-89 (1980).

58. From this perspective, *Brunswick* was an easy case. The plaintiffs may well have shown a violation of § 7—the mere possibility that a large firm active in many markets will cut prices or use other monopolization tactics in a new market is enough to show a § 7 violation—but they failed to show that their losses stemmed from the realization of this possibility. The defendant had merely kept afloat businesses that otherwise would have failed. It had not affected prices in any way. The "lost profits" the plaintiffs complained of were the result of the very situation that the antitrust laws are supposed to encourage—free competition among as many firms as a market can support. 429 U.S. at 488. The *Brunswick* Court's reasoning was heavily influenced by Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1130-36 (1976). *See* 429 U.S. at 487 n.11.

59. 451 U.S. 557 (1981). In *Truett Payne*, a car dealer sued his supplier, alleging that the supplier had violated § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982), by forcing him to pay higher prices than had been charged to other dealers. The plaintiff sought damages for the difference between the prices he had paid and the lower prices offered to his competitors. Like § 7 of the Clayton Act, however, § 2(a) of the Robinson-Patman Act is a prophylactic provision, which may be violated even without any actual effect upon competition. The Supreme Court therefore followed *Brunswick* and rejected this "automatic damages" claim. It held that the plaintiff would have to show that the price discrimination had *actually* affected competition among retail dealers and thereby caused his injury—that, as a result of the difference in costs, his competitors could profitably lower their retail prices and draw customers away from him. 451 U.S. at 562. His damages would therefore be measured not by the difference in prices, but by the profits he lost.

60. The *Brunswick* Court borrowed the phrase, 429 U.S. at 488, from Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis in the original).

61. *See* Continental T.V. v. GTE Sylvania, 433 U.S. 36, 57-59 (1977); Comment, *supra* note 23, at 344.

Soon after *Brunswick*, the Court spoke to one discrete problem in standing, though it called the problem one of "injury" rather than of "standing."[62] It held in *Illinois Brick Co. v. Illinois*[63] that indirect purchasers cannot seek treble damages from antitrust violators for overcharges passed on by those intermediate in the chain of distribution between the indirect purchaser and the violators. Though *Illinois Brick* largely resolved one standing question to which lower courts had applied the target test,[64] the decision is irrelevant to standing analyses outside the distributional context in which it arose.[65] *Illinois Brick* established merely that where inherent difficulties of apportioning losses among injured parties create a danger of duplicative recoveries, only those parties who have initially paid a particular overcharge can seek treble damages.[66] This rule is quite independent of the doctrine that the connection between the injury alleged and the conduct challenge cannot be merely speculative.[67] The *Illinois Brick* Court in fact conceded that the indirect purchasers seeking recovery might have been able to tie their losses to the defendants' price fixing.[68]

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62. The Court in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), noted that "the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4." *Id.* at 728 n.7. The difference, however, between holding a plaintiff to have no standing and holding that an injury he could well have suffered is not legally cognizable is quite elusive. *See infra* note 68. More recently, the Court has recognized that *Illinois Brick* is essentially a standing analysis. *See* Associated Gen. Contractors v. California State Council, 103 S. Ct. 897, 912 (1983).

63. 431 U.S. 720 (1977).

64. *See, e.g.*, Illinois v. Ampress Brick Co., 536 F.2d 1163, 1167 (7th Cir. 1976) (employing target test and holding indirect purchasers have standing), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 199 (9th Cir. 1973) (same), *cert. denied*, 415 U.S. 919 (1974).

65. The rule, of course, should not be applied in all chain-of-distribution contexts. Courts should, for example, permit both a wholesaler and a manufacturer to seek recovery for profits lost as a result of a competing manufacturer's alleged price discrimination or predatory pricing. Their damages, in such a case, consist of their lost profits, not the higher price paid by the wholesaler; the concerns of a rule addressing the passing-on of an injury are therefore not implicated. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1246, 1254–56 (E.D. Pa. 1980), *aff'd in part and rev'd in part on other grounds*, 723 F.2d 238, 315 (3d Cir. 1983); *see also* Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 967 n.20 (3d Cir. 1983) (approving *Zenith* court's reasoning), *cert. denied*, 104 S. Ct. 1278 (1984).

66. *Illinois Brick*, 431 U.S. at 745–47.

67. *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931) (damages which are not "the certain result of the wrong" cannot be recovered); Weinberg, *Recent Trends in Antitrust Civil Action Damage Determinations*, 1976 DUKE L.J. 485, 489–90.

Several decisions have inappropriately relied upon *Illinois Brick* for the proposition that complex theories of causation cannot support § 4 claims. *See, e.g.*, *In re* Petroleum Prods. Antitrust Litig., 691 F.2d 1335, 1340–41 (9th Cir. 1982); Reading Indus. Inc. v. Kennecott Copper Corp., 631 F.2d 10, 14 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981); *see also* Stein v. United Artists Corp., 691 F.2d 885, 895–98 (9th Cir. 1982) (applying *Illinois Brick* to bar suit by plaintiff seeking damages for losses suffered when forced to sell, at depressed price, stock in corporation that defendants allegedly boycotted). Since stock values are not solely a function of corporate revenue, the loss of the plaintiff in *Stein* had not truly been "passed-on" to him.

68. The Court admitted that its holding denied "recovery to those indirect purchasers who may

B. Brunswick *and Standing Doctrine*

Some courts and commentators treated *Brunswick* as irrelevant to standing doctrine. Because the standing of the *Brunswick* plaintiffs had never been challenged, these readers concluded that only a trial on the merits could determine whether a plaintiff has suffered an "antitrust injury."[69] They failed to realize that the *Brunswick* plaintiffs' allegations of predatory pricing had made a grant of standing quite proper. If the plaintiffs had, at the outset, attributed their losses solely to the continued existence of their competitors instead of alleging a disruption of the market, their lack of "antitrust injury" and of standing would have been clear from the start. Whether a plaintiff's claim is defeated at the standing stage or the damages stage may thus be merely a matter of when his theory of causation becomes clear.[70]

Some lower courts used *Brunswick* solely to reinforce their own diverse approaches to standing.[71] Indeed, the Second and Seventh Circuits were quite correct in using *Brunswick* to confirm their tests' results. As the Second circuit's decision in *Fields Productions* illustrates,[72] the only difference between the Second Circuit's test and *Brunswick*'s approach lay in their analytical progressions. The circuit's analysis looked to the particular per se rule invoked and then determined whether that rule presumed

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have been actually injured by antitrust violations." 431 U.S. at 746; *see* Dart Drug Corp. v. Corning Glass Works, 480 F. Supp. 1091, 1102 n.13 (D. Md. 1979) ("[T]he Supreme Court acknowledged in *Illinois Brick* that indirect purchasers might actually be injured by an overcharge, but for policy reasons the Court foreclosed such purchasers from attempting to prove injury. Such a prophylactic rule differs from the usual case-by-case analysis required in a determination of standing.").

69. In Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 888-89 (5th Cir. 1982), the Fifth Circuit rejected the defendant's contention that plaintiffs lacked standing because they could not *prove* antitrust injury; the court held that any inquiry into antitrust injury must await trial on the merits. The decision was later vacated and remanded by the Supreme Court in the wake of Associated Gen. Contractors v. California State Council of Carpenters, 103 S. Ct. 897 (1983) (*see infra* pp. 1326-28). 103 S. Ct. 1244 (1983). Upon reconsideration, the Fifth Circuit reached the same result, using a more appropriate analysis. 704 F.2d 785 (5th Cir. 1983). A similar misconception of the meaning of antitrust injury led one commentator to note: "[I]t invites confusion . . . indiscriminately to merge the doctrines of standing, antitrust injury and pass-on into a single, unitary principle . . . ." Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 COLUM. L. REV. 979, 996-97 (1977).

70. As one perceptive court observed with regard to "antitrust injury" and antitrust standing: "We suspect that the different terminologies may be a function of the differences in procedural posture of particular cases, with objections based upon 'standing' arising at earlier stages of the litigation than those based upon lack of injury or causation. The concepts, however, are virtually identical." Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1158 n.70 (E.D. Pa. 1981) (Becker, J.), *aff'd in part and rev'd in part on other grounds*, 723 F.2d 238 (3d Cir. 1983); *see* GAF Corp. v. Circle Floor Co., 463 F.2d 752, 759 (2d Cir. 1972), *cert. denied*, 413 U.S. 901 (1973).

71. *See, e.g.*, Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 545 F. Supp. 765, 774 (N.D. Ill. 1982) (applying target test and *Brunswick* in seriatim, without recognizing relationship between the two), *aff'd*, 712 F.2d 270 (7th Cir.), *cert. denied*, 104 S. Ct. 509 (1983); Pollock v. Citrus Assocs., 512 F. Supp. 711, 717-18 (S.D.N.Y. 1981) (same); Star Lines, Ltd. v. Puerto Rico Maritime Shipping Auth., 451 F. Supp. 157, 159 (S.D.N.Y. 1978) (same).

72. *See supra* note 47.

any disruption of the plaintiff's market. The analysis implicit in *Brunswick* focuses first on the plaintiff's market and then on whether the plaintiff, through either a per se claim or rule of reason allegations, can indicate some effect upon that market.[73]

After *Brunswick*, therefore, the Ninth Circuit's refusal to abandon the doctrine that permitted standing to the kind of plaintiff barred by *Fields Productions* was unjustified. By continuing to consider intent and foreseeability in its analysis of standing in per se claims, the Ninth Circuit expanded the scope of section 4 beyond that allowed by *Brunswick*.[74] In *Ostrofe v. H.S. Crocker Co.*,[75] for example, a former sales manager alleged that his employer had forced his resignation to prevent him from interfering in a conspiracy to fix prices. Even though the plaintiff clearly had failed to indicate any disruption of competition in his own market—the labor market—the Ninth Circuit found him to have standing under section 4. It reasoned that the "[d]ischarge of those who refuse to participate [in a price fixing conspiracy] is essential to success of the scheme"[76] and concluded that the plaintiff had suffered a direct injury.[77]

Ironically—in light of its previous idiosyncratic approach[78]—the circuit most receptive to *Brunswick* was the Sixth. Following the Supreme

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73. After *Brunswick*, in a case similar to *Fields Productions*, the Seventh Circuit recognized the essential identity between the "narrow" target approach and *Brunswick*'s analysis. In Repp v. F.E.L. Publications, 688 F.2d 441 (7th Cir. 1982), a composer of liturgical music challenged his publisher's practice of charging an annual blanket fee to those wishing to copy his and other composers' works. The court denied him standing. It observed that *Brunswick*'s "antitrust injury" test could be understood through either the "direct injury" or "target area" approach, *id.* at 444, but that, regardless of which approach was used, Repp's injury did not implicate the concerns of the antitrust laws, *id.* at 447. As in block booking, the publisher's blanket licensing could conceivably have forced purchasers to buy unwanted titles and have limited the ability of other composers and/or the licensors of their works to compete in the market for musical works. *These* parties would thus have standing if they claimed injury. But, as the court observed, Repp's "access to the marketplace with musical works *he owns*" was "unaffected"; he therefore fell "outside the range of economic injuries intended to be protected by a declaration that the licensing practice is unlawful." *Id.* at 446 (emphasis in original).

74. Soon after *Brunswick*, a district court in the Ninth Circuit examined that decision's effect upon the authority of *Mulvey*, *see supra* p. 1317. Vaguely defining "antitrust injury" as any injury directly attributable to an antitrust violation, the court held that *Mulvey* remained controlling. Laughlin v. Wells, 446 F. Supp. 48, 52 (C.D. Cal. 1978).

75. 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 1244 (1983).

76. *Id.* at 1384.

77. *Id.* at 1385 (observing that plaintiff's injury flowed "immediately, not remotely or indirectly" from his employer's violation). In a similar case, the Seventh Circuit later rejected the analysis in *Ostrofe* as inconsistent with *Brunswick*'s principle that a plaintiff must indicate some anticompetitive effect in the market in which he is a participant. *In re* Industrial Gas Antitrust Litig. (Bichan v. Chemetron), 681 F.2d 514, 517 (7th Cir. 1982) (employee allegedly terminated for refusing to adhere to employer's collusive marketing practices denied standing by court, observing: "Since the area of the economy endangered by the anticompetitive scheme was not the labor market, [plaintiff] can claim no 'antitrust injury.'"), *cert. denied*, 103 S. Ct. 1261 (1983); *see also* Perry v. Hartz Mountain Corp., 537 F. Supp. 1387, 1390 (S.D. Ind. 1982) (applying target test to deny standing to plaintiff similar to that in *Bichan*). *But cf.* Note, *Employee Standing Under Section 4 of the Clayton Act*, 81 MICH. L. REV. 1846, 1859-66 (1983) (arguing that discharged employees like Ostrofe should be allowed standing because of their contribution to efficient antitrust enforcement).

78. *See supra* note 48.

Court's decision, the circuit made "antitrust injury" a standing requirement in addition to its "zone of interests" test.[79] Because the "zone" test had been so vague and unrestricted, this change made *Brunswick* the centerpiece of the circuit's standing doctrine.[80]

IV. The Supreme Court's Standing Cases in the 1980's

By the 1980's, then, most lower courts—with the exception of the Ninth Circuit—were moving towards standing approaches consistent with *Brunswick*'s focus upon effects within the plaintiff's own market. In 1982, however, the Supreme Court derailed this movement away from tort analyses in *Blue Shield v. McCready*,[81] the first decision in which the Court explicitly addressed the standing question.

A. Blue Shield v. McCready

The employer of the plaintiff in *McCready* had provided her with health-plan coverage from Blue Shield. As a condition of reimbursement, the plan required physician supervision over all visits to psychologists. In contrast, the plan automatically reimbursed subscribers for visits to psychiatrists. The plaintiff-subscriber had sought and received treatment from a psychologist without obtaining a physician's approval. When the plan refused to reimburse her for the costs of her treatment, she sought treble damages for the denied reimbursements from Blue Shield and from the group of psychiatrists that had allegedly aided in the design of the provision.

McCready thus presented the standard challenge to antitrust standing doctrine: An arguably per se illegal practice had affected a variety of victims, and the Court had to determine which of these victims had suffered injuries cognizable under section 4. The challenged practice clearly resembled a boycott (albeit a conditional one) of the psychologists, initiated by competing psychiatrists.[82] If psychologists had lost potential patients, their

79. *See* Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1235 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981).

80. *See* J.F. Reed Co. v. K Mart Corp., 1982-1 Trade Cas. (CCH) ¶¶ 64,499-500 (E.D. Mich. 1981).

81. 457 U.S. 465 (1982).

82. The Virginia Academy of Clinical Psychologists had, at the same time as the *McCready* plaintiff, filed suit against Blue Shield of Virginia, Blue Shield of Southwestern Virginia, and the Neuropsychiatric Society of Virginia, alleging a conspiracy to favor psychiatrists to the detriment of psychologists. In that case, the Fourth Circuit observed that "[b]ecause of the special considerations involved in the delivery of health services, we are not prepared to apply a *per se* rule of illegality to medical plans which refuse or condition payments to competing or potentially competing providers." Virginia Academy of Clinical Psychologists v. Blue Shield, 624 F.2d 476, 484 (4th Cir. 1980). The court nevertheless held that the defendants' alleged conspiracy was, in form, a conditional concerted refusal to deal.

losses for standing purposes would clearly be "antitrust injuries," within the meaning of *Brunswick*. The per se rule against boycotts presumes that competition in their market would have been endangered by defendants' practice. The question in *McCready* was thus whether the plaintiff-subscriber could also claim an "antitrust injury." By considering this question, the *McCready* Court authoritatively recognized *Brunswick*'s applicability to standing analyses.[83] Moreover, as Justice Brennan, writing for the Court, noted, the injury claimed by the plaintiff was distinct from the injuries that psychologists might have suffered.[84]

The limited reading that the *McCready* Court gave *Brunswick*, however, permitted it to shift its focus from the market analysis implied by *Brunswick* to the circumstantial connection of the plaintiff's injury to the defendants' illegal practice.[85] The Court reasoned that only by denying reimbursements to those subscribers who made unapproved visits to psychologists could the defendants place the psychologists at a competitive disadvantage. The harm to the plaintiff was thus "a necessary step in effecting the ends of the alleged illegal conspiracy."[86] Indeed, her injury was "inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market."[87] These formulations harken back to those cases where a court's view of the directness of a plaintiff's injury controlled and ignore the fact that the question of whether an injury is "intertwined" with an antitrust conspiracy's ends is irrelevant to the market analysis demanded by *Brunswick*.[88]

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83. *McCready*, 457 U.S. at 483 n.19.

84. *Id.* at 475. The *McCready* plaintiff's claim was therefore not barred by the rule of *Illinois Brick*, *see supra* p. 1321.

85. In a footnote, the *Brunswick* Court had observed that a § 4 plaintiff need not "prove an actual lessening of competition in order to recover. . . . [C]ompetitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened." 429 U.S. at 489 n.14. This observation addressed predatory practices which, though they might initially benefit consumers by lowering prices, are condemned because of their *ultimate* effects. The theory of predatory pricing is that once prices are so low that most competitors are forced to drop out of the market, the price-cutting firm can recoup its losses by profiting from the newly diminished competitiveness of its market. The initial losses to the competitors are therefore antitrust injuries because they are of significance to the entire market; the competitors are thus allowed § 4 standing. *But see* Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 331–33 (1981) (arguing that competitors should not be permitted to sue for predatory pricing). The *McCready* Court, however, apparently interpreted the *Brunswick* footnote to mean that a plaintiff may have § 4 standing even though competition in her market was neither lessened nor even endangered, as long as competition *somewhere* has been affected. *McCready*, 457 U.S. at 482–83; *see id.* at 483 n.19 ("Most obviously, McCready's claim is quite unlike the claim asserted by the plaintiff in *Brunswick* for she does not seek to label increased competition as a harm to her.").

86. 457 U.S. at 479.

87. *Id.* at 484.

88. At various points in its opinion, the *McCready* Court adumbrated a standing analysis more consistent with *Brunswick*. By characterizing defendants' practice as a "concerted refusal to reimburse," *id.* at 480, Justice Brennan eliminated the need for any inquiry into market effects, since the per se rule against concerted refusals clearly allows standing to boycotted parties. *See also id.* at 484 n.21 (plaintiff's plight likened to that of hypothetical bank boycotted by psychiatrists until it ceased to

The *McCready* Court's focus upon the proximity of the plaintiff's injury to the per se illegality impeded the progress of post-*Brunswick* standing doctrine toward systematization. Most notably, the decision allowed the Ninth Circuit to continue its peculiar definition of target areas. In *Aurora Enterprises v. NBC*,[89] faced with a factual situation very similar to that in *Mulvey*,[90] the Ninth Circuit relied upon *McCready* to support its refusal to overturn *Mulvey* as inconsistent with *Brunswick*.[91] Those courts that had previously adhered to the narrow target approach held the line, however, citing *McCready* only for general propositions of standing and refusing to expand the scope of section 4.[92]

B. Associated General Contractors v. California State Council of Carpenters

While the Supreme Court had waited 92 years before explicitly addressing the standing question, it waited only a year before acting to minimize the confusion caused by *McCready*.[93] In *Associated General Contractors v. California State Council of Carpenters*,[94] a number of carpenters

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make loans to psychologists). The Court's focus upon "inextricable linkage," however, overshadowed this market-oriented strain of *McCready*.

In their dissenting opinions, Justices Rehnquist and Stevens also followed *Brunswick*'s analysis, but they quarreled with the Court's characterization of the defendants' behavior with respect to the plaintiffs. They noted that the "boycott" the Court discerned seemed more akin to a seller's refusal to provide a commodity on the precise terms sought by a consumer than to a concerted refusal to deal; the plaintiff had simply sought reimbursements for the cost of services not covered by her plan. *Id.* at 490–91 & n.7 (Rehnquist J., dissenting); *id.* at 494 n.4 (Stevens, J., dissenting).

89. 688 F.2d 689 (9th Cir. 1982).

90. The plaintiff-producers alleged that the defendant-television network had block booked certain programs they had produced, thereby depriving plaintiffs of some of the royalties they otherwise would have received. *Id.* at 691–93.

91. The district court had found the plaintiffs lacked standing; it reasoned that *Mulvey*, on which plaintiffs relied, should be considered overruled by *Brunswick*. Aurora Enters. v. NBC, 524 F. Supp. 655, 659 (C.D. Cal. 1981). The Ninth Circuit reversed. It asserted that *McCready*—decided after the trial court's decision—supported *Mulvey*, which thus remained "the law of this circuit." 688 F.2d at 693.

The *Aurora* court's emphasis upon the continued vitality of *Mulvey* led it to give little reasoning in support of its decision. But it did distinguish *Brunswick* in a remarkable way: "Competition was *increased* by defendants' actions in *Brunswick*; therefore, plaintiffs suffered no antitrust injury. In contrast, the alleged tying arrangement in the present case is a *per se* violation of the antitrust laws." *Id.* (emphasis in original). This construction of § 4 would give *all* individuals injured by a per se violation standing to sue for treble damages.

92. *See, e.g.*, Litton Sys. v. American Tel. & Tel. Co., 700 F.2d 785, 821 (2d Cir. 1983) (citing *McCready* in support of Second Circuit's target approach), *cert. denied*, 104 S. Ct. 984 (1984); Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346, 1350 n.4 (7th Cir. 1982) (citing *McCready* to support observation that "antitrust injury" is needed for § 4 standing); Car Carriers v. Ford Motor Co., 561 F. Supp. 885, 887 (N.D. Ill. 1983) (same).

93. The Court might have been prodded by the Justice Department. In a case that appeared to be more concerned with the antitrust labor exemption than antitrust standing, the Solicitor General filed an amicus brief endorsing the lower court's holding as to the exemption but challenging that court's standing analysis. Brief for the United States, Associated Gen. Contractors v. California State Council of Carpenters, 103 S. Ct. 897 (1983).

94. 103 S. Ct. 897 (1983).

unions sued a membership corporation of building and construction contractors and its members, claiming that the defendants had pursued a concerted campaign against the plaintiffs. The defendants had allegedly induced members and non-members both to avoid entering into collective bargaining agreements with the plaintiffs and to disfavor those who had signed such agreements. Applying *Brunswick*, the Supreme Court overturned the Ninth Circuit's application of the target test[95] and held that the plaintiffs lacked standing under section 4.

The allegations in the plaintiffs' complaint made the application of *Brunswick* simple and decisive. Not only did the complaint fail to identity the exact nature of the plaintiffs' injuries,[96] but it also alleged restraints only in the markets for construction contractors and subcontractors[97] without indicating that the plaintiffs' own market—the market for labor unions—had been affected.[98] That the plaintiff unions were not participants in the carpentry-contracting market was so clear that the Court could easily distinguish *McCready*.[99]

Thus, although the unions were the intended targets of the defendants' alleged conspiracy, the Court found their section 4 standing barred by *Brunswick*.[100] Even while preventing the tort principle of intent from influencing its standing analysis, however, the Court conflated standing and causation by emphasizing the "indirectness" of plaintiffs' injury as an alternative ground for denying their standing.[101] The Court's reliance upon this common-law principle might, in part, be attributed to the many

95. The Ninth Circuit, applying its liberal target area analysis, granted the plaintiffs standing since the alleged injuries were not merely a "foreseeable consequence" of defendants' conduct but its "intended result." California State Council of Carpenters v. Associated Gen. Contractors, 648 F.2d 527, 538 (9th Cir. 1980), *rev'd*, 103 S. Ct. 897 (1983).

96. 103 S. Ct. at 911.

97. The Court recognized that any coercion directed at contractors and subcontractors might violate the antitrust laws. Its opinion, however, indicated its reluctance to invoke the per se rule against boycotts. Justice Stevens, writing for the Court, observed that the "allegedly unlawful conduct involves predatory behavior directed at 'certain' parties, rather than a claim that output has been curtailed or prices enhanced throughout an entire competitive market." *Id.* at 909 n.40. Such a concern with actual market effects is appropriate only to a rule of reason analysis and might presage a re-evaluation of the per se rule against boycotts.

98. Justice Stevens noted: "The amended complaint . . . does not allege any restraint on competition in the market for labor union services . . . . [I]n this case there is no claim that competition between rival unions has been injured or even that any rival unions exist." *Id.* at 903 n.14.

99. "In this case, . . . the Union was neither a consumer nor a competitor in the market in which trade was restrained." *Id.* at 909.

100. *Id.* at 909–10.

101. *Id.* at 910. The Court seems to have used "directness" in two related but distinct senses. Like lower courts using "directness" as a standing test, *see supra* pp. 1314–15, it noted the long and complex chain of causation that separated plaintiffs from the challenged conduct. 103 S. Ct. at 910–11. The Court also alluded, however, to the "vaguely defined links" in that chain. *Id.* at 910. It thus seems to have conflated the direct injury standing analysis with the separate rule of *Bigelow* and *Story* against speculative theories of injury. *See* Bigelow v. RKO Radio Pictures, 327 U.S. 251, 263–66 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931); *supra* note 67.

lower-court cases that—lacking a more systematic approach—had drawn upon "proximate cause" to restrict the sweeping language of section 4.[102] Another reason for the Court's discussion of proximate cause may have been the Court's desire to legitimize its use of *Brunswick*'s analysis by rooting it in legislative history. Just as "proximate cause" limited tort recoveries, so, the Court argued, certain similar restrictions were implicit in section 4.[103] Therefore, "consequential" harms[104]—such as those suffered by the plaintiffs in *Associated General Contractors*—were not cognizable in either tort or antitrust law.

There are two problems, however, with this particular resort to legislative history. First, as the Court itself recently observed in *Texas Industries v. Radcliff Materials*,[105] "[t]he intent to allow courts to develop governing principles of law, so unmistakably clear with regard to substantive violations, does not appear in debates on the treble-damages action created in section 7 of the original [Sherman] Act . . . ."[106] The legislative histories of section 7 of the Sherman Act and section 4 of the Clayton Act are bereft of any indications that concepts such as directness were to have any relevance to determinations of standing.[107] Second, as Justice Marshall pointed out in his *Associated General Contractors* dissent: "An inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors."[108]

It is still too early to assess the impact of *Associated General Contractors* upon standing doctrine. If the decision will have any effects other than to confirm the primacy of *Brunswick*'s analysis, it will be because the decision's proximate cause discussion can justify grants of standing based upon a plaintiff's circumstantial relationship to a violation.[109] Such departures, however, have yet to occur.[110] Since *Associated General Contractors*, lower courts have followed the Supreme Court's direction to analyze standing questions "in light of"[111] the factors delineated in that case.[112]

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102. *See supra* pp. 1314–15.
103. 103 S. Ct. at 906–07.
104. *Id.* at 906 n.25.
105. 451 U.S. 630 (1981).
106. *Id.* at 643–44.
107. *See supra* note 28.
108. 103 S. Ct. at 914 (Marshall, J., dissenting).
109. *See* Note, *supra* note 77 (using proximity analyses of *McCready* and *Associated General Contractors* to support a policy argument favoring § 4 suits by employees like Ostrofe, *see supra* p. 1323, discharged for refusing to participate in their employers' antitrust conspiracy).
110. Since the court most likely to produce such a departure, the Ninth Circuit, had one application of its doctrine overturned in *Associated General Contractors*, departures from the Supreme Court's standard seem less likely now than they did after *McCready*.
111. After noting the diverse standing approaches prevailing in the lower courts, the *Associated General Contractors* Court counseled: "In our view, courts should analyze each situation in light of the factors set forth in the text *infra*." 103 S. Ct. at 908 n.33.
112. In Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079 (6th Cir. 1983), the Sixth

While consideration of "proximity and directness" has on occasion led to the complication of rather simple standing questions,[113] courts so far have followed *Brunswick* and focused upon competition in the plaintiff's market.[114]

CONCLUSION

A standing doctrine based upon *Brunswick* and focusing upon the plaintiff's market cannot easily be culled from the legislative history of the treble-damages provision. But neither can approaches based upon intent, foreseeability, or proximity. The advantages of a *Brunswick* approach are that it comports with prevailing views of the goals of antitrust law, particularly the distinction between per se offenses and offenses prohibited by the rule of reason, and that it produces uniform results if properly applied. If fully adopted by the lower courts, the *Brunswick* analysis will take the confusion out of standing doctrine and put it back in substantive antitrust law—where it belongs.

—Daniel C. Richman

Circuit listed the factors it distilled from *Associated General Contractors*:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.

Id. at 1085.

When the Third Circuit sought to list the "factors" identified in *Associated General Contractors*, it came up with a somewhat different list: "the causal connection between an antitrust violation and the injured party, the nature of the plaintiff's alleged injury, and the directness or indirectness of the asserted injury." Mexican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 964–65 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1278 (1984).

113. In *Southaven Land Co.*, a lessor of commercial premises alleged that a lessee of one of its properties had prevented the establishment of a grocery store on that property as part of its conspiracy to monopolize the area's retail grocery market. *Brunswick* would clearly bar a monopolization claim by a plaintiff who is not a participant in the relevant market claimed to be threatened. The *Southaven* court, however, did not cease its inquiry upon recognizing that the plaintiff was "neither a consumer, competitor or participant" in the relevant product market, but went on to the question of whether plaintiff's injury was "inextricably intertwined" with injuries in that market. 715 F.2d at 1086. Though the Sixth Circuit ultimately came to the conclusion it would have if it had adhered to *Brunswick*, it felt bound by *McCready* and *Associated General Contractors* to consider "proximity and directness." *Id.* at 1085.

114. *See* Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290 (2d Cir. 1983). In *Crimpers*, a firm organized to hold a trade show to facilitate contacts between producers of cable television programming and local cable television stations charged that defendants, two companies allegedly dominating the business of purchasing and assembling programming for sale to stations, had conspired to cause the boycott of its trade show. The Second Circuit found the plaintiff to have standing because his injury was "inextricably intertwined with the injury the defendants sought to inflict on producers and television stations in the cable television programming market." *Id.* at 294–95. Throughout its opinion, however, the court was careful to emphasize that the plaintiff was "'a competitor in the market in which trade was restrained,'" *id.* at 296 n.9 (quoting *Associated General Contractors*, 103 S. Ct. at 909), that is, the market for programming middlemen.