DePaul Law Review

Volume 23
Issue 3 *Spring 1974*

Article 18

A Reexamination of Standing to Sue under Section 4 of the Clayton Act - Boshes v. General Motors Corp.

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A REEXAMINATION OF STANDING TO SUE UNDER SECTION 4 OF THE CLAYTON ACT— *BOSHES v. GENERAL MOTORS CORP.*[1]

Roger Boshes and four other purchasers at retail of General Motors automobiles filed a private treble damage antitrust action under section 4 of the Clayton Act.[2] Plaintiffs alleged that General Motors Corporation and certain of its dealers combined and conspired to fix the retail prices and the terms of sale on automobiles manufactured and sold by various divisions of General Motors Corporation in violation of section 1 of the Sherman Act.[3] Plaintiffs contended that by virtue of the "General Motors Holding Plan," a plan by which General Motors organizes and finances dealerships, approximately 1600 General Motors dealers were forced by their manufacturer to maintain artificially high prices[4] and that a portion of the retail prices paid by plaintiffs, and others similarly situated, for automobiles constituted an illegal overcharge attributable to General Motors' alleged anti-competitive practices.[5] Plaintiffs' motion that the action be certified as a class action under Rule 23 of the Federal Rules of Civil Procedure,[6] the proposed plaintiff class to consist of all purchasers of General Motors automobiles from 1965 until the certification of the proposed class, was denied on the ground of class unmanageability.[7]

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1. Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973).

2. 15 U.S.C. § 15 (1970) which provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust 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.

3. 15 U.S.C. § 1 (1970).

4. The complaint asserted that the General Motors financed dealers were not free to reduce their prices "because such dealers must make enough profit to retire their financing debt." 59 F.R.D. at 591.

5. *Id.* at 590-91.

6. FED. R. CIV. P. 23.

7. 59 F.R.D. at 599. While conceding that size alone "will not generally be enough to make a class unmanageable," the court noted that a conservative estimate of the proposed plaintiff class would number somewhere between 30 and 40 million persons and that class members would be found in every state and a number of for-

The significance of the *Boshes* decision lay in the court's denial of General Motors' motion to dismiss the complaint on the ground that plaintiffs lacked standing to sue. In denying the motion, Judge Bernard Decker held that indirect purchasers of a product allegedly the subject of a price fixing conspiracy or those not in privity with the alleged price fixer may have standing to sue under section 4 of the Clayton Act, thus rejecting a substantial line of cases which has denied indirect purchasers standing as a matter of law. This note will assess the significance of the *Boshes* decision as it relates to the question of standing to sue under section 4 of the Clayton Act and will assess the impact that the decision will have and has already had in the area of treble damage antitrust actions.

In its motion to dismiss for lack of standing, the defendant argued that under *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[8] retail consumers as indirect purchasers do not, as a matter of law, have standing under section 4 of the Clayton Act to bring suit against a manufacturer for alleged price fixing violations. Judge Decker, in denying defendant's motion to dismiss for lack of standing, squarely and significantly rejected, for the first time,[9] the *Mangano Line*[10] of cases, which interpreted *Han-*

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eign countries. Therefore, the court asserted, "[i]t would place an impossible burden upon any court to provide adequate notice to a proposed class of [that] size and thereafter to attempt to assemble and classify the transactional material required to identify the particular interests of the millions of purchasers over . . ." the span of the damage period.

8. 392 U.S. 481 (1968).

9. Prior decisions have *arguably* rejected the *Mangano* reading of *Hanover Shoe* by implication. *See, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251, 262 n.14 (1972) (impliedly rejected any reading of *Hanover Shoe* establishing a direct-purchaser or privity standing requirement by citing with approval South Carolina Council of Milk Producers v. Newton, 360 F.2d 414, 419 (4th Cir. 1966), *cert. denied*, 385 U.S. 934 (1966) and Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967), two cases advocating the "target area" standing test); Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969) (involved alleged price discriminations in violation of § 2(a) of the Clayton Act as amended by § 13 of the Robinson-Patman Act and argued forcefully by analogy against any direct-purchaser or privity standing limitation in treble damage antitrust suits). The Ninth and Second Circuits have also impliedly rejected any direct-purchaser or privity standing requirement by adopting "target area" standing tests which generally inquire whether the plaintiff was within that area of the economy which was endangered or who could reasonably be foreseen to be affected by a breakdown of competitive conditions in a particular industry. *See* West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1088 (2d Cir. 1971) which held the cost-plus exception of *Hanover Shoe* applicable to the facts at bar, but contained language indicating that offensive use of the pass-on doctrine was permissible to establish plaintiff standing and thus impliedly disapproved any direct purchaser privity requirement; and Mulvey v. Samuel Goldwyn Prod., 433 F.2d 1073, 1076 (9th Cir. 1970), *reh'g denied*, 1971 Trade Cas. ¶ 73,247 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970); SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir. 1969). Moraine Prod. v. Atlas Chem. Indus., Inc., 1972 Trade Cas.

over Shoe as establishing a highly restrictive direct-purchaser or privity

¶ 73,812 (N.D. Ill. 1971) also impliedly rejecting any direct-purchaser or privity requirement by adopting a "foreseeability" test which inquired whether injury to the plaintiff was "reasonably foreseeable."

Also in connection with implied rejection of the *Mangano* reading of *Hanover Shoe, see In re* Ampicillin Antitrust Litigation, 55 F.R.D. 269 (D.D.C. 1972) regarding certification of a consumer class and nationwide wholesaler-retailer class; Southern Gen. Builders, Inc. v. Maule Indus. Inc., Civ. No. 67-486-JE (S.D. Fla. 1971) where the judge by unpublished order filed February 24, 1972, denied defendants' motion for judgment notwithstanding the verdict after a separate trial of the liability issue where there was no privity between plaintiff City of North Bay Village and any of the defendants; and the public works contracts entered into between the plaintiff City and the contractors were not cost-plus contracts. *See also In re* Antibiotic Antitrust Actions, 333 F. Supp. 313, 314 (S.D.N.Y. 1971) where the judge rejected defendants' motion to dismiss, or for summary judgment, against the insurers of ultimate drug consumers, who were far removed from the conspiratorial manufacturers, stating "that the resolution of the standing/remoteness/pass-on issues as they relate to this litigation must also await further development of the factual context in which they arise."; City of Austin v. United Concrete Pipe Corp., Case No. CA-3-228 (N.D. Tex. 1971) where Judge Taylor by unpublished order dated November 9, 1971 rejected a defense motion for summary judgment regarding "indirect" purchases; and *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971) where a class action was held maintainable on behalf of purchasers of broad spectrum antibiotics at the retail level for human consumption.

10. Philadelphia Housing Auth. v. American & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom.*, Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3rd Cir. 1971) (denied standing to plaintiff homeowners as indirect purchasers of plumbing fixtures); Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481 (S.D.N.Y. 1973) (bread consumers denied standing as indirect purchasers); New Mexico v. American Petrofina, Civil No. 8909 (D.N.M., unpublished order filed June 1, 1972) (denied standing to indirect purchasers of asphalt); Balmac, Inc. v. American Metal Prod. Corp., 1972 Trade Cas. ¶ 74,235 (N.D. Calif. 1972) (heating contractors and building owners not allowed to maintain class action against producers of gas vent pipe and fittings because of lack of privity with defendants); City of Akron v. Laub Baking Co., 1972 Trade Cas. ¶ 73,930 (N.D. Ohio 1972) (denied standing to all indirect purchasers of bread); Travis v. Fairmont Foods Co., 346 F. Supp. 679 (E.D. Pa. 1972) (milk consumers denied standing as indirect purchasers); City and County of Denver v. American Oil, 53 F.R.D. 620 (D. Colo. 1971) (indirect purchasers of asphalt denied standing); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 310 (S.D.N.Y. 1971) (the court dismissed claims of purchasers of finished animal feed products containing the antibiotics, but recognized the standing of wholesalers, veterinarians who purchased directly or indirectly, and purchasers for manufacture or use who purchased the antibiotics for non-human use from wholesalers in the same form as originally sold by the defendant manufacturers); Maricopa County v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 381 (E.D. Pa. 1970) (denied standing to plaintiff public bodies which contracted for the construction of public buildings because indirect purchasers of plumbing fixtures); United Egg Producers v. Bauer International Corp., 312 F. Supp. 319 (S.D.N.Y. 1970) (denied standing to ultimate consumers of eggs because indirect purchasers).

This so-called *Mangano Line* transforms the classic factual issue of proximate cause of damages into an inflexible principle of law that no one but the immediate purchaser has standing to sue under section 4 of the Clayton Act, except in situations where a cost-plus contract or analogous fixed mark-up type arrangement exists.

standing requirement, in treble damage antitrust actions.[11]

The *Mangano Line's* reading of *Hanover Shoe* requires that only those persons who purchase the product directly from the alleged antitrust violator have standing to sue under section 4 of the Clayton Act unless a cost-plus contract or analogous fixed mark-up type arrangement is involved. Indirect purchasers or those further removed from the alleged violator in the manufacturing-distribution chain are denied standing as a matter of law.[12] Judge Decker clearly indicates that analysis of the factual situation of each case and not application of preconceived determinations of law should determine whether a plaintiff has been "injured in his business or property by reason of anything forbidden in the antitrust laws."[13] Plaintiffs in *Boshes*, as retail consumers of a product marketed in the same form that it was in when sold by the alleged antitrust violator, are held to be not "too remote" to have standing.[14]

In *Hanover Shoe*, Hanover brought suit against United under section 4 of the Clayton Act for alleged price fixing violations resulting from United's refusal to sell shoe machinery to Hanover. As a defense, United claimed that Hanover, lessee of United's shoe machinery during the damage period, had not sustained any injury because Hanover passed on the full amount of any alleged price over-charge by United in the prices Hanover charged its customers for shoes. The Court held, *inter alia*, that this so called "pass-on" defense was no longer available in treble damage antitrust actions except in those situations in which it is easily provable that the person in privity with the alleged price fixer has suffered no damages, as where an overcharged buyer has a pre-existing cost-plus contract or other analogous fixed mark-up arrangement.[15] The *Hanover* court re-

11. "In fact," asserts Judge Decker, "this court has searched in vain for any discussion of the question of standing in the Hanover Shoe opinion." 59 F.R.D. at 595.

12. Since there is practically no industry in which any significant portion of production is sold by the manufacturer directly to the ultimate consumer, there exists no privity with the manufacturer as to the majority of consumer purchasers. Thus, the *Mangano Line's* privity requirement for all practical purposes destroys the possibility of consumer suits, under section 4 of the Clayton Act. *See* Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss for Lack of Standing at 12-13, Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973).

13. 15 U.S.C. § 15 (1970); Judge Decker's factual approach to standing to sue under the Clayton Act is very much in harmony with the reasoning of recent decisions of the United States Supreme Court which have considered the standing issue in other contexts and have emphasized the importance of the "injury in fact" component. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972); Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing v. Camp, 397 U.S. 15 (1970). *See also* Mount Clemens Indus., Inc. v. Bell, 464 F.2d 339 (9th Cir. 1972).

14. 59 F.R.D. at 597.

15. 392 U.S. at 494. In pre-*Hanover Shoe* days defense attorneys would attempt

jected United's pass-on defense on the grounds that establishing such a price pass-on would require a convincing showing of virtually unascertainable or at best highly speculative data. Justice White indicated that "even if it could be shown the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued."[16] The Court further indicated that generally allowing such a defense would, as a practical matter, reduce effective private enforcement of the antitrust laws by, in many cases, placing ultimate consumers who would have little monetary stake in bringing a law suit and little interest in attempting a class action, in the sole position to sue price fixers.[17]

In the *Mangano Line* of cases, *Hanover Shoe* was also interpreted to prohibit the *offensive*[18] use of the passing-on concept to establish the standing of an indirect purchaser. Judge Decker, in *Boshes*, indicates that any such reading of *Hanover Shoe* is metamorphically incorrect.[19]

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to illustrate that the plaintiff was not in fact injured by an alleged antitrust price fixing violation because the plaintiff had "passed-on" his higher costs in the form of higher prices to his customers situated further down the manufacturing-distribution chain. If the defense counsel was able to factually demonstrate that the full amount of the alleged injury or price increase had been "passed-on," then the plaintiff, having suffered no injury, was adjudged to lack standing to sue and his suit was dismissed. *See, e.g.*, Keogh v. Chicago & N.W. Ry., 260 U.S. 156, 164-65 (1922); Southern Pac. Co. v. Darnell-Taenzer Co., 245 U.S. 531 (1918); Northwestern Oil Co. v. Sacony-Vacuum Oil Co., 138 F.2d 967 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944); Twin Ports Oil Co. v. Pure Oil Co., 199 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941); Clark Oil Co. v. Phillips Petroleum Co., 56 F. Supp. 569 (D. Minn. 1944), *aff'd*, 148 F.2d 580 (8th Cir. 1945), *cert. denied*, 326 U.S. 734 (1945); Leonard v. Sacony-Vacuum Oil Co., 42 F. Supp. 369 (W.D. Wis.), *appeal dismissed*, 130 F.2d 535 (7th Cir. 1942). *See also* Comment, *Standing Under Clayton Act § 4: A Proverbial Mystery*, 77 DICK. L. REV. 73, 76-80 (1972).

16. 392 U.S. at 493.

17. *Id.* at 494.

18. Offensive use of the "pass-on" doctrine constitutes an assertion by an indirect purchaser that he or she has been injured by an illegal overcharge of the alleged antitrust price fixer because the overcharge has been passed down the manufacturing-distribution chain to him or her. It is an argument utilized by prospective plaintiffs to establish their standing to sue under section 4 of the Clayton Act. For an excellent discussion of offensive use of the "pass-on" concept *see* Note, *The Effect of Hanover Shoe on the Offensive Use of the Passing-On Doctrine* 46 S. CAL. L. REV. 98 (1972).

19. It should be noted that *Boshes* was not the first post-*Hanover Shoe* case to indicate that offensive use of the "pass-on" concept was permissible. *See, e.g.*, West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

The *Boshes* court notes that Justice White in his *Hanover Shoe* opinion offered two reasons for general rejection of the pass-on defense:[20] 1) he foresaw a great increase in the complexity of antitrust litigation if the defense was generally confirmed due to the complexity of proof necessary to establish a pass-on of increased costs and the impracticability of proving such a pass-on;[21] and 2) he recognized a need to preserve the effectiveness of the private antitrust enforcement mechanism.[22] These reasons were inextricably interrelated—a fact all but ignored by the *Mangano Line* in its interpretation of *Hanover Shoe*. As one commentator has suggested, "The court's emphasis on problems of proof reflected its concern that the attempt to establish a pass-on would so bog down the litigation process as to undermine the efficacy of the private enforcement mechanism."[23] The *Boshes* court siezes upon the two reasons enunciated in the *Hanover Shoe* opinion for the Supreme Court's general rejection of the pass-on defense and "adapts" them in an offensive pass-on context as important policy guides to be carefully weighed in analyzing the factual situation of each treble damage antitrust case to determine whether the plaintiff has standing to sue. In other words, under *Boshes* the necessity for there being some practical method of tracing an alleged price overcharge, and fostering private enforcement of the antitrust laws, are policy constructs to be considered and applied to the factual circumstances of each case in arriving at a standing determination. *Boshes* indicates that when a product is purchased by a plaintiff in the same form it was in when sold by the alleged antitrust violator the problem of tracing any price overcharge is *de minimus* and plaintiff's standing is, as a practical matter, a foregone conclusion. Judge Decker rejects any reading of *Hanover Shoe* which creates a direct purchaser or privity standing requirement as an unwarranted attempt to transform a rejection of a defense because it unduly hampered antitrust enforcement into a reason for a threshold refusal to entertain the claims of a certain class of plaintiffs, and as an at-

20. 59 F.R.D. at 594.

21. *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 493, 494 (1968).

22. *Id.* Public-judicial policy clearly favors vigorous private enforcement of the antitrust laws. *See, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251 (1972); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 564-68 (1951); Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-52 (1947). *See also* the analysis of the United States Supreme Court's attitude in West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

23. Comment, *Mangano and Ultimate Consumer Standing: The Misuse of the Hanover Doctrine*, 72 COLUM. L. REV. 394, 408 (1972).

tempt to turn the *Hanover Shoe* decision and its underlying rationale on its head. The Court refused to transform *Hanover Shoe* from a case extending liability under the Clayton Act into a case limiting liability.

While *Boshes* clearly rejects the direct-purchase or privity standing theory of the *Mangano Line*, examination reveals that the actual disposition of the standing issue in several of those cases would probably have been identical under the *Boshes* "factual analysis" test. For example, in *Mangano v. American Radiator & Standard Sanitary Corp.*[24] and *In re Antibiotic Antitrust Actions*[25] indirect purchaser plaintiffs were in such positions in the manufacturing-distribution chain that the tracing of any price overcharge was highly impracticable, if not impossible. In both cases, the product which was the subject of the alleged price fixing conspiracy was a relatively small component of the product actually purchased by the plaintiff. The subject product had passed through a second product market composed of competitive sellers making independent pricing decisions so as to obscure any effect an alleged subject product price fixing conspiracy might have had on the price of the product actually purchased by the plaintiff.[26] In light of these facts, application of the policy constructs discussed in *Boshes* would probably have also resulted in denial of plaintiffs' standing. Unlike the purchasers in *Boshes*, these plaintiffs purchased the subject product in a different form than it was in when sold by the alleged price fixer.

On the other hand, the denial of standing to sue in several cases of the *Mangano Line* appears to be in direct conflict with the *Boshes* rationale. In these cases,[27] there existed no significant overcharge tracing prob-

24. 438 F.2d 1187 (3rd Cir. 1971).

25. 333 F. Supp. 310 (S.D.N.Y. 1971).

26. Subject to similar analyses are: Balmac, Inc. v. American Metal Products Corp., 1972 Trade Cas. ¶ 74,235 (N.D. Calif. 1972) insofar as the case pertains to builder-owner plaintiffs; Maricopa County v. American Radiator & Standard Sani-Sanitary Corp., 323 F. Supp. 381 (E.D. Pa. 1970).

27. Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481 (S.D.N.Y. 1973) (where ultimate consumers of bread were denied standing to sue); Balmac, Inc. v. American Metal Products Corp., 1972 Trade Cas. ¶ 74,235 (N.D. Cal. 1972) (where plaintiff heating contractors, who were denied standing, purchased gas vent pipe and fittings which were the subject of the alleged price fixing conspiracy in the same form as sold by the alleged price fixer making any tracing of the overcharge problem de minimus); City of Akron v. Laub Baking Co., 1972 Trade Cas. ¶ 73,930 (N.D. Ohio 1972) (where ultimate consumers, who were denied standing, purchased bread, buns and other baked goods in the same form as sold by the alleged price fixer making any tracing problem de minimus). Subject to similar analysis are: Travis v. Fairmont Foods, 346 F. Supp. 679 (E.D. Pa. (1972) (where milk consumers were denied standing); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970) (where ultimate consumers of eggs were denied standing to sue).

lem. The plaintiffs, like the *Boshes* plaintiffs, purchased the products which were the subject of the alleged price fixing conspiracies in the same form the products were in when sold by the alleged price fixers. These products passed through no independent competitive product markets where independent pricing decisions were made which obscured any offensive pass-on of price overcharge. Despite these facts, plaintiffs were denied standing to sue. Accordingly, the conflict between the *Boshes* "factual analysis" test and the privity theory of the *Mangano Line* manifests itself on a dispositive as well as theoretical plane.

Since the *Boshes* decision, United States District Courts in the Southern District of Ohio[28] and the District of Connecticut[29] have cited with approval the reasoning of *Boshes* regarding the necessity of a factual approach to the standing issue and/or its rejection of the *Mangano Line.* The United States Court of Appeals for the Ninth Circuit has also reaffirmed its "target area" test in language which clearly rejects any reading of *Hanover Shoe* as establishing a direct purchaser or privity standing requirement.[30] Indeed, *State v. Standard Oil of California*[31] reversing *In re Western Liquid Asphalt*[32] directly rejects the privity direct purchaser standing theory of the *Mangano Line.*[33]

In re Western Liquid Asphalt denied standing to indirect purchasers of liquid asphalt on the basis of the *Mangano* privity reading of *Hanover Shoe,* explicitly citing the *Mangano Line* with approval.[34] The appellate court in *State v. Standard Oil of California* applying the "target area" standing test, rejects this *Mangano* privity approach to standing as too literal a reading of *Hanover Shoe* and cites the result and factual approach of *Boshes* with approval.[35] Judge Carter indicates that while the question

28. Bill Minnielli Cement Contracting, Inc. v. Richter Concrete Corp., 1973 Trade Cas. ¶ 74,951 (S.D. Ohio, 1973) (distinguishes the factual situation of *Bashes* from its own factual situation, primarily on the basis that the purchasers at bar were not consumers of a product marketed in the same form that it was in when sold by the alleged antitrust violator, as were the purchasers in *Boshes*).

29. *In re* Master Key Antitrust Litigation, 1973 Trade Cas. ¶ 74,680 (D.C. Conn. 1973).

30. *See, e.g.*, Multidistrict Vehicle Air Pollution, M.D.L. No. 31 v. Automobile Mfr. Ass'n Inc., 481 F.2d 122 (9th Cir. 1973); Contreras v. Grower Shipper Vegetable Ass'n, 484 F.2d 1346 (9th Cir. 1973), *cert. denied,* 42 U.S.L.W. 3459 (Feb. 19, 1974).

31. 487 F.2d 191 (9th Cir. 1973).

32. 350 F. Supp. 1369 (N.D. Cal. 1972).

33. *Contra,* New Mexico v. American Petrofina, Civil No. 8909 (D.N.M. unpublished order filed June 1, 1972); City and County of Denver v. American Oil Co., 53 F.R.D. 620 (D. Colo. 1971).

34. 350 F. Supp. at 1373.

35. 487 F.2d 191, 198 (9th Cir. 1973).

of whether appellants are clearly within the area of the economy which appellees reasonably could have or did foresee would be endangered by a breakdown of competitive conditions is one to be answered by the court as a matter of law, the answer to the question is to be arrived at by the court through factual analysis of the case at bar, and not by the application of any preconceived legal principle.[36]

These cases following the lead of *Boshes* will hopefully mark the beginning of the end for the overly restrictive privity or direct-purchaser standing test of the *Mangano Line*. *Boshes* has begun the move to restore the standing to sue determination in treble damage antitrust actions to the realm of factual analysis and policy application on a case by case basis. If the *Boshes* view prevails, a so-called indirect purchaser will no longer be denied standing to sue solely by virtue of his position in the manufacturing-distribution chain. *Boshes* and its progeny have finally rejected the *Mangano Line's* erroneous interpretation of *Hanover Shoe*.

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36. *Id.* at 200.

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