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Ostrofe v. H.S. Crocker Co.: Antitrust Standing under Section 4: A Departure from the Definitional Approach

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Ostrofe v. H.S. Crocker Co.: Antitrust Standing Under Section 4; A Departure From The Definitional Approach

*"Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."**

Benjamin Cardozo

I. Introduction

The Ninth Circuit Court of Appeals, in *Ostrofe v. H.S. Crocker Co.*[1] *(Ostrofe)*, made a substantial change in its practice of deciding standing issues under section 4 of the Clayton Act.[2] Formerly, the Ninth Circuit employed the "target area" test, which requires that the plaintiff, to have standing, be "aimed at" as a member of the economy affected by the anticompetitive practices.[3] The *Ostrofe* court found the test an inadequate means for deciding standing issues and abandoned it.[4] In its place the court established an analytical framework to bal-

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* Berkey v. Third Ave. Ry., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926) (Cardozo, J.)

1. 670 F.2d 1378 (9th Cir. 1982) (appeal pending).

2. 15 U.S.C. § 15 (1976). The section states that:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id. The section has been amended to provide for an award for interest if, under the circumstances, such an award is just. 15 U.S.C. § 15 (Supp. V 1981). The constitutional requirement of standing in antitrust cases is satisfied by alleging "injury to [one's] business or property . . . ." Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 811 (1977) [hereinafter cited as Berger & Bernstein]. The standing inquiry under section 4, however, requires "not only the *fact* of causation but also the presence of *legal* causation." *Id.*

3. *See* Conference of Studio Unions v. Loew's Inc., 193 F.2d 51, 55 (9th Cir. 1951).

4. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1382. The *Ostrofe* court never expressly states that the "target area" test is no longer the law in the jurisdiction. Nevertheless, the court's language implied so, stating: "The courts have devised various 'tests' for standing to sue designed to limit the expansive liability that might flow from a literal interpretation of the statute. While not without utility, these 'tests' have led to inconsistent, and unpredictable results." *Id.*

ance the policies underpinning section 4.[5] *Ostrofe* held that an employee, forced to resign[6] for refusing to cooperate with his employer's price fixing conspiracy, has standing to sue for treble damages under section 4 of the Clayton Act.[7]

Ostrofe represents a significant development in antitrust standing for two reasons. First, the Ninth Circuit is recognized as being instrumental in the development of the widely used "target area" test[8] that the court implicitly abandoned[9] in favor of a balancing test.[10] While the Ninth Circuit is not the first to adopt a balancing test,[11] the decision articulates the factors[12] to be considered and thus gives guidance to lower courts in their attempt to employ the test. Second, by using the new test, the court reached a conclusion that probably could not be achieved under the "target area" test:[13] that an employee has standing on

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5. *Id.* at 1383. *See infra* text accompanying notes 105-10. Briefly, the *Ostrofe* court stated that the policy in favor of enforcing the antitrust laws should be balanced against the problem of vexatious litigation and excessive liability. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1383.

6. The complaint alleged that the defendant resigned from his position: "Ostrofe's decision to resign from H.S. Crocker resulted from the threats of monetary reprisals . . . ." Appellant's Opening Brief at 2, Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir. 1982). Nevertheless, the circuit court of appeals treated Ostrofe as a "*discharged*" employee. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1382 (emphasis added). This Note will also refer to Ostrofe as a discharged employee.

7. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1386.

8. *See* Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971) (landlord corporation of motion picture theatres denied standing to sue motion picture distributors since the corporation was not itself a target of the alleged anticompetitive conduct), *cert. denied*, 406 U.S. 930 (1972); *see also* Perry v. Hartz Mountain Corp., 537 F. Supp. 1387, 1390 (S.D. Ind. 1982) (appeal pending) (where the court acknowledged the Ninth Circuit's leadership in developing the "target area" test).

9. *See supra* note 6.

10. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1383. Although the court does not specifically call the test a balancing test, the term will be used here for convenience.

11. The Third Circuit recently adopted an approach similar to that taken by the *Ostrofe* court, and the court denotes it the "functional analysis" approach. Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979).

12. *See infra* notes 111-25 and accompanying text.

The Third Circuit has been criticized for inadequately articulating the factors relevant to standing determinations under their "functional analysis" approach. *See* Spitzer, *The Third Circuit's "Functional Analysis": Patrolling The Portals To Treble Damage Actions Brought Under Section 4 of The Clayton Act*, 21 B.C.L. REV. 659, 676 (1980) [hereinafter cited as Spitzer].

13. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1380 (the district court held that Ostrofe could not challenge the conspiracy to fix prices because he was not the "target" of the scheme).

the theory that the employer unilaterally discharged the employee as a *means* of effectuating the anticompetitive scheme.[14] In making this determination, the court demonstrates how the balancing test is applied to a particular factual matrix.[15]

Part II of this Note presents the factual background of *Ostrofe,* the legal background of section 4 standing inquiries, and the procedural history of *Ostrofe.* Part III presents the majority and dissenting opinions of the court of appeals decision. Part IV critiques and analyzes these opinions. Part V explores the practical implications of the majority's balancing test. This Note concludes that the circuits should follow *Ostrofe* since the decision promotes standing determinations that are in harmony with the enforcement policies of the antitrust laws.

II. Background

A. *The Facts*

Frank J. Ostrofe is the former marketing director for H.S. Crocker Co., a concern that manufactures paper lithograph labels.[16] Ostrofe's complaint[17] against Crocker alleged that Crocker and other unnamed manufacturers of labels conspired to unreasonably restrain interstate trade and commerce in labels[18] in violation of section 1 of the Sherman Act.[19] According to Ostrofe, the conspiracy was a "continuing agreement and concert of action among the manufacturers to fix and maintain label prices, submit rigged bids, allocate customers and territories, and boycott those persons . . . who interfered . . . with their illegal plans."[20] The scheme required Ostrofe to apprise competitors of his employer's pricing decisions and protect the competitors from price competition by Crocker.[21]

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14. *Id.* at 1386.
15. *Id.* at 1383-86.
16. *Id.* at 1380.
17. *Id.*
18. *Id.*
19. 15 U.S.C. § 1 (1976). Section 1 of the Sherman Act states, in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." *Id.*
20. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1380.
21. Appellant's Opening Brief at 2, Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir. 1982).

Ostrofe contended that he refused to cooperate with the scheme.[22] The complaint alleged that, in reaction to his refusal to cooperate, executive officers at Crocker warned Ostrofe that his opportunity for promotion and his bonus were made contingent on his compliance with the scheme.[23] Moreover, his superiors warned Ostrofe that if he refused to cooperate, he would be discharged and blacklisted from future employment in the labels industry.[24] These threats allegedly forced Ostrofe to resign, and he was subsequently barred from employment in the industry.[25] For this injury, Ostrofe invoked section 4 of the Clayton Act: a remedial section that grants treble damages to successful private litigants.[26]

B. *Standing Under Section 4*

1. *The statute*

Section 4 provides in pertinent part that, "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . [for treble damages]."[27] This section was deliberately drafted with sweeping language to combat the threat that anticompetitive practices pose.[28] The expansive scope of this language, however, has prompted the judiciary to limit the number of litigants entitled to sue under section 4.[29] The courts maintain that the potency of the treble damage remedy necessitates that some injuries go unredressed,[30] since any one antitrust violation can potentially af-

22. Ostrofe alleged that Crocker's coconspirators complained to Crocker's executive officers when he refused to cooperate. The officers then attempted to coerce Ostrofe. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1380.

23. Appellant's Opening Brief at 2, Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir. 1982).

24. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1380.

25. *Id.*

26. Recall that section 4 also grants costs of the suit, including a reasonable attorney's fee. 15 U.S.C. § 15 (1976). *See supra* note 2.

27. *Id. see supra* note 2.

28. *See* Blue Shield of Virginia v. McCready, 102 S. Ct. 2540, 2545 (1982). "[T]he lack of restrictive language reflects Congress' 'expansive remedial purpose' in enacting § 4." *Id.*

29. *See* Ostrofe v. H.S. Crocker Co., 670 F.2d at 1382; Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 581 (3d Cir. 1979).

30. *See* Handler, *The Shift from Substantive to Procedural Innovation in Antitrust*

fect a multitude of individuals.[31] The underlying rationale for this limitation is that if the damage recoveries were so excessive as to drive the violator out of business, the market concentration would increase to the detriment of the beneficiaries of a competitive market: competitors and consumers.[32] Hence, overzealous enforcement is equally hostile to the purpose of the antitrust laws — to promote or maintain competition.[33]

Accordingly, the initial inquiry focuses on whether a particular plaintiff has standing to sue under section 4. This preliminary requirement is more rigid than the constitutional threshold that requires an individual to allege a "particular concrete injury" to have standing.[34] The section 4 plaintiff must allege "anti-trust injury"[35] and *legal* causation. Factual causation alone is not enough.[36] The courts have established this stringent standing requirement by interpreting the words "by reason of" in section 4.[37] The respective circuits have developed various

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Suits—The Twenty-Third Annual Antitrust Review, 71 COLUM. L. REV. 1 (1971).

31. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720 (finding the risk of duplicative recovery unacceptable, the court would not grant standing to indirect purchasers, since the plaintiff had probably passed on the amount of overcharge to its customers), *reh'g denied*, 434 U.S. 881 (1977). For an economic analysis of the *Illinois Brick* decision *see* Mantell, *Denial of A Forum to Indirect-Purchaser Victims of Price Fixing Conspiracies: A Legal and Economic Analysis of* Illinois Brick, 2 PACE L. REV. 153 (1982). *See generally* Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) (denying standing to state whose injury was allegedly inflicted on the general population and economy).

32. Berger & Bernstein, *supra* note 2, at 852.

33. *See* Ostrofe v. H.S. Crocker Co., 670 F.2d at 1383. *See also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

34. United States v. Richardson, 418 U.S. 166, 177 (1974). It is not enough to allege the impact is "undifferentiated and 'common to all members of the public.'" *Id.* at 176-77 (quoting *Ex parte* Levitt, 302 U.S. 633, 634 (1937)).

35. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 489. *See also* Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979) (interpreting *Brunswick* as defining "antitrust injury").

36. Berger & Bernstein, *supra* note 2 at 811.

Prosser states that, legal cause or "proximate cause" is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 236 (4th ed. 1971). He reasons that "[i]n a philisophical sense, the consequences of an act go forward to eternity" and the causes go back to the beginning of time. *See id.* Therefore, for pragmatic reasons "legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." *Id.* This limitation is usually imposed for pure policy reasons. *Id.* at 237.

37. *See* Berger & Bernstein, *supra* note 2, at 811; Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 488.

tests to cope with the inevitable linedrawing process characteristic of standing inquiries.[38] These tests can be grouped into three definitional categories: the "direct injury" test, the "target area" test, and the "zone of interests" test.[39]

2. *"Direct injury" test*

The determination under the "direct injury" test focuses on whether the injury is too "remote" or "indirect" to be redressed under section 4.[40] If the injury flows directly from the violation, then the plaintiff is granted standing.[41] The test emerged in the context of corporate shareholders suing another corporation for an alleged antitrust transgression. The courts held that the shareholders lacked standing to sue for the diminished value of their shares.[42] The victimized corporation suffered the direct injury, not the shareholders.[43] A further illustration of an "indirect" injury is the case where a landlord alleged injury as a result of a mortgage foreclosure caused by antitrust injuries sustained by the landlord's tenant.[44] The injury to the landlord was found to be incidental and therefore the landlord lacked standing.[45]

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38. *See infra* text accompanying notes 40-45, 59-62, 74-78. *See generally* Spitzer, *supra* note 12.

39. *See, e.g.*, Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151 (6th Cir. 1975) ("zone of interests" test); *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir.) ("target area" test), *cert. denied*, 414 U.S. 1045 (1973), *reh'g denied*, 414 U.S. 1148 (1974); Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.) ("direct injury" test), *cert. denied*, 411 U.S. 938, *reh'g denied*, 412 U.S. 914, 945 (1973).

40. *See* Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292, 294-95 (2d Cir. 1958) (where the shareholder had no standing to sue for conspiracy to cut off the corporation's supply of films because his claim was "only derivative" from that injury). *See also* Productive Inventions, Inc., v. Trico Prods. Corp., 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

41. *See, e.g.*, Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 508 (3d Cir. 1976) (directness must be determined on a case by case basis); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312, 317 (E.D. Pa. 1953), *aff'd*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

42. *See* Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910); Ames v. American Tel. & Tel. Co., 166 F. 820 (C.C.D. Mass. 1909).

43. Loeb v. Eastman Kodak Co., 183 F. at 709-10; Ames v. American Tel. & Tel. Co., 166 F. at 822-24.

44. Westmoreland Asbestos Co. v. Johns-Manville Corp., 30 F. Supp. 389 (S.D.N.Y. 1939), *aff'd mem.*, 113 F.2d 114 (2d Cir. 1940) (per curiam).

45. Westmoreland Asbestos Co. v. Johns-Manville Corp., 30 F. Supp. at 390-91. The

Commentators have criticized the "direct injury" test on several grounds.[46] The most pointed criticism is that the test is difficult to apply.[47] Courts have traditionally had difficulty drawing the line between direct and indirect injuries.[48] The question is always one of degree. While some courts have suggested that privity is necessary,[49] others have rejected this approach.[50] Furthermore, some courts have confused causation in fact with causation in law.[51] When this confusion occurs the inquiry becomes a substantive one into the "injury" requirement of section 4, and to determine that a plaintiff lacks the procedural requirement of standing under the test is misleading.[52] This is so because the court is prejudging the merits of the plaintiff's claim whereas standing determinations are intended to limit the number of litigants for policy reasons.[53]

Although the Third Circuit initially developed the "direct injury" test,[54] it has recently abandoned the test for a balancing test analogous to the test developed by the *Ostrofe* court.[55] The

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direct injury test has been the dominant appoach to standing since the 1950s. Even the "target area" test has been characterized as a "verbal variant" of the "direct injury" test, since in practice most courts treat the "target area" rubric as a test for directness. *See* Berger & Bernstein, *supra* note 2, at 818-19.

46. *See, e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS 224 (4th ed. 1971). *See* sources cited *infra* notes 80-81.

47. *See* Berger & Bernstein, *supra* note 2, at 819-20.

48. *Id.*

49. *E.g.*, City and County of Denver v. American Oil Co., 53 F.R.D. 620, 636-38 (D. Colo. 1971). *See* Beane, *Antitrust: Standing & Passing On*, 26 BAYLOR L. REV. 331, 333 (1974) ("[I]f the victim and the perpetrator are separated by an intermediary party, standing is usually denied to the claimant.").

50. *See, e.g.*, FLM Collision Parts, Inc. v. Ford Motor Co., 406 F. Supp. 224, 238 (S.D.N.Y. 1975), *rev'd on other grounds*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

51. *See* Berger & Bernstein, *supra* note 2, at 817-18 n. 32.

52. For instance, Judge Learned Hand found that the only relevant question under section 4 was the factual existence of injury caused by an antitrust violation. *See* Vines v. General Outdoor Adver. Co., 171 F.2d 487, 491 (2d Cir. 1948); *see, e.g.*, La Chapelle v. United Shoe Mach. Corp., 90 F. Supp. 721, 722 (D. Mass. 1950); Westor Theatres, Inc. v. Warner Bros. Pictures, Inc., 41 F. Supp. 757, 763 (D.N.J. 1941).

53. *See supra* notes 30-32 and accompanying text.

54. *See* Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910). *See supra* notes 40-58 and accompanying text for discussion of the "direct injury" test.

55. Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979) ("functional analysis" approach); *see also* Bravman v. Bassett Furn. Indus., Inc., 552 F.2d 90, 99 (3d Cir. 1977) (recognizing standing inquiries as a balancing test comprised of many constant and variable factors), *cert. denied*, 434 U.S. 823 (1978).

circuit was dissatisfied with the limitations associated with the "direct injury" test, since no test was capable of resolving all standing problems.[56] To meet this deficiency, the Third Circuit formulated a policy-oriented "functional analysis" test.[57] Similarly, other jurisdictions have developed alternative tests in response to the flaws inherent in the "direct injury" test.[58]

3. *"Target area"* test

To have standing under the "target area" test, the plaintiff must be, as the metaphor suggests, the target of the antitrust violation.[59] When applying the "target area" test, the court essentially asks whether the plaintiff was "aimed at" as a member of that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[60] One who is a bystander or incidentally injured by a violation cannot recover.[61] In the strictest sense this means the victim, to be within the "target area," must have been a competitor in the defendant's industry.[62] Thus, the landlord in the case used to illustrate the "direct injury" test[63] would probably not have standing. The tenant, as a competitor of the defendant, would be the target of the violation. Yet the test is usually not applied so restrictively as to require a victim to be the "bull's eye." The victim need only have been aimed at with enough precision to be

56. *See* Bravman v. Bassett Furn. Indus., Inc., 552 F.2d at 99.

57. *See* Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979).

58. For a summary review of the various standing tests see Mantell, *supra* note 31, at 157-65. *See infra* notes 39-45, 54-57, 74-78 and accompanying text.

59. *See* Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955).

60. *Id.* at 365.

61. *See, e.g.*, Productive Inventions, Inc. v. Trico Prods. Corp., 224 F.2d 678 (2d Cir. 1955) (standing denied to patent owner claiming derivative harm as a result of conspiracy directed against owner's licensees).

62. *See, e.g.*, Campo v. National Football League, 334 F. Supp. 1181, 1186-87 (E.D. La. 1971) (court considered target area to be industry in which defendant operated). *But see* Bravman v. Bassett Furn. Indus., Inc., 552 F.2d 90, 98-99 (3d Cir. 1977) (rejecting a "competitors only" rule since it would bar suits by victimized customers of price fixing conspiracies), *cert. denied*, 434 U.S. 823 (1978). For customer's right to challenge pricefixing conspiracies *see, e.g., In re* Master Key Antitrust Litig., 528 F.2d 5 (2d Cir. 1975).

63. *See supra* notes 44-45 and accompanying text.

in the "target *area*."[64]

This test originated in the Ninth Circuit in *Conference of Studio Unions v. Loew's Inc.*[65] The term "target area," however, was not coined until later cases.[66] Eventually the Ninth Circuit injected the element of foreseeability to the test so that the victim must have been one the defendant should have reasonably foreseen.[67] The Second Circuit still employs the "target area" test,[68] but absent the foreseeability element which it expressly rejected as being too broad.[69] The circuit perceived foreseeability in this context as overly comprehensive, since economic repercussions in the line of distribution result from almost every antitrust violation.[70]

Commentators have criticized the Ninth Circuit's use of the element of foreseeability on other grounds, arguing that its use is theoretically unsound.[71] The argument's proponents maintain that all antitrust injuries are the result of the violator's inten-

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64. Karseal Corp. v. Richfield Oil Corp., 221 F.2d at 365. *See, e.g.*, Battle v. Liberty National Life Ins., Co., 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

65. 193 F.2d 51 (9th Cir. 1951).

66. *See, e.g.*, Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955).

67. *See* Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir. 1964); *but cf. In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir.) ("target area" test), *cert. denied*, 414 U.S. 1045 (1973), *reh'g denied*, 414 U.S. 1148 (1974).

68. *See* Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 188 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, *reh'g denied*, 401 U.S. 1014 (1971).

69. Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d at 1296 n.2 (arguing that the "foreseeability" test would permit anyone to sue, regardless of how distant his interest or relationship).

70. *Id.*

71. Berger and Bernstein state that "[t]he concept of foreseeability is arguably irrelevant, for all antitrust injuries are intentionally rather than negligently inflicted." Berger & Bernstein, *supra* note 2, at 835. It is an established tort law principle that all injuries resulting from intentional violations generate liability for all provable consequences. *Id.*

Professors Areeda and Turner have noted:

> There is something to be said for excusing the defendant from damage liability for injuries that he neither intended nor could reasonably foresee. The law of torts often grants that excuse, and punitive treble damages create even more reason to do so. . . . What is foreseeable or even intended is not necessarily appropriate for antitrust protection.

AREEDA & TURNER, II ANTITRUST LAW 165-66 (1978) [hereinafter cited as AREEDA & TURNER].

tional acts.[72] Tort law principles require that *all* provable injuries flowing from intentionally tortious conduct be redressed whether or not the consequences were foreseeable.[73]

4. "Zone of interests" test

The Sixth Circuit has formulated a standing test with many of the attributes of the "target area" test but without the theoretically troublesome element of foreseeability.[74] The circuit uses the "zone of interests" test which is an adaptation of an administrative law test.[75] Similar to the "target area" test, the plaintiff must be in the zone protected or regulated by section 4 and the pertinent antitrust law allegedly violated (section 1 of the Sherman Act, for instance).[76] Hence, the plaintiff must be in the zone that the antitrust violation was intended to affect. The test differs from both the "target area" test and the "direct injury" test in that it reserves the question of whether the plaintiff's injury was "direct" as a factual issue to be determined on the merits.[77] By postponing the "directness" issue, the circuit sought to avoid what it perceived as the judiciary's use of earlier tests to determine the "*merits* of a *claim* under the guise of assessing the *standing* of the *claimant*."[78]

Critics note, however, that the "zone of interests" test im-

72. Berger & Bernstein, *supra* note 2, at 835. *But see* Austern, *Dealing With Uncertainties in How to Comply With the Antitrust Laws* 367068 (Van Cise & Dunn eds. 1954) (noting that even experts find it difficult to advise clients with any degree of certainty whether the client's conduct will transgress lawful bounds).

73. The foreseeability element is also contrary to substantive antitrust law. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953) (harmful effect of an antitrust violation on economic welfare is sufficient to give rise to antitrust liability).

74. *See* Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1145 (6th Cir. 1975); *cf.* Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1234 (6th Cir. 1981) (modifying the test in light of Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), to require that a plaintiff plead "antitrust injury").

75. Malamud v. Sinclair Oil Corp., 521 F.2d at 1151 (citing Association of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150 (1970) (two-prong test: plaintiff must allege 1) injury in fact, and 2) interest sought to be protected by the complaint is arguably within the zone of interests to be protected or regulated by the statute)).

76. *Id.*

77. *Id.* at 1150. *See* Ostrofe v. H.S. Crocker Co., 670 F.2d at 1389 n.1 (Kennedy, J., dissenting) (noting similarities and differences between the "target area" test and the "zone of interests" test).

78. Malamud v. Sinclair Oil Corp., 521 F.2d at 1150 (emphasis in original).

properly introduces an administrative law test into antitrust standing. They argue that administrative law rarely involves damage awards whereas *treble* damages is the primary right granted by section 4.[79] The suggestion is that the lure of treble damage awards requires thorough screening at the pretrial stage.[80]

5. *Implementation: a problem*

While the commentators cannot agree on which approach or test works best, most agree that all of the tests suffer from the way in which courts implement them.[81] Over the years courts applying these tests have shied away from analyzing the plaintiff's relationship to the antitrust violation.[82] Instead, plaintiffs have been "categorized" or "characterized" as coming within a certain class of individuals who have been found either to have or to lack standing.[83] One observer noted that: "Problems of characterization have reached their zenith in employee standing cases. Standing determinations have often depended on whether plaintiffs could be characterized as independent businessmen or agents rather than as salaried employees of the defendants."[84]

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79. Lytle & Purdue, *Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation*, 25 AM. U.L. REV. 795, 806 (1976) (critique of test based on administrative law test established in Association of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150 (1970)).

80. The claimant in an administrative law suit, however, lacks the incentive of treble damages to bring dubious or spurious claims. *See generally id.* at 806 n.50 (citing *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973), *cert. denied*, 414 U.S. 1045, *reh'g denied*, 414 U.S. 1148 (1974) for proposition that courts are more inclined to grant injunctive relief under section 16 of the Clayton Act than damages under section 4 because of the nature of the remedy.

81. *See, e.g.*, Berger & Bernstein, *supra* note 2; Alioto & Donnici, *Standing Requirements For Anti-Trust Plaintiffs: Judicially Created Exceptions to a Clear Statutory Policy*, 4 U.S.F.L. REV. 205 (1970); Lytle & Purdue, *supra* note 79; Mantell, *supra* note 31, at 157-59. Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1 (1971).

82. *See infra* note 84.

83. Berger & Bernstein, *supra* note 2, at 820-29.

84. *Id.* at 821. *See* Pitchford v. PEPI, Inc., 531 F.2d 92, 97 (3d Cir. 1975) (where the court found a corporate officer *qua* employee has no standing), *cert. denied*, 426 U.S. 935 (1976); Reibert v. Atlantic Richfield Co., 471 F.2d 727, 732 (10th Cir.) (holding that employees lack standing), *cert. denied*, 411 U.S. 938, *reh'g denied*, 412 U.S. 914, 945 (1973); *cf.* Bravman v. Bassett Furn. Indus., Inc., 552 F.2d 90, 100 (3d Cir. 1977) (sales representative has standing); Dailey v. Quality School Plan, Inc., 380 F.2d 484, 486-87 (5th Cir.

Generally, employees constitute a category that lacks standing,[85] and courts have decided the standing issue almost as a matter of *stare decisis*.[86] Traces of this are found in the fact that the district court granted summary judgment upon Crocker's motion.

C. *The District Court Decision*

To appreciate the difference between the traditional "target area" test and the balancing test that the majority adopts, one must be familiar with the district court's treatment of Ostrofe's complaint.[87] The district court, in effect, split Ostrofe's complaint into two "separate and unrelated" allegations: first, injury caused by a conspiracy to fix prices and allocate territories; second, a boycott of those who interfered with the conspiracy.[88]

As to the first allegation, the court found that Ostrofe, as an employee, was not the "target" of the agreement to fix prices.[89] Since Ostrofe was not a competitor or a consumer, the conspir-

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1967) (sales employee has standing); Roseland v. Phister Mfg. Co., 125 F.2d 417, 420 (7th Cir. 1942) (granting standing to employee sales agent); McWhirter v. Monroe Calculating Mach. Co., 76 F. Supp. 456, 460 (W.D. Mo. 1948) (manager paid by commission may sue).

85. *In re* Industrial Gas Antitrust Litig., 681 F.2d 514, 519-20 (7th Cir. 1982) (appeal pending) (rejecting *Ostrofe* decision and finding salaried executive lacking standing; injury indirectly caused by price fixing conspiracy); *see also* Callahan v. Scott Paper Co., 541 F. Supp. 550, 560 (E.D. Pa. 1982) (discharged employee who exposed conspiracy lacks standing); Perry v. Hartz Mountain Corp., 537 F. Supp. 1387, 1390 (S.D. Ind. 1982) (appeal pending) (adopting Judge Kennedy's dissent in *Ostrofe* and denying former employee standing since it was indirect result of antitrust violation). *But see* International Ass'n of Heat & Frost Insulators and Asbestos Workers v. United Contractors Ass'n, Inc., 483 F.2d 384, 394 (3d Cir. 1973) (recognizing employees right to standing), *amended*, 494 F.2d 1353 (1974); Michelman v. Clark-Schwebel Fiber Glass Corp., 1974-1 Trade Cas. ¶ 74,974 (CCH) (S.D.N.Y. 1974) (corporate employee and guarantor of employer's obligations has standing), *rev'd on other grounds*, 534 F.2d 1036 (2d Cir. 1976); Freeman v. Eastman-Whipstock, Inc., 390 F. Supp. 685 (S.D. Tex. 1975) (dictum) (employees have standing if they have extraordinary skills).

86. *See In re* Industrial Gas Antitrust Litig., 681 F.2d 514, 519-20 (7th Cir. 1982) (appeal pending): "Thus, as a general rule, stockholders, *employees* and creditors of an injured company . . . have all been denied recovery because their injuries were too 'indirect', 'secondary', or 'remote'." *Id.* (emphasis added) (citing Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975)). This language poignantly illustrates both the "categorization" and "characterization" problem.

87. The district court granted summary judgment without opinion. Nevertheless, the court of appeals decision gives a synopsis of the lower court's treatment of Ostrofe's claim. *See* Ostrofe v. H.S. Crocker Co., 670 F.2d at 1380-81.

88. *Id.* at 1380-81.

89. *Id.* at 1380.

acy was not "aimed at" him.[90] The district court found his injury was "an incidental effect" and therefore Ostrofe did not have standing to attack the agreement.[91] The district court did, however, recognize Ostrofe's standing to challenge the "separate" conspiracy: the agreement to boycott Ostrofe and others who interfered with the scheme.[92]

Subsequently, Ostrofe moved to amend the complaint while the summary judgment motion was pending on the boycott claim.[93] The proposed amendment alleged a unilateral refusal by Crocker to deal with Ostrofe as a means of effectuating the conspiracy.[94] The district court rejected the amendment as an attempt by Ostrofe to *reallege* the claim that he was adjudged to lack standing to challenge.[95] In reaching this decision, the court found that Ostrofe would be required to show at trial the existence of such a conspiracy to prove that the unilateral action was unlawful.[96] The court granted summary judgment to the defendant.[97] Thus, in applying the "target area" test, the district court precluded Ostrofe from challenging both the overall conspiracy and the unilateral action taken by Crocker to carry out the alleged scheme.[98]

III. The Court of Appeals Decision

A. *The Majority*

The Ninth Circuit Court of Appeals found that the district court erroneously fragmented Ostrofe's complaint.[99] By fragmenting the allegations, the plaintiff would have been denied the benefit of the probative value of the interrelationship of the

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90. *Id. See supra* notes 61-64 and accompanying text.

91. *Id.*

92. *Id.*

93. *Id.* at 1380-81.

94. *Id.* at 1381. This amendment to Ostrofe's complaint was the primary focus of the court of appeals decision.

95. *Id.*

96. *Id.*

97. *See supra* note 87.

98. *See* Ostrofe v. H.S. Crocker Co., 670 F.2d at 1380-81.

99. *Id.* at 1381. "It is axiomatic that the allegations of a complaint must 'be read as a whole, and . . . viewed broadly and liberally.' " *Id.* (quoting C. WRIGHT & A. MILLER, 5 FEDERAL PRACTICE AND PROCEDURE § 1363, at 657 (1969)). *See also* Conley v. Gibson, 355 U.S. 41 (1957).

claims.[100] Without being able to prove the existence of the conspiracy at trial, Ostrofe could not effectively prove the boycott.[101]

Before addressing the question presented by the theory embodied in Ostrofe's proposed amendment, the court noted that the boycott, by itself, was a violation of the Sherman Act.[102] For this reason alone, Ostrofe had standing. His claim was regarded as "indistinguishable"[103] from *Radovich v. National Football League*[104] where the Supreme Court granted standing. Having laid this foundation, the court proceeded to articulate the Ninth Circuit's new balancing test for deciding standing issues under section 4.

The majority stated that, to determine standing, the court should focus on balancing two competing policies: the enforcement of antitrust laws versus the avoidance of vexatious litigation and excessive liability.[105] The rationale for focusing on these policies is also twofold. First, the primary purpose for granting treble damages under section 4 is that the potential magnitude of an award serves to deter antitrust violations.[106] Hence, the extent to which a plaintiff's action will further the enforcement purpose of section 4 should be central to the determination of standing.[107] Second, if the plaintiff is one of a class whose members are so numerous that granting standing would enlarge "the

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100. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1381.

101. *See id.*

102. *Id.* The court was apparently referring to sections 1 and 2 of the Sherman Act.

103. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1382 (citing Radovich v. National Football League, 352 U.S. 445 (1957) (*Radovich*)).

104. 352 U.S. 445 (1957). In *Radovich*, the plaintiff was a professional football player. He alleged that the defendants conspired to monopolize and control professional football in violation of sections 1 and 2 of the Sherman Act. The plaintiff's contention was that a part of the conspiracy consisted of a scheme to destroy a competitive league, the All-American Conference, by boycotting it and its players. Radovich was a player for the competitor. This scheme was allegedly accomplished by boycotting and blacklisting players who had violated contracts that prohibited players from signing with another team without the consent of the team holding the contract. The *Radovich* Court granted standing to the plaintiff football player to sue under section 4 of the Clayton Act for the alleged injuries sustained as a result of the plaintiff being the subject of a boycott. *See id.* at 454.

105. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1383.

106. *Id.* (citing Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968)).

107. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1383.

private weapon to a caliber far exceeding that contemplated by Congress" then standing should be denied.[108] The *Ostrofe* court reduced these two interests to eight factors.[109] The court indicated that each factor should be considered individually in relation to the aggregate (policies) to determine whether standing should be granted.[110]

1. *Factors in favor of granting standing*

In analyzing Ostrofe's allegation that Crocker unilaterally discharged him as a means of effectuating the conspiracy, the majority focused on whether Ostrofe would be an effective enforcer of the antitrust laws.[111] The court proceeded on the premise that conspiracies in restraint of trade are commonly covert, and therefore go undetected.[112] From this premise, the court reasoned that exposure may depend on insider information.[113] Without adequate incentive, insiders (employees) are reluctant to disclose the scheme, since it would almost surely mean losing their jobs.[114] The court noted that the threat of criminal sanction for participating in the scheme is an insufficient incentive, because the chances that the scheme will be detected are slim.[115] Therefore, the court concluded that the possibility of recovering treble damages presents the only real incentive to employees to resist the unlawful scheme and to bring it to the attention of

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108. *Id.* (quoting Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d at 1295).

109. *See infra* text accompanying note 124 for a list of the eight factors.

110. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1383-86.

111. *See id.* at 1384-85. The positive factors the court considers are more variable in nature than the countervailing factors in that they are tailored to the factual makeup presented by the particular plaintiff seeking standing. The focus is on *how* the plaintiff is suited to be an effective enforcer, or, conversely, why the plaintiff lacks the attributes of an antitrust enforcer. *See id.*

112. *Id.* at 1384. It has been noted that "the detection rate of antitrust violations is much lower than that of other crimes because an antitrust violation 'is usually a concealed crime and there is rarely an identifiable victim who is aware of the violation.'" Berger & Bernstein, *supra* note 2, at 847 n.172 (quoting Statement before the Tenth New England Antitrust Conference, Nov. 20, 1976, *reprinted in* 790 ANTITRUST & TRADE REG. REP. (BNA) D-1 (1976)).

113. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1384.

114. *Id.*

115. *Id.*

authorities.[116]

Furthermore, discharging those who refuse to participate is a necessary element of every successful scheme.[117] Thus, according to the court, granting standing to such persons serves a dual purpose. First, it enhances potential liability for the conduct conspiring businesses must engage in to carry out the scheme.[118] Second, the early detection afforded by giving the remedy to discharged employees may mitigate the damage that would have otherwise occurred.[119] Disclosing the scheme at its inception reduces the injury to the consumer and minimizes damage to the competitive structure of the market.[120] Without further explanation, the majority also noted that the discharged employee's injury flows "immediately, not remotely or indirectly" and hence, he is a "proximate victim."[121]

2. *Factors counseling denial of standing*

Concluding that the above reasons support a strong basis for granting standing,[122] the majority then considered the countervailing factors that counsel denial of standing.[123] The court listed eight factors that should be considered in this respect. These factors are:

i. whether the number of persons that comprise the plaintiff's class are so numerous that granting standing would produce a "flood of litigation;" or

ii. whether their claims would impose a ruinous financial burden on the industry; or

iii. whether the plaintiff's damages would be duplicative in that a) the plaintiff could essentially recover twice for the same injury, and b) the damages are "passed on" to others; or

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116. *Id.*

117. The court stated that "[n]o conspiracy to fix prices and allocate customers can be effective without the cooperation of responsible employees of each competitor." *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1384-85. "[O]nce destroyed, competitive conditions may be difficult to restore." *Id.* at 1385.

121. *Id.* at 1385. For a discussion of this language see *infra* text accompanying notes 208-14.

122. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385.

123. *Id.*

iv. whether treble damages would, under the circumstances, constitute an unfair penalty imposed on an unwary defendant; or

v. whether assessing damages would be unduly speculative; or

vi. whether treble damages would be a "windfall" to the plaintiff; or

vii. whether the damage is indirectly related to the violation; or

viii. whether the remedial purpose for allowing three times the actual loss is not satisfied.[124]

The majority concluded that none of these factors were present in Ostrofe's case.[125]

3. Brunswick

Having reached the conclusion that none of the countervailing factors precluded suit by Ostrofe, the majority was constrained to address the Supreme Court ruling in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[126] *(Brunswick)*. In a separate portion of the opinion the majority proffered several reasons why the *Brunswick* decision did not require denying standing to Ostrofe.[127] Becuase the interpretation given to the language in *Brunswick* is crucial to whether Ostrofe has or lacks standing, a synopsis of the facts and reasoning of that case is necessary.[128]

The plaintiffs in *Brunswick* were operators of bowling centers that were owned by another concern.[129] The defendant, one of the two largest manufacturers of bowling equipment in the United States, acquired and operated a number of bowling centers.[130] Each acquired center had been indebted to defendant manufacturer as a result of equipment sold on credit.[131] These acquisitions were an attempt to mitigate losses accruing from

124. *Id.* at 1385-86.

125. *Id.* at 1386.

126. 429 U.S. 477 (1977).

127. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1386-88.

128. The majority and the dissent sharply disagree on the proper construction of *Brunswick*. *Compare id., infra* notes 152-68 and accompanying text, *with id.* at 1389-91 (Kennedy, J., dissenting), *infra* notes 170-72 and accompanying text.

129. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 479.

130. *Id.* at 479-80.

131. *Id.*

the defaulting centers' inability to make payments as a result of a sharp decline in the industry.[132] Six of these acquired centers were located in the market in which the plaintiffs operated.[133]

The plaintiffs claimed treble damages under section 4 on the grounds that the acquisitions might substantially lessen competition in violation of section 7 of the Clayton Act.[134] The plaintiffs' theory was that had the defendant *not* acquired the defaulting bowling centers, the defaulting centers would have closed.[135] By acquiring the centers, the defendants deprived the plaintiffs of a larger portion of the market and the increased profits they would have realized had the defaulting centers failed.[136]

In construing the plaintiffs' complaint with respect to section 4, the unanimous Court rejected this theory and denied standing to the plaintiffs.[137] The Court declined to adopt any of the standing tests used by the various circuits.[138] Instead the Court reached this conclsion by interpreting the words "injury" and "by reason of" in section 4,[139] the words traditionally interpreted as embodying the standing requirement.[140] The Court noted that Congress has condemned mergers only when they might produce anticompetitive effects.[141] Yet here the defendant's actions served to maintain or increase competition.[142] According to the Court the very reason why the plaintiffs claimed injury was that defendant's acquisitions increased competition, thereby depriving them of expected profits.[143] The Court stated

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132. *Id.*

133. *Id.* at 480 (the plaintiffs were located in three markets: Pueblo, Colo., Poughkeepsie, N.Y., and Paramus, N.J.).

134. *Id. See* 15 U.S.C. § 18 (1976) (proscribing acquisitions where the "effect of such acquisition may be substantially to lessen, or to tend to create a monopoly").

135. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 481.

136. *Id.*

137. *See id.* at 488.

138. *See id.* at 485-87; *see also* Blue Shield of Virginia v. McCready, 102 S. Ct. 2540, 2547 n.12 (1982) (where the Court declined to "evaluate the relative utility" of the various standing tests).

139. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 488. *See supra* note 2 for the text of section 4.

140. *See* Berger & Bernstein, *supra* note 2, at 810-11.

141. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 487.

142. *Id.* at 488.

143. *Id.*

that "it is far from clear that the loss of windfall profits . . . even constitutes 'injury' within the meaning of [section] 4"[144] and if injury did occur, it was not "by reason of anything forbidden in the antitrust laws."[145] Accordingly, the Court found the plaintiffs lacked standing.[146]

The precise language in the *Brunswick* decision that has captured the attention of the circuit courts is: "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[147] Prior to *Ostrofe*, the Ninth Circuit had interpreted this language to mean that antitrust laws are aimed at protecting competition and that the injury must reflect the "anticompetitive effect" of the violation.[148] The *Ostrofe* majority declined to follow these earlier interpretations.[149]

Instead the court chose to distinguish *Brunswick* on several grounds.[150] First, the court indicated that *Brunswick*, unlike *Ostrofe*, concerned a violation of section 7 of the Clayton Act.[151] Ostrofe alleged a violation of section 1 of the Sherman Act,[152] and thus the majority argued, the relevance of *Brunswick* is "unclear."[153] On this point, the court seemed to intimate that the substantive antitrust statute sued upon might somehow affect the standing determination under section 4. Furthermore,

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144. *Id.*

145. *Id.*

146. *See id.* at 489.

147. *Id.*

148. *See* Solinger v. A & M Records, Inc., 586 F.2d 1304, 1310-11 (9th Cir. 1978) (citing *Brunswick* for proposition that "injury caused by the violation must be one the antitrust laws were designed to protect against"), *cert. denied*, 441 U.S. 908 (1979). *See also* John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 498-500 (9th Cir. 1977) (discussing *Brunswick*).

149. *See* Ostrofe v. H.S. Crocker Co., 670 F.2d at 1387 n.24 and accompanying text (acknowledging prior interpretations of *Brunswick* in the circuit as having read the case as limiting standing to damages caused by the anticompetitive effects of violation).

150. *See id.* at 1386-88.

151. 15 U.S.C. § 18 (1976), *supra* note 134. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1386.

Note, however, that the complaint in *Brunswick* also alleged violations of sections 1 and 2 of the Sherman Act. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 480-81 n.3.

152. 15 U.S.C. § 1 (1976). *See supra* note 19 for text of statute.

153. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1386.

the court wrote that "the distinction between the concepts of standing and antitrust injury" is also uncertain.[154] This statement refers to the practice of some courts interpreting *Brunswick* as defining "*antitrust* injury," not the perimeters of standing.[155] Notwithstanding these doubts, the majority acknowledged that lower courts have interpreted *Brunswick* as limiting standing to those whose injury was "caused by the anti-competitive *effect*" of the violation, thus precluding suit by plaintiffs in Ostrofe's position.[156] Since Ostrofe alleged that Crocker's unilateral conduct was the *means*, not the effect, of carrying out the scheme, such an interpretation of *Brunswick* would bar Ostrofe's suit on the theory embodied in Ostrofe's amended complaint.[157] The majority, however, deemed such a narrow construction "[un]justified,"[158] and went on to explain what it perceived as the central theme of *Brunswick*.[159]

The majority maintained that *Brunswick* stands for the proposition that "to be actionable under section 4, plaintiff's injury should fall within the core of Congressional concern underlying the substantive provision of the antitrust laws . . . ."[160] From the fact that Congress imposed criminal liability upon violators of the Sherman Act,[161] even though they may be acting in

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154. *Id.*

155. Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d at 582.

156. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1387 (emphasis added).

The majority stated:

> *Brunswick* could be read as limiting Section 4 to suits for damages caused by the anticompetitive effect of the particular antitrust violation. Similar language appears in lower court opinions. So construed, *Brunswick* arguably would prevent suit by Ostrofe if his injury resulted only from unilateral conduct by Crocker in furtherance of the conspiracy rather than from the elimination of competition in the marketing of Ostrofe's services or in the marketing of labels.

Id. (citing GAF Corp. v. Circle Floor Co., 463 F.2d 752, 758 (2d Cir. 1972); *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d at 127; Conference of Studio Unions v. Loew's Inc., 193 F.2d at 54).

157. *See supra* note 156 and accompanying text.

158. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1387.

The court's note states that, "[e]ven under this construction, *Brunswick* would not bar recovery of treble damages for injuries sustained by Ostrofe from the alleged boycott, since such injuries would result directly from the elimination of competition in the marketing of Ostrofe's services." *Id.* at 1387 n.24.

159. *Id.* at 1387.

160. *Id.*

161. *See* 15 U.S.C. § 1 (1976), *supra* note 19.

a representative capacity, the majority inferred that Congress was concerned with more than merely maintaining competitive conditions.[162] It argued that "Congress was also concerned with the conduct of individuals acting on behalf of conspiring economic entities."[163] Since Ostrofe was injured by trying to comply with the mandates of the Sherman Act, he "suffered an 'antitrust injury . . . of the type the antitrust laws were intended to prevent.' "[164] Thus, the requirement of "*antitrust* injury," as defined in *Brunswick*,[165] was not a barrier to granting Ostrofe standing.

B. *The Dissent*

The dissent criticized the majority for ignoring controlling precedent in the circuit[166] and for misconstruing the Supreme Court's ruling in *Brunswick*.[167] Judge Kennedy argued that *Brunswick* has been clearly interpreted in the circuit as limiting standing to "persons injured as competitors in a defined market or in a discrete area of the economy."[168]

Furthermore, the dissent urged that by implicitly discarding the "target area" test, the majority had disregarded precedent in which the court "emphatically re-embraced the target area theory."[169] Judge Kennedy argued that the test envisages a balanc-

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162. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1387-88.

163. *Id.* at 1387.

164. *Id.* at 1388 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 489).

165. The Third Circuit includes the "definition of antitrust injury" from *Brunswick* as a factor in its "functional analysis" test. *See* Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d at 582.

Justice Brennan, when addressing the importance the circuit courts have placed on this language in *Brunswick*, noted: "*Brunswick* is not so limiting. . . . Thus while an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress . . . that is not the only form of injury remedial under § 4." Blue Shield of Virginia v. McCready, 102 S. Ct. at 2550.

166. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1389 (Kennedy, J., dissenting) (citing, e.g., John Lenore & Co. v. Olympia Brewing Co., 550 F.2d at 498-500 which discusses and applies the *Brunswick* analysis).

167. *Id.* at 1389 (Kennedy, J., dissenting).

168. *Id.* (Kennedy, J., dissenting) (citations omitted). Implicit in this line of argument is the accusation that the majority's decision runs contrary to the doctrine of *stare decisis*.

169. *Id.* (Kennedy, J., dissenting) (citing *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973), *reh'g denied*,

ing of policy interests[170] and encompasses *Brunswick's* requirement that "the injury flow[] from that which makes defendants' acts unlawful."[171] Applying the test to Ostrofe, the dissent found that he was not injured by the labels industry breakdown, but that his injury was merely collateral.[172] Hence, according to the dissent, Ostrofe was outside the target area.[173]

The dissent further found that Ostrofe did not have standing to challenge the boycott.[174] The dissent offered two alternative arguments in support of this position. First, the majority misplaced its reliance on *Radovich v. National Football league*[175] (*Radovich*) because Ostrofe's discharge was coercion apart from the main scheme.[176] Unlike *Radovich*, the boycott against Ostrofe, the dissent contended, was not "the same type as, and a part of, the larger conspiracy."[177] Second, the dissent viewed Ostrofe's failure to produce evidence in support of the boycott charge, independent of the conspiracy, as determinative.[178] Therefore, according to Judge Kennedy, the district court properly granted summary judgment.[179]

Finally, the dissent did not perceive this denial of standing as a harsh result in this case,[180] since Ostrofe had alternative remedies under state law.[181] Therefore, Judge Kennedy main-

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414 U.S. 1148 (1974)).

170. *Id.* at 1390 (Kennedy, J., dissenting).

171. *Id.* (Kennedy, J., dissenting). *See supra* text accompanying note 147.

172. *Id.* (Kennedy, J., dissenting).

173. *See id.* (Kennedy, J., dissenting).

174. *Id.* at 1390-91 (Kennedy, J., dissenting).

175. 352 U.S. 445 (1957). *See supra* note 104 for discussion of the *Radovich* decision.

176. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1391 (Kennedy, J., dissenting).

Recall that the majority argued that Ostrofe's case is indistinguishible from Radovich v. National Football League, 352 U.S. 445 (1957). *See supra* note 104 and accompanying text.

177. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1391 (Kennedy, J., dissenting).

178. *See id.* (Kennedy, J., dissenting). The dissent also noted that Ostrofe did not show ostracism after his resignation. *Id.*

179. *Id.* (Kennedy, J., dissenting).

180. *See id.* at 1392 (Kennedy, J., dissenting).

181. Judge Kennedy points out that California (located within the Ninth Circuit) has recognized the right of an at-will employee to sue for wrongful discharge on a breach of contract theory or tort action when the employee is discharged for refusing to perform an unlawful act. *Id.* (citing Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959)). *See* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816

tained, Ostrofe can seek compensatory relief and punitive damages without overextending the reach of federal antitrust laws.[182]

IV. Analysis

A. *The Majority*

1. *Relevant factors*

In summary, the majority identified the relevant competing policy interests and applied them to Ostrofe's claim.[183] The majority was concerned that the plaintiff, to be entitled to standing, represent an effective private enforcer of the antitrust laws. The court concluded that Ostrofe was worthy of fulfilling this role.[184] Against this factor in favor of granting standing, the majority considered the possibility that countervailing, negative factors were present, indicating that standing should be denied.[185] The court considered eight factors[186] and found none of these countervailing factors present in Ostrofe's case.

While the majority's articulation of the various factors is exemplary,[187] the Court's conclusory treatment of them is subject to criticism. Balancing is usually accompanied by close analysis,[188] yet the majority merely makes mention of some of these factors and negates their presence in the instant case.[189]

(1980) [hereinafter cited as *Protecting At Will Employees*].

182. The dissent argued that the majority's decision is indicative of a trend in the federal courts where, in the name of antitrust deterrence, the federal courts overextend their jurisdiction and threaten federalism. *See* Ostrofe v. H.S. Crocker Co., 670 F.2d at 1392 (Kennedy, J., dissenting).

183. *See supra* text accompanying notes 105-25.

184. *See supra* text accompanying notes 111-20.

185. *See supra* text accompanying notes 122-25.

186. *See supra* text accompanying notes 122-25.

187. The Third Circuit has been criticized for inadequately defining the factors to be considered in the "functional analysis" test promulgated in Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979). Spitzer, *supra* note 12, at 676.

188. *See, e.g.*, Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., No. 81-1203, slip op. (U.S. Feb. 23, 1983) (available Mar. 8, 1983, on LEXIS, Genfed library, Sup file) (where the Court stated, "[t]he decision . . . does not rest on a mechanical checklist, but on a careful balancing of the important factors . . . ." *Id. See also* Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 818-19 (1976) (noting that no one factor should be determinative in balancing and that a carefully considered judgment should take into account several factors).

189. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385-86.

Although some of the factors listed are superfluous or redundant, as is suggested by their cursory treatment,[190] others are important countervailing factors that require careful scrutiny. Of the court's list of eight countervailing factors, three should be considered of primary importance. The danger that the plaintiff is a member of a large class of plaintiffs speaks to the problem of allowing multiple claimants to recover judgments that would be trebled. By satisfying these judgments the defendant might be driven out of business, thus decreasing competition — and flouting the purpose of the antitrust laws. Such a result is the rationale underlying the second important factor: that the plaintiff's claims would impose a ruinous financial burden on the industry. This would occur where many discrete but nonduplicative treble damage recoveries would aggregate to bankrupt the defendant.[191] Finally, courts should be quick to deny standing where the recovery would be duplicative.[192]

a. Numerous plaintiffs

In considering the first factor, the court's analysis began: "Employees discharged by their employers for declining to take part in an anti-trust violation are not so numerous that recognizing their claims would threaten a flood of litigation . . . ."[193] This conclusion, however, is unsubstantiated. Since Ostrofe is the only employee alleging misconduct against his employer in this instance, perhaps the conclusion is justified here. Nevertheless, it is conceivable that Ostrofe is not the only employee injured by the acts of the allegedly conspiring corporations.[194]

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190. Among the lesser considerations are the extent that the plaintiff's damages would be "speculative" and the possibility that the defendant is "unwary" of the violation he has committed. Both are accorded, however, a separate paragraph. *See* Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385. *Cf. supra* note 201.

191. *See* Berger & Bernstein, supra note 2, at 851.

192. *See generally* Illinois Brick Co. v. Illinois, 431 U.S. 720 (pass-on doctrine), *reh'g denied*, 434 U.S. 881 (1977). *See supra* note 31.

193. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385.

194. *See generally* California State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc., 648 F.2d 527 (9th Cir. 1980) (standing denied where carpenter union brought action alleging association had conspired to coerce owners of property to hire contractors who were not signatories to collective bargaining agreement); Bubar v. Ampco Foods, Inc., 539 F. Supp. 535 (D. Idaho 1982) (five former employees denied standing).

Stated in terms of a general proposition the court's conclusion becomes even more questionable. The majority should have offered some basis for their conclusion or narrowed their finding (and language) to the facts presented by the instant case.

b. Financial ruin

In its decision, the majority frequently cited an article written by Berger and Bernstein,[195] where the authors advocate an approach similar to that adopted by the *Ostrofe* court. In setting forth their model, the authors propose that of all the countervailing factors, the court should consider the policy against "ruinous recovery" or "overkill" the most important.[196] Nevertheless, the majority merely concluded that granting employees standing would not be a ruinous financial burden without further explanation.[197] More attention is afforded the prospect that Ostrofe's damages would be "speculative."[198] When addressing this factor, the majority reasoned that courts are accustomed to assessing damages in cases of wrongful discharge.[199] Berger and Bernstein, however, argue that the "speculative" factor should play no part in the standing determination.[200]

c. Duplicative recovery

Similarly, when addressing the duplicative recovery factor the court summarily decided that granting standing would not result in a duplicative recovery.[201] The court correctly considered both prongs of this factor: that plaintiff might recover twice for the same injury and, that plaintiff might pass on the dam-

195. The frequent citation to, and similarity in language and approach to the Berger and Bernstein article, *supra* note 2, strongly suggests that the *Ostrofe* court used the authors' suggested approach as the prototype for their balancing test. This inference is bolstered by the fact that the authors used employee plaintiffs to illustrate the disparate treatment accorded similarly situated plaintiffs seeking standing.

196. *Id.* at 850-52.

197. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385.

198. *See supra* note 187.

199. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385.

200. *See* Berger & Bernstein, *supra* note 2, at 854-55.

201. The duplicative recovery, possibility of plaintiffs passing on their injuries, and ruinous recovery factors are all treated in one short paragraph, indicating the lack of analysis. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385.

ages or include them in the losses of others.[202] The court stated: "The damages done to such an employee are done to him alone; the damages he sustains are not passed on . . . ."[203] Again, it would seem the conclusions are sound, yet to dispense with this important factor without setting out the reasons for the conclusion sets a poor example for the lower courts who will need guidance in applying the majority's balancing test.

2. *The court's attention to less significant factors*

Juxtaposed to these three important countervailing factors are the factors that require only passing attention in most cases. Among these lesser considerations is the possibility that the antitrust violator is an unwary defendant undeserving of a treble damage penalty.[204] Antitrust infractions are perceived as intentional acts and as such, a defendant cannot be heard to complain that he was "unwary."[205] The "windfall" factor should also command relatively little attention.[206] A plaintiff receiving a "windfall" from his efforts to enforce the antitrust laws is, nevertheless, a private enforcer who ultimately acts in society's best interests. Without enforcement the antitrust laws lose their efficacy, and therefore the "windfall" is the transgressor's expense and society's gain. Nevertheless, the court pays considerable attention to some of the lesser factors to the detriment of the more important ones, which is especially disturbing in light of the Berger and Bernstein model on which the court seemed to base its analysis.[207]

3. *Remoteness*

A puzzling aspect of the majority opinion is the court's reference to "remoteness." The court stated that a discharged employee's injury flows "immediately, not remotely or indirectly."[208] This language is the language of the "target area" test

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202. *See supra* note 192.
203. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385.
204. *See supra* note 190.
205. *See supra* notes 72-73 and accompanying text.
206. *See* Berger & Bernstein, *supra* note 2, at 854.
207. *See supra* note 195.
208. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385.

and the "direct injury" test.[209] One wonders what role these indicia of the definitional tests will play in the new balancing test. The court may be indicating that the "remoteness" of the injury is merely one factor in the overall consideration, but this remains unclear.

Under the Berger and Bernstein analysis, the court's consideration of the "remoteness" of Ostrofe's injury is also misplaced. The authors take the position that if the court concludes that no countervailing policies are implicated, as the *Ostrofe* court has, "*the court should grant standing no matter how 'remote' the alleged injury.*"[210] The rationale is that the victim should be compensated whether his injury is "remote," inside or outside a "target area."[211] As noted with respect to the "windfall" factor, the deterrence policy also supports this conclusion. A "remote" enforcer is better than none.[212]

The court's characterization of Ostrofe as a "proximate victim" is as perplexing as its reference to "remoteness."[213] This "proximate" language might imply that the circuit intends to retain the element of foreseeability as a factor to be weighed in the standing determination. This could be viewed as a regression to the theoretically unsound use of foreseeability,[214] but the significance of this language is unclear. Perhaps subsequent cases will clarify the court's posture on the foreseeability element.

4. *Brunswick*

By addressing the *Brunswick* decision separately, the court fell victim to the evil that the balancing test was designed to

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209. *See supra* text accompanying notes 40-41, 59-61.

210. Thus, Ostrofe comes within Berger and Bernstein's Rule 1 of the authors' four-rule "Framework of Rules for Implementation and Accommodation." Berger & Bernstein, *supra* note 2, at 858. Rule 1 states:

> *Where no countervailing policy against a particular plaintiff's antitrust action is implicated, the court should grant standing no matter how "remote" the alleged injury.* This rule essentially provides that standing to obtain private antitrust relief shall, wherever possible, be coextensive with the substantive protection of the antitrust laws.

Id. at 860.

211. *Id.* at 860.

212. *See supra* text accompanying notes 206-07.

213. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385.

214. *See supra* note 71.

eliminate: attenuated distinctions and arguments that lose sight of the underlying purpose of section 4. It would have been sufficient to point out that "[t]he language of *Brunswick* must be read in light of the problem to which it was directed,"[215] and distinguish the case on factual grounds.[216] The *Brunswick* Court was faced with a plaintiff claiming injury from the defendant's actions that tended to maintain or increase competition.[217] The defendant's acquisitions rescued the failing bowling centers from collapse and thereby maintained the competitive conditions in the plaintiffs' market.[218] Ostrofe, on the other hand, alleged a conspiracy which had as its purpose the elimination of competition in the labels industry.[219] Such a conspiracy is not "inimical" to the antitrust laws.[220]

In failing to distinguish *Brunswick* on factual grounds, the majority resorted to unsound reasoning. It simply does not follow that because Congress imposed criminal sanctions on violators that persons refusing to violate the law were "intended" to be protected in this sense.[221] Criminal penalties are imposed to deter conduct that is contrary to society's interests. Society is the object of the protection, not the individual citizen (Ostrofe) who complies with the law. Thus, the court's argument attempting to put Ostrofe within the "core of congressional concern" fails. This flaw could have been avoided had the court merely included *Brunswick's* requirement of "*antitrust* injury" as just one of the many factors to be considered, as is the practice in the Third Circuit.[222]

5. *Prior antitrust litigation*

Finally, while the majority made reference to litigation involving Crocker,[223] the court failed to point out its significance.

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215. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1387.

216. *See supra* text accompanying notes 129-36.

217. *See supra* text accompanying notes 142-43.

218. *See supra* text accompanying notes 131-33.

219. *See supra* notes 16-21 and accompanying text.

220. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 488.

221. *See* Ostrofe v. H.S. Crocker Co., 670 F.2d at 1388.

222. *See, e.g.*, Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979) ("functional analysis" test).

223. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1380 n.1. The court merely cites the

In the prior litigation Crocker, and several other manufacturers of paper labels, agreed to a stipulated judgment.[224] The judgment required Crocker to take affirmative action to ensure that its officers and employees did not engage in conduct in violation of sections 1 and 2 of the Sherman Act. Although the judgment does not constitute an admission of guilt,[225] it suggests that the government suspected Crocker of anticompetitive practices, but lacked the resources to carry out the investigation and litigation. This illustrates the need for private enforcement, since the government does not have the means or resources to pursue all antitrust violations.[226] Ostrofe, as a private enforcer, is capable of filling this gap in the enforcement scheme.

B. *The Dissent*

The dissent's position draws most of its strength from the doctrine of *stare decisis*.[227] No one would question that the "target area" test was the rule in the jurisdiction prior to *Ostrofe*. Nevertheless, the Ninth Circuit has highlighted the test's flaws and limitations in dictum in a recent decision.[228] There the court

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prior litigation in which the defendnt's name appears. *See* United States v. H.S. Crocker Co., 1978-1 Trade Cas. ¶ 61,883 (CCH) (N.D. Cal. 1976); United States v. H.S. Crocker Co., 1975-2 Trade Cas. ¶ 60,615 (CCH) (N.D. Cal. 1975).

224. The *Compliance* section of the opinion states:

> Defendant shall take affirmative steps . . . to advise each of its officers, directors, managing agents and employees . . . of its and their obligations under this Final Judgment and of the criminal penalties for violation of Section IV of this Final Judgment. [Defendant] shall . . . cause a copy of this Final Judgment to be distributed at least one each year to each of its officers . . . .

United States v. H.S. Crocker Co., 1978-1 Trade Cas. ¶ 61,883, 73,703 (CCH) (N.D. Cal. 1976).

225. *Id.* The opinion stated that "this Final Judgment [does not] constitut[e] any evidence against or admission by any party with respect to any issue of fact or law. . . ." *Id.* at 73,702.

226. *See* Berger & Bernstein, *supra* note 2, at 848-49.

227. *See supra* notes 166-69 and accompanying text.

228. *See* California State Council of Carpenters v. Associated Gen. Contractors of California, Inc., 648 F.2d at 538 n.18, where the court wrote:

> We note with approval, however, that the zone of interests approach appears to embody a fundamental concern for the policies underlying the antitrust laws and Congress's purpose in creating a private antitrust damage action. That purpose appears to have been twofold:
>
> 1) to provide a meaningful compensatory remedy for private harm, and
>
> 2) to provide effective enforcement and deterrence by encouraging private parties to bring some of the suits not brought by the government.

wrote, "[w]e therefore suggest that, in future cases, parties who would be denied standing because they were not 'foreseeable victims' under the traditional target area test should still be permitted to litigate their claims if to do so would further the policies underlying the antitrust laws.[229] This clearly adumbrates the circuit's willingness to depart from the "target area" test to give effect to the policies underpinning section 4. The dissent seemed to lose sight of the fact that the purpose of section 4 is to see that the antitrust laws are enforced. For Judge Kennedy, it was enough that precedent has been established and the plaintiff does not fall within the "target area." He was unmoved by the fact that without Ostrofe as an enforcer, the violation may continue unchecked.

Perhaps the most critical flaw in Judge Kennedy's dissent, however, is that it fails to address or find fault with the majority's balancing test. The dissent did not advance any reason why the balancing test will prove inferior to the "target area" test. All of Judge Kennedy's arguments attacked the results achieved by applying the test and not the test itself.

V. Evaluation

The majority's case by case approach to standing under section 4 recognized that the standing inquiry should focus on balancing the policies in favor of private enforcement of the antitrust laws against the concern that granting standing will subject the violator to economic ruin.[230] The court articulated the factors a lower court should consider in making its determination and, in doing so, established an administrable test for the courts to apply.[231] With its emphasis on balancing factors and analyzing facts, the test eliminates both unwarranted attention on catch words and pharases (*e.g.*, "target," "direct") and the problem of "categorization." The result is a manageable analytical

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Id.

229. *Id.*

230. *See* Ostrofe v. H.S. Crocker Co., 670 F.2d at 1383 (citing Comment, *Standing To Sue For Treble Damages Under Section 4 Of The Clayton Act*, 64 Colum. L. Rev. 570, 571 (1964)).

231. *But cf. supra* text accompanying notes 193-95, 201-03 (the test is administrable, yet the *Ostrofe* court's analysis and application of the factors to the facts presented was conclusory and inadequate).

framework designed to foster the policy of antitrust enforcement.

Furthermore, this approach may eliminate some of the unpredictability associated with standing under the "target area" test. Formerly, a prospective plaintiff would have to indulge in highly conceptual guesswork to determine whether his injury was foreseeable and within the "target" of the conspiracy. The litigant risked protracted litigation on uncertain prospects merely to establish standing. While the balancing test offers no "bright line" answers, the prospective plaintiff can weigh the factors to determine whether or not he has standing. This should lend predictability to the determination, serving to encourage litigants to pursue their suits only when the factors are in their favor. The test, therefore, represents a sound approach in an area of law where judicial discretion is a necessity.

This test, if adopted in other jurisdictions, would also provide the discharged employee a remedy in jurisdictions where none exists under state law[232] and perhaps, more importantly, create an effective private enforcement mechanism that arrests the evil before substantial damage is done. Recognizing an employee's standing to sue would create a remedy for those discharged as a means of implementing and effectuating the anticompetitive scheme. The recovery would not depend on whether a state recognizes a cause of action for wrongful discharge and thus the remedy and deterrence would be uniform. The threat of treble damage awards would discourage employers from risking participation in anticompetitive conduct and thus enhance deterrence. The incentive to the employee not to cooperate also means the scheme will be frustrated at its inception and afford timely disclosure to the public. Early detection by an employee who "blows the whistle" after being discharged will mitigate the harm to the competitive market structure and reduce the period of inflated prices paid by the consumer.

VI. Conclusion

Ostrofe v. H.S. Crocker Co. is an important departure from

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232. *See Protecting At Will Empoyees, supra* note 181, at 1822 (only California, Illinois, Indiana, Michigan, Oregon, and West Virginia recognize the cause of action for wrongful discharge).

the definitional "target area" test in favor of a policy-oriented balancing test for standing determinations under section 4 of the Clayton Act. The test balances the opposing policy interests in light of the facts the case presents. The Ninth Circuit, in applying the test, correctly concluded that an employee who was unilaterally discharged by his employer as a means of effectuating an anticompetitive scheme has standing under section 4 of the Clayton Act. The *Ostrofe* decision, however, leaves unanswered questions pertaining to the part foreseeability and "remoteness" will play in future standing determinations. Subsequent decisions should eliminate this unfortunate ambiguity in the court's opinion, and thus help to advance the balancing test to attain a more prominent role in standing determinations.

J. Michael Naughton, Jr.