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Antitrust Injury and Standing: A Question of Legal Cause

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Since the Supreme Court introduced the concept of "antitrust injury" in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[1] no general agreement has evolved regarding the kinds of injuries encompassed within its scope. The *Brunswick* Court adopted the concept to identify those losses for which antitrust damages may be awarded. Because courts have recognized that they can often make this judgment at the outset of a case, they have begun to incorporate the concept of antitrust injury into the standing requirement for private antitrust suits to avoid unnecessary inquiries into liability when no cognizable damages have been alleged.[2] The Supreme Court's recent decision in *Blue Shield v. McCready*[3] confirms that antitrust injury will be an essential element of standing to maintain a treble damage action under section 4 of the Clayton Act,[4] yet demon-

1. 429 U.S. 477 (1977).

2. *See, e.g.*, Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1235 (6th Cir.) ("If the failure to prove cognizable damages requires a judgment for the defendant notwithstanding the verdict, . . . it follows that a failure to allege cognizable damages compels the dismissal of the complaint."), *cert. denied*, 454 U.S. 893 (1981). For further cases requiring antitrust injury as a prerequisite to standing, see General Cinema Corp. v. Buena Vista Distrib. Co., 681 F.2d 594, 596-97 (9th Cir. 1982) (only element of standing required was that plaintiff satisfy antitrust injury); Solinger v. A&M Records, Inc., 586 F.2d 1304, 1310 (9th Cir. 1978) (antitrust injury is an issue of causation; causation is an element of standing; and target area test is used to determine whether the plaintiff has satisfied the causation element), *cert. denied*, 441 U.S. 908 (1979); Donovan Constr. Co. v. Florida Tel. Corp., 564 F.2d 1191, 1192 (5th Cir. 1977) (antitrust injury doctrine is satisfied by traditional target area standing test), *cert. denied*, 435 U.S. 1007 (1978); Juneau Square Corp. v. First Wisconsin Nat'l Bank, 445 F. Supp. 965, 970-71 (E.D. Wis. 1978) (to satisfy traditional target area standing test, plaintiff must allege antitrust injury), *aff'd*, 624 F.2d 798 (7th Cir.), *cert. denied*, 449 U.S. 1013 (1980). *See also* Bichan v. Chemetron Corp., 681 F.2d 514, 516-17 (7th Cir. 1982) (former employee who claimed his dismissal resulted from failure to cooperate in price fixing scheme was not in target area of alleged conspiracy and thus did not suffer antitrust injury); John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 499 (9th Cir. 1977) (beer distributor who lost Hamm's account after merger of Hamm's and Olympia did not suffer the type of antitrust injury Congress meant to prevent with § 7 of Clayton Act).

3. 102 S. Ct. 2540 (1982).

4. *Id.* at 2551. Section 4 of the Clayton Act provides in part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the

strates the lack of consensus over what will constitute antitrust injury in any particular case.

In *Brunswick,* the Court defined antitrust injury as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[5] It is not clear, however, what injuries the antitrust laws were intended to prevent or from what aspect of defendant's conduct the injury must flow. Consequently, the *Brunswick* formulation has been difficult to apply. This Note attempts to provide a framework for determining whether a particular loss is antitrust injury by adopting a proximate cause test developed for determining liability in negligence cases. Part I traces the development of antitrust standing law in general and the antitrust injury doctrine in particular. Part II examines judicial efforts at defining antitrust injury and the economic efficiency purpose of the antitrust laws. It then explores an approach to antitrust injury based on the concept of legal cause used in tort law. Part III discusses the limits of the antitrust injury concept in standing analysis under section 4 of the Clayton Act.

I. DEVELOPMENT OF THE ANTITRUST STANDING DOCTRINE

A. THE TRADITIONAL STANDING TESTS

Treble damages in the antitrust laws have a threefold purpose: to compensate injured parties,[6] to punish and deter anti-

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damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1976 & Supp. IV 1980).

5. 429 U.S. at 489.

6. *See, e.g.,* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977) ("[T]he treble-damages provision . . . is designed primarily as a remedy."). The legislative history of § 7 of the Sherman Act, the predecessor to § 4 of the Clayton Act, also reveals that Congress intended the treble damages provision to be broadly remedial. In response to Senator George's attack on the constitutionality of the Sherman Act, Senator Sherman argued:

> He [Sen. George] treats this bill as a criminal statute from beginning to end, and not as a remedial statute with civil remedies. . . . He treats this bill very much as he does the Constitution of the United States, something to be evaded, to be strictly construed, instead of being what it is, a remedial statute, a bill of rights, a charter of liberty. . . . Now, Mr. President, what is this bill? A remedial statute to enforce by civil process . . . the common law against monopolies. How is such a law to be construed? Liberally with a view to promote its objects.

21 CONG. REC. 2461 (1890). Several legislators perceived this remedy as primarily for the benefit of consumers. Early in the debates concerning the proposed Sherman Act, when it contained only a double damages provision, Senator George noted:

trust violators,[7] and to encourage private enforcement of the antitrust laws.[8] Section 4 of the Clayton Act permits recovery of

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The consumer, therefore, paying all the increased price advanced by the middlemen and profits on the same, is the party necessarily damnified or injured.

Who are the consumers? The people of the United States as individuals; whatever each individual consumes, or his family, marks the amount of his interest in the price advanced by the combination.

Id. at 1767-68. And Senator Coke argued that the proposed bill providing only double damages would leave "the consumers of products which are raised and manufactured in this country . . . without a remedy." *Id.* at 2615. *See also id.* at 3146-47 (remarks of Sen. Reagan); *id.* at 2612 (remarks of Sens. Reagan and Teller).

When Congress passed the Clayton Act in 1914, it extended the treble damages remedy to cover injuries caused by violations of all the substantive antitrust laws and also provided a more liberal venue rule. Representative Webb, explaining the bill as it was reported out of the Judiciary Committee, remarked that the civil remedy "opens the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and gives the injured party ample damages for the wrong suffered." 51 CONG. REC. 9073 (1914). *See also id.* at 9489 (remarks of Rep. Floyd); *id.* at 9270 (remarks of Rep. Carlin); *id.* at 9079 (remarks of Rep. Volstead) (Section 4 "may add quite a little to the remedy which private parties have in securing relief where they have been oppressed by unfair methods of competition.").

7. *See, e.g.,* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct . . . ."); Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977) (One of the purposes of § 4 is "deterring violators and depriving them of 'the fruits of their illegality.' ") (quoting Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968)). *See also* Pfizer Inc. v. India, 434 U.S. 308, 314 (1978) (purposes of § 4 are to deter violators and to compensate victims); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969) (purpose of treble damage remedy is to promote private enforcement of antitrust laws); Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 139 (1968) (purpose of § 4 is to deter those contemplating antitrust violations).

The legislative history also reveals that Congress designed § 4 to provide "teeth" for effective enforcement of the antitrust laws because treble damages "will have a more deterrent effect . . . than a mere criminal penalty." 51 CONG. REC. 16,274 (1914) (remarks of Rep. Webb).

8. Before the Sherman Act version was finally settled upon, Senator Sherman argued that "damages should be commensurate with the difficulty of maintaining a private suit against a combination such as is described." 21 CONG. REC. 2456 (1890). Several senators spoke alternatively of the remedial and enforcement objectives of the treble damages provision. *See, e.g.,* 21 CONG. REC. at 2456, 2461 (1890) (Sen. Sherman); *id.* at 2615 (Sen. Coke); *id.* at 3146 (Sen. Hoar); *id.* at 3147 (Sen. George). Some commentators have concluded that various circumstances suggest that Congress's primary purpose in enacting the original treble damages provision was to provide an efficient enforcement device. *See, e.g.,* W. HAMILTON & I. TILL, ANTITRUST IN ACTION 10 (1941) ("A man knew when he was hurt better than an agency or government above could tell him. Make it worth their while—as the triple-damage clause was intended to do—and injured members could be depended upon to police an industry."); H. THORELLI, THE FEDERAL ANTITRUST POLICY 225 (1954) (suggesting that Congress's intent to largely codify the common law indicates reliance by Congress on the self-enforcement capabilities of private suits.); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury,* 47 U. CHI. L. REV. 467, 473 (1980) ("One can conclude that [Congress] expected the stat-

treble damages by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[9] Read literally, section 4 appears to confer a right to treble damages on any plaintiff who could establish that a defendant's violation of the antitrust laws was a cause in fact of some injury to the plaintiff's "business or property."[10] Because the typical antitrust violation sends a "ripple effect" through the economy injuring untold numbers of potential plaintiffs,[11] the federal courts have limited the availability of the treble damage remedy by grafting a standing requirement onto section 4.[12]

The courts justify imposing a standing requirement on plaintiffs as necessary to prevent duplicative or windfall recoveries by plaintiffs,[13] to avoid imposition of ruinous financial obligations on defendants,[14] and to ease the administrative

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ute to deter anticompetitive conduct rather than systematically make whole those who had been injured by past inefficiency."); Tyler, *Private Antitrust Litigation: The Problem of Standing,* 49 U. COLO. L. REV. 269, 281 (1978) (concluding that the goal of private enforcement must have been most important to Congress because it did not fund governmental enforcement or provide an enforcement agency for 13 years after passage of the Sherman Act).

9. 15 U.S.C. § 15 (1976 & Supp. IV 1980).

10. *See* Berger & Bernstein, *An Analytical Framework for Antitrust Standing,* 86 YALE L.J. 809, 810 (1977); 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, 796-98 (1976).

11. For instance, if several manufacturers conspire to exclude another manufacturer and cartelize an industry, the immediate injury is suffered by the excluded manufacturer. This will result in injury to the excluded manufacturer's suppliers, distributors, employees, and other business associates. The monetary loss to those parties will in turn be partially passed on to their landlords, suppliers, creditors, and other business associates. Various levels of government will suffer in the form of increased expenditures for unemployment compensation and lost sales tax and income tax revenues. Another similar ripple will flow from the reduced supply and increased price to consumers of the cartelized product. *See* Lytle & Purdue, *supra* note 10, at 796-98.

The potential injuries from antitrust violations are not limited to economic losses either. In one case a group of farmers sought relief for a loss in crop yields from the environmental effects of a conspiracy to eliminate research and development of motor vehicle air pollution equipment. *See* California v. Automobile Mfr. Ass'n (*In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31), 481 F.2d 122, 125 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973). The farmers were denied standing under § 4 because they were not within the target area of the alleged violation. *Id.* at 129-30.

12. *See* Alioto & Donnici, *Standing Requirements for Antitrust Plaintiffs: Judicially Created Exceptions to a Clear Statutory Policy,* 4 U.S.F.L. REV. 205, 206-07 (1970); Berger & Bernstein, *supra* note 10, at 810-11; Lytle & Purdue, *supra* note 10, at 798.

13. *See, e.g.,* Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972) (duplicative recoveries); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956) (windfall recoveries).

14. *See, e.g.,* Ostrofe v. H.S. Crocker Co., 670 F.2d 1378, 1385 (9th Cir. 1982);

burden of enforcing the antitrust laws.[15] Because the Supreme Court, prior to *Blue Shield,* had refused to prescribe a single approach for determining standing,[16] the circuit courts developed their own approaches to the standing problem.[17]

1. *The Direct Injury Test*

The "direct injury" rule grew out of *Loeb v. Eastman Kodak Co.,*[18] in which the Third Circuit denied standing to a stockholder of a corporation allegedly injured by the defendant's monopolization of the photographic industry, because his injury was an indirect consequence of the violation directed at the corporation.[19] Some courts have interpreted the direct in-

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Calderone Enterprises v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972). In *Calderone Enterprises* the Second Circuit reasoned:

> If the antitrust laws were precise and crystallized something might be said in favor of such an enormous expansion of potential treble damage liability, speculative as the damages might be. But the fact remains that because there are few "bright lines" in the area, even experts . . . often find it impossible to advise a client with any degree of certainty whether his contemplated conduct will transgress lawful bounds.

15. *See, e.g.,* Illinois Brick Co. v. Illinois, 431 U.S. 720, 746-47 (1977); Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910).

16. The Supreme Court has continually admonished the lower federal courts to avoid unduly burdening plaintiffs in antitrust actions. *See, e.g.,* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961) (per curiam) ("Therefore, to state a claim upon which relief can be granted . . . allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."); Radovich v. National Football League, 352 U.S. 445, 454 (1957) ("[T]his Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) ("The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices . . . ."). *See also* Reiter v. Sonotone Corp., 442 U.S. 330, 337-45 (1979) ("business or property" should be read broadly, to include consumers). The Court has recognized, however, that there must be some limitation on the availability of treble damages under § 4. *See, e.g.,* Illinois Brick Co. v. Illinois, 431 U.S. 720, 744-46 (1977); Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 n.14 (1972).

17. *See generally* 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 (1971); Note, *Standing to Sue in Private Antitrust Litigation: Circuits in Conflict,* 10 IND. L. REV. 532 (1977).

18. 183 F. 704 (3d Cir. 1910).

19. *Id.* at 709. The court reasoned that § 7 of the Sherman Act had to be construed in light of the prior common law which would have given a cause of action to the corporation alone:

> We have no reason to suppose, much less to assume, that [§ 7 of the Sherman Act] was intended . . . to run contrary to the settled policy of the law. Such an assumption would require us to believe that the act was intended, among other things, to multiply suits. Certainly it is not

jury rule as requiring the plaintiff to be in privity with the antitrust defendant.[20] Most courts, however, have rejected this approach and have included competitors and various other categories of plaintiffs on the basis of earlier cases in which these plaintiffs were held to have standing.[21] Under this approach, courts have denied standing to suppliers of injured customers,[22] licensors of injured licensees,[23] franchisors of injured franchisees,[24] employees of injured employers,[25] lessors of injured lessees,[26] and stockholders of injured corporations.[27]

The Supreme Court appears to have adopted the direct injury rule to preclude treble damage recoveries by indirect purchasers in a chain of distribution. In *Illinois Brick Co. v. Illinois,*[28] the Court held that an indirect purchaser could not maintain a treble damage action against an antitrust violator on the theory that the direct purchaser had passed on the viola-

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> apparent that the act was intended to or did confer upon hundreds or thousands of stockholders individual rights of action when their wrongs could have been equally well and far more economically redressed by a single suit in the name of a corporation. . . . There must exist some barrier which will effectually prevent such a multiplicity of suits as the plaintiff's position suggests.

Id.

20. *See, 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).

21. *See generally* Berger & Bernstein, *supra* note 10, at 820-30.

22. *See, 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); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956).

23. *See, e.g.,* SCM Corp. v. Radio Corp. of Am., 407 F.2d 166, 170-71 (2d Cir.), *cert. denied,* 395 U.S. 943 (1969); Productive Inventions v. Trico Prods. Corp., 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied,* 350 U.S. 936 (1956); Field Productions, Inc. v. United Artists Corp., 318 F. Supp. 87, 88 (S.D.N.Y. 1969), *aff'd,* 432 F.2d 1010 (2d Cir.), *cert. denied,* 401 U.S. 949 (1971).

24. *See, e.g.,* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 189 (2d Cir. 1970), *cert. denied,* 401 U.S. 923 (1971).

25. *See, e.g.,* Jones v. Ford Motor Co., 599 F.2d 394, 397 (10th Cir. 1979); Riebert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir.), *cert. denied,* 411 U.S. 938 (1973); Deaktor v. Fox Grocery Co., 332 F. Supp. 536, 541 (W.D. Pa. 1971), *aff'd,* 475 F.2d 1112 (3d Cir.), *cert. denied,* 414 U.S. 867 (1973); Centanni v. T. Smith & Son, Inc., 216 F. Supp. 330, 338 (E.D. La.), *aff'd*, 323 F.2d 363 (5th Cir. 1963); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299, 302-03 (D. Mass.), *aff'd,* 242 F.2d 758 (1st Cir.), *cert. denied,* 355 U.S. 828 (1957); Walder v. Paramount Publix Corp., 132 F. Supp. 912, 916 (S.D.N.Y. 1955).

26. *See, e.g.,* Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518, 519 (3d Cir.), *cert. denied,* 352 U.S. 890 (1956); 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).

27. *See, e.g.,* Jones v. Ford Motor Co., 599 F.2d 394, 397 (10th Cir. 1979); Martens v. Barrett, 245 F.2d 844, 846 (5th Cir. 1957).

28. 431 U.S. 720 (1977).

tor's overcharge.[29] The Court reasoned that the risk of duplicative recovery was too great to permit both direct and indirect purchasers to claim damages from a single overcharge on the basis of how much each had absorbed.[30] Similarly, the Court has denied treble damages to a state that claimed damage to its economy as a result of an antitrust violation on the ground that such damage merely reflected the injury to the business and property of the state's citizens for which the citizens might recover.[31]

2. *The Target Area Test*

Under the most frequently quoted formulation of the target area test, a plaintiff "must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[32] To have standing under this formulation, some courts require that the plaintiff be a party against whom the alleged violation was aimed, or a party within the "target area."[33] For example, in *Conference of Studio Unions v. Loew's, Inc.*,[34] the Ninth Circuit held that a labor union and its members were not within the target area of an alleged conspiracy between the major motion picture companies and another union.[35] The companies had agreed to hire the conspiring union's members in return for which the latter were to hire themselves out to the smaller motion picture com-

29. *Id.* at 746-47.

30. *Id.* at 737-47. The Court concluded:

> On balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under § 4, Hawaii v. Standard Oil Co. of Cal., 405 U.S. at 262, is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

Id. at 746.

31. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 264-66 (1972). Congress responded to the decision in *Hawaii v. Standard Oil Co.* by amending § 4 to allow suits by states as parens patriae, but the statute requires that the courts be careful to avoid duplicative recoveries. *See* 15 U.S.C. § 15(c) (1976 & Supp. IV 1980).

32. Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952).

33. *See, e.g.,* Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975); California v. Automobile Mfr. Ass'n (*In re* Multidistrict Vehicle Air Pollution), 481 F.2d 122, 129 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973); 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); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362-64 (9th Cir. 1955).

34. 193 F.2d 51 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952).

35. *Id.* at 54-55.

panies for supracompetitive wages. The court reasoned that the plaintiff labor union and its members were not within the target area because the alleged conspiracy was aimed at destroying the small motion picture companies, not the plaintiff union or its members.[36]

Although the target area test often produces the same results as the direct injury rule,[37] the Ninth Circuit has significantly broadened the potential scope of the former test by defining the target area as including all those to whom injury could be reasonably foreseen as a consequence of the violation.[38] Thus, the Ninth Circuit granted standing to a plaintiff

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36. *Id.* at 52-54. Elaborating on the requirement that injuries flow from harm to the competitive situation in the industry, the court stated:

> Any restraint on commercial competition would occur in the production of motion pictures and we fail to see how the appellants are in a position to complain about that situation. They are not in the business of producing motion pictures; they do not exhibit motion pictures; they neither compete with the [defendants] nor purchase from them. In fact, they are not employees of the companies whom it is alleged the appellees intend to destroy.

Id. at 54. The last sentence in the quoted material is interesting, for if the court were to grant standing on the basis of the plaintiffs' employment with the injured businesses, it would extend standing beyond the scope of the direct injury rule.

37. *See, e.g.,* Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1296 (2d Cir. 1971) (nonoperating lessor of movie theatre denied standing because not in target area of block booking scheme), *cert. denied,* 406 U.S. 930 (1972); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970) (nominally applying the target area test, court denied a franchisor standing to sue a competitor of an injured franchisee), *cert. denied,* 401 U.S. 923 (1971); Field Productions, Inc. v. United Artists Corp., 318 F. Supp. 87, 88 (S.D.N.Y. 1969) ("[T]he injury which plaintiff suffered must have been direct rather than incidental. Plaintiff must have been in the 'target area' of the alleged violation."), *aff'd,* 432 F.2d 1010 (2d Cir. 1970). The congruence of results and the lack of distinction between the target area test and the direct injury test by some courts is explicable because the target area test was originally conceived as a method of defining which injuries were sufficiently direct to meet the direct injury rule. *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). The target area test has generally been less restrictive than the direct injury rule. *See generally* Note, *supra* note 17.

38. This foreseeability approach developed from language in Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955), where the court concluded that the plaintiff "was not only hit, but was aimed at" by the defendant. *Id.* at 365. The court in Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964), stated that that language was not intended as a requirement that the defendant's purpose or intent must have been to injure the plaintiff, but "was intended to express the view that the plaintiff must show that, whether or not then known to the conspirators, plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy." *Id.* at 220. *See also* Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9th Cir. 1967).

who had sold his interest in certain films to the defendant on a percentage receipts basis and claimed injury when the defendant block booked the films in packages with less desirable films.[39] The court concluded that the plaintiff "was within the area 'which it could reasonably be foreseen would be affected' by block booking."[40]

3. *The Zone of Interests Test*

The Sixth Circuit recently imported the "zone of interests" test used in administrative law to determine standing to challenge an agency action.[41] The leading case employing this test to determine antitrust standing is *Malamud v. Sinclair Oil Corp.*,[42] in which the Sixth Circuit held that anyone "arguably within the zone of interests . . . protected" by the antitrust laws could maintain a treble damage action under section 4.[43] There the court granted standing to a plaintiff gasoline retailer who alleged lost profits as a result of an exclusive supply contract from which the defendant supplier would not release the plaintiff.[44] Although the court found that the defendant's goal was to maintain the status quo in the distribution market for gasoline, it concluded nevertheless that the interest the plaintiff sought to vindicate was protected by the antitrust laws.[45]

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

40. *Id.* at 1076 (quoting Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964)). The court of appeals rejected the district court's conclusion that the target area included only competitors of the defendant and customers for the films. *Id.* at 1076. The Supreme Court has held that block booking is illegal because of its effects on buyers of the tied product and on competitors in the market for the tied product. This lends support to the district court's definition of the target area in *Mulvey*. The Supreme Court, however, did not consider the effects of a tying arrangement on a licensor of the tying product. *See* United States v. Loew's, Inc., 371 U.S. 38, 45 (1962).

41. *See* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) ("[T]he question of standing . . . concerns . . . the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.").

42. 521 F.2d 1142 (6th Cir. 1975).

43. *Id.* at 1151 (quoting Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)).

44. *Id.* at 1151-52.

45. *Id.* The court defined the zone of interests very broadly by stating: "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." *Id.* at 1152. The court rejected the target area and direct injury tests, concluding that those tests were really being used to decide cases prematurely on the merits rather than to de-

4. *The Balancing Test*

The Third Circuit has concluded that section 4 standing analysis requires "a balancing of competing policy interests, principally the interest in effective enforcement . . . against the interest in avoiding vexatious litigation and excessive liability."[46] Courts adopting this test follow a case-by-case approach which focuses on the "factual matrix" and the policy considerations for and against standing in the particular case.[47]

The Ninth Circuit recently adopted this approach in *Ostrofe v. H.S. Crocker Co.*,[48] rejecting the target area test that had enjoyed a long reign in that circuit.[49] In *Ostrofe,* the court permitted a discharged employee who had refused to participate in an unlawful price fixing conspiracy to maintain a section 4 suit against his former employer.[50] The court concluded that a grant of standing in this case would promote the enforcement objec-

termine whether the plaintiff had stated a cause of action. "Clearly provided for under Section 4 is the requirement that any person must have suffered injury at the hands of the defendant before he can bring an action. This prerequisite both defines the real party in interest and satisfies the minimum criterion established by Article III." *Id.* at 1149. But the court also conceded that there should be some room for judicial self-restraint in deciding questions of standing. "[W]e are in sympathy with the policy of limiting the breadth of Section 4, by whatever theory, [but] we are equally mindful of the Supreme Court's admonition that summary judgment 'should be used sparingly. . . .'" *Id.* at 1150 (quoting Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962)).

46. Ostrofe v. H.S. Crocker Co., 670 F.2d 1378, 1383 (9th Cir. 1982) (footnote omitted), *vacated and remanded*, 51 U.S.L.W. 3633 (U.S. Feb. 28, 1983).

47. *See, e.g.,* Mid-West Paper Prod. Co. v. Continental Group, Inc., 596 F.2d 573, 581-87 (3d Cir. 1979); Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90, 99-100 (3d Cir.), *cert. denied,* 434 U.S. 823 (1977); Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 506 (3d Cir. 1976). Professor Handler has suggested that the balancing of factors approach may be the only satisfactory method of dealing with the problem of standing. *See* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review,* 71 COLUM. L. REV. 1, 29-31 (1971). Others have also formalized this approach. *See, e.g.,* Berger & Bernstein, *supra* note 10.

48. 670 F.2d 1378 (9th Cir. 1982).

49. *See supra* notes 32-40 and accompanying text.

50. 670 F.2d at 1386. On virtually identical facts the Seventh Circuit denied standing under the target area test. *See* Bichan v. Chemetron Corp. (*In re* Industrial Gas Antitrust Litigation), 681 F.2d 514 (7th Cir. 1982). The court there found that the terminated employee's "injury did not result from a lack of competition in the labor market. The conspiracy [plaintiff] charges was aimed at restraining competition in the industrial gas market, causing higher prices for consumers and potential loss of profits for nonconspiring producers." *Id.* at 517. From this finding the court held that only consumers or competitors in the industrial gas market were in the target area. In sharp contrast to the Ninth Circuit, the *Bichan* court reasoned that only "this select class of plaintiffs . . . can impose the deterrent sting of treble damages at the smallest cost of enforcement." *Id.* at 520.

tive of the statute without creating any of the harms the standing doctrine was intended to prevent.[51]

B. The Antitrust Injury Doctrine

In the 1950's and 1960's, the Supreme Court's standing decisions favored a liberal interpretation of section 4, imposing few constraints on who could maintain a treble damage action.[52] The relaxation of constraints on standing coincided with an expansion of substantive antitrust liability under the aegis of the Warren Court. During this period, the enforcement policy of the antitrust laws was being applied to protect competitors from the unfair practices of their rivals.[53] Thus, a broad grant of standing furthered the dual objectives of protecting the competitors who were thought to be the principal beneficiaries of the antitrust laws and of encouraging private enforcement of those laws.[54]

The focus of the antitrust laws, however, has shifted under the Burger Court to a recognition that the antitrust laws are intended to promote economic efficiency.[55] The emphasis on effi-

51. 670 F.2d at 1384-86. The court found a number of factors in favor of granting standing to the discharged employee: covert conspiracies may go undetected unless insiders such as employees are allowed to sue; enforcement objectives would be furthered by granting standing to discharged employees because liability would thereby be enhanced for unlawful conduct which is both common and necessary for the successful operation of the conspiracy; granting standing to the discharged employee may help to mitigate or prevent ultimate injury to others; and the injury in this case flows immediately from the violation—there is no more proximate victim. *Id.* Furthermore, none of the factors ordinarily justifying a restriction of standing was found in this case. There was no threat of a flood of litigation; there was no threat of potentially ruinous financial burden on the industry; there was no danger of duplicative recoveries; because price fixing is a per se violation, the defendant was not an unwary victim of the vagueness of antitrust laws; damages were not speculative or hard to calculate; and there was no danger of a windfall recovery. *Id.* The court defended its use of the "balancing of factors" approach by noting that the other tests have led to inconsistent and unpredictable results, and although the other tests may be useful in clear cases, the difficult cases require consideration of all the competing policies. *Id.*

52. *See supra* note 17. *See also* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 488 (1968) (eliminating as a defense the argument that the plaintiff had "passed on" an illegal overcharge and thus suffered no injury); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138-40 (1968) (eliminating the defense of in pari delicto).

53. *See, e.g.,* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

54. Page, *supra* note 8, at 467-68.

55. *See, e.g.,* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-21 (1979) (blanket licensing of musical compositions justified because radio and television had changed market conditions so blanket licensing was necessary to achieve efficiencies); National Soc. of Prof. Eng'rs v. United

ciency has led the Court to acknowledge that the purpose of the antitrust laws is to protect competition, rather than to subsidize inefficient competitors.[56] In keeping with the new focus of the substantive law the Court has also begun to alter the procedural law to maintain consistency with the efficiency objective of the antitrust laws.[57]

In *Brunswick Corp. v. Pueblo Bowl-O-Mat,*[58] the Court rejected the idea that any loss causally related to the violation was recoverable under section 4. Otherwise, the Court reasoned, antitrust recovery would be divorced from the purposes of the antitrust laws.[59] In vacating the damage award in *Brunswick,* the Court held that the plaintiffs' damage must flow from the anticompetitive aspects of the defendant's acts.[60] The facts of the case clarify the Court's holding. Brunswick, one of the nation's two largest manufacturers of bowling equipment, acquired a number of defaulting bowling centers, six of which were in competition with the plaintiffs' centers. The plaintiffs brought suit, alleging that the acquisitions violated section 7 of the Clayton Act, on the theory that, because of the defendant's size, it had the capacity to drive smaller competitors out of the market, thereby substantially lessening competition.[61] The plaintiffs claimed damages for the lost profits they would have made had the defendant not acquired and operated the defaulting centers.[62]

In the trial court, the judge instructed the jury in accordance with the plaintiffs' theory of the nature of the violation and the basis of damages.[63] The jury returned a verdict for the plaintiffs and awarded the damages claimed. On appeal the

States, 435 U.S. 679, 688 (1978) (rule of reason "focuses directly on the challenged restraint's impact on competitive conditions"); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 n.21 (1977) ("Competitive economies have social and political as well as economic advantages, . . . but an antitrust policy divorced from market considerations would lack any objective benchmarks.").

56. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) ("The antitrust laws, however, were enacted for 'the protection of *competition,* not competitors.' ") (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). *See also* Page, *supra* note 8, at 468.

57. *See, e.g.,* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

58. 429 U.S. 477 (1977).

59. *Id.* at 486-87.

60. *Id.* at 489.

61. *Id.* at 480-81.

62. *Id.* at 481.

63. NBO Indus. Treadway Cos. v. Brunswick Corp., 364 F. Supp. 316 (D.N.J. 1973), *rev'd on other grounds,* 523 F.2d 262 (3d Cir. 1975), *rev'd sub nom.* Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

Third Circuit endorsed the plaintiffs' legal theory, reasoning that "a giant [in] a market of pygmies . . . can resort to low or below cost sales to sustain itself against competition for a longer period . . . ."[64] Although the court of appeals remanded the case to the trial court to take evidence on whether the bowling centers would have failed if the defendant had not acquired them, it did not object to the plaintiffs' method of calculating damages.[65]

On petition to the Supreme Court, Justice Marshall, writing for a unanimous Court, reversed the lower courts on the issue of damages.[66] Justice Marshall wrote that every merger, whether lawful or unlawful, causes some economic dislocation. He noted that Congress did not condemn all mergers, but only those that may produce anticompetitive effects.[67] Since this merger was unlawful because of Brunswick's capacity to finance predatory conduct out of its "deep pocket," he reasoned that the plaintiffs' loss must be shown to have been related to the "deep pocket" rationale upon which the substantive violation rested.[68] In this case, Marshall noted, it was not, since the plaintiffs would have suffered identical injury had a "shallow pocket" parent acquired the defaulting centers.[69]

Marshall observed that not only was the injury not related to the substantive basis for liability, but an award of damages based on the injury claimed would be "inimical to the purposes" of the antitrust laws.[70] The lost profits claimed by the plaintiffs were profits they would have earned had the acquired centers dropped out of the market. In other words, they were profits that would have been earned as the result of a reduction in competition. Marshall concluded that, to recover treble damages,

> [p]laintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of

64. NBO Indus. Treadway Cos., Inc. v. Brunswick Corp., 523 F.2d 262, 268 (3d Cir. 1975).

65. *Id.* at 275-77.

66. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487 (1977).

67. *Id.*

68. *Id.*

69. *Id.* at 487-88 ("[W]hile respondents' loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisitions unlawful."). *Id.* at 488.

70. *Id.*

loss that the claimed violations . . . would be likely to cause."[71]

As Part II demonstrates, it has proven easier to state this rule than to apply it. Courts have wrestled with the concept of antitrust injury for six years without much success. Because *Brunswick* was ostensibly a case involving damages, not standing, the relationship between antitrust injury and standing was not clear.[72] Furthermore, *Brunswick* was brought under section 7 of the Clayton Act, leaving open the question whether the antitrust injury doctrine might have application to other provisions of the antitrust laws as well.[73] The Supreme Court's recent decision in *Blue Shield v. McCready,*[74] however, should resolve any doubt, to the extent any remained, that failure to allege antitrust injury will prove fatal to establishing standing to sue for treble damages, regardless of which section of the antitrust laws allegedly has been violated.[75]

II. TOWARD A THEORY OF ANTITRUST INJURY BASED ON LEGAL CAUSE

This Part traces the development of the antitrust doctrine from *Brunswick* to the Supreme Court's recent decision in *Blue Shield v. McCready*.[76] It then notes the relationship between antitrust injury and the efficiency rationale of the antitrust laws. Finally, a theory of antitrust injury based on legal cause will be examined.

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71. *Id.* at 489 (quoting Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125 (1969)) (emphasis in original).

72. *Compare* Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 888 (5th Cir. 1982) (holding antitrust injury is not an essential element of standing because "*Brunswick* is not a standing case. In *Brunswick* the Supreme Court was reversing a jury's award of damages after a full trial on the merits."), *vacated and remanded*, 51 U.S.L.W. 3633 (U.S. Feb. 28, 1983), *with* Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1234 (6th Cir.) (holding antitrust injury is an essential element of standing because "[i]f the failure to prove cognizable damages requires a judgment for the defendant notwithstanding the verdict, . . . it follows that a failure to allege cognizable damages compels the dismissal of the complaint"), *cert. denied,* 454 U.S. 893 (1981).

73. *See* Handler, *Changing Trends in Antitrust Doctrine: An Unprecedented Supreme Court Term—1977,* 77 COLUM. L. REV. 979, 992 n.76 (1977).

74. 102 S. Ct. 2540 (1982).

75. *Id.* at 2550-51. *See also* Murphy Tugboat Co. v. Crowley, 454 F. Supp. 847, 851-52 (N.D. Cal. 1978) (holding that the antitrust injury doctrine applies to all suits for treble damages under § 4, regardless of the substantive provision allegedly violated). The antitrust injury doctrine also applies to suits brought for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26 (1976). *See* Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210-11 (3d Cir. 1980).

76. 102 S. Ct. 2540 (1982).

A. Judicial Efforts to Define Antitrust Injury

1. *The Lower Federal Courts*

The decisions in the lower courts concerning what constitutes antitrust injury can be divided into two categories. Most courts have read *Brunswick* as requiring a plaintiff's injury to flow from or be caused by the anticompetitive effects of the defendant's acts.[77] These courts interpret this requirement as restricting the treble damage remedy to consumers or competitors in the area of the economy endangered by the defendant's acts. Thus, in *Bichan v. Chemetron Corp.*,[78] the Seventh Circuit held that an employee discharged for his failure to assist in the implementation of a price fixing scheme could not recover treble damages from his employer.[79] The court found that the alleged price fixing conspiracy was aimed at controlling the price of gas in the industrial gas market.[80] Since the plaintiff's injury was not caused by the anticompetitive effect of the conspiracy in the industrial gas market, the court reasoned that the plaintiff had not sustained antitrust injury.[81] Similarly, the Seventh Circuit has held that a defendant's exclusive distributor could not maintain a treble damage action because the distributor was forced to absorb a five percent discount defend-

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77. *See, e.g.,* California Computer Prods., Inc. v. International Business Mach. Corp., 613 F.2d 727, 732 (9th Cir. 1979).

> [T]he plaintiff must prove not only injury causally linked to the asserted violation, but also that the injury is of the type the antitrust laws were intended to prevent . . . . Satisfying the latter burden is dependent on a showing that the injury was caused by a reduction . . . in competition flowing from the defendant's acts . . . . Accordingly, the plaintiff must demonstrate that the defendant's conduct was intended to or did have some anticompetitive effect beyond his own loss of business or the market's loss of a competitor.

Id. See also General Cinema Corp. v. Buena Vista Distribution Co., 681 F.2d 594, 596-97 (9th Cir. 1982); Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 889 (5th Cir. 1982); Malcolm v. Marathon Oil Co., 642 F.2d 845, 855 (5th Cir.), *cert. denied,* 454 U.S. 1145 (1981); Midland Telecasting Co. v. Midessa Television Co., 617 F.2d 1141, 1145 (5th Cir.), *cert. denied,* 449 U.S. 954 (1980); Almeda Mall Inc. v. Houston Lighting & Power Co., 615 F.2d 343, 353-54 (5th Cir.), *cert. denied,* 449 U.S. 870 (1980); Lee-Moore Oil Co. v. Union Oil Co., 599 F.2d 1299, 1304 (4th Cir. 1979); John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 500 (9th Cir. 1977).

78. 681 F.2d 514 (7th Cir. 1982), *appeal filed*, 51 U.S.L.W. —.

79. *Id.* at 517.

80. *Id.*

81. *Id.* The court criticized the opinion to the contrary in McNulty v. Borden, Inc., 474 F. Supp. 1111 (E.D. Pa. 1979) for "incorrectly focusing on whether the injury was caused 'by reason of' the anticompetitive behavior rather than, as *Brunswick* . . . requires, whether the injury resulted from a lessening of competition in the affected industry." *Id.* at 518.

ant offered to favored customers.[82] According to the court, the plaintiff suffered no antitrust injury because the plaintiff's injury was not caused by the anticompetitive effect the price discrimination created between favored and nonfavored customers.[83]

Other courts, however, have not interpreted antitrust injury so narrowly. These courts hold that antitrust injury is sustained not only by consumers and competitors in the area of the economy endangered by an alleged violation but also by persons whose injuries facilitated the anticompetitive restraint or stemmed from conduct in furtherance of the violation.[84] In *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*,[85] for example, the district court held that a group of terminated brokers who were cut off from handling the defendant's products could bring an action for treble damages against the defendant because their foreclosure from the market for the defendant's products facilitated the defendant's plan to control the price and movement of sugar.[86] Likewise, the Ninth Circuit permitted an employee terminated because of his failure to implement a conspiracy in violation of the antitrust laws to recover treble damages from his employer, although the anticompetitive effects of the conspiracy did not cause the employee's injury. In *Ostrofe v. H.S. Crocker Co.*,[87] the Ninth Circuit held that such a terminated employee sustained antitrust injury since his injury was caused by conduct in furtherance of an antitrust violation.[88] The *Ostrofe* court read *Brunswick* to require that a plaintiff's injury "fall within the core of Congressional concern underlying the substantive provision of the antitrust laws allegedly violated."[89]

2. Blue Shield v. McCready

Blue Shield squarely confronted the Court with the issue whether a plaintiff must allege antitrust injury in order to have

82. Lupina v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1169 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

83. *Id.*

84. *See, e.g.*, Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir. 1982); Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 447 F. Supp. 867 (S.D.N.Y. 1978), *rev'd*, 602 F.2d 1025 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979).

85. 447 F. Supp. 867 (S.D.N.Y. 1978).

86. *Id.* at 878.

87. 670 F.2d 1378 (9th Cir. 1982).

88. *Id.* at 1387.

89. *Id.* at 1387. The court reasoned that by imposing criminal sanctions upon individuals who violate the antitrust laws, Congress evidenced its concern with the conduct of individuals. *Id.* at 1387-88.

standing under section 4 in a case not involving section 7 of the Clayton Act. In *Blue Shield,* the plaintiff claimed injury as a result of Blue Shield's practice of refusing to reimburse subscribers of its group health plan for psychotherapy treatment by psychologists, while providing reimbursement for comparable treatment by psychiatrists.[90] The plaintiff alleged that Blue Shield's practice violated section 1 of the Sherman Act because it was part of a conspiracy between psychiatrists and Blue Shield "to exclude and boycott clinical psychologists" from participation in Blue Shield's plans in order to reduce competition in the psychotherapy market.[91] The plaintiff claimed treble damages for the cost of the services of a psychologist for which Blue Shield refused to reimburse her in furtherance of the alleged conspiracy.[92]

Justice Brennan, who authored the majority opinion, wrote that section 4 standing is denied persons whose injuries are "too remote" from the alleged antitrust violation.[93] To determine remoteness, Brennan said,

> [W]e look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and, (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.[94]

Justice Brennan reasoned that the plaintiff's injury was not too remote under the first prong of his test, since the denial of reimbursement to the plaintiff and her class "was a necessary step in effecting the ends of the illegal conspiracy," so that the type of loss claimed was "clearly foreseeable."[95] Turning to the second prong of his test, Brennan focused on whether the

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90. 102 S. Ct. at 2542.

91. *Id.* at 2544.

92. *Id.*

93. *Id.* at 2547. Besides the remoteness limitation on standing, the Court noted that under *Illinois Brick* and *Hawaii v. Standard Oil Co.,* courts must limit standing to avoid the imposition of duplicative recoveries. *Id.* at 2546. This limitation was irrelevant in *Blue Shield* because neither McCready's employer, who purchased the plan, nor her psychologist had been injured by Blue Shield's refusal to reimburse McCready.

94. *Id.* at 2548.

95. *Id.* at 2549. Brennan further commented that "there can be no question but that the loss was precisely 'the type of loss that the claimed violations . . . would be likely to cause.' " *Id.* (quoting *Brunswick,* 429 U.S. at 489). Brennan also used the classic formulation of the target area test to argue that, as a consumer of psychotherapy covered under the plan, "McCready was 'within that area of the economy . . . endangered by [the] breakdown of competitive conditions' resulting from Blue Shield's selective refusal to reimburse." 102 S. Ct. at 2549 (quoting California v. Automobile Mfr. Ass'n (Multidistrict Vehicle Air Pollution, M.D.L. No. 31), 481 F.2d 122, 129 (9th Cir. 1973)).

plaintiff sustained antitrust injury. The defendant argued that the plaintiff did not sustain antitrust injury because her loss was not the result of any reduction in competition in the psychotherapy market caused by the alleged boycott.[96] Brennan, however, rejected the defendant's argument, finding *Brunswick* distinguishable because there the loss claimed depended upon an increase in competition, whereas McCready's claim was not so dependent.[97] Moreover, Brennan observed that antitrust injury is not limited to injuries that " 'reflect the anticompetitive effect' of the alleged violation."[98] Rather, Brennan read *Brunswick* as merely requiring that a plaintiff's injury be "of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws."[99] He concluded that McCready's injury was of such a type, since it was a "consequence of Blue Shield's attempt to pursue" an anticompetitive scheme.[100]

Brennan's majority opinion clearly vindicates those courts that have interpreted the concept of antitrust injury broadly to include persons injured as a result of conduct in furtherance of an antitrust violation as well as consumers and competitors in the restrained market.[101] The opinion explicitly rejects the view that antitrust injury is confined to those injuries caused by the anticompetitive effect of the defendant's violation.[102]

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96. 102 S. Ct. at 2549-50.

97. *Id.* at 2550.

98. *Id.* In concluding that anticompetitive effects need not be shown in every case Brennan relied on footnote 14 of the *Brunswick* opinion, which states in part:

> This does not necessarily mean . . . that § 4 plaintiffs must prove an actual lessening of competition in order to recover. The short term effect of certain anticompetitive behavior—predatory below-cost pricing, for example—may be to stimulate price competition. But competitors 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.

99. 102 S. Ct. at 2550. He also characterized *Brunswick* "as embracing the general principle that treble-damages recoveries should be linked to the procompetition policy of the antitrust laws." *Id.*

100. *Id.* at 2551. Elaborating on the relationship of McCready's injury to the anticompetitive scheme, Brennan found that her injury was "inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Id.* Either the psychologists were injured when subscribers yielded to Blue Shield's coercive pressure, or the subscribers were injured by paying a higher net charge for psychologists' services. Thus, the majority characterized the plan as offering a "Hobson's choice" to subscribers of "visiting a psychologist and forfeiting reimbursement, or receiving reimbursement by forgoing treatment by the practitioner of their choice." *Id.*

101. *See supra* notes 84-89 and accompanying text.

102. 102 S. Ct. at 2550.

Brennan's conclusion, however, that the *Brunswick* rationale was based on the fact that the injury complained of arose out of the procompetitive aspects of the violation misses the main point of the antitrust injury doctrine.[103] The actual basis of the *Brunswick* decision was that the alleged injury was unrelated to the substantive theory upon which liability was based.[104] As the *Brunswick* Court noted, the plaintiff's injury was not related to the "deep pocket" rationale which made the merger anticompetitive.[105] Whether injury not flowing from an anticompetitive aspect of a defendant's conduct actually flows from a procompetitive aspect or a neutral one is immaterial to the determination that no antitrust injury has occurred under the *Brunswick* rationale. By not focusing antitrust injury analysis on the anticompetitive aspects of the violation, the *Blue Shield* majority risked divorcing antitrust damages from the efficiency rationale of the antitrust laws.

B. Antitrust Injury and Economic Efficiency

When economists speak of "efficiency" as the goal of the antitrust laws, they mean the goal of maximizing society's welfare through the use of its scarce resources.[106] The antitrust laws are often said to be chiefly concerned with allocative efficiency,[107] or the extent to which society's resources are allocated to produce the combination of outputs that will maximize the aggregate welfare of individuals in society.[108] Consequently, the antitrust laws favor perfectly competitive markets, since they produce an optimal allocation of resources among

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103. *See supra* note 97 and accompanying text.

104. *See supra* notes 66-71 and accompanying text.

105. 429 U.S. at 487-88.

106. *See* D. Needham, Economic Analysis and Industrial Structure 138 (1969).

107. Besides allocative efficiency, economists frequently cite other economic goals for society. One is an equitable distribution of income. Monopoly is often criticized because it results in a wealth transfer from consumers to producers. Economists usually ignore this consequence of monopoly, however, since there is no basis to determine for which group the marginal utility of income is greater. *See, e.g,* F. Scherer, Industrial Market Structure and Economic Performance 460 (2d ed. 1980).

Another economic goal is technical efficiency. Technical efficiency refers to the cost in terms of society's resources of producing any given output. Economists, when drawing their diagrams, assume that each firm operates at its lowest possible cost curve in order to maximize profits. There is some debate among economists, however, regarding the accuracy of this assumption in the case of more concentrated industries in which competition is minimal. *See id.* at 464-65.

108. D. Needham, *supra* note 106, at 138.

competing outputs. Allocative efficiency is achieved in a perfectly competitive equilibrium because the marginal utility derived from the last item produced is equal to its marginal cost.[109] Such an equilibrium is efficient in the Pareto sense in that no change in the allocation of society's resources to make more of one good and less of another is capable of making some members of the community better off without making anyone worse off.[110]

On the other hand, the bane of the antitrust laws is monopoly. A monopolist restricts output to a level at which price exceeds marginal cost.[111] Consequently, the marginal benefit to society of the unproduced output exceeds its marginal cost.[112] Resources that would otherwise be used in the production of

109. This conclusion assumes that the marginal benefit to society as a whole is the same as the marginal benefit, or marginal utility, to the purchaser of the last unit of output. Similarly, perfect competition achieves allocative efficiency only if the social marginal cost of producing the last unit of output equals the marginal cost to producers.

110. In a perfectly competitive equilibrium, the rate at which society can transform one good into another would coincide with the rate at which each consumer would be willing to exchange that good for the other. Assume, for example, a society with only two goods, pencils and pens. If consumers are willing to give up one pen only if they receive two pencils, and producers can produce one more pen only if they use the inputs required to produce the last two pencils, the society will have achieved the Pareto optimal output. At this output, society cannot make anyone better off without making someone else worse off, since an attempt to help one consumer by giving him or her an additional pen would result in two fewer pencils for other consumers. *See* D. NEEDHAM, *supra* note 106, at 140-41.

111. A monopolist maximizes profits by producing at an output that equates marginal revenue with marginal cost. Because a monopolist's marginal revenue does not equal price, the output level of a monopolist will not correspond to that point where marginal cost equals price as it does for a perfectly competitive firm. As the figure below illustrates, the monopolist produces at an output of Q and charges a price of P.

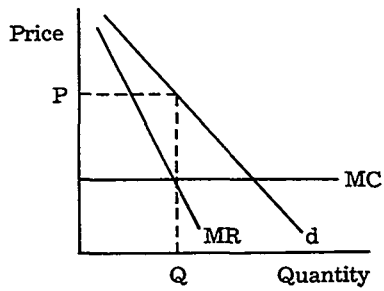

Figure 1

See E. MANSFIELD, MICROECONOMICS: THEORY AND APPLICATIONS 288-89 (4th ed. 1982).

112. *See* P. WONNACOTT & R. WONNACOTT, ECONOMICS 464-65 (1979).

the monopolized product are thus diverted to producing other goods that are less valuable to society. The resulting allocation of resources is not efficient in the Pareto sense, since some members of society could be made better off without harm to anyone by shifting resources from the production of the less desirable goods to the production of the monopolized product.[113]

The social cost of monopoly can be described, then, as the efficiency loss associated with the monopolist's restriction of supply, usually referred to as "deadweight loss."[114] Under monopoly conditions, consumers' willingness to pay for the lost output outweighs the cost of producing that output, as illustrated by the so-called "welfare triangle."[115] This loss, however, is not imposed on any particular, identifiable segment of soci-

113. Because the ratios of marginal cost and price between two products will not be equal if one, but not the other, of the products is produced by a monopolist, the rate at which society can transform one good into another will not correspond to the rate at which consumers would be willing to exchange that good for the other. *See* D. NEEDHAM, *supra* note 106, at 149. Consequently, it will be possible to make some members of society better off without making anyone worse off by shifting resources from the production of the competitively priced good to the production of the good priced above marginal cost. *See id.* at 150.

114. *See* F. SCHERER, *supra* note 107, at 460.

115. The following diagram illustrates the net welfare loss due to monopoly output restriction. If an industry were competitively structured, price would equal P_c and output would be Q_c. If the industry were monopolized, price would rise to P_m and output would decrease to Q_m. Consumer surplus, which was area P_qCP_c in perfect competition, is reduced by P_mBCP_c. The consumer surplus in rectangular area P_mBAP_c is transferred to the monopolist in the form of monopoly profit, but area ABC is lost to consumers under monopoly and is not captured by the monopolist. It therefore represents the net welfare loss attributable to the monopoly.

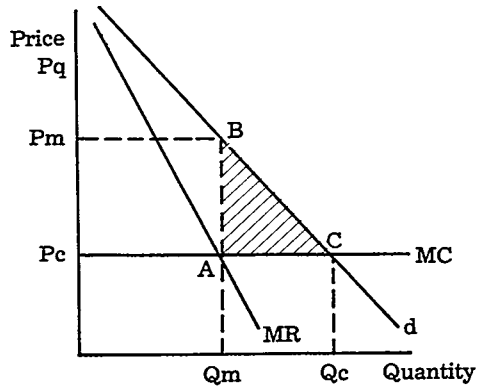

Figure 2

See E. MANSFIELD, *supra* note 111, at 292; F. SCHERER, *supra* note 107, at 459-60.

ety. Instead, society as a whole suffers as a result of the failure to produce the combination of outputs that consumers want.[116]

If allocative efficiency were the only concern of the antitrust laws, the treble damage remedy would not make much sense, for as economic theory teaches, everyone suffers the effects of a monopoly. Since Congress could not be expected to have conferred such a right on every member of society, there must be some limitation on the availability of the treble damage remedy. Such a limitation is not provided, however, by defining antitrust injury as the loss attributable to the allocative inefficiency caused by a defendant's anticompetitive practices. This cannot be what the *Brunswick* Court meant by requiring that a plaintiff's injury flow from the anticompetitive effects of the violation.[117]

C. A Causation Approach to Antitrust Injury

As the previous section demonstrates, interpreting *Brunswick* as requiring that a plaintiff's injury be caused by the anticompetitive effect of the defendant's conduct—if anticompetitive effect is taken to mean the efficiency loss resulting from the defendant's acts—would render the treble damage remedy ineffective to achieve its purposes. Thus, the search for *Brunswick*'s meaning must turn elsewhere. This Note suggests that the concept of legal cause as used in the law of negligence is useful in determining when a plaintiff has suffered antitrust injury.

1. *Legal Cause in the Law of Negligence*

Commentators have frequently recognized that antitrust standing requires not only causation in fact but also legal causation between the defendant's acts and the plaintiff's injury.[118] In *Brunswick,* the Court rejected the idea that any injury "causally linked" to a defendant's violation constitutes antitrust injury.[119] To understand antitrust standing, then, one must understand the inherently ambiguous term, "proximate cause."

Courts have imposed a proximate cause requirement on the recoverability of damages caused by a person's negligence in order to confine liability for negligent conduct within reason-

116. *See* P. Wonnacott & R. Wonnacott, *supra* note 112, at 464.
117. *See supra* text accompanying note 71.
118. *See, e.g.,* Berger & Bernstein, *supra* note 10, at 810-11.
119. 429 U.S. at 487.

able bounds. Although the term is not free from controversy, the most common view is that liability for negligence is restricted to the scope of the original risk created by the conduct.[120] Under this formulation, the test that determines the extent of liability is the same as the test that determines whether the conduct is negligent in the first place.[121] It is often said, therefore, that liability for negligence is limited to the "foreseeable" or "natural and probable" consequences of an act.[122] That is, the harm complained of must flow from the particular risk that made the conduct unreasonable.[123]

Professor Keeton explained this concept of proximate cause, which he called the "Risk Rule," as follows: "A negligent actor is legally responsible for that harm, and only that harm, of which the *negligent aspect of his conduct* is a cause in fact."[124] Keeton observed that an actor's conduct could be a cause of harm of which his or her negligence was not.[125] To illustrate his point, he discussed an example in which the proprietor of a restaurant places an unlabelled can of rat poison next to some cans of flour on a shelf near a stove. While the proprietor's negligence consisted of placing poison in a place where someone could mistake it for flour, the victim was killed when the poison exploded from the heat of the stove. Keeton argued that the proprietor's negligence was not the cause of the victim's death, since "it cannot be said that the harm of death from explosion would not have occurred but for defendant's placing the poison where it was likely to be mistaken for something intended for human consumption."[126] The victim's injury would have been identical even if the can of poison had been labelled and not placed next to the cans of flour. Thus, al-

120. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 43 (4th ed. 1971).

121. *Id.* at 251.

122. *See, e.g.,* Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U.S. 469 (1876).

123. In Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928), Judge Cardozo reformulated the rule in the text in terms of the foreseeability of harm to the person actually injured. This is usually expressed as the "foreseeable plaintiff" rule. Cardozo added a further limitation which required that the injury that occurred affect the particular interest threatened by defendant's negligence. *See id.* at 346-47, 162 N.E. at 101. This is similar to the rule uniformly applied where a defendant's negligence is based on the violation of a statute. In such cases, courts require that the plaintiff be within the class of persons protected by the statute and that the harm suffered be the kind the statute sought to prevent. *See* W. PROSSER, *supra* note 120, § 36.

124. R. KEETON, LEGAL CAUSE IN THE LAW OF TORT 9 (1963) (emphasis in original).

125. *Id.* at 5.

126. *Id.* at 6.

though the proprietor's conduct of placing the poison near heat was a cause in fact of the victim's death, the proprietor is not liable because that aspect of the proprietor's conduct which made it negligent—placing the poison where it could be mistaken for flour—was not a cause in fact of the victim's injury.

The language of *Brunswick* seems to require a similar distinction between the defendant's conduct and that which makes it unlawful in determining whether a plaintiff's loss is antitrust injury.[127] The problem remaining to be resolved, then, is to identify that which makes an antitrust violation unlawful.

2. *Applying Legal Cause to Antitrust Law*

Once one identifies the unlawful aspect of an antitrust violator's conduct, one need ask only whether it was a cause in fact of the plaintiff's injury in order to determine whether the plaintiff suffered antitrust injury. Professor Page has suggested defining the unlawful aspect of an antitrust violator's conduct as that aspect of the conduct that causes economic inefficiency.[128] Page argues that, for example, below-cost pricing causes output to expand to a point where the marginal cost of the last units produced exceeds consumers' willingness to pay for the output.[129] The lower price causes consumers to substitute the predatorily priced goods for goods produced by the

127. *See supra* text accompanying notes 70-71.
128. Page, *supra* note 8, at 477.
129. The following diagram illustrates the effects of predatory pricing.

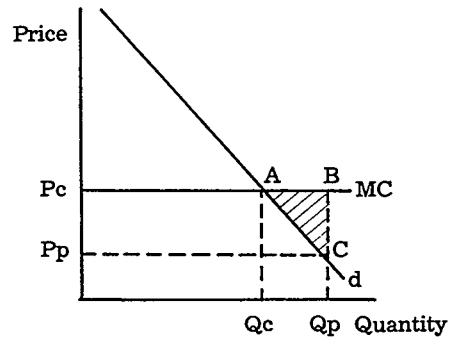

Figure 3

The predator's lower price causes industry output to increase from Q_c to Q_p. The triangle ABC represents the economic inefficiency, or "deadweight loss," of predatory pricing. In this area, the marginal cost of production exceeds the production's value to consumers. *See* Page, *supra* note 8, at 484 n.68.

predator's competitors, causing inefficiency in the allocation of society's resources.[130] Page implies, therefore, that competitors always suffer antitrust injury from predatory pricing, since their injury flows from that aspect of the violation that creates inefficiency.

But if the kind of inefficiency described above were the only effect of predatory pricing, it is doubtful that the antitrust laws would condemn it. The difference between this kind of inefficiency and the kind of inefficiency associated with a monopoly is that in the former the short run interests of predator and society are the same. Both the predator and society suffer from below-cost pricing. Society suffers because of the allocative inefficiency described above, and the predator suffers because of the wealth transfer from producers to consumers through the predatory price.[131] In a monopoly, wealth is transferred in the other direction—from consumers to producers. Thus, if this wealth transfer were the only effect of predatory pricing, society could rely on the self interest of producers to avoid it.

The antitrust laws condemn predatory pricing for another reason, however. If successful, predatory pricing drives competitors out of the market, increasing the predator's market share so that the predator can subsequently increase price above marginal cost.[132] The real reason, then, for condemning predatory pricing is that it can extinguish competition, causing the kind of allocative inefficiency associated with monopoly.[133] For predation to be successful, however, two conditions must be present. The predator must have greater financial staying power than its rivals, and there must be sufficiently high barriers to entry to avoid attracting new entrants.[134] If either condi-

130. The allocative inefficiency of predatory pricing is represented by the fact that the ratios of marginal cost and price between the predatorily priced product and a competitively priced product will not be equal. This means that resources can be shifted from the production of the predatorily priced product to the production of other goods, to make some members of society better off without harming anyone. *Cf.* D. NEEDHAM, *supra* note 106, at 149 (unequal marginal cost and price ratios between two products implies that resources could be reallocated to maximize welfare).

131. *See* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 712 (1975).

132. *See, e.g.*, William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., 668 F.2d 1014 (9th Cir. 1981); Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76 (2d Cir. 1981).

133. *See* Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 857-58 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

134. Areeda & Turner, *supra* note 131, at 698.

tion is not met, the object of the predator, to achieve monopoly profits, cannot be attained. Either the predator will be driven out of the market itself or it will not be able to maintain a monopoly price once competitors have been eliminated.

By focusing on the real efficiency loss with which the antitrust laws are concerned, the conditions without which the efficiency loss would not occur can be identified. Thus, unless a predator had superior staying power and there were barriers to entry, the allocative inefficiency associated with monopoly would not occur. Such conditions must therefore be a cause in fact of the plaintiff's injury in order for the plaintiff to incur antitrust injury. That is, for a competitor to claim antitrust injury from predatory pricing it must show that its injury would not have occurred but for the predator's superior staying power and high entry barriers.[135]

It is suggested that this analysis is capable of determining antitrust injury in other contexts as well. In *Blue Shield,* for example, McCready alleged that Blue Shield had engaged in a conspiracy with psychiatrists to boycott psychologists.[136] The alleged object of the conspiracy was to capture a greater share of the psychotherapy market for psychiatrists, presumably so they could raise the price of psychotherapy treatment above the competitive price. For the conspiracy to succeed, Blue Shield would have to possess some sort of economic power over consumers of medical insurance in order to persuade them to accept the Blue Shield terms which discriminated against psychologists. Thus, the appropriate inquiry to determine whether McCready sustained antitrust injury is to ask whether her injury, nonreimbursement for the services of a psychologist, would not have occurred but for Blue Shield's economic power in the medical insurance market. Although this inquiry necessitates speculation about what would have happened in the absence of some condition, it is nonetheless possible to conclude that McCready's injury would not have occurred unless Blue Shield possessed some economic power to force consumers to purchase the Blue Shield plan over a rival

135. In the case of predatory pricing, it can probably be assumed that the competitor's injury would not have occurred in the absence of these conditions, because for predatory pricing to make sense, the predator must be reasonably certain of success. Thus, it is reasonable to assume that the predator would not have engaged in nonremunerative pricing unless the conditions essential to its success were met. *See* William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981).

136. *See supra* text accompanying note 91.

plan which would have covered a psychologist's services.[137] Analyzing legal cause in antitrust cases in these terms supports Justice Brennan's conclusion that McCready did, in fact, suffer antitrust injury.

Moreover, this conclusion is consistent with *Brunswick*'s requirement that the injury be related to the rationale upon which substantive liability is based, since McCready's injury flowed from the conditions which were essential to the successful implementation of the conspiracy alleged. Put in this light, other cases might also be solved. Most important, however, this analysis avoids divorcing antitrust recoveries from the efficiency objective of the antitrust laws.

III. THE ROLE OF ANTITRUST INJURY IN STANDING ANALYSIS

There remains to be considered whether antitrust injury alone can define the class of plaintiffs who should be granted standing to maintain treble damage actions against antitrust violators. As defined in the previous Part, antitrust injury could confer standing on a potentially large class, if it were the sole criterion by which standing were judged.[138] In *Blue Shield,* Justice Brennan did not rely solely on the antitrust injury doctrine to determine McCready's standing. He added the requirement that there be a sufficiently close "physical and economic nexus between the alleged violation and the harm to the plaintiff."[139] Brennan apparently felt that this requirement was met because harm to the class of which McCready was a member was clearly "foreseeable" as a consequence of the alleged conspiracy.[140]

Brennan's additional foreseeability test, however, does not impose significant restraints on standing beyond those already accomplished through the antitrust injury doctrine. In fact, Brennan's foreseeability limit is simply another way to say that

137. If Blue Shield had no economic power in the medical insurance market, consumers who desired coverage for psychologists' services would simply purchase their medical insurance from a company that provided such coverage at a comparable price. Without some sort of economic advantage over its rivals, Blue Shield would be unable to attract such consumers to its medical plan and coerce them into purchasing their psychotherapy from psychiatrists instead of psychologists in order to obtain reimbursement. *See* Note, *The Monopolist's Refusal to Deal: An Argument for a Rule of Reason,* 59 TEX. L. REV. 1107, 1112 (1981).

138. *See infra* text accompanying notes 143-44.

139. 102 S. Ct. at 2548.

140. *Id.* at 2549.

the unlawful aspect of the defendant's conduct must be a cause in fact of the plaintiff's injury.[141] If standing is to be granted to a narrower class than those who sustain antitrust injury, another limitation must be found.

Conduct that is capable of producing the efficiency loss the antitrust laws seek to prevent may set off a sequence of events capable of injuring innumerable persons as the effects move through the economy.[142] An illegal overcharge, for example, can be passed on through any number of persons before it is finally absorbed at the end of a chain of production and distribution. Thus, it makes sense to impose what may be an arbitrary, but nevertheless necessary, limit on who among the class of those sustaining antitrust injury should have standing to recover treble damages. If standing were granted to all who suffered antitrust injury, duplicative recoveries could not be prevented, ruinous financial obligations could be inflicted upon antitrust violators, and multiple litigation could burden the administration of the antitrust laws.[143]

This Note proposes that standing be conferred on those within the class suffering antitrust injury, as defined above,[144] whose injuries flow directly from the efficiency loss caused by a defendant's conduct or whose injuries occur earlier in the chain of causation from the defendant's conduct. Thus, on the facts of *Blue Shield,* consumers of psychotherapy suffer injury directly from the efficiency loss, since they are unable to consume as much psychotherapy as they would if it were competitively priced.[145] On the other hand, Blue Shield medical plan subscribers and psychologists sustain injuries earlier in the chain of causation, since their injuries are necessary antecedents to achieving the efficiency loss in the psychotherapy market.[146]

Limiting antitrust recovery as suggested does not interfere with the purposes of the treble damage remedy, while the dan-

141. *See supra* notes 118-26 and accompanying text.

142. *See supra* note 11 and accompanying text.

143. *See, e.g.,* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

144. *See supra* text accompanying notes 128-35.

145. Of course, such consumers must first establish injury in fact. *See generally* Areeda, *Antitrust Violations Without Damage Recoveries,* 89 HARV. L. REV. 1127 (1976).

146. Unless subscribers are coerced into obtaining services from psychiatrists, and psychologists are thereby driven from the market, no inefficiency in the psychotherapy market would occur. *See supra* notes 136-37 and accompanying text.

gers that the standing requirement is intended to prevent are reduced. This approach insures that the parties most directly injured by an antitrust violation, and thus those most likely to prosecute such violations, would be compensated for their injuries, and the punishment imposed on wrongdoers would be commensurate with their wrongdoing. The danger of duplicative recoveries would be reduced by denying standing to indirect purchasers.[147] Moreover, the burden of administering the antitrust laws would be significantly decreased.

IV. CONCLUSION

This Note proposes a framework for analyzing whether a particular injury constitutes an antitrust injury for purposes of section 4 standing. The suggested approach draws on concepts from tort law that assist in identifying whether a defendant's violation is the legal cause of a plaintiff's injury. To make this determination, this Note suggests that courts inquire into the conditions which are necessary to achieve the efficiency loss threatened by the defendant's conduct and ask whether the plaintiff's injury would have occurred but for those conditions.

While this framework will help identify antitrust injury, it is not sufficient to define the class to which the treble damage remedy should be available; antitrust injury as so defined will produce too broad a plaintiff class to be manageable for standing purposes. Therefore, this Note proposes an additional limitation on standing that would extend it no further than the level directly affected by the efficiency loss caused by the defendant's conduct. It is hoped that this will clarify the nature of antitrust injury and its relation to legal cause, as well as identify its limits in standing analysis.

147. The proposal therefore encompasses the *Illinois Brick* rule barring recovery by indirect purchasers. *See supra* notes 28-30 and accompanying text.