Boston College Law Review

Volume 12
Issue 4 *Special Section Recent Developments In Environmental Law*

Article 7

3-1-1971

Sherman Act -- Action for Treble Damages Under Section 4 of the Clayton Act -- Inquiry by Reason of Conspiracy of Automobile Manufactures to Restrain Development of Emission-Control Devices -- In Re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment

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Sherman Act—Action for Treble Damages Under Section 4 of the Clayton Act—Injury by Reason of Conspiracy of Automobile Manufacturers to Restrain Development of Emission-Control Devices —*In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment.*[1] —Plaintiffs, a collection of private individuals, cities and states, brought individual and class actions against General Motors, Chrysler, Ford, American Motors and the Automobile Manufacturers Association, alleging violation of Section 1 of the Sherman Act,[2] and petitioning the court for treble damages recovery under Section 4 of the Clayton Act.[3] The various complaints[4] purported to represent a number of interests including all individuals within the United States, all farmers within the United States, all individuals within certain states and their political subdivisions, and all persons sustaining damage to their real or personal property and business through air pollution.[5] These plaintiffs, whose causes of action were consolidated for purposes of pre-trial expedition pursuant to 28 U.S.C. § 1407,[6] alleged that the defendants combined or conspired to eliminate all competition among themselves in the research, development, manufacture, installation and publicity of emission-control devices on motor vehicles, and that the defendants, through cross-licensing arrangements, collectively agreed to limit the purchase price of patent rights developed by outside interests.[7]

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[1] 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,318, at 89,254 (C.D. Cal. Sept. 4, 1970) [hereinafter cited as *In re Motor Vehicle Pollution*]. The district court also filed an opinion on the class action, see 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,317, at 89,251 (C.D. Cal. Sept. 4, 1970).

[2] 15 U.S.C. §§ 1-7 (1964).

[3] 15 U.S.C. § 15 (1964), superceding Sherman Act § 7, 26 Stat. 210 (1890). Section 7 of the Sherman Act was repealed in 1955, ch. 283, § 3, 69 Stat. 283 (1955).

[4] The respective complaints and plaintiffs will hereinafter be referred to by names of the primary plaintiffs.

[5] See *In re Motor Vehicle Pollution* at 89,252.

[6] See note 1 supra. The instant action represents a unification of multiple actions transferred to the District Court for the Central District of California in order to facilitate multidistrict litigation pursuant to 28 U.S.C. § 1407.

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. . . .
>
> (b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. . . .

[7] The history of this action can be traced to January 10, 1969 when the Attorney General filed a complaint against these same defendants, alleging substantially the same antitrust violations as these plaintiffs. 5 TRADE REG. REP. (Case 2037) ¶ 45,069 (C.D. Cal. January 10, 1969). On October 29, 1969, a consent decree was entered whereby the defendants were enjoined and restrained from engaging in the conspiratorial activity alleged in the government's complaint. United States v. Automobile Mfrs. Ass'n, CCH 1969 TRADE CASES ¶ 72,907 (C.D. Cal. October 29, 1969).

The plaintiffs in the instant case brought this action only because they were refused intervention in the government's action. 5 TRADE REG. REP. (1970 Trade Cas.) ¶ 73,070 (C.D. Cal. November 7, 1969). There the petitioners prayed for intervention as a matter of right under Rule 24(b) of the Fed. R. Civ. P. They apparently hoped to have the

The defendants proceeded to attack each of the class actions for failure to meet the requirements of Rule 23 of the Federal Rules of Civil Procedure[8] because of an absence of questions of law and fact common to the class and predominating over questions involving only its individual members.[9] Identifying conspiracy, impact and damage as the determinable issues, the court ruled that a conspiracy to impede development of equipment that would substantially prevent biospheric pollution is a question common to all classes and actions, and thus requires only singular litigation.[10] However, the issue of the uniquely injurious impact of the conspiracy was deemed as multifarious as the various injuries sustained by the public itself. Consequently, impact did not constitute a question of fact common to the classes represented in certain of the complaints, and precluded those plaintiffs from maintaining class actions on behalf of all "citizens of the United States" and "all residents."[11] Exemplifying where impact would be common to such a general class, the court referred to several cases[12] in which the character of the antitrust violation—price fixing—so defined the impact and the affected public sector, that the two were nearly synonymous.[13] Thus, given the inflated market price, every occasion of purchase of the defendant's product or products was equally the occasion of a determinable injury.

Conceding that the impact of smog could inflict varying degrees of injury upon the crops, flora and fauna in a state, political subdivision, public corporation or public authority, the court ruled that common issues of law and fact do inhere in the properly represented classes in the complaints submitted by several states.[14] However, the

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consent decree set aside and subsequently force a trial on the claims, which, if successful, would have served as a sound basis for their treble damages actions. Alternatively, they sought to accomplish the same objective by insertion of an admission of liability, or "asphalt clause." Id. at 88,204 n.5. Predictably enough, the defendants refused to consent to such a provision. Relying upon United States v. Blue Chip Stamp Co., 272 F. Supp. 430 (C.D. Cal. 1967), the court ruled that the intervenors were not entitled to permissive intervention when such would preclude the entry of a consent decree. The court assumed the decree to be enforceable, productive of immediate benefits, and obviative of protracted trial proceedings and risk of loss. However, a provision was entered into the decree requiring that the transcript and all evidence of the dismissed grand jury proceeding be impounded by the Department of Justice, to be obtainable by private parties through subpoena or other means upon a showing of good cause. Id. at 88,205.

[8] Fed. R. Civ. P. 23(a) and (b)(3).

[9] See *In re Motor Vehicle Pollution* at 89,252-253.

[10] Id.

[11] Id.

[12] Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968); Illinois v. Harper & Rowe Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969); In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Water Meters, 304 F. Supp. 873 (Judicial Panel on Multidistrict Lit. 1969).

[13] "If you qualify as a 'buyer' of the commodity in question the liability—damage issues—except as to amount of damage—lend themselves to common determination." *In re Motor Vehicle Pollution* at 89,253.

[14] Id. at 89,254.

court also ruled that the government entities who sued for damages on behalf of citizens within their respective jurisdictions could not qualify as representatives in this class action since they were not themselves members of the class of citizens or residents aggrieved.[15] Representation of government agencies as a class, their own representative to be selected later, was permitted. Furthermore, the states were allowed to sue in a *parens patriae* capacity for damage to their economic interests, provided the suit was not an artifice for the recovery of individual citizen claims.[16] Therefore, under the requirement that in a class action representatives be members of their class, the respective states, their political subdivisions and agencies, and farmers are the only classes that can be properly represented in the instant case.

The thrust of the defendants' motion to dismiss, however, was their assertion that the absence of a commercial relationship between the parties precluded the plaintiffs from any award of damages. HELD: that for purposes of the motion to dismiss the court is compelled to assume the injury alleged[17] and to afford the plaintiffs, unless there be failure of proof, opportunity to remedy the alleged injury.[18] Given both the evolving character of interpretation of Section 4 of the Clayton Act and the recognition of the injury alleged in this suit as unprecedented, this casenote will examine the complaint in light of antitrust precedents and the ruling on the motion to dismiss.

Although the common law declared illegal and unenforceable contracts and combinations which restrained trade and competition, the consequent restraints were subject to no penalty, and any injury in-

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[15] Id.

[16] See Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945); Hawaii v. Standard Oil Co. of Calif., 301 F. Supp. 982 (D. Hawaii 1969).

[17] *In re Motor Vehicle Pollution* at 89,255, citing Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967) and Knuth v. Erie-Crawford Dairy Coop. Ass'n, 395 F.2d 420 (3rd Cir. 1968).

[18] *In re Motor Vehicle Pollution* at 82,256. In addition, the defendants moved to dismiss the Handy complaint by an attack on Count II, which alleged violation of " 'plaintiffs' right to clean air and to a safe and healthy environment, free from the contaminants and pollutants which have resulted, and continue to result, from the operation of gasoline vehicles, and the use therein of gasoline, which vehicles and gasoline were, and still are, manufactured, distributed and sold by the defendants . . . ." Handy claimed that these rights were protected by the Fifth, Ninth, Tenth and Fourteenth Amendments and by the Civil Rights Act, 42 U.S.C. §§ 1983, 1988 (1964). The court, however, declined to rule that private corporations, even though massive in stature, have the function of public utilities or government agencies. Any legal injuries they inflict are exclusively private, and cannot give rise to an action under constitutional or statutory protection.

The defendants also attacked the petition for injunctive relief in 14 of the 15 complaints. Citing the function of transferee cases pursuant to 28 U.S.C. § 1407, the court ruled that the prayer for relief would not impair expedition of the pre-trial proceedings, and, moreover, that an attack upon the prayer during the pre-trial stage was both premature and presumptive that the plaintiffs would be unable to introduce evidentiary need for further injunctive relief.

curred was not actionable.[19] Therefore, in order to afford the public protection from the injurious effects of restraints on commerce, legislation at the turn of the century incorporated into the prohibitory language of the Sherman and Clayton Acts the common law concept of unlawful restraints issuing from any combination, conspiracy, contract or agreement.[20] Furthermore, through Section 7 of the Sherman Act and later Section 4 of the Clayton Act, Congress manifested its intent that the Acts be self-enforcing by encouraging private litigation through a treble damages incentive.[21] Seemingly, the conditions that the private plaintiff had to allege for standing to sue under section 4 were clearly specified therein: (1) one or more antitrust violations; (2) injury to business or property; and (3) "by reason of" causation between the violation and the injury.[22] However, this simple language has been the genesis of a body of decisional law whose statutory interpretation is still far from a settled statement of law.

In a proceeding under section 4 the plaintiff must allege the existence of a contract, combination or conspiracy in restraint of trade or commerce.[23] The initial determination must then be made as to whether the activity is illegal on its face by application of the "per se rule," or whether it necessitates examination of circumstances and consequences by application of the "rule of reason." The "per se rule" recognizes that there are forms of conduct that intrinsically restrain free and open competition irrespective of any extraneous considerations such as the volume and location of trade, the intent of the promoters, or any projected socio-economic benefits.[24] Consequently, price-fixing, market division, group boycotts and tying arrangements

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[19] For a concise and historically well-grounded articulation of the scope and intended effect of antitrust legislation, see Apex Hosiery Co. v. Leader, 310 U.S. 469, 497-501 (1940).

[20] Id.

[21] Nevertheless, this intent to establish a force of litigants ancillary to the government, was given little substantiation during the first 50 years of the Sherman Act when only 13 of 175 actions were successful. Note, 18 U. Chi. L. Rev. 130, 138 (1950). Since World War II, however, private antitrust litigation has proliferated, but usually only pursuant to action initiated by the government. Cf. Comment, 61 Yale L.J. 1010, 1056-062 (1952); Bicks, The Department of Justice and Private Treble Damage Action, 4 Antitrust Bull. 5 (1959); and Barber, Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience, 30 Geo. Wash. L. Rev. 181 (1961).

[22] 15 U.S.C. § 15:

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

[23] 15 U.S.C. § 15 (1964): "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."

[24] See, e.g., Justice Black in Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). Cf. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 498 (1969).

have traditionally been held to be per se violations of antitrust law.[25] If, however, the illegal conduct is not susceptible to application of the "per se rule," the court applies the second test, the "rule of reason." This requires judicial examination and evaluation of the effects of the conduct to determine if there is present any unreasonable restraint of trade and competition.[26] However, given the voluminous investigative burden and economic analysis that the rule of reason test imposes upon the court, it has been advanced that the showing for availability of the "per se rule" has been restricted, and that its extension into areas other than flagrant violations is being judicially contemplated.[27] There should be a strong probability, therefore, that since conduct like price-fixing, market division, group boycotts and tying arrangements —conduct which at least permits the manufacture and sale of the product, albeit at an inflated price—has been declared illegal,[28] a fortiori, conduct which precludes the distribution, or even research, of a product will be a per se violation. Clearly, therefore, it would appear that if the plaintiffs in *In re Motor Vehicle Pollution* can affirmatively demonstrate that the automotive industry and its trade association have conspired to impair the research, manufacture and installation of emission-control devices, the courts should apply the "per se rule" and decide that such activity constitutes a flagrant violation of Section 1 of the Sherman Act. The fact that the defendants are patentees who are denying to the general public the availability of an invention whose preventive benefits are of incalculable value to public health care should be an additional factor in compelling the courts to apply the "per se rule." Even if a court believes it possible to analyze the violation in purely economic terms a cogent argument still remains. In a system of putatively free enterprise, the patent system and its attendant incentive to invent can remain viable only if there is a public demand for an invention and a consequent supply of that demand. Should this objective be defeated by deliberate nonproduction or dilatory production of an invention, then antitrust law should become operative.[29]

[25] The Per Se Rule, Report of the Special Subcommittee of the Sherman Act Committee, 38 ABA Antitrust L.J. 731 (1969) [hereinafter cited as Report of the Special Subcommittee]. Cf. Bork, The Rule of Reason and the Per Se Concept: Price-Fixing and Market Division, 74 Yale L.J. 775 (1965).

[26] Cf. Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911) and Board of Trade of the City of Chicago v. United States, 246 U.S. 238 (1918). But see the dissent of Louis B. Schwartz in the Report of the Attorney General's Nat. Comm. to Study the Antitrust Laws, at 390 (1955).

[27] Report of the Special Subcommittee, supra note 25, at 783-804, particularly 799-801.

[28] See note 25 supra.

[29] Report of the Attorney General's Nat. Comm. to Study the Antitrust Laws, at 230:

> Appraising the antitrust significance of non-use, courts have been quick to separate reasonable justification from design to restrain trade. For example, agreements among patentees not to use patented inventions are recognized in purpose and effect as devices to impede competitors and foreclose their competi-

The possibility does nevertheless remain that courts will not apply the per se rule since the defendants will argue that technological and economic factors, and not profit motivation or deliberate elimination of competition, have prevented the development and installation of emission-control devices. An application of the per se rule would, therefore, be an inequitable and unwarranted extension of this test. This apologia has apparently been grounded in assertions alleging absence of "technological feasibility"[30] and "irreparable damage to the American economy."[31] Supposedly this damage would occur if automobile manufacturers were compelled to install emission-control equipment that would reduce emissions in 1975 by ninety percent from 1970 levels of contamination.[32] But even if the courts should apply the rule of reason test the possibility should be remote that they could convince themselves that these corporate mastodons, possessing vast resources in a society that has witnessed numerous technological achievements, have been and will continue to be justifiably unable to produce emission-control equipment.[33] Equally remote should be the possibility that the courts would succumb to those contentions projecting damage to the economy, unless damage to life and to the biosphere is considered to be of lesser value.

However, the existence alone of an antitrust violation, no matter how egregious, will not entitle a plaintiff to a private cause of action since Section 4 of the Clayton Act predicates the cause of action upon legal injury, that is, the fact of damage to business or property, and

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tion. Contracts, combinations or conspiracies for non-use of patented inventions to 'fence in' a technology or to 'block' a competing technology are clearly unreasonable per se antitrust violations.

See particularly Blount Mfg. Co. v. Yale and Towne Mfg. Co., 166 F. 555 (D. Mass. 1909) and Vitamin Technologists v. Wisconsin Alumni Research Foundation, 146 F.2d 941, 944-46 (9th Cir. 1945), and especially at 952 regarding loss of a patent right because of deliberate withholding of use of an invention from the public.

[30] Ford Motor Company's Position on the Main Issues of Senator Muskie's Subcommittee's Amended Clean Air Act, Hearings on S. 3229, S. 3466 and S. 3546 Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works, 91st Cong., 2nd Sess., pt. 5, at 1604 (1970) [hereinafter cited as 1970 Hearings].

[31] 1970 Hearings, supra note 30, at 1608, Statement by L.A. Iacocca, Executive Vice President, Ford Motor Co., Concerning Pending Senate Changes to the Clean Air Act, September 9, 1970.

[32] Cf. the proposed National Air Quality Standards Act of 1970, H.R. 17255, 91st Cong., 2d Sess. § 202(b)(1) (1970):

> Beginning with model year 1975 or after January 1, 1975, any new light duty vehicle or any new light duty vehicle engine, as determined by the Secretary, shall be required, for purposes of certification under this Act, to meet emission standards established by the Secretary for those air pollution agents for which emission standards were in effect prior to the date of enactment of the National Air Quality Standards Act of 1970, which at a minimum, shall represent a 90 per centum reduction from allowable emissions for 1970 model year vehicles or engines.

For an exhaustive analysis of the Act, see Comment, 12 B.C. Ind. & Com. L. Rev. 570 (1971).

[33] See notes 30 and 31 supra.

not on the violation itself.[84] Consequently, the plaintiff, or class of plaintiffs, must allege and prove a specific form of injury personal to him and distinguishable from that incurred by the general public:

> Allegation of the specific injury suffered by plaintiff differing from that sustained by it as a member of the community is essential. The manner, nature, character and extent of the injury sustained and the facts from which injury accrues and upon which damages may be assessed as well as those with regard to the effect of the alleged violation upon plaintiff's business must be pleaded.[85]

The courts have attached no special significance to "business or property" under section 4 and have interpreted the phrase simply to mean a "commercial or industrial enterprise or establishment."[86] Within this purview, therefore, it appears that both public and private plaintiffs in the instant case will have to prove with sufficient particularity injury to their business or property. For example, claimants representing cities, governmental bodies or states, individually and in a *parens patriae* capacity, could show that their water and wildlife resources, public buildings, and potential for economic growth have sustained damage. Similarly, the complaint representing farmers as an injured class could show injury to their property in the form of diminution of land value, acreage yield or quality of crops. In a less tangible manner perhaps, private plaintiffs might show that their respective businesses have incurred injury in the form of impairment of profitable employee production. The obvious defense to these allegations of injury will simply be that they are too speculative to admit recovery. However, a distinction must be drawn between the fact of damage and the extent or amount of damage. Although courts at one time denied recovery for damages that were in any measure speculative, they now recognize proof of some injury and causative violation sufficient to permit the jury to infer the extent and amount of damages, especially where the defendant himself, by the character of his viola-

[84] See Beegle v. Thomson, 138 F.2d 875, 881 (7th Cir. 1943), cert. denied, 332 U.S. 743 (1944); Robinson v. Stanley Home Prods., Inc., 178 F. Supp. 230 (D. Mass.), aff'd, 272 F.2d 601 (1st Cir. 1959).

[85] Beegle v. Thomson, 138 F.2d at 881. See also Blaski v. Inland Steel Co., 271 F.2d 853 (7th Cir. 1959); United States v. Borden Co., 347 U.S. 514, 518 (1954). Until 1957 the plaintiff also had the burden of proving public injury as well. But Radovich v. National Football League, 352 U.S. 445, 453-54 (1957), held that Congress had determined what activities constituted public harm and that, since public injury can be assumed to exist in some manner in every violation, the plaintiff should not have this additional burden. Cf. also Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656 (1961); Klor's Inc. v. Broadway-Hale Stores Inc., 359 U.S. 207 (1959).

[86] Image and Sound Serv. Corp. v. Altec Serv. Corp., 148 F. Supp. 237, 238 (D. Mass. 1956); Broadcasters, Inc. v. Morristown Broadcasting Corp., 185 F. Supp 641 (D. N.J. 1960). Cf. also Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942), which extends the definition of business or property to include employment or occupation which is a source of income.

tion, has rendered the task of accurate determination difficult or impossible.[37]

Once an antitrust violation and injury have been established, the plaintiff has the burden of proving a causal relationship between them as required in the "by reason of" language of section 4.[38] The quantum of proof required to establish this fact of causation has been the subject of no little decisional controversy. Some courts have held that the proof should meet the test of preponderance of the evidence or even a test requiring some measure of certainty.[39] The Supreme Court has held that if a reasonable inference can be drawn from the facts alleged that the forbidden conduct caused the injury, the question of requisite causation is one for the jury.[40] However, the defendant's illegal conduct need not be the exclusive cause of the injury, but only a substantial factor or material cause.[41] Since the strict tests of preponderance or certainty contain degrees of flexibility that vary in each circumstance, it is difficult to predict the consequences of their application in *In re Motor Vehicle Pollution*. Clearly the evidence of scientific and commercial data adduced by the plaintiffs would have to show substantial and material causation attributable to the defendant's conduct, and not to any other contributory forces. However, since the

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[37] Cf. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931):

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner has sustained some damage and the measure of proof necessary to enable the jury to fix the amount.

See also Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); Wolfe v. National Lead Co., 225 F.2d 427, 433 (9th Cir.), cert. denied, 350 U.S. 915 (1955); Flinkote Co. v. Lysfjord, 246 F.2d 368, 392 (9th Cir), cert. denied, 355 U.S. 835 (1957).

[38] See note 22 supra.

[39] See Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 957 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960) ("preponderance of the evidence"); Flintkote Co. v. Lysfjord, 246 F.2d 368, 392 (9th Cir.) cert. denied, 355 U.S. 835 (1957) ("reasonable probability"); Momand v. Universal Film Exchanges, Inc., 172 F.2d 37, 43 (1st Cir. 1948), cert. denied, 336 U.S. 967 (1949) ("fair degree of certainty"). Cf. also Talon, Inc. v. Union Slide Fastener, Inc., 266 F.2d 731, 736 (9th Cir. 1959) and E.V. Prentice Mach. Co. v. Associated Plywood Mills, Inc., 252 F.2d 473, 477 (9th Cir.), cert denied, 356 U.S. 951 (1958).

[40] See Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 246 (1946); Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962). Cf. Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962), where the Court expressed strong disfavor against summary proceedings in antitrust litigation: "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."

[41] See Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); Switzer Bros., Inc. v. Locklin, 297 F.2d 39, 47 (7th Cir. 1961), cert. denied, 369 U.S. 851 (1962); E.V. Prentice Mach. Co. v. Associated Plywood Mills, Inc., 252 F.2d 473, 479 (9th Cir.), cert. denied, 356 U.S. 951 (1958); and Billy Baxter, Inc. v. Coca-Cola Co., — F.2d — (2d Cir. 1969).

judicial trend views such summary judgments with disapprobation,[42] it would appear likely that the courts in accord with precedent would allow reasonable men to infer from proof of an antitrust violation and subsequent loss, that the defendants' conduct is a substantial factor or a material cause of the injury. In order to defeat any finding that their illegal conduct has been a causative factor, the automobile manufacturers will probably produce evidence that the causative contributors to air pollution are multiple, and that their own responsibility for such pollution is demonstrably neither a dominant nor a substantial cause. However, since it is well established that a defendant's violative activity need not be the sole cause of an injury,[43] and that emissions from motor vehicles contribute decidedly to environmental contamination,[44] the trier of fact could find that the defendants' conspiracy to restrain the availability of emission-control devices is a substantial factor in causing the plaintiffs' injury.

Even if a plaintiff proves that he was injured in his business or property by reason of the defendants' antitrust misconduct, the final and crucial showing must be "directness of injury."[45] To preserve his standing to sue under this judicially constructed touchstone, the plaintiff must show that his injury is non-derivative, affecting him as a direct competitor of the defendant. This test of privity or direct relations was first enunciated in *Loeb v. Eastman Kodak Co.*,[46] which held that a stockholder-creditor of a company damaged by the defendant's illegal conduct could not bring a cause of action under section 4 because of the absence of privity with the defendant. As in any other derivative action the requisite standing to sue rests with the "directly" injured party,[47] not with a party whose injury is "indirect, remote and

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[42] See note 40 supra.

[43] See note 41 supra.

[44] See 1970 Hearings, supra note 30, at 1639. See also Id. at 1656-659, the letter from Senator Gaylord Nelson, member of the Comm. on Labor and Public Welfare, to Jennings Randolph, Chairman, Senate Public Works Comm. on results of the 1970 Clean Air Car Race where college students, modifying an internal combustion engine and employing non-leaded fuels, surpassed the proposed 1975 federal standards, a goal the automotive industry pleads it cannot meet until 1980.

[45] SCM Corp. v. Radio Corp. of America, 407 F.2d 166, 168 (2d Cir.), cert. denied, 395 U.S. 943 (1969); Productive Inventions v. Trico Products Corp., 224 F.2d 678, 679 (2d Cir. 1955), cert. denied, 350 U.S. 936 (1956); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952); Nationwide Auto Appraiser Serv. Inc. v. Association of Casualty and Surety Co., 382 F.2d 925, 929 (10th Cir. 1967); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956); Valasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), cert. denied, 372 U.S. 907 (1963); Billy Baxter, Inc., v. Coca-Cola Co., — F.2d — (2d Cir. 1970).

[46] 183 F. 704 (3d Cir. 1910).

[47] Consequently, several classes of would-be plaintiffs have been denied standing to sue under this requirement. See, e.g., Nationwide Auto Appraiser Serv., Inc. v. Association of Casualty and Surety Co., 382 F.2d 925 (10th Cir. 1967) (franchisors); Valasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962) (suppliers to an injured corporation); SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir. 1969) and Productive Inventions v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955) (patent

consequential."[48] Even if the plaintiff suffers injury as a result of the defendant's conduct, that injury is termed "indirect" if there is present an intermediate person who has also sustained injury. The thrust of the defendants' motion to dismiss, the allegation of an absence of any "commercial relationship"[49] between the parties, apparently anticipates the application of this "direct relations" talisman. For even if the plaintiffs can show a causal link between the antitrust violation and the injury to their business or property, it must be admitted that the traditionally defined direct commercial and competitive relationship to the automotive manufacturers is possessed only by those parties whose business involves the research, development or sale of automotive emission-control devices. The possibility exists that the plaintiffs could successfully assert privity by claiming to be purchasers of the defendants' product. Here, however, the courts could rule that this privity characterizes only vendors and vendees,[50] and that it is not the privity required for an antitrust recovery. Again, if the plaintiffs are to have the required direct relationship to the defendants, as defined in *Loeb*,[51] they must themselves be engaged in the same commercially competitive activity. It will be difficult for the plaintiffs in *In re Motor Vehicle Pollution* to advance such a claim. Although it is encouraging to note that the court in the pre-trial proceedings did not profess adherence to any legalistic atavism,[52] it is likely that should the court apply the impacted criterion of "direct relations" it will hold that the plaintiff's injury is indirect. Moreover, since "directness" is a test determinative of legal injury, a court ruling that the legal injury is insufficient due to indirectness will preclude submission to the jury even if a reasonable inference of causation could be drawn.

Other courts, while retaining the "directness of injury" test, have nevertheless adopted a more flexible standard of proof of such directness. They hold that standing to sue is fulfilled if the plaintiff, even if not in a relationship of privity or direct competition, can show himself within the target area, that is, "that area of the economy which is threatened by a breakdown of competitive conditions in a particular

licensors suing for lost royalties because of injury to licensee); Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), cert. denied, 352 U.S. 890 (1956) and Lieberthal v. North Country Lanes, Inc., 221 F. Supp. 685 (S.D.N.Y. 1963), aff'd on other grounds, 332 F.2d 269 (2d Cir. 1964) (lessors and landlords). But see Congress Building v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957) (where lessee is party to the violation).

[48] 183 F. at 109.

[49] See *In re Motor Vehicle Pollution* at 89,255.

[50] See, e.g., MacPherson v. Buick Motors Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[51] 183 F. 704 (3d Cir. 1910).

[52] *In re Motor Vehicle Pollution* at 89,256:

> We are now concerned with the phrase "injured in his business or property *by reason of anything* forbidden in the antitrust laws" in light of the allegations of these complaints, rather than the traditional, legalistic approach defined by the cases cited by defendants in their motion to dismiss. Each of the plaintiffs allege injury to their respective business or property *by reason of* antitrust violations of the defendants.

industry."[53] It is conceivable, therefore, that a court could allow a reasonable inference to be drawn that the plaintiffs herein were in the target area of the automotive manufacturers' illegal activity, and thereby suffered direct injury to their business or property. The defendants may disclaim any attempt to inflict such injury, but fact analysis could prove that the impact of their illegal restraints upon emission-control equipment hit the economic target of the plaintiffs' business and property and, in effect, marked the plaintiffs as the principal victims of the defendants' violations.

But the cases which apply the "target area" label,[54] albeit a less constrictive approach than privity, invariably involve plaintiffs who have some commercial relationship to the affected competitive market. And even in these cases standing to sue has been denied. For example, in *Billy Baxter, Inc. v. Coca-Cola Co.*[55] the plaintiff-franchisor purchased federally registered trademarks and secret carbonated beverage extracts, and then sold them to franchisee-bottlers who manufactured and distributed them, remitting royalties to the franchisor. But Billy Baxter, Inc. did not merely license secret trade information and then passively collect royalties. In its role of trademark owner, responsible to the purchasing public for product quality, the licensor actively exercised "quality control" by reserving to itself the supervisory right to inspect and direct the bottling practices and distribution performances of its licensees. When the defendant beverage manufacturers and licensors of bottlers allegedly engaged in market division and offered discriminatory price concessions to the plaintiff's customers in order to exclude his products from the market, the plaintiff sought treble damages under section 4. Nevertheless, the court ruled that the plaintiff had no standing to sue because his role as franchisor separated him from the actual production-distribution market. Therefore, he was not within the target area which received the primary impact of the violations.[56] Thus, a plaintiff whose relationship to the affected competitive market was more than merely tenuous was denied standing to sue. Given, therefore, the decisional interpretation of "target area"

[53] Conference of Studio Unions v. Loew's Inc., 193 F.2d 51, 55 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952). See also Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679, 688-89 (8th Cir. 1966); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418 (4th Cir.), cert. denied, 385 U.S. 934 (1966); Hoopes v. Union Oil Co. of Cal., 374 F.2d 480, 485 (9th Cir. 1967).

[54] See cases cited in note 53 supra.

[55] — F.2d — (2d Cir. 1970).

[56] But see the dissent of Judge Waterman who argues persuasively that Billy Baxter, Inc. was directly aimed at and directly hit by the alleged violation. Since the allegations assert that the defendants' objective was to eliminate, not the bottling industry, but Billy Baxter products, the bottlers are only incidentally hit. Although they are harmed to the extent that they are no longer able to produce and market Billy Baxter brand-name products, a market for bottling—perhaps now even the defendants' products—can still be in demand. But the complete extermination of Billy Baxter, Inc., clearly shows that it was the intended victim and was directly within the target area, even though his injury was transferred through an intermediary.

that requires a commercially competitive relationship to the affected market or economic sector,[57] it would seem improbable that the courts would find that the plaintiffs, though injured by the defendants' illegal activity, were within the directly jeopardized economic sector. Thus located in the peripheral "fall-out" area, their injury would be remote and indirect.[58]

However, if the courts decide not to remain bound by judicial allegiance to the traditional "by reason of" glosses and responses to injuries alleged under section 4,[59] but instead choose to explore statutory purpose and policy exclusively in light of these particular allegations of injury, then the complainants *In re Motor Vehicle Pollution* could be successful despite the novelty of injury and diversity of complainants. In *Radovich v. National Football League*[60] the Court held:

> Petitioner's claim need only be "tested under the Sherman Act's general prohibition on unreasonable restraints of trade" . . . and meet the requirement that petitioner has suffered injury thereby. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party . . . . *In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in these laws.* (Emphasis added.)[61]

Thus, although the Supreme Court has never ruled specifically upon the touchstone of directness of injury, its language strongly suggests that the only requirements for standing to sue under section 4 are proof of an antitrust violation and of an injury by reason of the violation.[62] Although application of the "directness" litmus may have occa-

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[57] See note 53 supra.

[58] See note 48 supra.

[59] See note 45 supra.

[60] 352 U.S. 445 (1957).

[61] Id. at 453-54.

[62] In Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656, 660 (1961), the Court held:

> Congress having thus prescribed the criteria of the prohibition, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.

See also Mandeville Farmers, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948):

> The statute does *not confine its prohibition to consumers, or to purchasers, or to competitors, or to sellers.* Nor does it immunize the outlawed acts because they are done by any of these . . . . *The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.* (Emphasis added.)

For a succinctly articulated alternative to anachronistic talismans, see Note, 64 Colum. L. Rev. 570, 585-88 (1964):

> To ask whether the plaintiff was "directly injured" is to ask the wrong question; what the court should ask is whether the plaintiff (1) is, himself, within the

sionally precluded a claim that was fraudulent or absurdly speculative, it is submitted that too often this device has been arbitrarily employed to avoid proper fact analysis. The plaintiff should be afforded the presumptive right of action, unless his claim would be conspicuously opposed to the purpose of the statute and the intent of Congress. The courts should be alert to causes of action which are specious or which would allow unconscionable windfalls, but they should not permit this consideration to obscure the recognition of the private litigant's broadly defined right of action under section 4. Ironically, under the judicial gloss of "directness of injury," the party who receives the windfall is the defendant if the plaintiff is not in privity or in the economic target area. Recovery thus becomes predicated upon how the plaintiff chooses to do his business and what degree of commercial relationship he has to the affected economic market. Hopefully the courts in the instant case will construe the "by reason of" requirement to find the allegations of injury sufficient to permit a jury determination. Should the jury then find for the plaintiffs and award treble damages, Section 4 of the Clayton Act would be infused with unprecedented viability in affording private parties economic protection and judicial remedy. Yet, in the final analysis, such anticipated success itself would be clothed in irony since it would be a clear demonstration of congressional failure to perceive or concede that antitrust violations could inflict injury upon entities of considerably greater value than business or property.

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class of persons entitled to protection and (2) alleges an injury of the type the statute was intended to guard against. The evident purposes of § 4 are the self-enforcement of the antitrust laws, the deterrent effect of possible treble liability, and the compensation of persons injured by violations. Its purpose is so broad and its mandate so clear that any person who can show damage prima facie should be within the protected class.

BOSTON COLLEGE
INDUSTRIAL AND COMMERCIAL
LAW REVIEW

VOLUME XII | MARCH 1971 | NUMBER 4