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Retaliatorily Discharged Employees' Standing to Sue Under the Antitrust Laws

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IN 1890 Congress passed the Sherman Antitrust Act.[1] The Act reflected Congress' concern that large business organizations such as corporations, trusts, and cartels were driving small partnerships out of business while denying other businesses the opportunity to compete. The Act sought to control the sometimes outrageous anticompetitive activities occurring between large businesses and small businessmen. Congress passed the Act based on the assumption that a competitive economy best served the public interest.[2] In order to most effectively enforce the antitrust legislation, section 7 of the Act allowed private parties to sue for violations of the Sherman Act and to collect treble damages.[3] The Sherman Act did not, however, adequately resolve the problem of anticompetitive conduct. Consequently, Congress passed the Clayton Act[4] in 1914 in order to strengthen the Sherman Act and make antitrust legislation more effective.[5]

Section 4 of the Clayton Act supersedes section 7 of the Sherman

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[1] Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1982)). Section 7 of the 1890 Act was repealed by the Clayton Act, ch. 283, § 3, 69 Stat. 282, 283 (1955).

[2] E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 3 (1974). The two substantive sections of the Sherman Act are sections 1 and 2. *See* 15 U.S.C. §§ 1, 2 (1982).

[3] *See* Sherman Antitrust Act, ch. 647, § 7, 26 Stat. 209, 210 (1890) (current version at 15 U.S.C. § 7 (1982)).

[4] Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1982)).

[5] *See* Note, Pfizer, Inc. v. India: *Foreign Sovereigns' Standing to Sue for Treble Damages*, 12 J. MARSHALL J. PRAC. & PROC. 187, 187-88 (1978).

Act and permits any person whose business or property has been injured by reason of an antitrust violation to sue for threefold the amount of actual damages.[6] This treble damage provision serves both as an incentive for private individuals to sue and as a punitive sanction.[7]

The language in section 4 is extremely broad in its scope. Read literally, it could encompass every harm that is directly or indirectly the result of an antitrust violation.[8] Such a reading, however, could result in deleterious effects to the economy;[9] the federal courts have never read the statute this broadly.[10] Rather, they have developed

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[6] Section 4 of the Clayton Act, 15 U.S.C. § 15 (1982), provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 7 of the Sherman Act applied only to the Sherman Act, while the Clayton Act covers violations of all federal antitrust laws. Section 7 was repealed in 1955 as redundant. Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283.

[7] Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy*, 3 N.M.L. REV. 286 (1973); *see infra* notes 62 & 74.

[8] Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 529 (1983).

[9] If everyone ultimately injured by an antitrust violation were allowed to sue, antitrust defendants would be exposed to a degree of liability which could result in their being forced out of business. Further, remotely injured plaintiffs with speculative claims or complex theories of damages would bring endless lawsuits that would overwhelm the courts. *See* Comment, *A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions*, 72 CALIF. L. REV. 437, 439-40 (1984).

[10] In concluding that § 4 cannot be read literally, the Supreme Court in *Associated General* cited dictum from a previous case to support its position: "[A]s Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law." National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687-88 (1978), *quoted in* 459 U.S. at 531 (footnotes omitted).

The *Associated General* Court then stated that the legislative history of § 7 of the Sherman Act (and, consequently, § 4 of the Clayton Act) must be "consider[ed in the] legal context in which Congress acted" in order to determine the limitations from the literal language of the statute. 459 U.S. at 532.

The Court's analysis that the language in § 4 should be limited rests at least in part on the correctness of Justice Brandeis' statement. But as one judge has stated:

> Contracts do not restrain trade, they are the essence of trade. In the absence of a contract no trade can occur; even barter implicates a contract, although one which is immediately executed. Given my view, the notion that the Sherman Acts' plain words cannot be implemented because they lead to an absurd result is just plain wrong. Because the premise is in my opinion wrong, it follows that the reasoning based on the premise is wrong. I do not mean to

various doctrines of antitrust standing to determine appropriate antitrust plaintiffs. These standing doctrines have never been consistently applied. Even recent pronouncements by the Supreme Court have failed to clarify the issue.[11]

The standing analysis is particularly confused with respect to employees who have been retaliatorily discharged for failing to cooperate in activities violating the antitrust laws. A typical fact pattern will serve to illuminate the dimensions of the problem.

An employee is instructed by his superior to engage in activities the employee believes violate the antitrust laws. He refuses to carry out the employer's orders and is consequently fired.[12] The question then arises whether he is someone whose business or property has been injured as a result of an antitrust violation such that he has standing to sue for treble damages. It is well settled that the loss of one's job constitutes an injury to property.[13] The thorny question is whether the loss of employment happened by reason of the employer's antitrust violations. Only if a court determines that the job loss resulted from the antitrust violation may the employee sue for treble damages.[14] In this Article, I will argue that when an employee loses his job as the result of failing to effectuate his em-

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suggest that no limitations adhere to the statutory formulation, only that such limitations cannot logically be based upon the faulty premise.

Sacramento Valley Chapter of the Nat'l Elec. Contractors Ass'n v. International Bhd. of Elec. Workers, 632 F. Supp. 1403, 1408 n.9 (E.D. Cal. 1986) (Karlton, C.J.).

[11] In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977), the Court announced the doctrine that antitrust injury was necessary for recovery. Later, the Court appeared to widen its concept of antitrust injury. *See* Blue Shield v. McCready, 457 U.S. 465, 482-83 (1982). Most recently, the Court announced a multifactor test for antitrust standing without harmonizing the previously decided cases. *Associated General*, 459 U.S. at 535 n.31, 536-45; *see infra* notes 87-100 and accompanying text. Consequently, the issue of determining limitations on standing has been left to the lower courts. As one would expect, the courts have differed in their conclusions.

[12] This is only one example of how an employee might be retaliatorily discharged. There are any number of variations on this theme. For example, the employee might not protest to his superior but instead "blow the whistle" to the appropriate authorities and be fired for having done so. What is central to these variations is that the employee is discharged because he is not effectuating the anticompetitive conduct desired by his employer.

[13] In Radovich v. National Football League, 352 U.S. 445 (1957), the Supreme Court recognized that loss of employment was an injury under § 4. Numerous lower federal courts have held that loss of employment constitutes an injury to one's business or property. *See, e.g.*, Quinonez v. National Ass'n of Sec. Dealers, 540 F.2d 824, 829-30 (5th Cir. 1976); Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332, 334-35 (7th Cir. 1967).

[14] This Article deals only with standing to sue for damages under § 4 of the Clayton Act. It does not address the standing requirements for injunctive relief under § 16, 15 U.S.C. § 26 (1982). Still, sections 4 and 16 provide complementary remedies. Under

ployer's antitrust violation, the job loss occurred by reason of the antitrust violation, and the employee has standing to sue for treble damages under section 4 of the Clayton Act.

I

HISTORICAL TESTS FOR DETERMINING ANTITRUST STANDING

In *Associated General Contractors, Inc. v. California State Council of Carpenters*,[15] the Supreme Court identified five factors a court must consider in determining whether a particular plaintiff has standing to sue for antitrust injury.[16] Tests developed by the federal courts prior to the Supreme Court's ruling provide a foundation for applying those factors.

In struggling to determine how broadly they should interpret section 4 of the Clayton Act, the circuit courts created various standing tests.[17] All these tests narrowed the standing threshold to a boundary more restrictive than the plain language of the statute would seem to mandate. However, the thrust of each test differed. As a result, courts reached sharply differing results in similar cases.[18]

The direct injury test was the first test developed.[19] This test per-

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both sections, a plaintiff must allege "an injury of the type the antitrust laws were designed to prevent." *See* Cargill, Inc. v. Monfort, Inc., 107 S. Ct. 484, 489-91 (1986).

[15] 459 U.S. 519 (1983).

[16] *Associated General*, 459 U.S. at 536 n.33; *see infra* text accompanying notes 87-100.

[17] *See* Note, *Standing to Sue in Private Antitrust Litigation: Circuits in Conflict*, 10 IND. L. REV. 532 (1977); Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977).

[18] The results have differed on an intercircuit as well as an intracircuit basis. For example, the Ninth Circuit held that retaliatorily discharged employees have standing to sue under § 4 pursuant to the use of a balancing test. Ostrofe v. H.S. Crocker Co., 740 F.2d 739 (9th Cir. 1984) (Ostrofe II), *cert. dismissed*, 469 U.S. 1200 (1985), *adhering to* 670 F.2d 1378 (9th Cir. 1982) (Ostrofe I), *vacated and remanded*, 460 U.S. 1007 (1983). In contrast, the Seventh Circuit denied standing to sue to a retaliatorily discharged employee pursuant to the use of a target area test. Bichan v. Chemetron Corp., 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983). Thus, different tests yield different results.

In the Third Circuit, the use of the same test by different trial courts has led to different results. Applying a balancing test used by the Third Circuit, one federal district court granted retaliatorily discharged employees standing to sue under § 4, *see* Shaw v. Russell Trucking Line, Inc., 542 F. Supp. 776 (W.D. Pa. 1982), while another court almost simultaneously denied retaliatorily discharged employees standing to sue under § 4, *see* Callahan v. Scott Paper Co., 541 F. Supp. 550 (E.D. Pa. 1982).

[19] This rule evolved from an early antitrust case, Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910).

mits only those plaintiffs whose injury is considered to be a direct result of the prohibited anticompetitive activity to sue. It looks for an immediate connection between the plaintiff and defendant:[20] "Generally, a plaintiff separated from the violator by one or more intermediate tiers of victims lacks standing under the direct injury test."[21] Plaintiffs suffering injury determined to be indirect, remote, incidental, or consequential lack standing.[22] Over time, courts so strictly interpreted the direct injury test that the number of private antitrust actions was severely limited.[23]

In response to this strict interpretation, several circuits developed a "target area" theory of standing.[24] This test requires the plaintiff to show "he is within the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry" and that the illegal practices were aimed at him.[25] Under this test, a court must identify the area or areas of the economy adversely affected by the alleged antitrust violation and then determine whether the claimed injury occurred within those areas.[26] These determinations are difficult to make.

Several courts approached the problems presented by the target area test by stating that whether or not the plaintiff was in the target area was a factor of whether the injury was proximately caused by the violation or whether it was remote or incidental.[27] Obviously, the way the court defined the target area and its analysis of proximate versus remote causation affected the breadth of the perimeters of the test. While some courts interpreted these factors broadly, many courts interpreted them narrowly, effectively reducing the perimeters of the target area test to those of the direct injury test.[28]

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[20] 2 P. AREEDA & D. TURNER, ANTITRUST LAW, § 334(c).

[21] ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 395 (2d ed. 1984).

[22] *Loeb*, 183 F. at 709.

[23] Midway Enters., Inc. v. Petroleum Mktg. Corp., 375 F. Supp. 1339, 1341 (D. Md. 1974).

[24] *See, e.g.*, South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir. 1966).

[25] Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955) (quoting Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952)).

[26] Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 762 (11th Cir. 1983).

[27] *See, e.g.*, Perkins v. Standard Oil Co., 395 U.S. 642 (1969) (citing the Ninth Circuit Court of Appeals' analysis that standing is determined by a proximate cause analysis); Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966).

[28] Berger & Bernstein, *supra* note 17, at 831-32. The Ninth Circuit's interpretation of the target area did not require that the defendant intend to injure the plaintiff. The

Thus, the same sorts of incongruities that marked the application of the direct injury test resulted from application of the target area test.

Concern that both the direct injury and target area tests were too restrictive led the Sixth Circuit to adopt the zone of interests test.[29] The court noted that under either of the other two tests, the entire question of directness of injury was a factual one, but that standing was a preliminary determination ordinarily evaluated upon the allegations of the complaint.[30] Concerned that the other tests imposed too great a burden on the plaintiff at the pleading stage of the case, the court adopted a two-part test to determine standing: (1) did the plaintiff suffer injury in fact, and (2) was the interest sought to be protected within the zone of interest to be regulated by the statute?[31]

Subsequently, the court clarified that it had repudiated any proximate cause limitations in favor of the less stringent requirement that the plaintiff merely be protected by substantive antitrust law.[32] Of course the perimeters of the zone of interests test are determined by how narrowly or broadly the court defines the interest protected. In fact, two antitrust authorities, Areeda and Turner, contend that a court makes the same inquiries in determining the interests protected as it does in applying the target area test.[33]

Although each of the tests discussed above attempted to resolve the problem of which plaintiffs should have standing, courts applied the tests inconsistently. Similarly situated plaintiffs were treated differently by courts using the same test or different tests.[34] For this

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plaintiff needed to show only that its operation was in an area the defendant could reasonably have foreseen would be affected by the antitrust violation. Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964). In contrast, the Second Circuit used a restrictive definition of the target area which virtually restricted standing to competitors of the antitrust violator. It denied standing to lessors, suppliers, and other parties who would have been granted standing under the Ninth Circuit's more liberal definition. Note, *supra* note 17, at 537-38, 549-50.

[29] Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975). The court adopted the zone of interest test from a standing test formulated by the Supreme Court in an administrative law case, Association of Data Processing Serv. Orgs. v. Camp., 397 U.S. 150 (1970). *But see* Berger & Bernstein, *supra* note 17, at 836-39; P. AGREEDA & D. TURNER, *supra* note 20, § 334.

[30] *Malamud*, 521 F.2d at 1150.

[31] *Id.* at 1151.

[32] Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1233 (6th Cir. 1981).

[33] P. AGREEDA & D. TURNER, *supra* note 20, § 334.

[34] *See* Berger & Bernstein, *supra* note 17, at 812-13.

reason, two circuits decided to do away with talismanic tests altogether and opted instead for case-by-case analyses based on multiple factors. The Third Circuit, in *Cromar Co. v. Nuclear Materials and Equip. Corp.*,[35] stated its concern that restricting standing to a narrow class would weaken the enforcement remedy created by Congress, while allowing too broad a class of plaintiffs might result in more litigation than Congress contemplated. The court stated, therefore, that standing in each case must be fully analyzed in terms of the factual matrix presented.[36]

The facts considered by the court in *Cromar* included the nature of the industry in which the alleged violation occurred, the relationship of the plaintiff to the alleged violator, and the alleged effect of the antitrust violation upon the plaintiff. After considering these factors, the court must decide whether the plaintiff is one "whose protection is the fundamental purpose of the antitrust laws."[37] The Third Circuit's analysis provided a broad grant of standing, allowing parties who were not competitors to sue under section 4.[38]

Two years later, the Ninth Circuit adopted a similar analysis.[39] In determining whether a retaliatorily discharged employee had standing to sue, the court rejected the target area test because it produced inconsistent results; instead, to determine standing, the court balanced the interest in effective enforcement of the antitrust laws against the interest in avoiding vexatious litigation and excessive liability.[40]

These cases presaged the Supreme Court's analysis in *Associated General Contractors v. California State Council of Carpenters,*[41] in which the Court announced that standing needed to be determined on a case-by-case basis, depending on several factors. *Associated General*, along with two other cases, *Brunswick v. Pueblo Bowl-O-Mat, Inc.*[42] and *Blue Shield v. McCready*,[43] have altered the circuit

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[35] 543 F.2d 501 (3d Cir. 1976).

[36] *Id.* at 506.

[37] *Id.* (quoting *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 125 (9th Cir. 1973)).

[38] For example, using this multifactor analysis, the Third Circuit held that a retaliatorily discharged employee had standing to sue his employer for treble damages. Bravman v. Bassett Furniture Indus., 552 F.2d 90 (3d Cir. 1977). For a similar analysis utilized by the District Court of Colorado, see Winther v. DEC Int'l, Inc., 625 F. Supp. 100 (D. Colo. 1985). *See infra* text accompanying notes 197-201.

[39] *See* Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir. 1982).

[40] *Id.* at 1382-83; *see infra* notes 167-88 and accompanying text.

[41] 459 U.S. 519 (1983).

[42] 429 U.S. 477 (1977).

[43] 457 U.S. 465 (1982).

courts' standing analyses. Consequently, these cases form the starting point for considering the question of whether retaliatorily discharged employees have standing to sue for treble damages under the antitrust laws.

II

THE TRILOGY

A. Brunswick v. Pueblo Bowl-O-Mat

The *Brunswick* Court introduced the concept of antitrust injury to the standing analysis. In *Brunswick*, bowling centers in three markets brought an antitrust action against Brunswick Corporation. Brunswick, one of the two largest manufacturers of bowling equipment, had acquired and operated bowling centers that had defaulted on debts owed to it. The plaintiffs owned and operated bowling centers competing against the centers taken over by Brunswick. They alleged that Brunswick's acquisitions violated section 7 of the Clayton Act because Brunswick's size would give it the capacity to drive smaller competitors out of business and thus lessen competition.[44] The plaintiffs sought, under section 4, to recover three times the reasonably expectable increased profits they would have made had the competing centers gone out of business rather than being acquired and operated by Brunswick.[45]

The Supreme Court held that the plaintiffs could not sue for damages because they failed to prove that the damages were the result of an antitrust injury. In determining that standing to sue is contingent upon proof of antitrust injury,[46] the Court first looked to the language of section 7 of the Clayton Act and then compared it with section 4.[47] The Court stated that section 7 is a prophylactic measure intended to arrest lessened competition and monopoly before they have a chance to have an effect.[48] However, Congress did not

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[44] *Brunswick*, 429 U.S. at 480-81.

[45] *Id.*

[46] *Id.* at 489.

[47] Although the Court never expressly states its holding in terms of lack of standing to sue, the decision is in fact based on standing to sue. The basis for the Court's decision is not the plaintiff's failure to prove an antitrust violation. Rather, the plaintiff failed to prove that it was injured as a result of that antitrust violation. Thus, the Court's decision never reaches the merits of whether or not an antitrust violation has occurred. Rather, the Court merely decides that this plaintiff is not the proper one to contest that issue.

[48] *Brunswick*, 429 U.S. at 485. Section 7 prohibits mergers that substantially lessen competition or tend to create a monopoly. 15 U.S.C. § 17 (1982).

intend for every dislocation caused by an improper merger to be remediable.[49] Such an analysis would divorce antitrust recovery from the purposes of the antitrust laws without a clear command from Congress to do so.[50]

Although section 4 is primarily a remedial statute,[51] allowing recovery under section 4 for all dislocations caused by section 7 violations would authorize damages for losses with no relation to antitrust concerns and make recovery fortuitous.[52] *Brunswick* illustrates this potential problem. The plaintiff's injury was unrelated to the purposes underlying section 7. The loss of potential profits resulted from a third party continuing operation of competing bowling centers. These losses would have occurred regardless of whether the third party was violating section 7 or not. In the language of the Court, the plaintiff's loss "did not occur 'by reason of' that which made the acquisitions unlawful."[53] As a result, the injury was unrelated to the antitrust laws, and the plaintiffs had no right which could be vindicated by the antitrust laws. Thus, the plaintiffs were inappropriate parties to bring an action concerning a violation of the antitrust laws.[54]

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[49] *Brunswick*, 429 U.S. at 486-87.

[50] *Id.* at 487.

[51] Although the Court characterized section 4 as primarily remedial, it recognized the punitive component of the statute. It noted, though, that while treble damages were partly provided for punitive purposes, they also served to make the remedy meaningful. *See Brunswick*, 429 U.S. at 486 n.10.

[52] *Id.* at 487.

[53] *Id.* at 488.

[54] This analysis runs parallel to a basic aspect of constitutional standards of standing. For a party to have standing to bring an action in federal court, it must show that it is a proper party to litigate the interest sought to be vindicated. It will be a proper party where it has such a personal stake in the outcome that the dispute will be presented in an adversarial context capable of judicial resolution. Sierra Club v. Morton, 405 U.S. 727, 732 (1972). To have such a stake, the party must demonstrate injury in fact and that the injury alleged will be prevented or redressed by the relief requested. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 80-81 (1978).

Technically, there is a two-part test for determining constitutional standing. First, the plaintiff must show a "distinct and palpable injury." *Id.* at 72 (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)). Second, the plaintiff must show a "fairly traceable" causal connection between the claimed injury and the challenged conduct. *Id.* at 72 (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261 (1977)). A plaintiff may satisfy this second prong by showing a substantial likelihood that the relief requested will prevent or redress the injury. *Id.* at 75 n.20.

The parallel between standing under § 4 and constitutional standing is clear in *Brunswick*. Although the plaintiff suffered injury in fact, its injury was unrelated to the alleged antitrust violation. Even if the court remedied the violation, plaintiffs would not be in any better position if someone else were to take over the competing bowling centers. Consequently, the antitrust relief requested would not redress the injury. There-

If the Court in *Brunswick* had gone no further than to require antitrust injury for standing, the opinion would have been entirely appropriate and unexceptionable. However, the Court also stated that the injury pled 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 loss that the claimed violations . . . would be likely to cause.' "[55] This restrictive definition of antitrust injury was unnecessary and unwarranted by the facts in *Brunswick*.

While competitors are clearly within the boundaries of standing set by section 4, there is nothing in section 7 that limits standing to competitors. Section 7 was enacted to strengthen the preclusion of anticompetitive behavior.[56] The policies involved in enforcing other substantive sections should be equally applicable to enforcement of section 7. It therefore follows that the antitrust injury analysis in *Brunswick* should apply to standing analysis concerning a violation of any substantive section.[57] Construing this language as providing standing only to competitors is too restrictive. The Court expressly rejected this interpretation in *Blue Shield v. McCready*.[58]

B. Blue Shield v. McCready

In *McCready* the plaintiff, Carol McCready, brought an antitrust action against Blue Shield regarding the prepaid group health care plan her employer purchased from Blue Shield. The plan provided partial reimbursement for psychotherapy by psychiatrists but not for comparable treatment by psychologists.

A psychologist treated McCready, and Blue Shield denied her claim for the cost of the treatment. Consequently, she filed a class action on behalf of all similarly situated Blue Shield subscribers

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fore, the plaintiffs were not the proper party to bring the antitrust suit. Thus, the policy analysis in *Brunswick* is that the court should not find that the plaintiff has statutory standing if remedying the statutory violation would not prevent or redress the plaintiff's alleged injury.

[55] *Brunswick*, 429 U.S. at 489 (quoting Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125 (1969)).

[56] *See* United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 597 (1957).

[57] Immediately after the Supreme Court decided *Brunswick*, there was speculation that the antitrust injury analysis might be limited to section 7 violations. However, subsequent cases decided by the Court make it clear that the analysis applies to other substantive sections of the antitrust laws as well. *See* Blue Shield v. McCready, 457 U.S. 465 (1982); Associated Gen. Contractors, Inc., v. California State Council of Carpenters, 459 U.S. 519 (1983).

[58] 457 U.S. 465 (1982).

against Blue Shield and the Neuropsychiatric Society of Virginia. She alleged that the defendants engaged in an unlawful conspiracy "to exclude and boycott clinical psychologists from receiving compensation" under the Blue Shield plans, in violation of section 1 of the Sherman Act, and that Blue Shield's failure to reimburse her was in furtherance of the conspiracy.[59] She further alleged Blue Shield's action caused injury to her business or property and that she, therefore, had standing to sue for treble damages.[60]

The district court dismissed the action, holding that McCready had no standing to sue under section 4. A divided panel of the Fourth Circuit Court of Appeals reversed, finding that McCready did have standing to maintain the suit.[61] The Supreme Court affirmed the lower court's decision.

In so holding, the Court initially noted that section 4 contains little restrictive language, reflecting Congress' intent that the statute have an expansive remedial purpose.[62] In order to maximize this remedial purpose, the Court previously had interpreted the statute as protecting not only consumers, purchasers, or sellers, but "all who are made victims of the forbidden practices by whomever they may be perpetrated."[63] Having determined that the language of the statute did not preclude the plaintiff from suing,[64] the Court ad-

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[59] *McCready*, 457 U.S. at 469-70 (quoting from plaintiff's complaint).

[60] *Id.* at 470.

[61] McCready v. Blue Shield, 649 F.2d 228 (4th Cir. 1981).

[62] *McCready*, 457 U.S. at 472. The treble damage provision is the principal means of effecting this expansive remedial purpose. It serves to deter violators, deprive them of the fruits of their illegal actions, and provide ample compensation to victims of antitrust violations. Pfizer, Inc. v. India, 434 U.S. 308, 313-14 (1978).

[63] *Pfizer*, 434 U.S. at 312 (quoting Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948)). In previous cases, the Court, in attempting to maximize the remedial purpose, broadly interpreted the meaning of the terms "person" and "property" in the statute. In *Pfizer*, the Court's rationale for holding that "person" includes foreign sovereigns was that such an interpretation was necessary to maximize the deterrent effect of the treble damages provision. 434 U.S. at 312; *see* Note, *supra* note 5, at 193-94; *see also* Reiter v. Sonotone Corp., 442 U.S. 330, 342 (1979) (under a similar rationale, the Court found that injury to property includes "a wrongful deprivation of . . . money because the price of [goods] . . . [is] artificially inflated by reason of . . . anticompetitive conduct.")

[64] The Court noted that it had previously acknowledged two classes of limitations on the applicability of § 4. The rationale underlying these limitations is the danger of duplicative recoveries. *See* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) (a state may not sue for treble damages in its *parens patriae* capacity); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (indirect purchasers who overpay as a result of direct purchasers' overpayment have no standing to sue under § 4).

The Court in *McCready* found no danger of a duplicative recovery for the injury suffered by the plaintiffs. While there might be more than one injury arising from the

dressed the critical question of whether the plaintiff's injuries were too remote to afford her standing. Although Congress did not intend to give every person ultimately affected by an antitrust violation standing to sue under section 4, the breadth of the statute's remedial purpose required the Court to be cautious in setting the boundaries for standing so as not to defeat the statute's remedial objective. However, the potency of the remedy required some limitations.[65]

In determining those limitations, the Court drew an analogy to the proximate cause analysis used in tort law. This approach required a two step inquiry. First, what is the physical and economic nexus between the alleged violation and the harm to the plaintiff? Second, what is the relationship of the injury alleged to the forms of injury Congress was likely to be concerned about in enacting the antitrust laws and providing a treble damages remedy?[66]

In applying this test to McCready's complaint, the Court determined that the injury was not so remote as to preclude standing. In an analysis cognizant of, and sensitive to, the policies underlying section 4, the Court rejected the idea that plaintiff's injury was too remote simply because the defendant's intent was to exclude psychologists from the psychotherapy market.[67] Standing under section 4 is not a function of the specific intent of the antitrust violators.[68] Rather, the Court held that the harm to the plaintiff was not only clearly foreseeable but was a necessary step in effecting the allegedly illegal ends.[69] The Court concluded that "[w]here the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question . . . that the loss was precisely 'the type of loss that the claimed violations . . . would be likely to cause.' "[70]

Next, the Court addressed the relationship between the injury alleged and the forms of injury Congress was concerned about in enacting the antitrust laws. McCready alleged that Blue Shield was engaged in a purposefully anticompetitive scheme and that she was

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antitrust violation (for example, separate injuries to competitors and consumers), there was no risk of duplicative recovery for the specific injury suffered by the plaintiffs. Thus, this type of limitation did not preclude plaintiffs from suing under § 4.

[65] *McCready*, 457 U.S. at 477. In determining the limits of standing, the Court conceded that neither the statutory language nor the legislative history offered any guidance on the question of remoteness of injury. *Id.*

[66] *Id.* at 477-78.

[67] *Id.* at 478-79.

[68] *Id.* at 479.

[69] *Id.*

[70] *Id.* (quoting Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)).

injured as a consequence of its attempts to effect the scheme. Because her injury was the means by which Blue Shield attempted to inflict injury on the psychologists, the Court found McCready's injury was inextricably intertwined with the injury Blue Shield sought to inflict on the psychologists. The Court concluded that, therefore, McCready's injury flowed from what made Blue Shield's actions unlawful and fell within the area of congressional concern.[71] In more general terms, injury caused to intermediate parties as the means of accomplishing an ultimate goal of injuring competitors in a market is antitrust injury.[72] The Court decided that it would not infer a limitation on the broad right to recover under section 4 unless the policies underlying the antitrust laws created a persuasive rationale for denying standing.[73]

The Court's analysis in *McCready* is consistent with its analysis in *Brunswick*. *Brunswick* was concerned with who is the proper party to maintain an action to vindicate antitrust concerns. *McCready* refined *Brunswick*, recognizing that determining the proper party to bring suit cannot be accomplished by a mechanical formula that allows only injured competitors to bring suit. Indeed, the *McCready* Court expressly rejected an analysis that the plaintiff need prove an actual lessening of competition in order to have antitrust standing. Instead, the Court held that the question that needs to be asked is whether allowing the injured party to sue will further the procompetitive policies embodied in the antitrust laws. One way of answering the question is to look at what type of injuries Congress specifically sought to redress.

Congress' primary concern in passing the antitrust laws was to protect consumers from overcharging due to lack of competition. However, such a statement is not the end, but rather the beginning, of the analysis. Congress also desired a statutory scheme that would prevent anticompetitive acts as effectively as possible.[74] To

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[71] *Id.* at 484.

[72] The Court specifically recognizes this principle in footnote 21 of the opinion. It hypothesizes a bank that is boycotted by a group of psychiatrists until the bank stops making loans to psychologists. In this hypothetical, the bank is an intermediate party injured as a means of effectuating an anticompetitive scheme in the psychotherapy market. The Court stated there is "no doubt" that the bank would be able to recover for the injuries inflicted on it. *Id.* at n.21.

[73] *Id.* at 485.

[74] Much discussion took place in Congress concerning the effectiveness of the enforcement of the antitrust laws. For example, Senator George attacked an early version of the Sherman Act which would have only outlawed anticompetitive arrangements intended to increase the cost of an article to consumers. He argued that requiring proof

achieve that objective, a party should be granted standing to sue under section 4 when allowing the suit would further procompetitive policies. Questions of standing should not be answered simply by determining whether the plaintiff is a competitor or a consumer.

The court in *McCready* recognized that the breadth of the language in section 4 requires a policy-based analysis and that, in the absence of policies which require restricting the scope of section 4, plaintiffs should not be denied standing.[75] *Associated General Contractors v. California State Council of Carpenters*[76] discussed the issues that should be raised in a policy-based analysis.

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

Associated General addressed the issue of whether construction unions had standing to sue for treble damages under section 4. The plaintiffs alleged that the defendant engaged in activities "to weaken, destroy, and restrain the trade of certain contractors" and "to restrain the free exercise of the business activities of plaintiffs."[77] The district court dismissed the complaint, which included a federal antitrust claim. With respect to the federal antitrust claim, the court stated that the complaint alleged nothing more than the typical dispute a union might have with an employer and noted that such a dispute was normally resolved by recourse to la-

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of such an intent would lessen the bill's effectiveness and that there were other, more effective ways to protect consumers. 21 CONG. REC. 1767-68 (1889) (Remarks of Senator George).

The treble damages provision is another example of Congress' intent to maximize enforcement of the antitrust laws. Senator Sherman felt that merely doubling the damages incurred would not be sufficient to provide adequate incentive for private parties to sue to enforce the antitrust laws. 21 CONG. REC. 2569 (1889) (Remarks of Senator Sherman.) This view prevailed, and Congress provided that private parties should receive treble damages in order to maximize incentive to sue and, therefore, maximize enforcement. Thus, Congress clearly was concerned with how to make the antitrust laws most effective.

See also Pfizer, Inc. v. India, 434 U.S. 308, 314-15 (1978) (allowing foreign sovereigns standing to sue furthers congressional intent to make the antitrust laws as effective as possible).

[75] *McCready*, 457 U.S. at 485.

[76] 459 U.S. 519 (1983).

[77] *Id.* at 523. The plaintiffs also alleged a violation of a collective bargaining agreement, as well as violations of state business, tort, and antitrust laws. The district court ordered a stay of proceedings, pending arbitration on the plaintiffs' claims for breach of the collective bargaining agreement. California State Council of Carpenters v. Associated Gen. Contractors, 404 F. Supp. 1067, 1072 (N.D. Cal. 1975). The court dismissed the complaint with respect to the state law claims. *Id.*

bor law mechanisms rather than to federal antitrust law.[78]

The Ninth Circuit Court of Appeals reversed the district court's dismissal of the federal antitrust claim.[79] The majority determined that plaintiffs had alleged a Sherman Act violation, a group boycott, and that plaintiffs had standing to sue under section 4 for the violation. The majority, using the target area test, reasoned that the plaintiffs were within the area of the economy the defendants could or did foresee would be endangered by the breakdown of competitive conditions. In fact, not only was the injury to the plaintiffs' business a foreseeable consequence, it was also the intended result of the conduct.[80] Therefore, the plaintiffs had standing to sue under section 4.

The Supreme Court, ruling solely on the federal antitrust claim, reversed. The Court found that plaintiffs had adequately alleged an antitrust violation but that they did not have standing to pursue the claim.[81] The Court reiterated the familiar phrase that although the language of section 4 is broad enough to encompass every direct or indirect injury attributable to an antitrust violation, Congress did not intend such an open-ended meaning.[82] Rather, the language of section 4 must be construed in light of the Act's common-law background,[83] which, in the case of the Sherman Act, included recognized limitations on recoveries in tort and contract litigation. The frequent references to common-law principles in the congressional debates imply that Congress intended comparable limitations to apply to antitrust litigation.[84] Thus, the Court concluded, courts

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[78] *Associated General*, 404 F. Supp. at 1069. The court stated that "[w]hile an *agreement between* a union and an employer to conspire in some respect may give rise to an antitrust violation, the normal labor *dispute between* union and employer does not." *Id.* (emphasis in original).

[79] California State Council of Carpenters v. Associated Gen. Contractors, Inc., 648 F.2d 527 (9th Cir. 1980). The court of appeals affirmed the lower court decision on the other claims. *Id.* at 540.

[80] *Id.* at 537-38.

[81] *Associated General*, 459 U.S. at 528-29.

[82] *Id.* at 529-30.

[83] *Id.* at 531. The Court's discussion is actually concerned with the enactment of § 7 of the Sherman Act. Section 7 was superseded by § 4 of the Clayton Act, so the analysis of § 7 is equally applicable to section 4 of the Clayton Act. *See supra* note 6.

[84] *Associated General*, 459 U.S. at 532-33. The Court identified judge-made limitations such as foreseeability and proximate cause, directness of injury, certainty of damages, and privity of contract. Importantly, this analysis is merely for the purpose of establishing limitations on the broad language of § 4. As the Court appropriately noted, the 1890 limitations on damages do not define the boundaries of recovery today. The common law is not static, and current notions of limitations, not limitations existing in 1890, should control the standing analysis. *See id.* at 533 n.28. The Court's analysis

should not read section 4 as being open-ended with respect to damages recovery.[85] The question thus became what damages are recoverable or, in other words, which plaintiffs have standing to sue under section 4. In analogizing the standing issue to proximate causation in tort law, the Court concluded that no black-letter rule can apply in every case.[86] Rather, standing in any given case must be determined by utilizing factors identified in previous cases.

The Court in *Associated General* enumerated five factors courts should consider in determining if a plaintiff has standing to sue for treble damages. First, the complaint must allege a causal connection between the antitrust violation and the harm to the plaintiffs.[87] Encompassed by this factor, which is relevant to the determination of standing, but not dispositive, is the defendant's specific intent to harm the plaintiffs.[88] The *Associated General* Court found that the alleged causal connection between the antitrust violation and the harm (including the alleged specific intent to harm the plaintiffs) favored granting the plaintiffs standing. However, the common-law limitations on recovery of damages mandated an analysis of other factors.

The second factor the Court identified was whether the plaintiffs suffered an antitrust injury.[89] The Court recognized that the plaintiff was a union rather than a consumer or competitor in the allegedly restrained market. Unions are primarily the creatures of labor law and, as such, frequently will not be considered entities which the antitrust laws were designed to protect, especially in disputes

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fails to deal with the fact that the Court has previously stated that common-law principles do not always apply to limit standing. *See infra* text accompanying notes 130-33.

[85] *Associated General*, 459 U.S. at 535.

[86] *Id.* at 535-36.

[87] *Id.* at 537. This factor encompasses the requirement that the plaintiff have constitutional standing. An allegation of harm to the plaintiff caused by the defendant will satisfy this requirement. *See supra* note 54.

[88] *Associated General*, 459 U.S. at 537 n.37. The Court never gives an analysis as to why the existence of intent to cause harm through antitrust injury is not dispositive. Further, a strong argument can be made that where the defendant intends to cause injury to the plaintiff, the plaintiff should have standing to sue under § 4. *See infra* notes 120-26 and accompanying text.

[89] *Associated General*, 459 U.S. at 538. The Court suggested that this is merely a factor courts should consider. Thus, the Court did not clearly indicate whether antitrust injury was a prerequisite for standing under § 4 or whether it was merely a factor, the nonexistence of which was relevant but not dispositive. However, in Cargill, Inc. v. Monfort, Inc., 107 S. Ct. 484 (1986), the Court expressly stated that the existence of an antitrust injury is necessary, though not always sufficient, for standing under § 4. *Id.* at 489 n.5.

with employers with whom they bargain.[90] The Court concluded that in this case the issue was primarily a labor relations problem rather than one which involved the antitrust laws.[91]

Third, the Court considered the directness or indirectness of the asserted injury.[92] The *Associated General* Court found the chain of causation to be so indirect as to militate against a finding of antitrust standing.[93] Plaintiffs' injury allegedly resulted from the defendants coercing intermediate parties to divert business from union firms to nonunionized firms with a concomitant detrimental effect on the unions. The Court found that whatever unspecified injuries the unions suffered were only an indirect result of whatever harm the coerced firms might have suffered.[94] Therefore, the Court concluded, the coerced firms were the appropriate parties to vindicate the public interest in the antitrust laws.[95]

The fourth factor the Court considered was the speculativeness of the damages claim.[96] The Court stated that in determining standing under section 4, courts should consider "whether a claim rests

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[90] *Associated General*, 459 U.S. at 539-40.

[91] *Id.* at 540. Such a conclusion is not automatic. The Court previously has held that labor issues can give rise to antitrust injury. *See, e.g.*, Radovich v. National Football League, 352 U.S. 445 (1957) (employee who was the target of a boycott by employers had standing to sue under § 4). Thus, it is improper to automatically treat labor issues as outside the protection of the antitrust laws.

[92] *Associated General*, 459 U.S. at 540.

[93] *Id.* at 540-42.

[94] *Id.* at 541. The Court noted that the plaintiffs' allegations of injury were general and unspecified. The Court then speculated as to what injuries the union might have suffered. It found that each speculative injury would be too indirect to favor a finding of standing. *Id.* at 541 n.46.

[95] *Id.* at 542. The Court's preference for parties directly affected over those indirectly affected concurs with the policies underlying the antitrust injury requirement. That requirement is based on a theory of who is an appropriate party to bring an antitrust claim. *See supra* text accompanying notes 54-58. Where a party exists whose self-interest would normally motivate it to sue, thus vindicating the public interest in antitrust enforcement, the need to allow more remote parties to sue is diminished. *Associated General*, 459 U.S. at 542. Denying the indirectly injured party a remedy is not likely to leave significant antitrust violations undetected or undeterred because the directly injured party will bring suit. *Id.* Thus, preferring directly injured parties to bring suit does not weaken the policies underlying the treble damages provision.

However, the analysis cannot be read as a blanket prohibition against allowing indirectly injured parties to sue. The linchpin of the argument for preferring a directly affected party is the assumption that the party will have been injured and will want to sue. If the directly affected party either is not injured or has some other incentive not to sue, it may be necessary to allow an indirectly injured party to sue to vindicate the public interest in antitrust law enforcement.

[96] *Associated General*, 459 U.S. at 542. Although closely related to the direct injury analysis and the practical judicial restraints, the Court discusses the issue separately.

at bottom on some abstract conception or speculative measure of harm."[97] The Court found the plaintiffs' claim to be highly speculative, because there were no concrete allegations as to exactly how the union had been injured.[98] The speculativeness of the complaint thus weighed against a finding of standing.[99]

Fifth, and finally, the Court weighed the strong interest in keeping the scope of complex antitrust trials within judicially manageable limits.[100] The Court found that the plaintiffs' complaint created problems of identifying damages and apportioning them among the directly injured contractors and the indirectly injured plaintiffs.[101] This finding would have resulted in complexities the Court had previously found might be beyond judicially manageable limits.[102] Therefore, the indirectness of the injury weighed against granting plaintiffs standing.

Upon weighing these factors, the Court concluded that the plaintiffs did not have standing under section 4. The Court found that the allegation of specific intent to cause consequential harm was not

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[97] *Id.* at 543 (citing Blue Shield v. McCready, 457 U.S. 465, 475 n.11 (1982)). At first glance, using speculativeness of the damages claim as a factor in determining standing seems inappropriate. A determination as to whether or not a plaintiff has been injured as a result of the defendant's action is a determination on the merits. Saying no damages have occurred is very different from saying that the plaintiff has been damaged but may not sue. A plaintiff should not have its claim dismissed for lack of damages when it has had no opportunity to develop its theory through discovery or at trial.

Upon closer inspection, however, the use of speculativeness of damages as a factor seems more appropriate. The question of speculativeness affects the last factor discussed by the Court in *Associated General*, keeping the scope of complex antitrust trials within judicially manageable limits. *See infra* text accompanying notes 100-102. While difficulty in ascertaining damages should not preclude recovery, the Court has held that § 4 focuses on tangible economic harm. *McCready*, 457 U.S. at 475 n.11. Thus, where the claim is unduly esoteric or speculative, scarcity of judicial resources may make it appropriate to consider this as a relevant factor in determining standing.

[98] *Associated General*, 459 U.S. at 542-43.

[99] *Id.*

[100] The line of cases evincing this interest has been concerned with either the risk of duplicative recoveries for the same injury or the problem of complex apportionment of damages. *Id.* at 543-44; *see infra* notes 139-43.

[101] *Associated General*, 459 U.S. at 544-45. In order to determine the damages suffered by the union, the trial court would have had to go through several steps. First, the trial court would have had to determine to what extent the coerced firms diverted business away from union subcontractors. If the court found such coercion, it would then have to determine the extent to which the subcontractors absorbed the injury or passed it on to their employees through reduction in the work force or work load. Subsequently, the court would have to calculate the effect of the injuries on employees' union membership. *Id.* at 545. Thus, determining the injury the union suffered would be a labyrinthine task and would add another layer of complexity to proving an antitrust violation.

[102] *See infra* text accompanying notes 163-67.

enough to give plaintiffs standing[103] inasmuch as each of the other factors, nature of the injury, indirectness of the injury, speculativeness of the injury, and complexity of the theory of recovery, weighed heavily against allowing standing in this case.[104]

Associated General further refines the Court's approach in *Brunswick* and *McCready*. It is the Court's recognition that standing determinations can be made appropriately only by looking at the policies underlying the antitrust laws.

III

APPLICATION OF *ASSOCIATED GENERAL* TO RETALIATORILY DISCHARGED EMPLOYEES

Applying the factors enumerated in *Associated General* to the case of a retaliatorily discharged employee leads one to conclude that the employee should have standing to sue for treble damages under section 4.

In coming to this conclusion, one must understand how these factors function together. Two of them, causal relation and antitrust injury, serve as threshold requirements which the plaintiff must meet before the last three factors become relevant.[105] Only if both elements are present should inquiry be made into the applicability of the final three factors—directness of injury, speculativeness of harm, and complexity of litigation.[106] These are essentially limitation factors. The question is whether any of these factors singly or collectively require the court to deny standing, notwithstanding the existence of causally related antitrust injury.

Where an employee is retaliatorily discharged for failing to effectuate an antitrust violation, there is a causally related antitrust injury. Further, none of the three factors used in considering limitations of standing argue against standing for such employees. Therefore, they should be granted standing.

The initial threshold question is whether there is a causal relation between the defendant's actions and the alleged injury to plaintiff.

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[103] *Associated General*, 459 U.S. at 545.

[104] *Id.*

[105] The plaintiff must prove causal relation in order to satisfy constitutional standing requirements. *See supra* note 54. The court could dismiss the case at any of several stages during the litigation. For example, defendant could bring a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) or bring a motion for summary judgment under Rule 56 at the pretrial stage. Even if the plaintiff survives such challenges, he must ultimately prove causal relation.

[106] *See Associated General*, 459 U.S. at 537-45.

In the situation of a retaliatorily discharged employee, there is a clear, undisputed relation. The defendant-employer has discharged the plaintiff-employee for failing to aid the employer's antitrust violation. Further, not only is the employer responsible for the employee's injury, the employer specifically intends to cause the injury. Courts should give this specific intent to cause harm great weight if the injury caused is an antitrust injury.[107]

Although a causal relationship exists between the employer's act and the employee's injury, whether the injury suffered is an antitrust injury remains a troublesome question. A proper reading of *Brunswick* and *McCready* requires the conclusion that the employee has suffered antitrust injury. As stated earlier, the analysis underlying the concept of antitrust injury focuses on whether the plaintiff is an appropriate party to vindicate the interests implicated by the antitrust laws. This question is answered by determining whether allowing the injured party to sue will further the procompetitive policies of the antitrust laws.

McCready utilized a two-part test to determine whether a plaintiff's suit will further these procompetitive policies: first, what is the physical and economic nexus between the alleged violation and plaintiff's injury; second, what is the relation of the injury alleged to the forms of injury Congress was concerned about in enacting the antitrust laws?[108] Applying this test to retaliatorily discharged employees leads to the conclusion that allowing them to sue will clearly further the procompetitive policies of the antitrust laws.

With respect to the issue of physical and economic nexus, the employer's harm to the employee is not only foreseeable, it is intentional. Further, just as in *McCready*, causing the harm is a necessary step in effecting the ends of the alleged antitrust violation. Thus, because the injury is "so integral an aspect of the [antitrust violation] alleged,"[109] it is the type of injury this violation would be expected to cause. Therefore, where a party engages in a course of action which violates the antitrust laws, that party should be liable, where appropriate,[110] for injuries caused by the illegal means used to effect the violation, and not merely for the illegal ends hoped to be achieved.[111]

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[107] *See infra* text accompanying notes 121-36.

[108] *See supra* text accompanying notes 76-89.

[109] Blue Shield v. McCready, 457 U.S. 465, 479 (1982).

[110] The language, "where appropriate," refers to the application of the three limitation factors enumerated in *Associated General*.

[111] Such an analysis has been previously adopted in an employee-employer relation-

With respect to the issue of whether this form of injury is the sort of injury Congress was likely to be concerned with in enacting the antitrust laws, one must conclude that finding employers liable to retaliatorily discharged employees is consistent with antitrust policy.[112] Granting retaliatorily discharged employees standing would further enforcement of the antitrust laws.[113]

By virtue of their positions, employees are capable of detecting and disclosing antitrust violations that might otherwise go undetected.[114] Antitrust violations are often subtle, covert actions. If a party who can identify the violation is not granted standing to sue, the detection rate will be lower than it otherwise could be.[115] Moreover, employees have superior access to information and evidence

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ship situation. In International Ass'n of Heat and Frost Insulators v. United Contractors Ass'n, 483 F.2d 384 (3d Cir. 1972), *modified*, 494 F.2d 1353 (3d Cir. 1974), the Third Circuit found that a union had standing to sue under § 4 where it alleged that it was the means by which the employer was allegedly attempting to restrict competition in violation of the antitrust laws. *See* Altman, *Antitrust: A New Tool for Organized Labor*, 131 U. PA. L. REV. 127, 135-36 (1982).

[112] The primary argument that a retaliatorily discharged employee has suffered antitrust injury is that allowing the employee to sue will further the procompetitive policies of the antitrust laws. Further, granting such a party standing will result in increased economic efficiency. Where a party seeks to illegally injure competition through intermediate means, dislocations occur in the initial sector of the economy affected, in this case employees. This is because the employer's labor decisions will now be made on the basis of an employee's willingness to abet an illegal scheme rather than on the basis of market factors. Thus, it is appropriate to allow an employee to raise an antitrust challenge to the employer's actions and recover treble damages if successful.

However, allowing an antitrust remedy in this situation does not lead to a finding that all resulting economic dislocations are remediable under the antitrust laws. In determining whether a particular situation properly falls within the ambit of the antitrust laws, a court must compare the situation in which employees are used as a means of effectuating an antitrust violation and those situations in which an antitrust violation takes place and the employees of the affected firm are injured as a consequence. In the former, the employees' injuries are, in the words of *McCready*, "inextricably intertwined" with the injury suffered by the employer's competitors. *McCready*, 457 U.S. at 484. In the latter, the employees are not necessary to the accomplishment of the illegal scheme. It is only after the scheme is complete and becomes effective that any injury occurs to the employees. In these situations, the courts have denied the employees standing. Some courts have reached this conclusion on the theory that there is no causal relation between the alleged violations and the challenged employment practice. *See, e.g.*, Thomsen v. Western Elec. Co., 680 F.2d 1263 (9th Cir. 1982). Another court focused on the fact that the injury complained of was not the means of the violation but rather a result of the violation. *See* Province v. Cleveland Press Publishing Co., 787 F.2d 1047 (6th Cir. 1986).

[113] Ostrofe v. H.S. Crocker Co., 670 F.2d 1378, 1384 (9th Cir. 1982) (Ostrofe I), *vacated and remanded*, 460 U.S. 1007 (1983).

[114] *Id.*

[115] *Id.* (citing Berger & Bernstein, *supra* note 17, at 847 n.172).

that can lead to more successful suits.[116] Without the ability to sue for treble damages, employees have little incentive to disclose the violation, in view of the fact that disclosure is quite likely to result in dismissal without a prospect for civil recovery.[117]

Additionally, granting standing may prevent or mitigate the injury to the ultimate victims of the antitrust scheme.[118] A suit brought early in the life of an illegal scheme may result in the demise of that scheme before its ends are realized. Encouraging early disclosure may be critical, as once the competitive structure has been injured, restoration of competitive conditions is difficult.[119] Even if the competitive structure does sustain injury, it is desirable to minimize the damage. Thus, there is strong incentive to allow suits that will reveal antitrust violations early.

The salutary effect achieved by allowing employees standing to sue when they are the means of effectuating an antitrust violation makes it clear that allowing them standing furthers the procompetitive policies of the antitrust laws. In addition, remedying the antitrust violation will obviate the employees' injury. Without the illegal schemes, the employees have nothing to blow the whistle on and will not lose their jobs. Thus, one may conclude that retaliatorily discharged employees have suffered antitrust injury.

Not only has the retaliatorily discharged employee suffered antitrust injury, this injury is the result of the employer's specific intent to harm the employee for not effectuating the antitrust violation. A strong argument can be put forth that where a defendant specifically intends to harm the plaintiff, resulting in antitrust injury, the existence of the intent should be dispositive for courts to find standing to sue under section 4.

It is true that in *Associated General*, the Court held that the existence of specific intent to harm is not dispositive.[120] However, the Court never explained the rationale for that holding. It merely cited Sherman, *Antitrust Standing: From Loeb to Malamud*,[121] for the proposition that "[s]ummary judgment was an appropriate remedy in this case, *because the factual questions of motive and intent were not material to the appellant's standing* . . . . Assuming the

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116 *See* Comment, *supra* note 9, at 470.

117 *Ostrofe I*, 670 F.2d at 1384. The court noted that without contractual protection, the rights of private employees to recover are tenuous. *Id.* at 1384 n.12.

118 *Id.* at 1384.

119 *Id.* at 1384-85 (citing Berger & Bernstein, *supra* note 17, at 847).

120 *Associated General*, 459 U.S. at 537.

121 51 N.Y.U. L. REV. 374 (1976).

truth of appellant's extensive material factual allegations, *they were nevertheless insufficient to show standing to sue.*"[122]

The court in *Billy Baxter* concluded that specific intent to harm the plaintiff was not a sufficient basis for standing because the injury to the plaintiff was indirect and did not fall within the target area of the defendant's illegal act.[123] The court rejected the idea that the intent to harm the plaintiff might make plaintiff the target.[124] Instead, the court focused on the means by which the plaintiff was harmed and found it to be too indirect to support standing.[125] Even accepting the court's analysis that the only way the defendant could harm the plaintiff was through an intermediary, the court never explained why a party should not be liable for treble damages to a party it sets out to harm through a violation of the antitrust laws. It simply concluded that the method of injury was too indirect to support standing.

In adopting the analysis in *Billy Baxter*, the *Associated General* Court did not add any explanation as to why the existence of intent to harm should fail to be dispositive. It simply cited *McCready* as additional authority for the proposition and then went on to state that other factors may be controlling. The citation to *McCready* is inappropriate for the proposition that the existence of intent to harm should not be dispositive. *McCready* stands for the proposition that lack of intent does not preclude standing. A finding that lack of intent is not dispositive does not compel a finding that the existence of intent should not be dispositive.

The Court's analysis is appropriate if it means that there must be

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[122] *Id.* at 391 (citing Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970) (emphasis in original), *cert. denied*, 401 U.S. 923 (1971).

[123] *Billy Baxter*, 431 F.2d at 189. In *Billy Baxter* the franchiser, Billy Baxter, Inc., franchised bottlers to manufacture and sell its line of products. The franchiser then sued Coca-Cola Company and Canada Dry Corporation, alleging that they violated the antitrust laws by using improper methods to persuade retailers not to buy the Billy Baxter line of products. The court held the franchiser did not have standing to sue because it was not in the target area of the alleged scheme. *Id.* at 188-89. The court found the target area of the defendants' improprieties was the marketing of bottled beverages. Thus, the bottlers were the targeted market. Billy Baxter, Inc., as the bottlers' franchiser, was one step removed from the targeted market. Since the plaintiff was not in the target area, it did not have standing to sue under § 4. *Id.*

The court held the plaintiff had no standing despite that Billy Baxter, Inc., alleged that the defendants specifically intended to harm it. The court stated that an allegation of specific intent was insufficient to grant standing where the injury was not in the target area of the alleged illegal act. *Id.* at 189.

[124] *Id.*

[125] *Id.*

antitrust injury as well as an intent to harm. However, where there is intent to cause harm by means which result in antitrust injury, the Court has given no reason why this should not be dispositive on the issue of standing.

Antitrust violations are essentially tortious acts.[126] At common law, which the Court says provides guidance for determining the perimeters of standing,[127] the general rule is that an intentional tortfeasor is liable to the victim of the intentional tort if the victim proves the tortious conduct was the cause-in-fact of the victim's injuries.[128] Thus, if the defendant intentionally caused harm to the plaintiff, the defendant should be liable to the plaintiff. By the same principle, where the injury intentionally caused is an antitrust injury, the defendant should be liable for treble damages. Therefore, common-law principles of tort liability seem to require a finding that the plaintiff has standing to sue under section 4.[129]

This argument does not obviate the need for a plaintiff to prove antitrust injury. A plaintiff must still prove antitrust injury in order to recover treble damages. However, if the plaintiff proves antitrust injury and can prove that the defendant *intended* to cause the antitrust injury, then common-law tort principles should require a finding of standing to recover.

Although common-law tort principles argue for standing, their existence is not dispositive of the issue.[130] The Court has departed from common-law principles where it felt that applying a principle would be inappropriate. For example, in *Perma Life Mufflers, Inc. v. International Parts Corp.*,[131] the Court held that the common-law doctrine of *pari delicto* could not be applied to bar antitrust recovery by the plaintiff. The Court stated that it would be inappropriate

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126 Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946).

127 *Associated General*, 459 U.S. at 531; *see supra* notes 82-86 and accompanying text.

128 *Associated General*, 459 U.S. at 548 n.3 (Marshall, J., dissenting) (citing RESTATEMENT OF TORTS § 279 (1934)).

129 Within the context of retaliatorily discharged employees, the harm is directly caused. However, Justice Marshall would go even further and find liability even where the intentional tortfeasor injures his victim indirectly. "I am not aware of any cases exonerating an intentional tortfeasor from responsibility for the intended consequences of his actions merely because he inflicted harm upon his victim indirectly rather than directly." *Associated General*, 459 U.S. at 549 (Marshall, J., dissenting).

130 Even Justice Marshall, who, in his dissent, raised the issue of whether common-law tort principles require that intent be dispositive, is apparently unwilling to go so far as to state that intent is dispositive. After making this argument, he goes on to discuss the other policy factors raised by the majority and argues that none of them operates to deny the plaintiffs standing in *Associated General*. *Id.* at 549-52.

131 392 U.S. 134 (1968).

to raise broad common-law barriers to relief in antitrust cases because private treble damage suits serve such an important public purpose.[132] Therefore, because Congress had not affirmatively evinced an intent to apply *pari delicto* to the antitrust laws, the Court found it inappropriate to apply such a common-law principle where doing so would defeat the purposes of the antitrust laws.[133]

Common-law principles are relevant considerations. However, they should be inapplicable when they operate against the purposes of the antitrust laws. Certainly there are complexities unique to antitrust law that courts may be unable to deal with effectively.[134] It may be appropriate for the courts to decline to decide cases involving these complexities. However, such declinations should be made sparingly.[135]

In conclusion, while the existence of intent to cause harm through antitrust violations should not automatically confer standing, common-law principles dictate that this factor should be given great weight; certainly it should be given greater weight than the Court appears to give it in *Associated General.*

Having determined that the first two factors enumerated in *Associated General* create a strong argument in favor of standing for retaliatorily discharged employees, the question then becomes whether any of the three factors which the Court uses to limit standing apply so as to deny retaliatorily discharged employees standing. The first factor to consider is the directness or indirectness of the injury. One of the most striking characteristics of the scheme in which employees are used to effect an antitrust violation is the directness of the injury caused when the employer fires the employee for failing to carry out the violation. No intermediary actions or parties are involved. The employee suffers the injury as

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[132] *Id.* at 138.

[133] The Court, in *Perma Life*, cites prior cases as illustrations to support its decision that common-law barriers should not apply to the antitrust laws. The Court noted that it was important to allow appropriate private parties to sue so as to maximize the deterrent effect of the treble damages provision. Thus, although common-law barriers to antitrust relief may not apply, the rationale underlying *Perma Life* is consistent with the idea that common-law doctrines maximizing the effectiveness of the antitrust laws should apply. *See id.* at 138-39. The Court in *Associated General* never addresses this problem.

[134] *See infra* text accompanying notes 139-43.

[135] Where courts use rules of standing to dismiss plaintiffs' actions, plaintiffs may be precluded from effective discovery which might allow them to prove the validity of their actions. It also effectively denies them their right to a jury trial, since they will never get a chance to present their case to the jury. Thus, although it may be appropriate to dismiss plaintiffs' action on standing grounds, courts should be cautious in doing so.

the direct result of the employer's actions, i.e., the *retaliatory discharge*. Thus, the concerns implicated in determining whether indirectly injured parties should have standing to sue under section 4 do not arise in this context.[136]

The next limitation factor to consider is the speculativeness of the damages claim.[137] The retaliatorily discharged employee's damages claim does not rest on "some abstract conception or speculative measure of harm."[138] It is easily measured by factors such as lost wages, lost seniority, and damage to reputation. These types of damages are readily measured in other types of lawsuits, and they are also easily measured within the context of an antitrust suit. Thus, this factor does not bar granting retaliatorily discharged employees standing to sue under section 4.

The last limitation factor is the strong interest courts have in keeping the scope of complex antitrust trials within judicially manageable limits. Cases addressing this concern have essentially focused on avoiding the risk of duplicative recoveries or the danger of complex apportionment of damages.[139] These concerns are most clearly demonstrated in the Supreme Court's prohibition of pass-on theories in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[140] and *Illinois Brick Co. v. Illinois*.[141] In *Hanover Shoe* the Court held that in assessing plaintiff's damages, the possibility that the plaintiff might have recouped any overcharges by passing on the overcharges to its customers was not relevant. The Court reasoned that although the task of establishing that overcharges were passed on would normally prove insurmountable, antitrust defendants would frequently want to attempt to assert this defense if the Court allowed it. This would result in long and complicated proceedings involving massive evidence and complicated theories. Thus, the Court refused to allow a passing-on defense because the resultant

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[136] *See supra* note 95.

[137] It is important to distinguish the issue of speculativeness of the damages claim from the issue of speculativeness as to whether there was an antitrust violation. It is possible for the court to find that the conduct the employee refused to engage in would not have violated the antitrust laws. Then a dismissal would be proper, but it would be on the merits. The speculativeness of damages claim is not concerned with the strength of the plaintiff's case concerning the antitrust violation. Rather, it assumes the existence of an antitrust violation and addresses the question of how the violation harmed the plaintiff.

[138] Blue Shield v. McCready, 457 U.S. 465, 475 n.11 (1982).

[139] *Associated General*, 459 U.S. at 543.

[140] 392 U.S. 481 (1968).

[141] 431 U.S. 720 (1977).

length and complexity of trials would be unmanageable.[142]

In *Illinois Brick* the Court rejected the theory of offensive passing-on. Thus, purchasers who paid a higher price because their suppliers were overcharged as a result of an antitrust violation were unable to recover for the higher costs the suppliers had passed on to them. The Court reasoned that allowing the use of offensive passing-on would create the danger of multiple recovery for a single injury and add "whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness."[143] Thus, the Court prohibited the use of this theory.

Antitrust suits by retaliatorily discharged employees do not raise any such problems of complexity. The damages suffered by employees in such cases are distinct from whatever damages are suffered by those ultimately affected by the antitrust violation. Further, the actions giving rise to the damages of each party are separable. Nor is there any problem in apportioning damages among plaintiffs. The portion of the trial given over to proving the retaliatorily discharged employee's damages is no more complex than it would be in a wrongful discharge action.

Allowing antitrust actions by retaliatorily discharged employees will require proof of an antitrust violation, and that portion of the trial may be quite complex. However, the complexity is due to the nature of the antitrust violation and not to the proof of damages. Proving an antitrust violation is complex, no matter who the plaintiff is. The question raised by *Illinois Brick* is whether the proof of damages by the specific plaintiff will add another layer of complexity to the already complex task of proving an antitrust violation. The answer in the case of a suit brought by a retaliatorily discharged employee is that the proof of damages is relatively simple and adds no new layer of complexity to the trial. Therefore, this last limitation factor of keeping antitrust trials within judicially manageable limits is not relevant to retaliatorily discharged employee suits and does not bar standing in such suits.

In conclusion, the factors enumerated by the Court in *Associated General* require courts to grant retaliatorily discharged employees standing. In these suits, the threshold requirements of causation of harm through antitrust injury are satisfied. Further, the fact that the employer intentionally caused the harm creates a strong argument in favor of standing. Finally, none of the limitation factors

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[142] *Hanover Shoe*, 392 U.S. at 493 (1968).

[143] *Illinois Brick*, 431 U.S. at 737 (1977).

provide a reason to deny standing. Therefore, the policies underlying the antitrust laws are best served by granting retaliatorily discharged employees standing.

IV

ASSOCIATED GENERAL'S EFFECT ON FEDERAL COURTS' ANALYSIS OF RETALIATORILY DISCHARGED EMPLOYEES' STANDING

Associated General has not, for the most part, effected a change in the results of cases involving retaliatorily discharged employees' standing to sue under section 4.[144] Nor should one expect *Associated General* to create such a change. As the analysis in the previous section shows, the application of four of the five *Associated General* factors to cases involving retaliatorily discharged employees clearly supports granting standing. The injury is unquestionably proximately caused by the defendant's actions; the injury is direct; the damages are not speculative; and the proof of damages is not complex. The only factor over which there is any controversy is whether the retaliatorily discharged employee has suffered antitrust injury.

After *Brunswick*, the courts primarily used the various standing tests devised—direct injury, target area, zone of interest and balancing—as gauges of whether or not the plaintiff suffered antitrust injury.[145] The *Associated General* Court, in enumerating the standing factors courts should consider, provided no guidance as to what constitutes antitrust injury.[146] As a result, the courts have reached

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[144] The Second Circuit, however, has significantly changed its analysis concerning standing subsequent to *Associated General*. This change has resulted in a different decision concerning retaliatorily discharged employees' standing. *See* Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290 (2d Cir. 1983); *see infra* notes 147-66 and accompanying text.

[145] For example, in RJM Sales & Marketing, Inc. v. Banfi Products Corp., 546 F. Supp. 1368 (D. Minn. 1982), the court found a broker did not have standing to sue under § 4 where the broker alleged that its contract was terminated for failing to carry out the defendant's allegedly illegal scheme. The court, using the target area test, found that the alleged antitrust violation was aimed at the defendant's competitors and not the broker. The court analogized the plaintiff's claim to that of a retaliatorily discharged employee and adopted the Seventh Circuit's analysis of that situation, thereby concluding that the broker had not suffered an antitrust injury. *Id.* at 1379 (citing Bichan v. Chemetron Corp., 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983)). The court also considered *Ostrofe I* and *McCready* and found that they did not support an argument of standing for the broker. *RJM Sales & Marketing*, 546 F. Supp. at 1380.

[146] *See Associated General*, 459 U.S. at 537-44; *see supra* notes 87-100 and accompanying text.

the same conclusions regarding what is an antitrust injury as they did prior to *Associated General.*

Inasmuch as antitrust injury is essentially the dispositive factor in determining standing for retaliatorily discharged employees, one would expect the various circuits' positions on standing to remain approximately the same. Indeed, with the exception of the Second Circuit, this is the result that has occurred. Five of the federal circuits have decided cases involving this issue. For purposes of simplicity, the three circuits which have addressed the issue since *Associated General* will be discussed first. The two circuits which addressed the issue prior to *Associated General*, but which have not since addressed it, will then be discussed. Finally, the remaining circuits will be discussed regarding what each might hold when the issue arises.

A. Circuits Deciding Retaliatorily Discharged Employee Standing Since Associated General

1. Second Circuit

The Second Circuit is the one circuit where *Associated General* has resulted in a different conclusion concerning retaliatorily discharged employees' standing to sue under section 4. In *Crimpers Promotions, Inc. v. Home Box Office, Inc.*,[147] the Second Circuit held that it would no longer follow the target area test in determining antitrust standing. The court did not reject the prior decisions it had made based upon the target area test, but it recognized that the test had proven difficult to apply. Therefore, it held that in future cases, courts in the Second Circuit are "to follow the approaches adumbrated by the Supreme Court in *McCready* and *Associated General* without regard to whether the results are consistent with the language in earlier Second Circuit cases."[148]

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[147] 724 F.2d 290 (2d Cir. 1983).

[148] *Id.* at 293. In *Crimpers* the plaintiff, Crimpers Promotion, Inc. (Crimpers), put together a trade show for cable television programming. It sued defendants Home Box Office, Incorporated (HBO) and Showtime Entertainment Corporation (Showtime), alleging that they coerced other programmers into not attending the trade show for the purpose of furthering their attempt to monopolize the market for independent television programming. The trade show ultimately folded. The court held that pursuant to *McCready* and *Associated General* the plaintiff had standing to sue under § 4. *Id.* at 296-97. The court found that granting Crimpers standing would not result in duplicative recovery. *Id.* at 293. The profits lost on the trade show were separate from the anticompetitive effect HBO's and Showtime's anticompetitive acts had on competitors. *Id.* at 293-94.

The court also found that the plaintiff's injury was not remote. Rather, the plaintiff's

Pursuant to this language, the U.S. District Court for the Southern District of New York held, in *Donahue v. Pendleton Woolen Mills, Inc.*,[149] that retaliatorily discharged employees had standing to sue under section 4. The plaintiffs were three sales representatives who alleged that they were the means by which the defendant company effectuated an illegal resale price maintenance agreement.[150] Plaintiffs alleged that they were terminated to make an example of them to other sales representatives because they refused to take part in this scheme. The court found that under principles set forth by the Supreme Court in *McCready* and *Associated General*, this situation was sufficient to establish standing to sue on the antitrust claim.[151]

Following a lengthy analysis of *McCready* and *Associated General*, the *Donahue* court applied the criteria used in those cases, as per the *Crimpers* court's directive.[152] First, the court recognized that there was no danger of duplicative recoveries of the sort implicated in *Illinois Brick*.[153] The court recognized that the alleged injuries suffered by the plaintiffs were caused by their loss of employment and did not overlap with the injuries suffered by dealers victimized by the resale price agreements alleged by the plaintiffs.[154] Next, the court found that the plaintiffs' injuries were not

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injury was a direct result of the defendant's actions to boycott the show. *Id.* at 294. Further, because boycotting the show was a direct means of effectuating the monopoly, the court found this type of injury to be the type Congress was concerned with in protecting competition. *Id.* at 294-95.

The court then found that under the factors listed in *Associated General*, the plaintiffs had standing. *Id.* at 297. The court stated that *Associated General* had not altered the position taken in *McCready*. The court recognized that the injury was directly caused by defendant's action and that it concerned anticompetitive conduct, i.e., it was an antitrust injury. *Id.* at 296. The court noted that because Crimpers was directly injured, there was not another class of persons better suited to sue. Finally, the court did not find the plaintiff's damages claim too speculative or the theory of recovery too complex. *Id.* at 297.

[149] 633 F. Supp. 1423 (S.D.N.Y. 1986).

[150] Following an investigation into Pendleton Woolen Mills' marketing practices by the Federal Trade Commission, the company entered into a consent order with the FTC that required the company to cease maintaining, fixing, or enforcing resale prices for its products and to refrain from monitoring or sanctioning dealers who did not abide by the company's pricing instructions. *In re* Pendleton Woolen Mills, Inc., 94 F.T.C. 229 (1979). The plaintiff alleged that despite the consent decree, the company continued to engage in the prohibited activities.

[151] *Donahue*, 633 F. Supp. at 1430.

[152] *See id.* at 1435-37.

[153] *Id.* at 1435.

[154] *Id.*

remote.[155] The court cited *McCready* for the proposition that the injury suffered need not result from the lessening of competition in the market to be affected, and held that there need only be a sufficiently close nexus between the plaintiff's injury and the antitrust violation.[156] It found such a nexus present in *Donahue*, stating that the company could foresee that it would have to coerce or terminate sales representatives who were reluctant to implement the scheme.[157] The court found that such actions were a necessary step in effectuating the plan, exactly as in *McCready*.[158] Thus, the conduct was the type Congress would have sought to redress. The court concluded that *McCready* and *Crimpers*, if read together, suggest that

> when injuring the plaintiff is the means of perpetrating the ultimate constraint on competition or where injuring the plaintiff prevents plaintiff from alleviating restraints on competition, the conclusion of Congressional concern follows as a matter of course, unless, as in *Associated General*, Congress has already provided specific redress for the harm alleged by the plaintiff in another body of law.[159]

The court then determined that the plaintiffs had standing to sue under the factors set forth in *Associated General*.[160] The court found the plaintiffs' injury to be an antitrust injury proximately caused by the defendant, referring to its analysis of *McCready*.[161] It found the injury to be direct enough so that no one else would have stronger motivation to sue.[162] Further, the court found the theory

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[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.* Interestingly, the court found that the company did not specifically intend to harm its sales representatives, but that the lack of specific intent was not determinative for the standing issue. *Id.* at 1435 n.8. The court's analysis concerning specific intent is inaccurate. It may be true that the company's specific intent in creating a resale price maintenance scheme was to injure discount houses and not its employees. However, in implementing this scheme, the company specifically intended to injure representatives who did not comply with its directions in order to insure the efficacy of the scheme. Therefore, there was specific intent to injure representatives as part of the illegal anticompetitive scheme.

[159] *Id.* at 1435-36.

[160] *Id.* at 1437.

[161] *Id.* at 1436.

[162] *See Id.* In addition to noting that no one else would have a stronger motivation to sue, the court stated that no one else would have standing to assert the retaliatory discharge claims of the plaintiffs. *See id.* This analysis is irrelevant. The retaliatory discharge is actionable under § 4 because it is necessary to best effectuate antitrust policy. Whether other parties have standing to implicate retaliatory discharge policies is not germane to that question.

of damages to be less speculative than other theories of antitrust recovery which the Second Circuit had found justiciable and saw no danger of duplicative recovery.[163] Thus, the court held that retaliatorily discharged employees had standing to sue for treble damages under section 4.[164]

The court's conclusion is different from the conclusion it would have reached prior to *Associated General*.[165] Until *Crimpers*, the Second Circuit had used the target area test and had defined the target area very narrowly.[166] Had *Donahue* been decided pursuant to the Second Circuit's target area test, the court likely would have interpreted the target of Pendelton Woolen Mills' scheme as those dealers who did not maintain the resale price. Because the court would not have considered the employees part of the target of the scheme, the employees would have been denied standing. Thus, the Second Circuit's adoption of the *Associated General* test significantly affected the outcome in *Donahue*. However, the Second Circuit is the only circuit in which *Associated General* has made such a difference.

2. *Ninth Circuit*

In contrast to the Second Circuit, the Ninth Circuit's treatment of retaliatorily discharged employees since *Associated General* has remained essentially the same as it was prior to that decision. Prior

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[163] *Id.* at 1436-37.

[164] *See id.* at 1438-39. The court also stated that it was following the Ninth Circuit's decision in Ostrofe v. H.S. Crocker Co., 740 F.2d 739 (9th Cir. 1984) (Ostrofe II), *cert. dismissed*, 469 U.S. 1200 (1985), which it found indistinguishable. *Id.* at 1437; *see infra* notes 190-95 and accompanying text. It distinguished the Seventh Circuit's decision in Bichan v. Chemetron Corp., 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983), as inapplicable because it was decided under the target area test, which the Second Circuit considers outmoded after *Associated General*. *Donahue*, 633 F. Supp. at 1438; *see also infra* notes 257-67 and accompanying text.

[165] The court's separate analysis of *McCready* and *Associated General* is more cumbersome than necessary. The concerns addressed in *McCready* are encompassed in the factors set forth in *Associated General*. It is correct to interpret those factors in accordance with *McCready*, but it is not necessary to discuss the two cases separately. Evidence of this is readily seen in the fact that the court's analysis of the factors in *Associated General* frequently refers back to *McCready*. Nonetheless, the court correctly considered the concerns set forth in both cases.

[166] For example, in Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 188 (2d Cir. 1970), the court found that even where the defendants specifically intended to harm the plaintiffs, the plaintiffs would not have standing to sue because they were outside the target area. Further, the court defined the target area very narrowly, restricting it to the defendants' competitors. *See id.*

to *Associated General*, in its 1982 *Ostrofe v. H.S. Crocker Co.*[167] decision, the Ninth Circuit held that a sales manager, Ostrofe, who was discharged for failing to participate in an alleged antitrust scheme by his employer, H.S. Crocker Co., had standing to sue under section 4.[168] Initially, the court rejected the use of any of the historical tests for standing, stating they had led to inconsistent results.[169] Noting that treble damages suits play an important part in the enforcement of the antitrust laws, the court stated that this fact must be balanced against the possibility that granting a particular class of plaintiffs standing might open the "floodgates of litigation" too wide.[170] In the instant case, the court found that interest in enforcing the antitrust laws outweighed the interest in restricting standing.[171]

The court stated that retaliatorily discharged employee suits would further enforcement of the antitrust laws in a number of ways.[172] First, such suits would provide incentive for employees to bring to the attention of authorities covert schemes, such as price fixing, that might otherwise go undetected by the intended victims of those schemes.[173] The court further reasoned that if employees may sue for treble damages, the increased potential liability of the employer might deter the employer from violating antitrust laws.[174] Second, granting employees standing may prevent or mitigate the injury to the intended victims of the scheme.[175] Employees are in the best position to bring a suit early enough in the life of the scheme to minimize the damage caused. Third, the court noted that the harm to these employees is direct and is not incidental to, nor derivative from, other parties' injuries.[176] Therefore, retaliatorily discharged employees are the most proximate victims and best qual-

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[167] Ostrofe v. H.S. Crocker Co., 740 F.2d 739 (9th Cir. 1984) (Ostrofe II), *cert. dismissed*, 469 U.S. 1200 (1985), *adhering to* 670 F.2d 1378 (9th Cir. 1982) (Ostrofe I), *vacated and remanded*, 460 U.S. 1007 (1983).

[168] *Ostrofe I*, 670 F.2d at 1381. Ostrofe also sought damages for injuries allegedly caused by Crocker's and other manufacturers' boycott of his personal services because he failed to participate in the anticompetitive scheme. The court found he had standing to sue for this cause of action, too. *See id.* at 1381-82.

[169] *Id.* at 1382-83.

[170] *Id.* at 1383.

[171] *Id.* at 1383-84.

[172] *Id.* at 1384.

[173] *Id.*

[174] *Id.*

[175] *Id.* at 1384-85.

[176] *Id.* at 1385.

ified to sue.[177]

In contrast to the enhanced enforcement of the antitrust laws in permitting employees to sue, the court found no negative consequences requiring denial of standing.[178] It stated that the number of retaliatorily discharged employees was not so large as to create a flood of litigation or threaten financial burdens which might ruin an industry.[179] The court also determined that there was no danger of duplicative recovery.[180] Thus, the court concluded that policy considerations favored granting retaliatorily discharged employees standing to sue under the antitrust laws.[181]

The court then addressed the issue of whether Ostrofe had suffered antitrust injury in light of *Brunswick*.[182] The Court rejected the argument that *Brunswick* limited standing only to competitors.[183] Instead, it interpreted *Brunswick* as merely requiring that a plaintiff's injury "fall within the core of Congressional concern underlying the substantive provision of the antitrust laws allegedly violated."[184] The court held that retaliatorily discharged employees' injuries did so. In support of this conclusion, the court reasoned that Congress' imposition of criminal liability on individuals even though they were merely discharging the duties of their employment showed that Congress was concerned with the conduct of individuals in price fixing and customer allocation schemes.[185] The court reasoned further that Ostrofe's cooperation was necessary to implement the antitrust violation.[186] Only if Ostrofe agreed to violate the Sherman Act could the employer's scheme succeed. Therefore, there was an intimate relationship between the act that would have made the conduct unlawful and the injury which formed the basis of the lawsuit.[187] The court found that this correction was sufficient to satisfy the *Brunswick* requirement of antitrust injury and concluded, therefore, that Ostrofe had standing to sue under

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177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.* at 1386.

182 *See id.* at 1386-88 (discussing Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977)); *see supra* notes 43-58 and accompanying text.

183 *See Ostrofe I*, 670 F.2d at 1387.

184 *Id.*

185 *Id.* at 1387-88.

186 *Id.* at 1388.

187 *Id.*

section 4.[188]

Thereafter, the Supreme Court granted certiorari in *Ostrofe I*, vacated the judgment, and remanded the case for further consideration in light of *Associated General*.[189] On remand, the Ninth Circuit again held that Ostrofe had standing to sue under section 4.[190] Specifically addressing the issue of whether Ostrofe had standing to sue because he had been retaliatorily discharged, the court found that *Associated General* did not require a different decision; Ostrofe still had standing to sue.[191]

The court found that the critical issue was whether or not Ostrofe had suffered antitrust injury. Reasoning that Ostrofe was an essential participant in the anticompetitive scheme because the scheme could not have succeeded without his participation, the court held he had suffered an antitrust injury.[192] The court concluded that, therefore, Ostrofe's injury was such an integral part of the anticompetitive scheme that it constituted antitrust injury within the meaning of *McCready*.[193]

The court also found that there was a direct relationship between Ostrofe's injury and the antitrust violation and that no one else had as strong an incentive to sue under section 4.[194] Had Ostrofe participated in his employer's scheme he would have been criminally liable. His refusal to participate resulted in his dismissal. Therefore, he had strong incentive to bring suit to challenge the scheme.[195]

Accordingly, the court held that Ostrofe had satisfied the antitrust injury requirement of *Associated General*, read in the context of *McCready*.[196] Thus, *Associated General* did not substantially af-

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[188] *See id.*

[189] 460 U.S. 1007 (1983).

[190] *Ostrofe II*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985).

[191] The court relied on two different theories in reaching this conclusion. First, it stated that its original decision that Ostrofe had standing based on Crocker's and other manufacturers' boycott of his personal services for failing to participate in the scheme was not affected by *Associated General*. *Id.* at 740. Second, the court found that under *Associated General*, its decision in *Ostrofe I*, granting standing for the retaliatory discharge, was correct. *Id.* at 744.

[192] *Id.* at 745-46.

[193] *Id.* at 746.

[194] *Id.* The court was correct in finding that the plaintiff was directly injured by the defendant's actions. However, it should not have included this discussion in its antitrust injury analysis. It is a limitation factor which the court should consider once the threshold requirement of antitrust injury has been satisfied. *See supra* text accompanying notes 105-06.

[195] *Ostrofe II*, 740 F.2d at 746.

[196] *Id.* However, the court stated that even if its interpretation of antitrust injury was too broad, Ostrofe had standing to challenge his discharge as the direct victim of a

fect the Ninth Circuit's analysis of antitrust injury nor its decision that retaliatorily discharged employees have standing to sue under section 4.[197]

3. *Tenth Circuit*

The issue of retaliatorily discharged employee standing also arose in the Tenth Circuit after *Associated General* had been decided. Prior to *Associated General*, the Tenth Circuit applied the direct injury test to determine whether a plaintiff had standing to sue under section 4. However, the Tenth Circuit had never decided the issue of retaliatorily discharged employee standing under this test. After *Associated General*, this issue was decided by the District Court of Colorado in *Winther v. DEC International, Inc.*,[198] in which the court held a retaliatorily discharged employee did not have standing to sue under section 4.

Winther alleged that he had been discharged from his position as a salesman for DEC International because he refused to participate in a scheme that violated the antitrust laws. The court denied him standing, finding he had not suffered antitrust injury. The court came to this conclusion for two reasons. First, the court found that because Winther was neither a competitor nor a consumer, he was not within that area of the economy endangered by a breakdown of competitive conditions resulting from the alleged violations.[199] Second, the court stated that his injuries resulted from his discharge and that nothing in the language or history of the antitrust laws suggested that Congress intended to protect employees from coercion to participate in antitrust violations.[200] Therefore, the court concluded that he had not suffered an injury of the type the antitrust laws were intended to prevent, i.e., he had not suffered an antitrust injury.[201] While the court recognized that the plaintiff had

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conspiracy between Crocker and other manufacturers to have him fired for refusing to participate. *Id.* This theory differs from a retaliatory discharge analysis in that under a retaliatory discharge theory, unilateral action by the employer to effectuate an antitrust violation will result in the employee having standing to sue. The alternative theory relied on by the court in *Ostrofe II* grants the employee standing as the direct victim of a conspiracy to boycott him. Whether such a victim has standing was a question the Supreme Court explicitly reserved in *Associated General*.

[197] Subsequent to this judgment, the Supreme Court dismissed the petition for a writ of certiorari. *Ostrofe II*, 469 U.S. 1200 (1985).

[198] 625 F. Supp. 100 (D. Colo. 1985).

[199] *Id.* at 102.

[200] *Id.*

[201] *Id.*

suffered a direct injury in terms of causation, the directness of injury was insufficient to overcome the lack of antitrust injury.[202]

The court went on to state that the denial of standing was consistent with Tenth Circuit decisions prior to *Associated General.*[203] It cited two earlier cases in which employees had been denied standing to sue under section 4, *Reibert v. Atlantic Richfield Co.*[204] and *Central National Bank v. Rainbolt.*[205] In *Reibert* the court held that an employee, who was discharged because his job was no longer necessary following an allegedly illegal merger between two oil firms, did not have standing to sue under section 4. The court found this injury to be too indirect or remote from the antitrust violation.[206] The employee could not show his discharge resulted from the lessening of competition because employees often lose their jobs even where a merger is legal.[207] The *Winther* court restated the *Reibert* holding in the language of *Associated General,* stating the employee did not have standing to sue because he had not suffered antitrust injury.[208]

In *Rainbolt* the court held that the director of a corporation, who was ousted following an allegedly illegal hostile takeover, did not have standing to sue under section 4 because any injuries he sustained were only incidentally related to the alleged antitrust violation.[209] The court found that the director was ousted because he lost majority control of the corporation, not because of a decrease in competition.[210] The *Winther* court said that this analysis meant, in the language of *Associated General,* that the director did not have standing to sue because he had not suffered antitrust injury.[211]

After asserting that its decision was consistent with *Reibert* and *Rainbolt,* the *Winther* court rejected the *Ostrofe II* analysis that retaliatorily discharged employees have antitrust standing because their injury is an integral part of the anticompetitive scheme. The *Winther* court explained that nothing in *Associated General* supports such an analysis of antitrust standing.[212] Finally, comparing

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202 *Id.*
203 *Id.*
204 471 F.2d 727 (10th Cir.), *cert. denied,* 411 U.S. 938 (1973).
205 720 F.2d 1183 (10th Cir. 1983).
206 *Reibert,* 471 F.2d at 732.
207 *Id.* at 731.
208 *Winther,* 625 F. Supp. at 102.
209 *Rainbolt,* 720 F.2d at 1186.
210 *Id.*
211 *Winther,* 625 F. Supp. at 102.
212 *Id.* at 103.

Ostrofe to *Reibert*, the *Winther* court rejected the *Ostrofe II* alternative analysis that Ostrofe had standing because he was the direct victim of a boycott. The court found that even a direct injury is insufficient to establish antitrust standing where there is no antitrust injury, and therefore dismissed Winther's federal antitrust claim for failure to state a claim sufficient for relief.[213]

Although the *Winther* court correctly analyzed antitrust injury as a threshold factor, the lack of which cannot be overcome merely because the injury is a direct one, its analysis of antitrust injury remains narrow and mechanical. It is not enough to dispose of the issue by saying that there is no evidence that Congress intended to protect employees. Rather, the issue is whether protecting retaliatorily discharged employees will further the enforcement of the antitrust laws. *Associated General* requires that courts use such a policy-based analysis rather than some talismanic test. *Winther* never considers the issue of whether protecting retaliatorily discharged employees will further the goals of Congress.

The *Winther* court's comparison of *Winther* to *Reibert* and *Rainbolt* evidences the mechanical nature of its analysis. The only factor *Winther* has in common with *Reibert* and *Rainbolt* is that in all three cases an employee seeks to sue under antitrust laws. However, the underlying cause of injury in *Winther* differs vastly from that of *Reibert* and *Rainbolt*.

Reibert and *Rainbolt* were correctly decided. In *Reibert* the employee's injury was not part of the effectuation of the alleged antitrust violation. Rather, the alleged anticompetitive scheme was in fact completed before the employee was injured. Because the employee's injury was not related to the anticompetitive conduct, the court correctly denied him standing. Similarly, the allegedly anticompetitive scheme in *Rainbolt* could be completed without the consent of the director of the bank. His injury was not integral to the effectuation of the scheme. Consequently, the court correctly denied him standing. In contrast to these two cases, Winther's cooperation was necessary to effectuate the antitrust scheme. Without the sales personnel's cooperation, a scheme to enforce a sales program violating the antitrust laws is impossible. Therefore, in the context of a standing analysis based on maximizing enforcement of the antitrust laws, *Reibert* and *Rainbolt* are distinguishable from *Winther*.

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[213] *Id.*

The *Winther* court's rejection of the *Ostrofe II* rationale of standing is merely conclusory. The court simply states that nothing in *Associated General* supports such an analysis. While the court gives no reasoning to support this conclusion, it seems to be based on the *Winther* court's earlier flawed, mechanical interpretation of the antitrust laws. Further, as explained above, the court inappropriately uses *Reibert* to rebut the rationale of a case involving a retaliatorily discharged employee.

It is impossible to know whether other courts in the Tenth Circuit will follow the holding in *Winther*. In view of the flaws in its analysis, they should be wary of using it as precedent.

B. Circuits Deciding Retaliatorily Discharged Employee Standing Before Associated General

1. Third Circuit

The Third Circuit's analysis of retaliatorily discharged employees' standing has been inconsistent. In *Bravman v. Bassett Furniture Industries, Inc.*,[214] the Third Circuit used a multifactored test in coming to the conclusion that a retaliatorily discharged employee had standing to sue under section 4. Bravman, a sales representative for a furniture manufacturer, claimed he was fired because he failed to comply with certain selling restrictions allegedly violative of the Sherman Act. He also claimed that the manufacturer, Bassett Furniture, had conspired with other manufacturers to enforce these restrictions. The court considered four factors in determining that Bravman had standing to sue under section 4—his relationship to the defendants, his position in the area of the economy in which the alleged anticompetitive acts occurred, the directness of the injury, and the congressional policies underlying section 4.[215]

While the court did not specifically apply these factors, it noted that the alleged selling restrictions acted directly on Bravman as a sales representative and that Bassett Furniture had substantial market power which it was using anticompetitively.[216] Therefore, "[a]llowing Bravman to act as a private attorney general in challenging" the exercise of restraints on his power to sell furthered the policies underlying section 4 and the substantive policies of the antitrust laws.[217] Finally, the court noted that once Bravman was fired,

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[214] 552 F.2d 90 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977).
[215] *Id.* at 99-100.
[216] *Id.* at 100.
[217] *Id.*

he would be competing against Bassett Furniture's sales representatives in the future, and he could thus be construed as a competitor. He would then be within the target area of the alleged antitrust violation.[218] The court declined to base its grant of standing on any one of these factors, simply concluding that Bravman's allegations in their totality conferred standing under section 4.[219]

The Supreme Court's decisions in *Brunswick* and *Illinois Brick* altered the test set out in *Bravman*. Thus, in *Mid-West Paper Products Co. v. Continental Group, Inc.*,[220] the Third Circuit stated that, in addition to the factors used in *Bravman*, the courts must consider the issues of antitrust injury and the use of pass-on theories in determining whether the plaintiff is one whose protection is "the fundamental purpose of the antitrust laws."[221]

The application of *Brunswick's* antitrust injury analysis caused great confusion regarding retaliatorily discharged employees' standing to sue under section 4. District courts dealing with very similar fact patterns came to opposite conclusions on this issue. For example, in *Callahan v. Scott Paper Co.*,[222] a court in the Eastern District of Pennsylvania held that employees discharged because they objected to the employer's alleged antitrust violations did not have standing to sue under section 4.[223] At almost exactly the same time, in *Shaw v. Russell Trucking Line, Inc.*,[224] a court in the Western District of Pennsylvania held that an employee discharged for refusing to participate in an alleged antitrust violation did have standing to sue under section 4.

The explanation for these contrasting results is found in their analyses of antitrust injury. The court in *Callahan* reasoned that the employees' firing was not the consequence of a breakdown in competitive conditions and that the plaintiff, therefore, suffered no antitrust injury.[225] The *Callahan* court read *Brunswick* as requiring

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218 *Id.*

219 *Id.*

220 596 F.2d 573 (3d Cir. 1979).

221 *Id.* at 583.

222 541 F. Supp. 550 (E.D. Pa. 1982).

223 Plaintiffs also alleged that their compensation on the job decreased as a result of Scott Paper's illegal favoring of some customers over others in violation of the Sherman, Clayton, and Robinson-Patman Acts. The court ruled that plaintiffs did not have standing to bring this cause of action because their injuries were too indirect. *See Callahan*, 541 F. Supp. at 557-59.

224 542 F. Supp. 776 (W.D. Pa. 1982).

225 *Callahan*, 541 F. Supp. at 560. The court's ruling was consistent with other cases decided in that district on this issue. *See, e.g.*, Booth v. Radio Shack Div., No. 81-3670,

plaintiffs to show that their damages were caused by the anticompetitive effect of the particular antitrust violation.[226] Because the plaintiffs were discharged for objecting to the antitrust violations rather than the lessening of competition, the court held that they had not suffered antitrust injury and did not have standing to sue under section 4.[227] In contrast, the *Shaw* court applied the factors in *Bravman*, finding that the plaintiff had an immediate rather than indirect relationship with his employer and, more importantly, that the plaintiff's injury was a direct consequence of the alleged antitrust violations of the defendants.[228] It therefore concluded the employee had standing.[229]

The *Callahan* court's definition of antitrust injury as an injury which results from a breakdown in competitive conditions is an application of the language at the end of the *Brunswick* opinion.[230] This language proved to be too restrictive a test; consequently, the Court rejected it in *McCready*, thus liberalizing the standing test.[231] The analysis in *Shaw*, however, is consistent with that of *McCready* in that *Shaw* focuses on the directness of the injury to the antitrust violation. Since *McCready* was decided subsequent to *Callahan*, there is a strong argument that the restrictive definition of antitrust injury that precluded the employees' standing in *Callahan* no longer has any vitality. Rather, the analysis in *Shaw* is more appropriate and should serve as precedent for finding antitrust injury and, ultimately, standing to sue under section 4.

Further, the factors set forth in *Bravman* are similar to the limitation factors announced by the Supreme Court in *Associated General.* These limitation factors are directness of injury, speculativeness of the damages claimed, and complexity of the proof of damages. *Bravman* expressly looked at the directness of the injury. The relation of the plaintiffs to the defendants and the plaintiffs' position in the area of the economy affected, both of which the *Bravman* court considered, are elements that a court would explore in determining the complexity of the proof of damages. Finally, congressional pol-

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slip op. at 2 (E.D. Pa. Jan. 28, 1982) (Westlaw, DCT); McNulty v. Borden, Inc., 542 F. Supp. 655, 661 (E.D. Pa. 1982).

226 *Callahan*, 541 F. Supp. at 561.

227 *Id.*

228 *Shaw*, 542 F. Supp. at 780-81.

229 *Id.* at 780.

230 *See* Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); *see supra* text accompanying notes 55-58.

231 *See* Blue Shield v. McCready, 457 U.S. 465, 484-85 (1982); *see supra* text accompanying notes 71-73.

icy underlying section 4 is exactly what the Court is trying to reach in setting out the factors in *Associated General.* Thus, the concerns articulated in *Bravman* are essentially the same as those articulated in *Associated General.*

One would expect that, in applying the principles in *Associated General*, the Third Circuit will find that retaliatorily discharged employees have standing to sue under section 4. This conclusion follows from the fact that retaliatorily discharged employees have suffered antitrust injury and that the Third Circuit, in *Bravman*, previously found they have standing. However, the Third Circuit's decision in *Gregory Marketing Corp. v. Wakefern Food Corp.*[232] casts doubt upon the accuracy of such a prediction.

In *Gregory Marketing*, the plaintiff, Gregory Marketing Corp., was a broker for Red Cheek, an apple juice manufacturer. Gregory Marketing sold Red Cheek's products to commercial distributors and retailers, including Wakefern Food Corp. The plaintiff discovered that Red Cheek was giving Wakefern special price discounts not available to other buyers. Red Cheek then ordered Gregory Marketing to fabricate explanations justifying the discounts for any competitors inquiring about them. Gregory Marketing objected to the practice, and when it refused to comply, its brokerage agreement with Red Cheek was terminated. Gregory Marketing filed suit against Red Cheek and Wakefern, alleging a violation of the Robinson-Patman Act.[233] The plaintiff alleged two injuries: first, the loss of future brokerage commissions plaintiff would have received had the brokerage agreement not been terminated, and second, the loss of commissions caused by the discounted prices which reduced the gross sales on which the broker's commissions were based.[234]

The district court granted defendant's motion to dismiss, ruling that Gregory Marketing did not have standing to sue under section 4. The court stated that the broker's injury did not result from the anticompetitive nature of the discriminatory practice but rather from the termination. The district court concluded that, therefore, the plaintiff had not suffered antitrust injury.[235] It further noted that Wakefern's competitors could sue and that allowing the broker

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[232] 787 F.2d 92 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 87 (1987).

[233] 15 U.S.C. § 13(a) (1982).

[234] *Gregory Mktg.*, 787 F.2d at 93.

[235] *Id.*

to sue would expose the defendants to multiple liability.[236] The court specifically distinguished between brokers and employees, suggesting that an employee's injury is more closely linked to the antitrust violation than is a broker's injury.[237]

The Third Circuit affirmed the district court's ruling, essentially adopting the lower court's rationale. The court of appeals stated that there were two types of restrictions on standing to sue under section 4: the risk of multiple treble damage recoveries and the antitrust injury requirement.[238] The court held that, notwithstanding the causal connection asserted between the alleged antitrust violation and the plaintiff's injury, and notwithstanding the alleged intent to harm the plaintiff, no antitrust injury resulted. The court reasoned that the broker was neither a competitor nor a consumer in the apple juice market and therefore was not "within that area of the economy . . . endangered by [the] breakdown of competitive conditions."[239] The court reasoned that the plaintiff's loss of future income did not result from decreased competition in the apple juice market, but from the termination of the contract.[240]

The court concluded that the reduced commissions from lower gross sales also was unrelated to the anticompetitive conduct. The court reasoned that if Red Cheek had reduced its prices for all buyers, Gregory Marketing still would have lost commissions, notwithstanding the lack of antitrust violations. Alternatively, if Red Cheek had continued to provide Wakefern with a discount but had absorbed the losses itself, Gregory Marketing would not have been injured even though there would be an antitrust violation.[241]

The court continued its antitrust injury analysis by stating that the language in *McCready*, granting standing to parties who were necessary to carry out the antitrust violation and who were thus inextricably intertwined with the antitrust injury, was inapplicable in *Gregory Marketing*. The court stated that the broker's participation in the plan was not essential to effectuating the antitrust violation. There were other means by which Red Cheek and Wakefern could have accomplished the price discrimination without involving Gregory Marketing. Because the plaintiff was not a necessary party to effectuating the antitrust violation, the court concluded that *Mc-*

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236 *Id.*
237 *Id.* at 93-94.
238 *Id.* at 94.
239 *Id.* at 95 (quoting Blue Shield v. McCready, 457 U.S. 465, 481 (1982).
240 *Id.* at 96.
241 *Id.*

Cready did not give the plaintiff standing to sue under section 4.[242]

The court also found that Wakefern was only indirectly injured by the alleged antitrust violation, that Gregory Marketing was only incidentally affected, and that Wakefern's competitors were the ones most directly injured.[243] Because the competitors were best suited to bring an action, Gregory Marketing was not the appropriate party to uphold the antitrust laws.[244]

Next, the court concluded that allowing the plaintiff to sue would result in the risk of duplicate damages awards or excessive complexity.[245] It reasoned that allowing Gregory Marketing to sue for lost commissions and future profits would not preclude Wakefern's competitors from also suing for damages from lost sales. Consumers could also sue for damages based on higher prices paid for the products. The court stated that recognizing all these claims would require joinder of potential plaintiffs to minimize problems of multiple litigation and would result in an excessively complex trial.[246]

Lastly, the court rejected Gregory Marketing's argument that even if it did not satisfy the criteria enumerated in *Associated General*, it should be granted standing in order to promote vigorous enforcement of the antitrust laws.[247] The plaintiff argued that it was in the best position to expose such a scheme and that the deterrent policy of the antitrust laws would be best served by granting it standing.[248] The court agreed that maximizing enforcement of the antitrust laws was an appropriate aim but held that allowing the plaintiff to sue would widen the class of section 4 plaintiffs too far, resulting in a flood of litigation.[249]

Although *Gregory Marketing* deals with a retaliatorily discharged broker rather than an employee, the analysis utilized in the case could easily be applied to arguments made by a retaliatorily discharged employee seeking standing to sue. In fact, the language in the case indicates that the court will utilize the *Gregory Marketing*

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[242] *Id.*

[243] *Id.* at 97.

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *Id.* at 98.

[248] *Id.* This argument was based on the Ninth Circuit's analysis in *Ostrofe II*, by finding that a retaliatorily discharged employee should be allowed to sue because he was best situated to know of the anticompetitive scheme and had the greatest incentive to bring suit. *See* Ostrofe v. H.S. Crocker Co., 740 F.2d 739 (9th Cir. 1984) (Ostrofe II), *cert. dismissed*, 469 U.S. 1200 (1985).

[249] *Gregory Mktg.*, 787 F.2d at 98.

analysis in determining whether employees have suffered antitrust injury pursuant to the *McCready* test. The court states that it is unpersuaded by the rationale of *Ostrofe II* that employees should have standing because they are essential participants in the anticompetitive scheme.[250] Thus, it is possible the Third Circuit will find employees nonessential to the effectuation of an antitrust scheme.

The Third Circuit's analysis in *Gregory Marketing* of why the broker was not essential illustrates how the court could come to such a conclusion. There the court reasoned that even though the broker had in fact been the means of accomplishing the antitrust scheme, theoretically there were other ways of accomplishing the same objective. The court held that, therefore, the broker could not be deemed essential to the plan. Such analysis construes the concept of "essentiality" very narrowly. Rather than looking at the actual means to determine what was necessary to effectuate the scheme as planned, the court will look at all the various means by which the scheme could have been accomplished. If there is some other viable method, the actual means used will not be essential.

Accordingly, where an employee is fired for failing to comply with a superior's orders which would violate the antitrust laws, the court could find the employee not essential to the plan. Undoubtedly, alternative methods of accomplishing the plan could be devised which would circumvent the particular noncomplying employee. For example, the employer could hire an independent contractor to perform the employee's task. As a result, that particular employee would not be considered inextricably intertwined with the scheme and would not have standing to sue under section 4.

The Third Circuit's analyses of directness of injury and excessive complexity or duplicative damages are as applicable to employees as they are to brokers. Just as in *Gregory Marketing*, the court could find that an injury to a retaliatorily discharged employee is indirect because the competitors are most directly injured by anticompetitive schemes. The court could reason that the employee was discharged for disobeying orders and not because of the anticompe-

[250] *Id.* at 96-97. The court then states the *Ostrofe* analysis generally has been rejected by other courts. While there are courts that have explicitly rejected this analysis (the Seventh Circuit and district courts in the Third and Tenth Circuits), other courts have adopted the analysis (district courts in the Second and Third Circuits). This split hardly constitutes a general rejection of the doctrine.

titive scheme. Therefore, the employee's injury would be too indirect to allow the employee standing to sue.

With respect to the issue of excessive complexity, the court could state that allowing employees to sue would not preclude competitors or consumers from suing since each suffers different types of damages. Allowing all these types of plaintiffs to sue would result in an excessively complex trial. Therefore, employees should not have standing to sue under section 4. Finally, the court could conclude with the observation that just as granting standing to brokers would open the flood gates to excessive litigation under section 4, the same would be true if employees were allowed to sue.

The reason *Gregory Marketing*'s analysis is so applicable to the issue of retaliatorily discharged employees' standing is that brokers serve much the same function as employees. A corporation is a fictitious entity incapable of directly taking action; it can act only through its human agents. Some of these agents are categorized as employees. Others are categorized as independent contractors dealing with the corporation. Gregory Marketing was an agent of the corporation categorized as an independent contractor. Its job could have been performed by employees with little or no functional difference. Thus, if courts are to apply *Gregory Marketing* in the future, categorization should be deemed irrelevant, and the result should be the same regardless of whether the agent is an employee or independent contractor.[251]

However, *Gregory Marketing*'s precedential value should be minimal, if indeed it is not overruled, because its analysis is fatally flawed. The first flaw is its holding that the broker was not essential to the anticompetitive scheme. The court reaches this conclusion by envisioning other means by which the scheme might have been effectuated that would not involve the broker. Such an analysis is inconsistent with *McCready*.

In *McCready* the Court found that inasmuch as the plaintiff, McCready, was injured because she was the means by which Blue

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[251] At one time such categorization of the plaintiffs was dispositive of the standing issue. If plaintiffs could be categorized as independent contractors, they would be granted standing. If the plaintiffs were categorized as employees, they would be denied standing. Commentators criticized this practice because similar cases yielded different results based solely on the categorization of plaintiffs. *See* Berger & Bernstein, *supra* note 17, at 820-24. Such inconsistent results played a large part in the Court's decision to abandon the various tests for determining antitrust standing and to create the multifactor analysis set forth in *Associated General*. *See supra* text accompanying notes 34-41.

Shield attempted to restrain competition in the psychotherapy market, her injury was inextricably intertwined with the injury Blue Shield sought to inflict on psychologists.[252] Thus, the Court concluded that she had suffered antitrust injury. Nowhere did the Court explore alternative means by which the defendant might have restrained competition in the psychotherapy market. It was sufficient for the Court to determine that, in the scheme adopted by the defendants, injury to the intermediate parties was inevitable.

Similarly, in *Gregory Marketing*, Red Cheek and Wakefern adopted a particular scheme to injure competition. In that scheme, the defendants contemplated and intended injury to intermediate parties. The possibility that the defendants might have chosen other schemes is irrelevant. In the scheme chosen, the defendants intentionally injured the plaintiff as part of an alleged attempt to restrain competition. This is essentially the same issue raised in *McCready* and should be resolved the same way.

To interpret antitrust injury as the Third Circuit did in *Gregory Marketing* would almost completely emasculate the Supreme Court's holding in *McCready*. Intermediate parties such as McCready would never suffer antitrust injury so long as there were some other means of implementing the antitrust violation. For example, in *McCready* the Court posits a hypothetical situation in which a group of psychiatrists conspire to boycott a bank until the bank ceases to make loans to psychologists.[253] The Court states there is "no doubt" that the bank would have standing to sue to recover its injuries.[254] However, under *Gregory Marketing*, the bank would not recover. It is neither a competitor nor a consumer in the psychotherapy market. In addition, the bank is not a necessary party to the scheme because there are other means by which psychiatrists could restrain competition in the psychotherapy market. (For example, they could conspire with a health insurer to have an insurance plan reimburse only psychiatrists' services and not those of psychologists.) As a result, under *Gregory Marketing*'s analysis, the bank did not suffer antitrust injury and has no standing to sue under section 4.

An analysis, such as that the *Gregory Marketing* court utilized, which focuses on theoretical schemes rather than assessing the in-

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[252] *See* Blue Shield v. McCready, 457 U.S. at 484; *see supra* notes 71-73 and accompanying text.

[253] *McCready*, 457 U.S. at 484 n.21.

[254] *Id.*

jury actually caused by the anticompetitive scheme in fact adopted by the defendant, is inconsistent with *McCready*. The proper analysis is to look at the scheme actually adopted by the defendant and to determine if the harm to the intermediate party is the means by which competition is ultimately restrained. Under this analysis, the broker in *Gregory Marketing* did suffer antitrust injury and, by analogy, so would retaliatorily discharged employees.

The *Gregory Marketing* court's analysis of directness of injury is also incorrect. The court held that the injury to the broker was merely an indirect result of the anticompetitive scheme and that the competitors were more directly injured. The court's analysis seems to confuse the limitation issue of directness of injury with the threshold issue of antitrust injury. The relation of the injury suffered by the plaintiff to the anticompetitive effects of the scheme is a factor in deciding whether or not the plaintiff has suffered antitrust injury. In contrast, the directness-of-injury issue enunciated by the Supreme Court in *Associated General* is a proximate cause issue. In *Associated General* the Court held that the injury to the unions was too indirect to support an argument for antitrust standing. The Court found that the chain of causation between the union's injury and the defendant's actions contained "several somewhat vaguely defined links."[255] In *Gregory Marketing*, by comparison, the chain of causation between the broker's injury and the defendants' action contained no intermediate links. The defendants acted directly on the broker, discharging it. Thus, this limitation factor supports the broker's, and by analogy an employee's, standing to sue under section 4.

Finally, the *Gregory Marketing* court's analysis that allowing the broker to sue would result in excessively complex trials is also flawed. To analyze the excessive complexity issue, a court must first look at the risk of duplicative recoveries (the risk that two or more parties will recover for the same injury). The injury suffered by the broker in *Gregory Marketing* is distinct and different from the injuries suffered by competitors or consumers. The broker is alleging damages of lost commissions. No one else will be suing to recover for these injuries. Allowing the broker to sue does not create a risk of duplicative recovery.

Nor will allowing the broker to sue significantly complicate the trial. The *Gregory Marketing* court states that if competitors, con-

[255] Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 540 (1983).

sumers, and the broker are all allowed to sue, trials will become too complex. However, competitors have standing to sue, as do consumers.[256] Adding one more party whose proof of damages is relatively straightforward will not create a new layer of complexity at trial. Thus, this issue does not argue against giving a broker, and by analogy a retaliatorily discharged employee, standing to sue under section 4.

In conclusion, *Gregory Marketing* incorrectly applies *McCready* and *Associated General.* When the Third Circuit decides the issue of retaliatorily discharged employee standing, the case will be best decided by following the precedent established in *Bravman* and granting the employee standing to sue rather than by analogizing from *Gregory Marketing.*

2. *Seventh Circuit*

Like the Third Circuit, the Seventh Circuit ruled on the issue of retaliatorily discharged employee standing prior to *Associated General,* and has not yet addressed the issue subsequent to that decision. In *Bichan v. Chemetron Corp.*[257] the Seventh Circuit held that a retaliatorily discharged employee did not have standing to sue under section 4. Bichan alleged that he was fired from his position as an executive manager for Chemetron Corporation for refusing to participate in practices that violated the antitrust law. In holding that Bichan did not have standing, the court utilized a two-step test.[258] First, it determined whether or not the plaintiff had suffered antitrust injury. If the plaintiff did suffer antitrust injury, the court then looked to see if plaintiff was the proper party to bring the action. In applying this test, the court found that Bichan had not suffered antitrust injury.[259]

The court stated that the antitrust violations alleged by Bichan were aimed at restraining competition in the industrial gas market. Because the area of the economy endangered by the antitrust violations was the gas market and not the labor market, the court found that Bichan had not suffered antitrust injury.[260] Further, the court

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[256] In Reiter v. Sonotone Corp., 442 U.S. 330 (1979), the Supreme Court held that consumers who pay a higher price for goods purchased for their personal use have standing to sue under § 4.

[257] 681 F.2d 514 (7th Cir. 1982), *cert. denied,* 460 U.S. 1016 (1983).

[258] *Id.* at 515.

[259] *Id.* at 516.

[260] *Id.* at 517.

rejected the Ninth Circuit's analysis in *Ostrofe I*, [261] stating that it ignored the holding in *Brunswick*. The *Bichan* court read *Brunswick* to mean that only consumers or competitors are protected by the antitrust laws.[262] The court concluded that in enacting the antitrust laws, Congress was not concerned with employee coercion or discharge, and consequently held that a "mere relationship with the anticompetitive scheme is insufficient to bring the injured party within the scope of § 4; only where the injury is directly related to the scheme's anticompetitive effect does § 4 apply."[263]

The court went on to state, in dicta, that even if Bichan had suffered antitrust injury, he was not the proper party to bring the antitrust action because his injury was simply too remote from the antitrust violations.[264] The court reasoned that if every person affected by an antitrust violation were allowed to bring suit, the courts would be flooded with litigation. Therefore, the court held that it would only grant standing to plaintiffs who are "efficient enforcers" of the antitrust laws.[265] The court defined "efficient enforcers" as consumers or competitors who have been injured.[266]

The *Bichan* court's analysis in both steps of its test is unduly restrictive and mechanical in setting standards for standing to sue under section 4. The court simply states that the target area test requires that antitrust injury be defined as an injury flowing from the lessening of competition.[267] Although such a restrictive analysis may be understandable within the context of *Brunswick*, it fails to recognize that the appropriate question is whether granting the plaintiff standing will further the enforcement of the antitrust laws.

The continued validity of the *Bichan* court's analysis of *Brunswick* is questionable in light of *McCready* and *Associated General*. Under the *Bichan* analysis, the hypothetically boycotted bank in *McCready* would not have standing. The *Bichan* court would view the injury to the bank as resulting from the psychiatrists' boycott, not from the lessened competitive conditions in the psychotherapy market. Thus, under the *Bichan* court's analysis, the bank would

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[261] For a description of the Ninth Circuit's *Ostrofe I* analysis, see *supra* text accompanying notes 167-197.

[262] *Bichan*, 681 F.2d at 519.

[263] *Id.*

[264] *Id.*

[265] *Id.* at 520.

[266] *Id.*

[267] *Id.* at 518. The court goes so far as to say that Bichan's ability to promote competition (the goal of the antitrust laws) is irrelevant to determining whether Bichan suffered antitrust injury. *Id.*

not have suffered antitrust injury and would not have standing to sue under section 4, notwithstanding the Court's statement in *McCready* that the bank would have standing.

Stated more generally, the *Bichan* court's analysis would never allow intermediate parties who were injured because they were the means of effectuating the antitrust violation standing to challenge the violation. Only ultimate victims would have standing. The *Bichan* court would reach this conclusion by saying that Congress did not intend to protect the parties who are coerced into effecting a violation but did intend to protect the parties who are ultimately affected, i.e., consumers and competitors. Such a statement is erroneous.

It is true that the purpose of the antitrust laws is to protect consumers by ensuring competition. However, this does not mean Congress intended that only consumers and competitors be able to sue. The congressional debates surrounding the enactment of the antitrust laws show that Congress intended to make the antitrust laws as effective as possible.[268] While allowing too many parties standing to sue might result in such a flood of litigation that the enforcement of the antitrust laws would be weakened, allowing standing to anyone other than the ultimate victims will not necessarily result in such a flood. In fact, allowing suit by an intermediate party who has been injured as a necessary part of the effectuation of an anticompetitive scheme would bolster enforcement of the antitrust laws.

The question becomes whether retaliatorily discharged employees are parties whose suits will bolster enforcement of the antitrust laws. In the language of *Bichan,* are they appropriate parties to sue? *Bichan* says that because retaliatorily discharged employees are neither consumers nor competitors, they are not efficient enforcers of the law and, therefore, are not appropriate plaintiffs. Yet, as shown previously, retaliatorily discharged employees are in a unique position to expose covert anticompetitive schemes early enough to minimize the harm done.[269] In that sense they are certainly efficient enforcers of the law.

The *Bichan* court's analysis of both antitrust injury and who is an appropriate party to sue is narrow and mechanical. In light of the Supreme Court's mandate in *Associated General* that standing determinations be made on the basis of how to best further the

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[268] *See supra* note 74.

[269] *See supra* text accompanying notes 113-19.

procompetitive goals underlying the antitrust laws, the *Bichan* court's analysis is inappropriate. Nevertheless, in *Local Beauty Supply, Inc. v. Lamaur, Inc.*,[270] the Seventh Circuit stated that even after *Associated General,* it will continue to follow the two-part *Bichan* test. However, the court did modify the analysis somewhat. The court will still consider the existence of antitrust injury as the threshold issue to be resolved, but it held that the target area test is inappropriate for determining the existence of antitrust injury.[271] Instead, courts should use the target area test to determine whether the plaintiff is an appropriate party to bring the action.[272]

The *Lamaur* court's modification of the *Bichan* test will not significantly alter the analysis of antitrust injury in the Seventh Circuit. The *Lamaur* court recognized that *Associated General* did not provide guidance as to what constitutes antitrust injury. Therefore, the Seventh Circuit is unlikely to change its restrictive analysis as a result of *Associated General.* Shifting the target area analysis to the second part of the test—is the plaintiff an appropriate party—will most likely make no difference. The Seventh Circuit can analyze the issue by holding that, unless the plaintiff is a consumer or a competitor, the plaintiff suffered only a remote or indirect injury from the anticompetitive conduct. Therefore, it is quite likely the Seventh Circuit will continue to deny retaliatorily discharged employees standing to sue under section 4.

C. Circuits That Have Not Decided Retaliatorily Discharged Employee Standing

The remaining federal circuits have never expressly addressed the issue of retaliatorily discharged employees' standing to sue under section 4. While this fact makes it difficult, if not impossible, to predict what each circuit will do when confronted with this issue, some circuits have issued opinions that offer some guidance as to how they may decide the issue. These circuits will be discussed

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[270] 787 F.2d 1197 (7th Cir. 1986). In *Lamaur* the plaintiff, Local Beauty Supply, alleged that the defendant, Lamaur, refused to deal with it because the plaintiff refused to abide by provisions in the distribution agreement which the plaintiff alleged violated the antitrust laws. The plaintiff claimed as its damages the lost profits it suffered when the defendant cancelled the distributorship agreement. The court found that the plaintiff's profits resulted from the antitrust violation. Because the plaintiff benefitted from the antitrust violation, it had not suffered antitrust injury. Therefore, it did not have standing to sue under § 4. *Id.* at 1202-03.

[271] *Id.* at 1201.

[272] *Id.*

first. Those circuits whose opinions offer no guidance will then be considered.

1. Fifth Circuit

The Fifth Circuit, in *Walker v. U-Haul Co.*,[273] granted an intermediate party, whose injury was allegedly the means by which the defendant implemented an antitrust violation, standing to sue under section 4. Although the court of appeals ultimately affirmed the trial court's summary judgment in favor of the defendant, applying the court of appeals' rationale would allow standing for retaliatorily discharged employees.

The plaintiff, Walker, was a franchisee of the defendant U-Haul. U-Haul owned the building in which Walker operated the franchise. When U-Haul significantly raised the rent on the building, Walker was forced to surrender the franchise. Walker brought suit under section 4, alleging that U-Haul had forced him out of business for the purpose of monopolizing or attempting to monopolize the retail truck and trailer rental market in that area.[274] Initially, the court of appeals affirmed the summary judgment for U-Haul on the theory that Walker did not have standing to sue under section 4.[275] On rehearing, the court ruled that Walker's pleadings might have been sufficient to demonstrate antitrust standing,[276] although it again affirmed the summary judgment for U-Haul on the basis that Walker failed to show or allege any facts that evidenced a specific monopolistic scheme by U-Haul.[277]

The court reasoned that if Walker's allegations were true, he would be alleging a direct, measurable injury.[278] U-Haul acted directly on him by destroying his business. Further, the damages he suffered were lost profits that no other party could claim. Thus, there was no danger of duplicative recoveries.

The court then addressed the issue of whether Walker had suf-

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[273] 747 F.2d 1011 (5th Cir. 1984).

[274] Walker also brought claims alleging that the defendant violated Mississippi's state antitrust and franchise statutes as well as claims alleging fraud and breach of fiduciary duty. The court of appeals affirmed the trial court's grant of summary judgment for U-Haul on the state antitrust and franchise statute claims and reversed the trial court's grant of summary judgment for U-Haul on the fraud and breach of fiduciary duty claims. Walker v. U-Haul Co., 734 F.2d 1068 (5th Cir.) (Walker I), *opinion of denial of rehearing en banc*, 747 F.2d 1011 (5th Cir. 1984) (Walker II).

[275] *Walker I*, 734 F.2d at 1073-74.

[276] *Walker II*, 747 F.2d at 1014.

[277] *Id.* at 1016.

[278] *Id.* at 1014.

fered antitrust injury. It stated that to show antitrust injury, Walker had to prove that the injury to his business "flowed from" the alleged antitrust violation.[279] However, the court stated that Walker had failed to sufficiently allege or submit any evidence indicating that U-Haul's act actually furthered a monopolistic scheme to eliminate competitors, such as Ryder or Hertz, from the market. As a result, Walker could not successfully oppose U-Haul's motion for summary judgment.[280]

Although the court never expressly stated that Walker adequately alleged antitrust injury, the conclusion is inescapable. The court expressly stated that Walker might have demonstrated antitrust standing.[281] This statement cannot be true unless he suffered antitrust injury. Second, the court stated that Walker's downfall stemmed from his failure to show how putting him out of business would further U-Haul's attempt to monopolize.[282] The court did not say that if Walker could have shown a causal relationship, he would still have lost. Thus, the court's opinion suggests that if Walker had demonstrated how forcing him out of business would have furthered an attempted monopoly by U-Haul, then U-Haul's motion for summary judgment would have been denied.

The Fifth Circuit's analysis in *Walker* is applicable to retaliatorily discharged employees. The employee suffers direct, measurable injury. The employer acts directly on the employee, destroying his job. The damage suffered is lost compensation that no other party can claim. There is no danger of duplicative recoveries. Finally, if the employee can show that firing him will further an antitrust violation, he will have suffered antitrust injury. In conclusion, if the Fifth Circuit applies the rationale of *Walker v. U-Haul* to retaliatorily discharged employees, it will grant them standing.

2. Sixth Circuit

The Sixth Circuit has neither expressly decided a case dealing with retaliatorily discharged employees nor decided an analogous case. However, in other cases involving analysis of antitrust standing, courts in the circuit have used language that, if applied to retaliatorily discharged employees, would result in a finding that

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[279] *Id.* at 1015.

[280] *Id.* at 1015-16.

[281] *Id.* at 1015.

[282] *Id.*

such employees have suffered antitrust injury such that they would have standing to sue under section 4.

In *Southaven Land Co. v. Malone & Hyde, Inc.*, [283] the plaintiff was a lessor who alleged that the defendant, who had assumed a lease to premises owned by the plaintiff, had rendered the lessor's premises unfit as a grocery store outlet in order to preserve its competitive dominance in the retail grocery market. The court stated that it would no longer follow the zone of interest test for determining standing to sue under section 4 because that test had been superseded by the multifactor test set forth by the Supreme Court in *Associated General*.[284] Using the multifactor test, the court first found that the plaintiff had not suffered antitrust injury. It reasoned that, as a lessor, the plaintiff was neither a consumer, competitor, nor participant in the grocery market.[285]

Next, the *Southaven Land* court stated that such a finding was not dispositive of the issue because the plaintiff could suffer antitrust injury if its injury were inextricably intertwined with the injury the defendant intended to inflict upon the retail grocery market or participants in that market. However, the court concluded that the plaintiff was not inextricably intertwined and thus had not suffered antitrust injury.[286] It also found there were more direct victims of the scheme, such as consumers and competitors, and any damage suffered by the plaintiff was, at best, speculative.[287] Thus, the court concluded that under the multifactor test, the plaintiff did not have standing to sue under section 4.[288]

The court's conclusion in *Southaven Land* is appropriate. The court's analysis of antitrust injury is especially interesting because it gives rise to the conclusion that in the Sixth Circuit retaliatorily discharged employees would have standing to sue under section 4. The court states that there are two alternative ways in which a plaintiff can suffer antitrust injury. One is to be a consumer, competitor, or participant in the relevant economic market.[289] Even if a plaintiff does not meet this test, the court will find antitrust injury if the plaintiff is inextricably intertwined with the injury intended to

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[283] 715 F.2d 1079 (6th Cir. 1983).

[284] *Id.* at 1085-86. For a description of the *Associated General* factors, see *supra* text accompanying notes 87-100.

[285] *Southern Land*, 715 F.2d at 1086.

[286] *Id.* at 1086-87.

[287] *Id.* at 1087-88.

[288] *Id.* at 1088.

[289] *Id.* at 1086.

be inflicted upon the relevant market or participants. A plaintiff is inextricably intertwined if he is "manipulated or utilized by [the defendant] as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographical markets."[290] Another Sixth Circuit panel adopting this rationale stated, "[a]n inextricably intertwined injury is one that results from the manipulation of the injured party as a means to carry out the restraint of trade in the product market."[291]

With this language, the Sixth Circuit is expressly stating that intermediate parties can have standing to sue under section 4. Inasmuch as retaliatorily discharged employees are injured parties who were manipulated to effectuate an antitrust violation, they are clearly inextricably intertwined with the antitrust violation and have suffered antitrust injury. The fact that another panel in the Sixth Circuit has adopted the rationale of *Southaven Land* makes it likely that the Sixth Circuit will apply this rationale to retaliatorily discharged employees and find that they have suffered antitrust injury.

3. *Remaining Circuits*

The remaining circuits, the first, fourth, eighth, eleventh and District of Columbia, have not decided the issue of retaliatorily discharged employees' standing to sue under section 4, nor have they offered any language that would be an effective guide to whether an intermediate party could suffer antitrust injury. Each of them has adopted the multifactor test of *Associated General* in some form, but how each will apply it to retaliatorily discharged employees cannot be predicted.

The First Circuit adopted the *Associated General* test in *Kartell v. Blue Shield*.[292] There, the court stated that physicians lacked standing to sue to challenge Blue Shield's alleged predatory pricing behavior in setting health insurance rates.[293] In denying the physicians standing, the court stated that the physicians did not have a

[290] *Id.* Analyzing antitrust injury in light of *McCready* leads to this conclusion. The court in *Southaven Land* is interpreting *McCready* as saying that the reason McCready suffered antitrust injury was not that she was a consumer *per se* but rather that her injury was necessary to effectuate the anticompetitive scheme.

[291] Province v. Cleveland Press Publishing Co., 787 F.2d 1047, 1052 (6th Cir. 1986) (employees who lost their jobs when the newspaper for which they worked merged with another paper did not have standing to bring an antitrust action challenging the validity of the merger).

[292] 749 F.2d 922 (1st Cir. 1984).

[293] *Id.* at 933.

sufficiently direct interest in the injuries occurring in the health insurance market to allow them standing to challenge the anticompetitive scheme in that market. Under the facts of the case, the court found the possibility of injury to the physicians to be too remote and indirect to allow standing.[294]

Kartell does not discuss any of the other *Associated General* factors nor does it discuss *McCready's* applicability to antitrust injury. To date, no case decided by the First Circuit has discussed this issue. Thus, it is impossible to predict how the First Circuit will decide the issue of whether retaliatorily discharged employees have standing to sue under section 4.

The Fourth Circuit has not yet decided a case in which it has adopted the *Associated General* test. District courts in the circuit have continued to use the target area test, stating that the results of using the target area test are consistent with the policy analysis of *Associated General.*[295] One such court has adopted the two-part test for determining standing under the target area analysis enunciated in *Bichan.*[296] Another has cited *Bichan* for the requirement that antitrust injury must be "inextricably related to, and caused by, the alleged anticompetitive conduct."[297] Nevertheless, because neither case dealt with an intermediate party being coerced into effectuating an antitrust violation, it is impossible to tell whether or not these courts would also adopt *Bichan's* narrow interpretation of antitrust injury. If they do, it would be evidence that courts in the Fourth Circuit will deny retaliatorily discharged employees standing to sue under section 4. However, the Fourth Circuit has yet to rule on what test should be used after *Associated General.* Therefore, it is again impossible to tell how it will rule on this issue.

The Eighth Circuit, in *McDonald v. Johnson & Johnson,*[298]

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[294] *Id.* at 932-33. The court found that the only evidence the physicians presented to support their allegations of predatory pricing was an isolated instance concerning a competitor who had less than one tenth of one percent of the market share. The court said that even if the charge were true, the plaintiffs provided no evidence that predatory pricing would increase Blue Shield's market power. Therefore, the court found that the possibility of any injury to the physicians was simply too remote and indirect.

[295] *See, e.g.*, Ficker v. Chesapeake & Potomac Tel. Co., 596 F. Supp. 900, 905 (D. Md. 1984) (attorney lacked standing to sue telephone company and publisher of its directories for failure to print his advertisement containing price information); Eastern Auto Distrib., Inc. v. Peugeot Motors, Inc., 573 F. Supp. 943 (E.D. Va. 1983) (supplier of automobiles denied standing to sue intermediate distributor for engaging in anticompetitive conduct with retail automobile dealers).

[296] *See Eastern Auto*, 573 F. Supp. at 947-48.

[297] *Ficker*, 596 F. Supp. at 905.

[298] 722 F.2d 1370 (8th Cir. 1983).

adopted the *Associated General* multifactor test with one slight variation. In *McDonald* the plaintiffs were owners of a company, Stimtech. Defendant Johnson & Johnson bought all of Stimtech's stock. The plaintiffs alleged that the defendant defrauded them. They claimed the defendant bought Stimtech to suppress its products, which competed with the defendant. As a result, the plaintiffs claimed that they received less from the contract of sale than they would have received if the defendant had not suppressed Stimtech's products. They alleged the suppression violated the antitrust laws and sued for treble damages.

The court held the plaintiffs did not have standing to sue under section 4. Initially, the court held that the plaintiffs could not sue for treble damages as stockholders.[299] Even though they might have been defrauded in the sale of the stock, the loss was not related to the effects of the lessening of competition in the health care market, and there were other remedies available to plaintiffs for this loss.[300] The court cited no authority for this analysis.[301]

The court next held that the plaintiffs could not sue as individuals. It applied the five factors of *Associated General* and added another—improper motive.[302] After citing *Brunswick* for the proposition that antitrust injury must be directly related to the harm the antitrust laws were designed to prevent, the court found the injury to the plaintiffs was not proximately caused by the illegal market restraint.[303] The court also found that the damages were entirely speculative.[304] As a result, the court denied the plaintiffs standing to sue under section 4.[305]

While the *McDonald* court's reasoning with respect to the plaintiffs' standing is not germane to the issue of retaliatorily discharged employees' standing, it is important to note that the court appears to believe that the Supreme Court intends *Associated General* to re-

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[299] *Id.* at 1373, 1375-76.

[300] *Id.* at 1373, 1376-77.

[301] Although the court cited no authority for this holding, it is consistent with corporate law. Precedent for such a holding can be traced all the way back to Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910).

[302] *McDonald*, 722 F.2d at 1374. It is unclear why the court added the factor of improper motive since the Supreme Court stated that a defendant's specific intent to harm a party is not dispositive. Nevertheless, the court was correct to give weight to improper motive. *See supra* text accompanying notes 120-35.

[303] *McDonald*, 722 F.2d at 1374-77.

[304] *Id.* at 1374.

[305] *Id.* at 1383.

quire a narrow interpretation of antitrust standing.[306] The court noted that since *Associated General*, the Supreme Court considered writs of certiorari in three cases. In the two cases in which the court of appeals granted antitrust standing, the Supreme Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Associated General*.[307] The *McDonald* court found it significant that the Supreme Court denied certiorari in the one case in which the plaintiff had been denied antitrust standing.[308]

Such an analysis is not valid. In the two cases in which the Supreme Court vacated judgment, the respective courts of appeals again found the plaintiffs had antitrust standing.[309] The Supreme Court then dismissed certiorari in one of the cases[310] and denied certiorari in the other.[311] Because the Supreme Court has not disturbed the granting of antitrust standing in these two cases, it is no longer possible to argue that the Supreme Court's choices in granting or denying certiorari constitute a mandate for a narrow interpretation of antitrust standing.

Nonetheless, the Eighth Circuit in *McDonald* and in other decisions construing antitrust standing has focused on *Brunswick*'s analysis of antitrust injury rather than on the broader analysis used in *McCready*.[312] If it continues to do so, the Eighth Circuit will deny retaliatorily discharged employees standing. However, the Eighth Circuit has not addressed any issue analogous to retaliatorily discharged employees' standing, so it is difficult to predict what it will do in such a case.

The Eleventh Circuit, in *Construction Aggregate Transport, Inc. v.*

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306 *Id.* at 1374 n.4.

307 The two cases were H.S. Crocker Co. v. Ostrofe, 460 U.S. 1007 (1983) and Mitsui & Co. v. Industrial Inv. Dev. Corp., 460 U.S. 1007 (1983).

308 *McDonald*, 722 F.2d at 1374 n.4. The case was Bichan v. Chemetron Corp., 460 U.S. 1016 (1983).

309 Industrial Inv. Dev. Corp. v. Mitsui & Co., 704 F.2d 785 (5th Cir. 1983); *Ostrofe I*, 740 F.2d 739 (9th Cir. 1984).

310 *Ostrofe II*, 469 U.S. 1200 (1985).

311 Mitsui & Co. v. Industrial Inv. Dev. Corp., 464 U.S. 961 (1983).

312 *See, e.g.*, Midwest Communications, Inc. v. Minnesota Twins, Inc., 779 F.2d 444 (8th Cir. 1985) (television station lacked antitrust standing where its loss stemmed from a failure to make the best bid for broadcast rights to sports telecasts and not from any alleged antitrust violations); Henke Enter. v. H-Vee Food Stores, 749 F.2d 488 (8th Cir. 1984) (hardware store owner lacked standing to bring suit under antitrust laws against owner of grocery store assigning its space in a shopping center under an agreement prohibiting the assignee from leasing the property as a grocery store).

Florida Rock Industries, Inc.,[313] stated that it will continue to use the target area test even after *Associated General*. The court stated that *McCready* "implicitly sanctioned the continued, flexible use of the 'target area' test."[314] It further stated that analysis under the *Associated General* factors would result in the same conclusion as analysis under the target area test.[315]

The target area test as utilized by the Eleventh Circuit is a two-part test. First, the court identifies the market area adversely affected by the alleged antitrust injury. Second, the court decides whether the alleged injury occurred within the market area.[316]

The Eleventh Circuit's continued use of the target area test should not have an effect on determinations of antitrust standing. The critical question is how broadly the market area will be interpreted. So far, the Eleventh Circuit has interpreted the market area broadly.[317] However, the court has not yet addressed the issue of whether an intermediate party who is the means of effectuating an antitrust injury in a market area will be considered within that market area. Therefore, it is impossible to predict how the Eleventh Circuit will decide the issue of retaliatorily discharged employees' standing to sue under section 4.

The Circuit for the District of Columbia has not yet decided a case concerning antitrust standing after *Associated General*. One district court has discussed the meaning of *Associated General* in some depth. In *Adams v. Pan American World Airways, Inc.*,[318] former employees of a defunct airline, Laker Airways, sued the competitors of the airline for damages. The court held that Laker Airways had been directly injured but that the employees were only indirectly injured. Thus, the court denied the employees standing to sue under section 4.[319] In discussing the meaning of *Associated General*, the *Adams* court focused on the Supreme Court's language

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[313] 710 F.2d 752 (11th Cir. 1983).

[314] *Id.* at 762 n.23.

[315] *Id.* at 765 n.28.

[316] Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1498 (11th Cir. 1985).

[317] *See, e.g., Amey*, 758 F.2d 1486 (plaintiffs, a corporation involved in construction and real estate development, had standing to sue for alleged antitrust violations arising out of a bank's requirement that anyone purchasing mortgage financing from the bank pay for title services and opinions provided by a law firm designated by the bank); *Construction Aggregate Transp.*, 710 F.2d 752 (aggregate materials hauler had standing to bring antitrust suit against producer of aggregate materials where complaint alleged that the producer was also a hauler and was trying to eliminate competition in the hauling industry).

[318] 640 F. Supp. 683 (D.C. Cir. 1986).

[319] *Id.* at 684. The court also found that any damages would be speculative, that

that the antitrust laws were enacted to protect consumers and competitors.[320] The court concluded that, unless there were unusual circumstances, only consumers or competitors in the market in which the trade was restrained have standing to sue under section 4.[321]

While such language appears to be narrow, the court recognizes the possibility that under certain circumstances parties who are not consumers or competitors would have standing to sue. However, the court did not indicate what might constitute an unusual circumstance. In any event, the Court of Appeals for the District of Columbia has been silent regarding the effect of *Associated General*, so it is impossible to predict how broadly or narrowly it will set the perimeters of antitrust standing.

CONCLUSION

The multifactor test enunciated in *Associated General* was a recognition by the Supreme Court that standing to sue under section 4 is best determined by analyzing who is an appropriate party to vindicate the public's interest in having the antitrust laws enforced. Viewed from such a perspective, retaliatorily discharged employees should have standing to sue under section 4.

Congress decided to allow private antitrust suits in order to best ensure competition and thus protect consumers. To that end, it passed a statute allowing the recovery of treble damages with the hope of creating an army of private attorneys general. Congress deemed this the most effective method of exposing unfair competition. Consonant with Congress' intent, the base of antitrust law enforcers should include those people inextricably intertwined with antitrust violations and uniquely situated to discover and expose the prohibited actions. Employees are in the best position to detect and disclose covert anticompetitive schemes that might otherwise go undetected by the ultimate intended victims. After all, an anticompetitive scheme cannot succeed if the employees involved refuse to take part in it. The early detection and disclosure of such a scheme will minimize and prevent damage to the competitive structure of the affected market. These are the positive effects of allowing retaliatorily discharged employees to sue.

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determining damages would require complex apportionment theories, and that allowing the suit would discourage settlements in antitrust cases. *See id.* at 685-86.

[320] *Id.* at 684.

[321] *Id.*

There are no significant negative effects to allowing retaliatorily discharged plaintiffs standing to sue under section 4. The injury to such employees is direct, so there are no problems with causation. The damages are not speculative. There is no danger of duplicative recovery. Further, the proof of damages does not add another layer of complexity to the trial.

Congress did not intend for every person tangentially affected by an antitrust violation to recover treble damages. However, where allowing a party to sue will have beneficial effects on antitrust enforcement with no significant negative effects, and where that party is inextricably intertwined with the commission of the antitrust violation, it makes sense to grant the party standing to sue.

The majority of federal circuits have not yet decided this issue. In view of the salutary effects of allowing retaliatorily discharged employees to sue, the courts should grant retaliatorily discharged employees standing to sue under section 4 of the Clayton Act.