

A Farewell to Arms:* The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions

Section 4 of the Clayton Act grants a right to sue for treble damages to “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.”¹ The statute’s unrestricted language reflects its broad ameliorative purposes: improved enforcement of the antitrust laws, effective deterrence of future violations, and relief to those injured by anticompetitive conduct.² However, because of fear that the treble damages remedy will inflict unintended harms on defendants and society as a whole, courts tend to approach section 4 claims with caution. As one commentator has remarked, “[t]he judiciary has not been generous in construing Section 4”³

To this end, courts have developed specialized standing rules⁴ to restrict the pool of private plaintiffs permitted to pursue the remedy provided by the statute. This has been achieved primarily through the doctrine of legal causation. However, in recent years courts have incorporated an additional requirement into the standing equation: to have standing, a private antitrust plaintiff must also convince the court that he has suffered an “antitrust injury”—that is, an injury against which the antitrust laws were designed to protect.⁵

This Comment evaluates the modern antitrust standing doctrine and defines the role that the antitrust injury requirement should play in section 4 standing analysis. Part I explores the policy concerns that gave rise to the antitrust standing doctrine. Part II reviews the development of the doctrine, examines its components, and presents the mul-

* “One need not be sitting on the bull’s-eye in order to be within the target area of an antitrust conspiracy.” *Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1361 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); “But Mulvey was ‘hit’ as squarely as were *Karseal* and *Hoopes*: He was neither sideswiped nor struck by a carom shot.” *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073, 1076 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

1. 15 U.S.C. § 15 (1982).

2. See *infra* text accompanying notes 7-14.

3. L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 247, at 770 (1977).

4. Of course, plaintiffs must also satisfy article III standing rules, and where required, the prudential standing rules imposed by the federal judiciary. See generally C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 13 (4th ed. 1983).

5. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977).

tifactoral standing analysis recently adopted by the Supreme Court. Part III evaluates the Court's new approach and proposes that while it represents a vast improvement over the traditional doctrine, the new approach should be modified to include a more direct balancing of the full panoply of policy considerations that militate for and against a grant of standing. Part III also criticizes the addition of the "antitrust injury" requirement to the standing equation. Recognizing that the requirement is likely to remain, however, Part III finds it a role that will not unduly interfere with the substantive policies underlying section 4. The requirement of antitrust injury should be incorporated into the balancing test proposed herein as but one of many considerations brought to bear in standing determinations, and it should rarely—if ever—be given controlling effect.

I

ANTITRUST STANDING POLICIES

Section 4 of the Clayton Act provides private plaintiffs with a cause of action for injuries suffered from antitrust violations.⁶ The statute specifies that successful plaintiffs may recover treble damages together with reasonable attorneys' fees.

By creating this private right of action, Congress was able to promote several policies. First, section 4 provides compensation to victims of antitrust violations,⁷ and forces violators to divest themselves of the fruits of their wrongdoing.⁸ Second, the very nature of a treble damages provision provides strong encouragement for private attorneys general to enforce the antitrust laws, which in turn deters potential defendants from violating those laws.⁹ Finally, the enforcement and de-

6. 15 U.S.C. § 15 (1982): "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

7. See *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 486 n.10 (1977). In *Brunswick*, the Court noted that Senate discussions concerning the predecessor of § 4, § 7 of the Sherman Act, ch. 647, 26 Stat. 210 (1890), "indicate that it was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers," (quoting 21 CONG. REC. 1767-68 (1890) (remarks of Sen. George)), and that House debates concerning § 4 itself confirm that the remedy was "conceived primarily as 'open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered.'" (quoting 51 CONG. REC. 9073 (1914) (remarks of Rep. Webb)).

8. See *Blue Shield v. McCready*, 102 S. Ct. 2540, 2545 (1982).

9. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.") (emphasis in original); see also *Pfizer Inc. v. Government of India*, 434 U.S. 308, 314-15 (1978); *Perma Life*

terrence engendered under section 4 further the broad substantive goals of the antitrust laws: to promote competition,¹⁰ economic efficiency,¹¹ and consumer welfare;¹² to prevent concentrations of economic and social power;¹³ and to protect small business from overreaching conglomerates.¹⁴

Despite the benefits of section 4, there are dangers inherent in its provisions. Many courts have noted the "ripple" effect of antitrust violations, which affect large numbers of persons in many different ways.¹⁵ If access to the courts is unrestricted, the lure of treble damages may produce a host of claims resulting in "overdeterrence." Antitrust defendants will be exposed to ruinous liability, and more important, valuable resources will be diverted to defend an endless stream of lawsuits.¹⁶ Moreover, the courts will be burdened with a flood of suits brought by remotely situated plaintiffs with speculative claims involving complex or tenuous theories of recovery and damages that are diffi-

Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 809 & n.1, 848-50 (1977).

10. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4-5 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."); C. KAYSER & D. TURNER, *ANTITRUST POLICY* 14-16 (1959).

11. See R. POSNER, *ANTITRUST LAW* 8-22 (1976).

12. See R. BORK, *THE ANTITRUST PARADOX* 66 (1978), cited in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

13. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962) ("The dominant theme pervading congressional consideration of the 1950 amendments [including § 7 of the Clayton Act] was a fear of what was considered to be a rising tide of economic concentration in the American economy."); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945); C. KAYSER & D. TURNER, *supra* note 10, at 17-18; Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 382-84 (1965).

14. See *Brown Shoe*, 370 U.S. at 315-16 ("[C]onsiderations cited in support of the bill [included] the desirability of retaining 'local control' over industry and the protection of small businesses."). But cf. Baker & Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CALIF. L. REV. 311, 317-21 (1983); Kauper, *The 1982 Horizontal Merger Guidelines: Of Collusion, Efficiency, and Failure*, 71 CALIF. L. REV. 497, 503 n.16 (1983) (both noting the trend toward ignoring non-economic values in antitrust law).

Beyond the purposes mentioned in the text, courts recognize punishment and retribution as intended effects of the treble damages provision. *E.g.*, *Brunswick*, 429 U.S. at 486 n.10.

15. *E.g.*, *Blue Shield v. McCreedy*, 102 S. Ct. 2540, 2547 (1982); see also 2 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 333, at 162 (1978).

16. See 2 P. AREEDA & D. TURNER, *supra* note 15, ¶ 333, at 162. In addition, the particularly disturbing possibility remains that intrusive, burdensome and protracted periods of discovery will force defendants to settle almost any claim, regardless of the difficulties that a given plaintiff might face if ultimately forced to establish the cause and extent of his or her injury. See Note, *Application of the Data Processing Standing Test in Treble Damages Actions—Malamud v. Sinclair Oil Corp.*, 17 B.C. INDUS. & COM. L. REV. 489, 493 n.33 (1976); Comment, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 585 (1964).

cult to prove.¹⁷

Courts are, therefore, concerned lest an overly liberal standing analysis permit duplicative or derivative claims.¹⁸ Such claims, when they hold defendants liable more than once for the same injury, are unfair and impose an undue financial burden on defendants.¹⁹ Conversely, plaintiffs might be compensated twice, or for "injuries" that they never actually suffered.²⁰ The undesirability of permitting such "windfall" recoveries,²¹ coupled with the unjustifiable burden such suits would place on judicial resources, has led courts to limit standing to those plaintiffs who can most easily prove that their injuries resulted from the defendant's conduct, and whose damages can be ascertained without complex litigation.²²

Thus, the private right of action provided by section 4 implicates a broad spectrum of policy concerns. At one end, the "positive" policies underlying the statute encourage compensation of injured victims, enforcement of the antitrust laws, and deterrence of future violations. At the other end, the statute's generous remedy creates certain "negative" risks that threaten to undermine the effectiveness and fairness of the private antitrust enforcement scheme. Any economic benefit derived from the deterrence of anticompetitive conduct could thus be negated.²³

17. See 2 P. AREEDA & D. TURNER, *supra* note 15, ¶¶ 341c-d; 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, 801 (1976). At least one article has suggested that concern for administrative efficiency offers courts an independent incentive to stem the tide of private antitrust litigation. Berger & Bernstein, *supra* note 9, at 812.

18. See *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 911-12 (1983).

19. *Cf. Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731 n.11 (1977) (criticizing commentators who ultimately prefer duplicative recovery over denying any recovery to an injured plaintiff: "We do not find this risk [of duplicative recoveries] acceptable.").

20. For example, illegal overcharges may be absorbed at any level in a chain of distribution. Thus, allowing remote purchasers to recover treble damages for illegal overcharges might result in compensation for injuries never actually suffered. See *id.* at 730-31.

21. See *Minnesota v. United States Steel Corp.*, 299 F. Supp. 596, 601 (D. Minn. 1969), *vacated on other grounds*, 438 F.2d 1380 (8th Cir. 1971). Essentially, a "windfall" recovery is a windfall not because it is trebled, but because it does not represent damages actually suffered by the plaintiff, or represents an injury that has already been compensated. See Berger & Bernstein, *supra* note 9, at 812.

22. *Associated General Contractors*, 103 S. Ct. at 911-12. In addition, courts fear "overkill"—that is, the possibility that a multiplicity of treble damage actions will punish defendants more than Congress envisioned and in the process eliminate important sources of competition. See *Calderone Enters. v. United Artists Theatre Circuit*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *cf. Berger & Bernstein, supra* note 9, at 851-52 (arguing that this concern is valid only insofar as anticompetitive effects may flow from the bankruptcy of a defendant).

23. See *Associated General Contractors*, 103 S. Ct. at 912 (in discussing the administrative burdens involved in one proceeding, the Court wrote that such litigation "not only burdens the courts, but also undermines the effectiveness of treble-damages suits" by prejudicing later plain-

To avoid these destructive effects, courts have developed specialized standing rules for section 4 plaintiffs. The history of antitrust standing analysis is, therefore, a chronicle of attempts to harmonize these contradictory policies. Although judicial responses to this challenge vary, they center on two major requirements: legal causation (the proper plaintiff) and antitrust injury (the proper harm). This Comment focuses on these requirements.

II

THE DEVELOPMENT OF ANTITRUST STANDING ANALYSIS

The federal circuit courts are the source of most antitrust standing analysis. For many years, the doctrine of legal causation represented the primary component of such analysis. More recently, courts have required plaintiffs to demonstrate that the harms they have suffered constitute "antitrust injury." During the past two years, the Supreme Court has taken a more active role in the formulation of antitrust standing doctrine, which has culminated in a new approach to standing analysis. This Part traces these developments.

A. Causation Analysis: The Proper Plaintiff

Historically, section 4's "by reason of," or causation, requirement has received the most attention in the courts.²⁴ On its face, the statute appears to require only causation-in-fact. Courts stress, however, that "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable."²⁵ The courts determine that point through the doctrine of legal causation.

The causation requirement was formulated in response to the perceived need to eliminate those plaintiffs whose claims present undue

tiffs); see also *Calderone Enterprises*, 454 F.2d at 1295 (noting the hazards of overkill and a flood of burdensome litigation); *Minnesota v. United States Steel Corp.*, 299 F. Supp. at 601.

24. See *Blue Shield v. McCready*, 102 S. Ct. 2540, 2547 n.12 (1982) (noting without comment the various tests developed by the courts of appeal); Note, *supra* note 16, at 494 n.40.

25. *Blue Shield*, 102 S. Ct. at 2547 (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting)); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972) ("The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."). *Standard Oil* is often cited by the circuit courts as support for their own standing restrictions. See, e.g., *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 546 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); *Bravman v. Bassett Furniture Indus.*, 552 F.2d 90, 96 n.13 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977); *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1146 (6th Cir. 1975). But compare the very expansive language used by the Supreme Court in *Pfizer Inc. v. Government of India*, 434 U.S. 308, 312 (1978) (quoting *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)): "The Act [§ 4] is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

"negative risks" to the policy goals of section 4.²⁶ It is thus intended to provide a framework for finding plaintiffs who best further the antitrust standing policies. The doctrine itself is the brainchild of the circuit courts; in order to implement it, the courts have formulated several "tests."

1. *The Direct Injury Test*

As its name implies, the direct injury test permits only those plaintiffs immediately and primarily affected by an antitrust law violation to seek recovery under section 4.²⁷ Courts applying this test generally limit standing to those in privity²⁸ or in competition²⁹ with the defendant.³⁰

26. See generally *Berger & Bernstein*, *supra* note 9, at 812, 813-15.

27. See *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678, 679 (2d Cir. 1955) ("[O]nly those at whom the violation is directly aimed or who have been directly harmed may recover."), *cert. denied*, 350 U.S. 936 (1956); *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910) ("The injury complained of was directed at the corporation, and not the individual stockholder. Hence any injury which he, as a stockholder, received was indirect, remote, and consequential.").

Currently no court uses the direct injury test as its exclusive standing analysis; rather, the test plays a supplementary role as a means of excluding suits presenting risks of double recovery. Thus, the direct injury test has been used to deny standing to such plaintiffs as shareholders, creditors, suppliers, landlords, and employees of more directly injured parties. See *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 127 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 54 n.1 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952), and cases cited therein.

The Supreme Court has been receptive to direct injury analysis. In *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), the Supreme Court held that an antitrust violator could not assert a "pass-on" defense against a direct consumer plaintiff suing for return of a monopolistic overcharge. Thus, the defendant could not claim that the plaintiff never suffered an injury, because the overcharge was simply added to the cost of the product sold to the buyer. *Id.* at 487-88. Later, faced with the reverse situation of an indirect consumer attempting to recover a monopolistic overcharge, the Court held that where the monopolist would be precluded from asserting a pass-on defense against a direct purchaser, indirect purchasers could not use the pass-on theory offensively to recover. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 734-35 (1977).

The Supreme Court has recently moved beyond this specialized context, indicating that direct injury analysis may play an important part in antitrust standing analysis. See *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 910 (1983); *infra* text accompanying notes 92-101, 132-34.

28. See *In re Multidistrict Vehicle Air Pollution*, 481 F.2d at 127; *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Klein v. Lionel Corp.*, 237 F.2d 13, 15 (3d Cir. 1956); Note, *supra* note 16, at 496. The idea is to eliminate those plaintiffs who are seeking to recover for injuries some or all of which may have been absorbed by someone standing between the plaintiff and the defendant.

29. See, e.g., *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518, 519 (3d Cir.) (per curiam) (denying standing to lessor to sue for restraint imposed on tenant by tenant's competitor), *cert. denied*, 352 U.S. 890 (1956); *Loeb*, 183 F. at 709 (shareholder may not sue for harms inflicted on its company by competitor firm); 2 P. AREEDA & D. TURNER, *supra* note 15, ¶ 334c, at 164-65.

30. For example, under the direct injury test a shareholder may not directly sue a corporation whose anticompetitive tactics harm his company and thereby diminish the value of his shares. Rather, the shareholder's company is the proper plaintiff, because it is more immediately harmed.

Courts justify the direct injury requirement by citing the risks of overkill, duplicative recoveries, and speculative or complex damage claims.³¹ If plaintiffs affected only by injuries inflicted more immediately upon others are granted standing, such plaintiffs might be overcompensated, while defendants might be punished more than once for their evils.³² Moreover, limiting standing to directly injured persons allows courts and defendants to avoid the burden of claims asserting injuries only tenuously related to defendants' actions, or requiring complex damages litigation.³³

2. Target Area Causation Analysis

Target area causation analysis requires the plaintiff to show that he is "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."³⁴ The circuits applying this general rule have split, however, on how properly to interpret it.

a. The Restrictive Target Area Test

The Second, Fifth, and Seventh Circuits have interpreted the target area rule restrictively,³⁵ maintaining that to have standing, a person must be one against whom the anticompetitive conduct, whether by intent or natural design, is aimed.³⁶ Like the direct injury test to which

Thus, the shareholder's only remedy would be a derivative action on behalf of the company for its lost profits.

31. *E.g.*, *Loeb*, 183 F. at 709; *see also Associated General Contractors*, 103 S. Ct. at 911-12. With each additional level of plaintiffs, the risk that factors other than the antitrust violation caused the plaintiff's injury increases. By excluding the more remote tiers of plaintiffs, overkill and windfalls can be reduced, and the risks of speculative damages and duplicative recoveries minimized.

32. *Loeb*, 183 F. at 709; *Hans Hansen Welding Co. v. American Ship Bldg. Co.*, 1973-2 Trade Cas. (CCH) ¶ 74,739 (S.D.N.Y. 1973) (injured employees denied standing because of likelihood they will be compensated if employer recovers treble damages). *See generally Berger & Bernstein, supra* note 9, at 813-19.

33. *See Associated General Contractors*, 103 S. Ct. at 911-12; *cf. 2 P. AREEDA & D. TURNER, supra* note 15, ¶ 335c, at 174 (noting the increased risks of speculative damages from less proximate plaintiffs).

34. *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *see also In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 129 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973) and cases cited therein.

35. *Repp v. F.E.L. Publications*, 688 F.2d 441, 445 (7th Cir. 1982); *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 546 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); *Southern Concrete Co. v. United States Steel Corp.*, 535 F.2d 313, 316 (5th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *Calderone Enters. v. United Artists Theatre Circuit*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

36. For example, in *Billy Baxter Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971), the court denied standing to a soft drink formula licensor who alleged

it is closely related, this approach has been justified on two grounds: it reduces the threat of overkill, and it restricts standing to those plaintiffs whose injuries can be most easily proven and whose claims present little risk of duplicative or derivative recovery.³⁷

b. *The Liberal Target Area Test*

The Fourth and Ninth Circuits have employed a more liberal version of the target area test.³⁸ Under this approach, the target area extends beyond those market participants at whom the conduct is aimed to include any plaintiff *foreseeably* threatened by the anticompetitive act.³⁹

In contrast to the restrictive target area rule, the foreseeability ap-

a conspiracy to divide the product market to the exclusion of its licensees, stating: "The only 'target area' . . . is the marketing of bottled beverages." *Id.* at 188. The court indicated further that had the conspiracy been aimed directly at the licensor—for example, by an attempt to coerce his licensees into terminating relations with the plaintiff—the licensor would have had standing. *Id.*

The *Billy Baxter* court was less concerned with the intended victim than it was with the actual victim. For a case using restrictive target area analysis focusing on intent, see *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976), in which a union, its members, and the members' employer each alleged losses due to a conspiracy between another union and a tugboat operator to exclude the plaintiffs from the tugboat leasing and labor markets. The court noted that had the plaintiffs alleged conduct aimed at the employer alone, the employees and union would not have had standing. *Id.* at 1176. But since the complaint also alleged that the conspiracy was designed to decrease competition in the tugboat labor market, all of the plaintiffs had standing. *Id.* at 1176-77.

37. *Calderone Enterprises*, 454 F.2d at 1295; 2 P. AREEDA & D. TURNER, *supra* note 15, ¶ 334d (noting the benefits of restrictive analysis but ultimately somewhat critical of the restrictive target area approach); Lytle & Purdue, *supra* note 17, at 798-801.

38. See *Solinger v. A & M Records*, 586 F.2d 1304, 1309-11 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979) (plaintiff foreseeably affected by market allocation as a potential entrant into the record distribution market; plaintiff not foreseeably affected as an employee terminated by an existing competitor); *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971) (film producer on percentage-based contract foreseeably affected by a block-booking arrangement between distributors and theater owners); *Hoopes v. Union Oil Co.*, 374 F.2d 480, 485 (9th Cir. 1967) (vendor had standing to challenge a complicated lease-leaseback arrangement between an oil company and a service station owner-operator where use of the vendor's property would foreseeably be restricted); *South Carolina Council of Milk Producers v. Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966) (remanding to determine whether milk producers within the target area were foreseeably affected by wholesale and retail grocers' conspiracy to monopolize sale of groceries by predatory pricing); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 364-65 (9th Cir. 1955) (wax products manufacturer's illegal tying of sales to its franchised service stations foreseeably affected the plaintiff products manufacturer); *L & H Inv., Ltd. v. Belvey Corp.*, 444 F. Supp. 1321 (W.D.N.C. 1978) (retailer-tenant foreseeable target of landlord's conspiracy with other retailer-tenants to restrict new tenant entry by refusing to allow lease assignments).

39. For example, in *Blankenship v. Hearst Corp.*, 519 F.2d 418 (9th Cir. 1975), a newspaper distributor complained of a price-fixing scheme in which he was an unwilling participant. The court held that the target area included such distributors, because the defendant "could reasonably foresee that efforts directed at dealers to have the dealers influence their carriers as part of a scheme to control retail price would affect the dealers." *Id.* at 426.

proach to causation analysis suffers from a lack of any firm justification or explanation of its purposes. However, commentators who have considered the question appear to justify it on tort law principles.⁴⁰

3. *The Zone-of-Interests Test*

Several years ago, the Sixth Circuit rejected the direct injury and target area tests.⁴¹ Instead, it adopted the administrative law rule whereby a plaintiff need show no more than that "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute . . . in question."⁴²

The court rejected the direct injury and target area tests because those tests, by requiring factual showings, confuse the questions of standing and merits, and demand too much from a plaintiff at the pleadings stage.⁴³ Instead, the court reasoned that the public interest element of section 4 makes private antitrust actions analogous to administrative law actions. Thus, it adopted the broad zone-of-interests test employed in that context.⁴⁴

4. *The Balancing Tests*

In recent years, a fourth test has been employed in the standing determination. In *Cromar Co. v. Nuclear Materials & Equipment Corp.*,⁴⁵ the Third Circuit endorsed a "factual matrix" test, stating that "no single formula captures the many considerations involved" in determining whether a plaintiff has standing.⁴⁶ The test itself, as aptly described in a subsequent case, is "essentially a balancing test comprised of many constant and variable factors."⁴⁷ These factors have

40. See Berger & Bernstein, *supra* note 9, at 835; see also Note, *Antitrust Injury and Standing: A Question of Legal Cause*, 67 MINN. L. REV. 1011, 1032-33, 1037-38 (1983). But see 2 P. AREEDA & D. TURNER, *supra* note 15, ¶ 334d, at 165-66 ("There is something to be said for excusing the defendant from damage liability for injuries that he neither intended nor could reasonably foresee But query whether all reasonably foreseeable injuries should be recognized for antitrust purposes.").

41. *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1149-50 (6th Cir. 1975).

42. *Id.* at 1151 (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)); see also *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1233-35 (6th Cir.) (following the *Malamud* zone-of-interests test), *cert. denied*, 454 U.S. 893 (1981). But see *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983) (rejecting the zone-of-interests test in light of the new multifactorial analysis announced in *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897 (1983)).

43. *Malamud*, 521 F.2d at 1149-50.

44. *Id.*

45. 543 F.2d 501 (3d Cir. 1976).

46. *Id.* at 508-09. The court's acknowledged goal was to devise a test which preserved the enforcement value of the treble damages remedy, without overextending its availability to the point of overkill. *Id.* at 506, 508.

47. *Bravman v. Bassett Furniture Indus.*, 552 F.2d 90, 99 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977):

included the direct injury and target area tests.⁴⁸

More recently, a panel of the Ninth Circuit adopted a balancing analysis focusing on the standing policies implicated by section 4, to the exclusion of more formalistic tests.⁴⁹ There are many advantages to this approach, especially when combined with the new multifactoral standing analysis developed by the Supreme Court in *Associated General Contractors, Inc. v. California State Council of Carpenters*.⁵⁰ These advantages are discussed at greater length below.⁵¹

B. Antitrust Injury Analysis: The Proper Harm

In recent years, the federal judiciary has added another requirement to the standing equation. In addition to showing causation, plaintiffs must demonstrate that they have suffered "antitrust injury." This test, which requires more than the traditional showing of injury-in-fact, is intended to limit recovery under section 4 to those injuries with which Congress was most concerned when it enacted the antitrust laws.⁵²

The test originated in *Brunswick Corp. v. Pueblo Bowl-O-Mat*.⁵³ There, one of the largest manufacturers of bowling equipment began to acquire failing bowling centers in an attempt to lessen the impact of a general decline in the bowling industry. Competing bowling centers challenged the acquisitions under section 7 of the Clayton Act,⁵⁴ alleg-

Each case, therefore, must be carefully analyzed in terms of the particular factual matrix presented. In making this factual determination courts must look to, among other factors, the nature of the industry in which the alleged antitrust violation exists, the relationship of the plaintiff to the alleged violator, and the alleged effect of the antitrust violation upon the plaintiff. Then, while recognizing that breaches of the antitrust laws have effects throughout society, a court must decide whether this plaintiff is one "whose protection is the fundamental purpose of the antitrust laws."

Id. (quoting *Cromar Co. v. Nuclear Materials & Equip. Corp.*, 543 F.2d 501, 506 (3d Cir. 1976)).

48. *See id.* at 99-100 (plaintiff was within the area threatened by the conspiracy and was directly injured by the restraints: no one stood between him and the defendant to absorb the impact); *see also* *Mid-west Paper Prods. Co. v. Continental Group*, 596 F.2d 573, 583-87 (3d Cir. 1979) (buyer from competitor of price fixer was without standing to sue a price fixer for overcharges because the plaintiff, though within the target area as a buyer of bags, was not in privity with the price fixer, and because of possible ruinous recoveries, speculative damages, and complex litigation).

49. *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 1244 (1983). The court considered the "positive" policies of compensation, enforcement, and deterrence, as well as the "negative" risks of overkill, and the possibility of duplicative, speculative, passed-on, or windfall recoveries. *Id.* at 1384-86.

50. 103 S. Ct. 897 (1983).

51. *See infra* text accompanying notes 135-52.

52. *See Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977); *see also* *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 909-10 (1983); *Blue Shield v. McCready*, 102 S. Ct. 2540, 2550 (1982).

53. 429 U.S. 477 (1977).

54. 15 U.S.C. § 18 (1982).

ing that their profits had declined due to the entry of Brunswick, a “giant” among “pygmies.”⁵⁵ They claimed that had Brunswick not acquired the failing centers, they ultimately would have closed. Thus, the remaining competitors’ profits would have increased.⁵⁶ After a full trial on the merits, a jury awarded the plaintiffs damages on that theory.

On appeal, the Supreme Court first noted that the acquisitions were unlawful because of the anticompetitive effects made possible by the entry of a “‘deep pocket’ parent into a market of ‘pygmies.’”⁵⁷ However, the injury alleged—the loss of profits that would have accrued had the defendant not acquired the centers—did not reflect the size of the entrant. Rather, the same loss would have occurred had another “pygmy” acquired the centers.⁵⁸ Furthermore, the Court noted that in effect the plaintiffs were complaining that Brunswick had *pre-served* competition by acquiring the failing centers. The Court thus concluded that to permit the recovery of profits that would have accrued only if competition had decreased would frustrate the substantive purposes of the antitrust laws.⁵⁹ It therefore reversed and remanded for a judgment notwithstanding the verdict:

We . . . hold that for plaintiffs to recover treble damages on account of § 7 violations, they 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. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be “the type of loss that the claimed violations . . . would be likely to cause.”⁶⁰

The antitrust injury test, as stated and applied in *Brunswick*, however, was ambiguous. It was unclear whether the controlling factor in *Brunswick* was the increase in competition, the absence of a decrease in competition, or the lack of injury of the kind section 7 was meant to prevent.⁶¹ Moreover, the *Brunswick* Court was reviewing an award of damages. It was, therefore, unclear whether antitrust injury was relevant only in determining damages, or was also a standing require-

55. *Brunswick*, 429 U.S. at 482. The “giant among pygmies” or deep-pocket theory of illegal entry by acquisition essentially is that competition is threatened merely by the size and resources of the new competitor. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

56. *Brunswick*, 429 U.S. at 481.

57. *Id.* at 487; see *supra* note 55.

58. *Brunswick*, 429 U.S. at 487.

59. *Id.* at 488.

60. *Id.* at 489 (quoting *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1968)) (emphasis in original).

61. See *supra* text accompanying note 60.

ment.⁶² Finally, it was uncertain whether the test applied in cases other than those involving "prophylactic offenses"⁶³ such as unlawful mergers.⁶⁴

Notwithstanding these ambiguities, most courts have enthusiastically adopted *Brunswick's* antitrust injury rule. Not only have they incorporated the rule into standing analysis,⁶⁵ but they treat the absence of antitrust injury as an absolute bar to a section 4 action.⁶⁶ Moreover,

62. See *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 888 (5th Cir. 1982), *vacated and remanded*, 103 S. Ct. 1244, *aff'd on other grounds on reh'g*, 704 F.2d 785 (5th Cir.), *cert. denied*, 104 S. Ct. 393 (1983).

63. For purposes of this Comment, the author has coined the term "prophylactic offenses" to refer to those antitrust violations that are illegal not because they actually restrain trade, but because of their tendency to restrain trade. Examples are illegal mergers and price discriminations. See *infra* text accompanying notes 181-86.

64. See, e.g., *Ostrofe v. H. S. Crocker Co.*, 670 F.2d 1378, 1386 (9th Cir. 1982) (expressing doubt as to *Brunswick's* applicability to a § 1 case), *vacated and remanded*, 103 S. Ct. 1244 (1983); *Midland Telecasting Co. v. Midessa Television Co.*, 617 F.2d 1141, 1145 (5th Cir.) (reliance on *Brunswick* "misplaced" in Sherman Act § 1 action), *cert. denied*, 449 U.S. 954 (1980); *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 15 (1st Cir. 1979) (distinguishing Sherman Act §§ 1 and 2 claims from *Brunswick*, because the latter involved a § 7 prophylactic case where no harm resulted), *cert. denied*, 446 U.S. 983 (1980); *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1303 (4th Cir. 1979) (unlike cases involving illegal mergers, "the case will be quite rare in which a *per se* violation of the Sherman Act does not cause competitive injury"); *Bosse v. Crowell Collier & MacMillan*, 565 F.2d 602, 607 n.5 (9th Cir. 1977) (appearing to limit the *Brunswick* antitrust injury test to § 7 merger cases).

Five years after *Brunswick*, in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), the Supreme Court extended antitrust injury analysis to cases involving price discriminations. Before *Truett Payne*, courts were split over the availability of the automatic damages theory. Compare *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969) (allowing automatic damages), *cert. denied*, 396 U.S. 1012 (1970), with *Enterprise Indus. Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.) (rejecting automatic damages), *cert. denied*, 353 U.S. 965 (1957). Under the automatic damages theory, instead of proving the actual amount of sales lost due to a price discrimination, the plaintiff need only show the difference in the price he paid and the price paid by his favored competitor. After *Truett Payne*, however, if a plaintiff can show no more than a potentially anticompetitive price discrimination, he cannot recover. Instead, his damages must consist of actual profits lost as consumers switch to the favored competitors, resulting in an actual decrease in competition. 451 U.S. at 562.

Truett Payne, however, did not answer the lower courts' doubts as to the applicability of the antitrust injury test in nonprophylactic contexts, since price discrimination can also be considered a "prophylactic" offense. See *infra* text accompanying notes 181-85.

65. See, e.g., *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977) (the first case to explicitly incorporate the antitrust injury test into § 4 standing analysis). But see *Industrial Investment*, 671 F.2d at 888-89 ("It is analytically unsound, we think, to consider the requirement of antitrust injury an additional component of the standing inquiry.").

66. *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir.) (in sale of air-conditioning manufacturing division, where buyer intended to dominate the nonautomotive air-conditioning market by means of a breach of contract, seller—although within the "zone of interests" protected by the antitrust laws—did not suffer antitrust injury *qua* competitor because it was no longer a competitor in the air-conditioning market, and thus lacked standing to sue *qua* competitor; seller did have standing, however, *qua* consumer), *cert. denied*, 454 U.S. 893 (1981); *Warner Management Consultants v. Data Gen. Corp.*, 545 F. Supp. 956 (N.D. Ill. 1982) (although computer systems distributor was the target of supplier's efforts to implement a tying arrangement, lost profits due to the distributor's refusal to comply with the arrangement was not antitrust injury as

they have made it a standing requirement in every antitrust action, thus extending the *Brunswick* rule beyond the prophylactic context in which it arose.⁶⁷ Confusion remains, however, over the meaning of the antitrust injury rule, leaving courts with the discretion to choose among plausible interpretations of *Brunswick*.

I. Restrictive Antitrust Injury Analysis: The Protected Interests Test

In its restrictive form, the antitrust injury test asks whether the injury alleged is a harm that the particular statute violated was designed to prevent.⁶⁸ In other words, the test limits standing to those plaintiffs suffering from the harms most clearly condemned by the antitrust law in question.⁶⁹

For example, in *Outboard Marine Corp. v. Pezetel*,⁷⁰ an electric

required to mount a per se attack, because it did not reflect the anticompetitive use of market power).

67. See, e.g., *Repp v. F.E.L. Publications*, 688 F.2d 441 (7th Cir. 1982) (blanket licensing); *Copy-Data Sys. v. Toshiba America, Inc.*, 663 F.2d 405 (2d Cir. 1981) (vertical restraints of trade); *Chrysler*, 643 F.2d 1229 (monopolization attempt); *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976) (conspiracy to monopolize); *Warner Management Consultants*, 545 F. Supp. 956 (illegal tying arrangement).

68. *Repp v. F.E.L. Publications*, 688 F.2d 441, 446-47 (7th Cir. 1982) (music composer challenging blanket licensing did not allege antitrust injury where he complained of lost revenues under the arrangement; antitrust injury would have been alleged had he complained of the denial of opportunity to enter market with songs not transferred to licensor); *Alameda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 354 (5th Cir.) (defendant utility company refused to sell power by less expensive "one-meter" method, resulting in shopping mall developers' inability to compete with other developers and with the utility company itself; plaintiff developers did not allege antitrust injury because they did not intend to become the competitors of utility company and did not allege that their lost profits were due to diminished competition among mall owners; rather, lost profits appeared to be due only to their inability to extract favorable rate), *cert. denied*, 449 U.S. 870 (1980); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1169 (7th Cir. 1978) (since price-discrimination provisions protect only buyers, a distributor forced into absorbing a manufacturer's illegal rebate to favored retailers does not have antitrust injury; its injuries only reflect harsh treatment by manufacturer, not anticompetitive effects of price discrimination), *cert. denied*, 440 U.S. 982 (1979); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 410 (D. Del. 1978) (only intrabrand, not interbrand, competitors can allege antitrust injury resulting from intrabrand marketing divisions, because competitive restraints operate most directly on intrabrand competitors); see also *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752, 757-59 (2d Cir. 1972) (floor tile manufacturer's complaint that defendants' acquisition of control over it was intended to monopolize and restrain competition in floor tile market did not allege antitrust injury, because it did not allege that its own position in the market would be affected; only plaintiff's competitors could allege antitrust injury), *cert. dismissed*, 413 U.S. 901 (1973); cf. *Solinger v. A & M Records*, 586 F.2d 1304, 1312 n.9 (9th Cir. 1978) (describing the restrictive standing analysis to be applied in merger cases, the court said: "Before a private party can be injured directly by the type of violation section 7 was designed to prevent, the party must be an existing competitor in the relevant market."), *cert. denied*, 441 U.S. 908 (1979).

69. For instance, a plaintiff that alleges an attempted boycott must demonstrate that its injury consists of decreased profits in the boycotted market. See *Blue Shield v. McCready*, 102 S. Ct. 2540, 2552-55 (1982) (Rehnquist, J., dissenting). Obviously, only boycotted firms can demonstrate such injury.

70. 461 F. Supp. 384 (D. Del. 1978).

golf cart manufacturer charged that a Polish golf cart manufacturer allocated territories among its American dealers through exclusive dealerships and covenants not to compete. The court stated, however, that the laws against territorial allocation were designed to allow intrabrand competitors the fullest opportunity to compete within a given geographical market. Thus, while an unreasonable territorial allocation might harm an interbrand competitor by increasing his competitor's relative strength, "[u]nder *Brunswick Corp.*, . . . only intrabrand competitors would have standing to challenge the reasonableness of the vertical territorial restraints."⁷¹

Courts have also employed restrictive antitrust injury analysis to deny standing to "plaintiffs-as-means"—those plaintiffs seeking to recover for injuries suffered in the implementation of an antitrust violation.⁷² For instance, in *In re Industrial Gas Antitrust Litigation*,⁷³ the court concluded that the injury suffered by a gas company executive who refused to cooperate in his employer's price-fixing scheme did not constitute "antitrust injury." Rather, the court read *Brunswick* "to hold that section 4 protects only those persons injured as consumers or competitors in a defined market or in a discrete area of the economy."⁷⁴ Since the plaintiff was injured neither by paying supracompetitive prices nor by losing profits due to an inability to compete in the industrial gas market, his injury was insufficient to confer standing.⁷⁵

2. *Liberal Antitrust Injury Analysis*

Some courts have not been inclined to interpret *Brunswick* so restrictively. These courts look beyond the harms against which the statute was meant to protect and focus on the procompetitive policies of

71. *Id.* at 402-03.

72. Examples of plaintiffs-as-means can be found in *Blue Shield*, 102 S. Ct. at 2551 (beneficiary of health care subscription had "Hobson's choice" of acceding to defendant's conspiracy against psychotherapists by going to psychiatrist covered by health plan or, instead, absorbing the cost of visiting a psychotherapist whose services were not covered by plan; although here injuries in choosing latter course did not flow from a decrease in competition, they were nonetheless "inextricably intertwined" with the anticompetitive scheme); *Crimpers Promotions v. H.B.O.*, 724 F.2d 290, 294 (2d Cir. 1983) (independent cable television trade show organizers were injured by defendant's efforts to restrain trade in cable television programming market); *In re Industrial Gas Antitrust Litigation*, 681 F.2d 514 (7th Cir. 1982) (employee anticompetitive scheme), *cert. denied*, 103 S. Ct. 1261 (1983); *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982) (similar facts), *vacated and remanded*, 103 S. Ct. 1244 (1983); *Lupia*, 586 F.2d 1163 (distributor forced to absorb manufacturer's illegal rebate to favored retailers; only disfavored retailers, not distributor, suffered harms flowing from anticompetitive effects of price discrimination); *Warner Management Consultants v. Data Gen. Corp.*, 545 F. Supp. 956 (N.D. Ill. 1982) (computer systems distributor suffered loss of profits as result of refusing to accede to defendant's tying arrangement).

73. 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983).

74. *Id.* at 519.

75. *Id.*

the antitrust laws in general. Accordingly, they require only that the harm alleged reflect a decrease in competition.⁷⁶

In *L & H Investments Ltd. v. Belvey Corp.*,⁷⁷ for example, a shopping mall retailer and lessee claimed that, as part of a conspiracy to preclude competition among retailers within the mall, his lessor had refused to allow him to assign his lease. Under a restrictive analysis, consumers and potential entrants would suffer more immediately. However, the court held that the plaintiff's harms satisfied the antitrust injury requirement, as there could be "no new entry without a corresponding exit."⁷⁸ Thus, the plaintiff's injury—his losses suffered on liquidation—reflected a decrease in competition caused by the successful conspiracy.⁷⁹

Although this "decreased competition" test works well in most cases, a problem arises when a court is faced with a plaintiff-as-means. Such a plaintiff rarely suffers injuries that reflect decreased competition; rather, the plaintiff is injured because it has been misused by a defendant attempting to inflict competitive harms in a market. The competitive harms have no relationship to the types of injuries the plaintiff has suffered at the defendant's hands. A rule that requires such plaintiffs to allege injuries reflecting decreased competition effectively bars them from pursuing their claims.

To resolve this quandary, the more liberal Ninth Circuit excused the plaintiff-as-means in *Ostrofe v. H.S. Crocker Co.*⁸⁰ from alleging that his injuries resulted from decreased competition. Like the plaintiff in *In re Industrial Gas Antitrust Litigation*,⁸¹ Ostrofe was an employee forced to resign because he refused to participate in a price-fixing and market allocation scheme. In contrast to the Seventh Circuit, however, the Ninth Circuit granted Ostrofe standing to sue for his lost compensation. After it examined the question of antitrust injury, the court

76. See *Aurora Enters. v. National Broadcasting Co.*, 688 F.2d 689, 692-93 (9th Cir. 1982) (film producers supplying film were foreseeable victims of distributors' block-booking arrangement and loss of revenues was antitrust injury) (citing *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), cert. denied, 402 U.S. 923 (1971); *Hecht Co. v. Southern Union Co.*, 474 F. Supp. 1022, 1026 (D.N.M. 1979) (farming corporation, as a consumer of natural gas, was a foreseeable target of oil producers' price-fixing scheme where defendants had reason to know their agreement would affect price of all natural gas in target area; plaintiff, though not an actual purchaser of defendants' product, suffered antitrust injury in increased cost of gas it purchased from outside the target area); *Laughlin v. Wells*, 446 F. Supp. 48, 52 (C.D. Cal. 1978) (producer of more desirable film may claim lost profits as a result of block-booking scheme alleged to have reduced competition among distributors, because "[p]laintiffs' injury arises as a direct result of, is caused by, the antitrust violation") (emphasis in original).

77. 444 F. Supp. 1321 (W.D.N.C. 1978).

78. *Id.* at 1324.

79. *Id.* at 1325.

80. 670 F.2d 1378 (9th Cir. 1982), vacated and remanded, 103 S. Ct. 1244 (1983).

81. See *supra* text accompanying notes 73-75.

concluded that *Brunswick* could be read to deny standing to plaintiffs-as-means. Such a construction, however, would not be justified, as *Brunswick* was concerned only with the effects of an antitrust violation on competition, and did not address injuries caused in furtherance of an antitrust violation.⁸² Thus, the court noted the desirability of conferring standing upon whistle-blowing employees, the " 'intimate relationship between circumstances which make the wrongdoer's conduct unlawful and the [plaintiff's injury],'" and the fact that, unlike the *Brunswick* plaintiff, Ostrofe's losses did not reflect an increase in competition, and held that Ostrofe had alleged antitrust injury.⁸³

C. Recent Supreme Court Decisions

Until recently, the Supreme Court has been content to leave the main task of developing the antitrust standing doctrine to the circuit courts. Rarely did it even comment on the widely varying tests devised by the lower courts. Within the past two years, however, the Court has twice chosen to participate in the development of the doctrine.

1. The Blue Shield Decision

In *Blue Shield v. McCready*,⁸⁴ the plaintiff was a health care subscriber whose benefits included reimbursement for psychiatrists' fees, but not for psychologists' fees. She alleged a conspiracy between Blue Shield and psychiatrists to exclude psychologists from the health care market. Since the plaintiff was not a competitor in the health care market, the district court denied her standing, holding that she fell outside the restrictive target area. Yet Blue Shield's refusal to reimburse her represented the very means by which the defendants hoped to achieve a monopoly.⁸⁵

On appeal, the Supreme Court addressed both the legal causation and antitrust injury doctrines. With regard to the former, the Court declined to comment generally on the various tests devised by the circuit courts, but indicated that restrictive target area analysis could not be indiscriminately applied to all plaintiffs. Thus, the Court held that at least where no risk of speculative or duplicative recoveries exists, and where the harm alleged is both foreseeable and the very means by which the anticompetitive scheme will be effectuated, the "remedy cannot reasonably be restricted to those competitors [the psychologists]

82. *Ostrofe*, 670 F.2d at 1387.

83. *Id.* at 1388 (quoting Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 COLUM. L. REV. 979, 990 (1977)).

84. 102 S. Ct. 2540 (1982).

85. *McCready v. Blue Shield*, 649 F.2d 228, 230 (4th Cir. 1981), *aff'd*, 457 U.S. 465 (1982).

whom the conspirators hoped to eliminate from the market.”⁸⁶

With regard to the antitrust injury doctrine, *Blue Shield* answered several of the questions left open by *Brunswick*. First, the Court acknowledged that the antitrust injury rule was a central component of standing analysis,⁸⁷ confirming what most circuit courts had already assumed.⁸⁸ Second, it applied the antitrust injury rule to a conspiracy claim, thus confirming that a showing of antitrust injury is important to maintain any antitrust action, regardless of the violation alleged.

In addition, the Court rejected a reading of *Brunswick* that would require all plaintiffs to show that their injuries reflected decreased competition. Instead, faced with a plaintiff-as-means and a situation not unlike that in *Ostrofe*, the Court found antitrust injury where the plaintiff's injury, though not the result of reduced competition, was directly and “inextricably intertwined” with the competitive injury the conspirators sought to inflict on psychologists and the psychotherapy market.⁸⁹ Thus, the Court appeared to align itself with the most liberal view of antitrust injury.⁹⁰

Blue Shield does not, however, resolve all of the conflicts surrounding antitrust injury analysis in standing determinations. While the decision makes it clear that the plaintiff's injury was sufficient given the facts of the case, it is of uncertain value to courts which must decide whether injuries suffered in dissimilar situations constitute antitrust injury.⁹¹

86. *Blue Shield*, 102 S. Ct. at 2546. The Court implicitly acknowledged that deterrence, compensation, and divestment policies would be unduly frustrated by a rule of standing that barred a plaintiff-as-means such as McCready from maintaining her action and left her with little choice but to accede to the violation by choosing a psychiatrist. See *id.* at 2546 n.10, 2547. But cf. *id.* at 2551 (possibly implying that had she acceded, McCready would not have had standing because she would be only an indirect victim).

87. *Blue Shield*, 102 S. Ct. at 2549-51.

88. See *supra* notes 65-67 and cases cited therein.

89. *Blue Shield*, 102 S. Ct. at 2551.

90. Its stance, however, soon proved illusory. In 1983, the Court denied certiorari in a case denying standing to a plaintiff whose injury consisted of harms suffered when he was terminated and blacklisted for contravening his employer's anticompetitive scheme. *In re Industrial Gas Antitrust Litigation*, 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983). It simultaneously vacated and remanded another case with virtually identical allegations wherein the plaintiff was found to have standing to sue for similar injuries. *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 1244 (1983). The full import of *Blue Shield*'s rejection of restrictive target area analysis thus remains unclear. It appears likely, however, that the Court's actions reflect its agreement with the Seventh Circuit's finding of a lack of antitrust injury. The Court's most recent opinion suggests that in addition to being “inextricably intertwined” with competitive injury, the plaintiff's injury must reflect his position as a participant in the affected market. *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 909-10 (1983); see *infra* note 156.

91. Compare, e.g., *Chelson v. Oregonian Publishing Co.*, 715 F.2d 1368, 1371 (9th Cir. 1983) (if newspaper dealers association can show that a newspaper company frustrated negotiations between the dealers and advertisers to include advertising inserts in the newspapers, it will have

2. *The Associated General Contractors Decision*

In *Associated General Contractors, Inc. v. California State Council of Carpenters*,⁹² the plaintiff, a carpenters' union, sued a general contractors' association. The plaintiff alleged that the association had influenced both association members and third parties to divert their business away from unionized contracting and subcontracting firms in order to weaken the collective bargaining relationship between those firms and the union. Thus, the plaintiff argued, the defendants' actions restrained both the trade of those firms and the union's business activities.⁹³

The defendants argued that the plaintiff lacked standing to sue. To resolve the issue, the Court adopted a multifactoral analysis that incorporated a broad set of considerations. Drawing upon common law damage principles and previous decisions,⁹⁴ the Court identified several factors as relevant. These included: (1) whether a causal connection between the violation and the injury had been alleged; (2) whether the defendant was alleged to have intended such injury; (3) whether the injury was of a type that Congress meant to redress in enacting section 4; (4) the directness of the relationship between the alleged violation and the injury; (5) the existence of an identifiable class of more directly injured persons presumably motivated to enforce the antitrust laws; (6) the degree to which the claim was speculative or abstract; (7) the availability of alternative and more appropriate remedies; (8) the risk of duplicative recoveries; and (9) the probability that complex damages litigation would be required.⁹⁵

Applying this analysis, the Court acknowledged that while the union's claim presented no problem with regard to the first two factors, nonetheless "[a] number of other factors may be controlling."⁹⁶ For example, the union had alleged neither a "marketwide restraint of

shown an injury "inextricably intertwined" with the anticompetitive injury sought to be inflicted on the advertisers), and *Magic Chef, Inc. v. Rockwell Int'l Corp.*, 561 F. Supp. 732, 737-38, (N.D. Ill. 1983) (buyer from targeted competitor, harmed by the competitor's inability to perform on a supply contract due to defendant's anticompetitive practices, showed an injury "inextricably related to" the defendant's antitrust violation, even though his harm was due to competitor's anticipatory repudiation), with *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1086-87 (6th Cir. 1983) (lessor of retail grocery premises who claimed that defendant's attempt to monopolize the area's food markets had made it impossible for the lessor to conduct a profitable business had not alleged an injury "inextricably intertwined" with the attempted monopoly).

92. 103 S. Ct. 897 (1983).

93. *Id.* at 903.

94. *Id.* at 904-07. To justify its reliance on common law damage principles, the Court cited their existence at the time the antitrust law's private remedy provisions were enacted and reasoned from there that Congress "presumably" intended such principles to apply to § 4. *Id.* at 905-07.

95. *Id.* at 908-12.

96. *Id.* at 908.

trade," nor, as had the plaintiff in *Blue Shield*, the type of harm that might befall a consumer or competitor in the affected market. Rather, the union's injuries were predominantly labor oriented, and it was not even clear that the union would benefit from enhanced competition in the market. Thus, the Court concluded that the union lacked antitrust injury.⁹⁷

Turning to factors that had traditionally been subsumed under the "causation" rubric, the Court noted that the injury alleged was the indirect result of coercion directed against others,⁹⁸ and that therefore, more directly injured persons were available to enforce the antitrust laws.⁹⁹ Moreover, "[p]artly because [the injury] is indirect, and partly because [it] may have been produced by independent factors," the claim was extremely speculative.¹⁰⁰ Furthermore, because of the indirect nature of the injury, complex damages litigation would be required to avoid duplicative recoveries.¹⁰¹ Finally, the union's injuries could be redressed under the federal labor laws.¹⁰² Finding these factors to "weigh heavily against judicial enforcement of the Union's antitrust claim," the Court reversed the Ninth Circuit's grant of standing.¹⁰³

Associated General Contractors has had a significant impact on the structure of antitrust standing analysis. The Sixth Circuit, for example, has abolished its zone-of-interests test, acknowledging it to be inconsistent with the Supreme Court's approach.¹⁰⁴ Similarly, the Second Circuit has repudiated its restrictive target area approach.¹⁰⁵ Most other

97. *Id.* at 909-10.

98. *Id.* at 910-12.

99. *Id.* at 911 ("Denying the Union a remedy . . . is not likely to leave a significant antitrust violation undetected or unremedied.").

100. *Id.* The Court went on to imply that had the union alleged contract terminations, a decreased share of the unionized contracting market, a decline in the number of its employed members, or a decrease in its revenues from dues or initiation fees, or inability of the coerced firms to do business with the unionized firms, its claim would not have been speculative. *Id.* As it was, except for the allegations of breaches of collective bargaining contracts, redressable under the federal labor laws, the union had charged no more than "unspecified injuries in its 'business activities.'" *Id.* at 910.

101. *Id.* at 912 ("It would be necessary to determine to what extent the coerced firms diverted business away from union subcontractors, and then to what extent those subcontractors absorbed the damage to their businesses or passed it on to employees by reducing the workforce or cutting hours or wages. In turn it would be necessary to ascertain the extent to which the affected employees absorbed their losses and continued to pay union dues.") (footnote omitted).

102. *Id.* at 909-10, 911.

103. *Id.* at 913.

104. *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085-86 (6th Cir. 1983).

105. *Crimpers Promotions v. H.B.O.*, 724 F.2d 290, 292-93 (2d Cir. 1983) (cable television trade show organizers may sue defendants for arranging a boycott of their trade show in an attempt to maintain their control over the buying and selling of cable television programming). Note, however, that the position of the *Crimpers* plaintiff was similar to that of the *Blue Shield* plaintiff in connection with whom the Supreme Court had expressly rejected an overly restrictive standing analysis. See *supra* text accompanying notes 84-90. Thus the Second Circuit could still

courts addressing the antitrust standing question since *Associated General Contractors*, while not disavowing their prior standards, have also made an effort to conform their standing analyses to that of the Supreme Court.¹⁰⁶

Like *Blue Shield*, *Associated General Contractors* did not completely resolve the ambiguities surrounding the meaning of "antitrust injury." Some courts read the opinion very narrowly, requiring the plaintiff to be either a competitor of the defendant, or a consumer of the defendant's goods.¹⁰⁷ Others draw broader conclusions, reading *Associated General Contractors* and *Blue Shield* together to mean that the plaintiff must be some type of "participant" in the relevant market, someone whose interests would be benefited by enhanced competition in the market, or someone whose injuries are otherwise "inextricably intertwined" with the anticompetitive behavior.¹⁰⁸

III

CRITICISM OF MODERN ANTITRUST STANDING ANALYSIS

As outlined in Part I, the antitrust standing doctrine was born out of judicial concern over the dangers inherent in section 4's broad remedy. Read literally, the statute exposes defendants to excessive and unfair liability, which undermines both the efficiency and effectiveness of the private enforcement scheme.¹⁰⁹ In this sense, standing analysis represents an attempt to strike a balance between the wholesale pursuit of section 4's positive policies and the negative risks posed by such a pursuit.

To gauge how well courts have translated this goal into actual rules of standing, one must consider the capacity of the analysis to eliminate those plaintiffs whose claims threaten the effectiveness and fairness of the private antitrust enforcement scheme more than they

cling to a restrictive approach in some future cases. See *id.* (distinguishing the instant case from one brought by a supplier, who is "generally denied" standing, and implying that a restrictive analysis might be applied in such a case).

106. See, e.g., *Quality Foods de Centro America, S.A. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989 (11th Cir. 1983); *Province v. Cleveland Press Publishing Co.*, 571 F. Supp. 855 (N.D. Ohio 1983); *Magic Chef, Inc. v. Rockwell Int'l Corp.*, 561 F. Supp. 732 (N.D. Ill. 1983); cf. *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 964-65 (3d Cir. 1983) (Third Circuit reading *Associated General Contractors* as vindication of its balancing approach), *cert. denied*, 52 U.S.L.W. 3610 (U.S. Feb. 21, 1984).

107. E.g., *Construction Aggregate Transp. v. Florida Rock Indus.* 710 F.2d 752, 765 n.28 (11th Cir. 1983); see also *Crimpers*, 724 F.2d at 296 n.6 (expressing uncertainty over whether a plaintiff need be a competitor or consumer, but nonetheless finding the trade show organizer to be a competitor in the restrained market in the sense that it served to facilitate dealings between producers and television stations).

108. E.g., *Southaven Land*, 715 F.2d 1079; *Chelson v. Oregonian Publishing Co.*, 715 F.2d 1368, 1371-72 (9th Cir. 1983).

109. See *supra* text accompanying notes 15-23.

advance its enforcement and compensation goals. This Part undertakes that task. The first Section assesses the responsiveness of the Supreme Court's new multifactoral analysis to the policies underlying section 4 and the antitrust standing doctrine. The Section proposes that courts adopting the analysis explicitly balance the extent to which standing will further the "positive" goals of section 4 against the "negative" risks that an overly broad grant of standing poses. In a like manner, the second Section examines the justifications for and the role of antitrust injury in section 4 standing analysis, and proposes that it be deemed a controlling factor in the balance of standing policies only where the plaintiff alleges a "prophylactic offense." Finally, both Sections propose clarifications and improvements of the Court's multifactoral approach to standing decisions.

A. Multifactoral Standing Analysis

To some extent, any evaluation of the Supreme Court's new multifactoral standing analysis must be comparative. Prior to the *Associated General Contractors* decision, courts employed various legal causation tests to implement the policy considerations underlying the antitrust standing doctrine. These tests not only produced inconsistent results, but were ill-designed to assess directly the section 4 policy concerns raised by particular plaintiffs' claims.¹¹⁰

Courts applying the direct injury and restrictive target area tests sacrificed the flexibility that should optimally inhere whenever competing interests must be balanced.¹¹¹ Instead, balances struck as appropriate in particular cases were frozen into inflexible "rules" or tests that courts applied in almost every case;¹¹² these tests rarely accommodated the shift in the mix of policy concerns posed by the particular cases at hand. As a result, courts mechanically applied the tests even when the specific risks against which they were designed were present only in limited force, or were absent.¹¹³ Moreover, because the tests operated

110. For the exception to this general rule, see *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 1244 (1983), in which the court employed an approach that directly balanced the relevant standing policies.

111. *Berger & Bernstein*, *supra* note 9, at 844 n.154. For arguments against the direct injury and restrictive target area courts, see generally *Bravman v. Bassett Furniture Indus.*, 552 F.2d 90, 95-99 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *South Carolina Council of Milk Producers v. Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); *Midway Enters. v. Petroleum Mktg. Corp.*, 375 F. Supp. 1339, 1343-44 (D. Md. 1974); *Berger & Bernstein*, *supra* note 9; Note, *supra* note 16, at 496-97; cf. 2 P. AREEDA & D. TURNER, *supra* note 15, ¶ 334d (giving only a qualified endorsement of the restrictive target area approach).

112. See generally *Berger & Bernstein*, *supra* note 9, at 820, 843-44; Note, *supra* note 16, at 496.

113. See, e.g., *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1168-69 (7th Cir. 1978) (a

more in accordance with their labels than with any overarching principles or policy concerns, they yielded contradictory and inconsistent results.¹¹⁴

The liberal target area and zone-of-interests tests similarly fell short of ideal. By focusing on foreseeability on the one hand, and "arguable zones of interests" on the other, these tests represented overly expansive views of standing.¹¹⁵ Moreover, because of their lack of explicit attention to factors relevant to section 4's policy goals, neither

distributor forced into absorbing a manufacturer's discount to favored customers was not the target of the illegal action and thus had no standing despite the fact that its injury did not duplicate those of disfavored retailers, was clearly caused by the defendant's action, was easy to calculate, and posed no threat of financial ruin), *cert. denied*, 440 U.S. 982 (1979); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 188 (2d Cir. 1970) (licensor harmed by anticompetitive conduct aimed against its licensees, upon which it was wholly dependent, had no standing because it was not the target, even though its damages were separate from those of its licensees, were no more speculative or difficult to prove than those of its licensees, and were unlikely to financially ruin the defendant), *cert. denied*, 401 U.S. 923 (1971).

Similarly, in line with the restrictive target area theory, Areeda and Turner would deny suppliers standing to sue to recover profits lost as a result of antitrust violations directed against their buyers. See 2 P. AREEDA & D. TURNER, *supra* note 15, ¶¶ 338-41. The authors reason that since a supplier's lost profits are more likely to be the result of causes independent of the antitrust violation, proof of damages would be too difficult. *Id.* at ¶ 338d. Presumably, this would be because the supplier must prove not only that the antitrust violation caused the target's needs to fall by the amount of *X* dollars, but also that, as a consequence, the target purchased *Y* dollars less from the supplier than he would have without the violation.

Yet the problems of proof are not insurmountable. Ample discovery procedures are available for collecting evidence as to the target's and the plaintiff's harms and their connection to the violation, and in many circumstances, buyers may cooperate with their suppliers in their efforts to collect data. Moreover, in some cases, the supplier will be wholly and directly dependent on the targeted market. Where this is so, his damages can be easily assessed. This was in fact the case in *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), but the plaintiff was denied standing anyway. One could argue that Billy Baxter, as the targets' franchisor, was also the better plaintiff to promote antitrust enforcement goals in the sense that it was probably in a better position to finance the litigation.

Nor does the possibility of overkill call for a rule that automatically limits standing to directly injured or targeted victims. Even a direct target can claim damages ruinous to an antitrust violator; conversely, the claims of all potential plaintiffs may represent but a drop in a violator's bucket. See *Berger & Bernstein*, *supra* note 9, at 843-44, 851-52. The restrictive causation tests are also subject to the more fundamental objection that by focusing only on the negative risks of granting standing, they ignore the extent to which § 4 goals may be furthered by allowing the plaintiff to proceed. *Cf. infra* text accompanying note 143.

114. Compare, e.g., *Sanitary Milk Producers v. Bergjans Farms Dairy*, 368 F.2d 679 (8th Cir. 1966) (allowing suppliers to sue for an antitrust violation directed at retailers, but noting that these suppliers were also competitors of the defendant), with *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970) (licensor may not sue competitor for its attempts to exclude licensees from the market). See generally *Berger & Bernstein*, *supra* note 9, at 819-35.

115. See *Berger & Bernstein*, *supra* note 9, at 835; *Lytle & Purdue*, *supra* note 17, at 803-07. Compare *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970) (film producer on percentage-based contract foreseeably affected by a block-booking arrangement between distributors and theatre owners), *cert. denied*, 402 U.S. 923 (1971), with *Contreras v. Grower Shipper Vegetable Ass'n*, 484 F.2d 1346 (9th Cir. 1973) (*per curiam*) (agricultural employees may not allege loss of work due to employer's conspiracy to limit production and fix prices), *cert. denied*,

represented a principled attempt to limit standing so as to promote the overall effectiveness and fairness of the private antitrust enforcement scheme.¹¹⁶

In direct contrast to these formalistic tests was the Supreme Court's acknowledgment in *Associated General Contractors* that "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case."¹¹⁷ Under the Supreme Court's suggested analysis, therefore, plaintiffs should not be slotted as "targets" or "foreseeable" victims. Rather, courts should look more directly to whether a particular plaintiff's claim implicates the "negative" factors militating against a grant of standing. This analytic framework, which constitutes a more sensitive and individualized approach to standing determinations, should lead to more consistent results. It thus represents a major improvement over the former tests.

1. *Beyond Associated General Contractors: Multifactoral Standing Analysis and the Lower Courts*

Unfortunately, it is too early to tell whether, in the long run, the class of plaintiffs permitted to maintain antitrust suits will change significantly as a result of *Associated General Contractors*.¹¹⁸ Whether it does will depend upon two factors. The first is the extent to which courts understand the policy framework underlying the multifactoral analysis. The second is the courts' willingness to apply that framework

415 U.S. 932 (1974). It is difficult to distinguish the foreseeability of the former plaintiff from the unforeseeability of the latter.

The Sixth Circuit was heavily criticized for attempting to transport the broad "zone-of-interests" standard, designed for administrative law, into the antitrust context. See Lytle & Purdue, *supra* note 17, at 805-06; Sherman, *Antitrust Standing: From Loeb to Malumud*, 51 N.Y.U. L. REV. 374, 392-405; see also 2 P. AREEDA & D. TURNER, *supra* note 17, ¶ 334d, at 167-68; Note, *supra* note 16.

116. In some instances, courts have found ways to avoid the worst excesses of liberal target area analysis. Standing has been denied where the damages seemed speculative, *In re Multidistrict Vehicle Air Pollution Control M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1049 (1973), where the recovery would have been unduly harsh, *Coutreras v. Grower Shipper Vegetable Ass'n*, 484 F.2d 1346 (9th Cir. 1973) (*per curiam*), *cert. denied*, 415 U.S. 932 (1974), or where the damages appeared duplicative, *Stein v. United Artists Corp.*, 691 F.2d 885 (9th Cir. 1982). However, the analysis has been *ad hoc* and unpredictable. See *Berger & Bernstein*, *supra* note 9, at 820-35.

117. *Associated General Contractors*, 103 S. Ct. at 908; *cf. id.* at 908 n.33 ("In our view, courts should analyze each situation in light of the factors set forth in the text . . .").

118. It almost certainly will change in the Sixth Circuit. See *Southaven Land Co. v. Maloue & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983) (rejecting the zone-of-interests test for a multifactoral analysis that put heavy emphasis on directness of injury). The Second Circuit has indicated a willingness to let go of the restrictive target area test in favor of the multifactoral analysis, but it remains to be seen whether the direct injury factor will pick up where the restrictive target area test left off. See *Crimpers Promotions v. H.B.O.*, 724 F.2d 290, 294 (2d Cir. 1983); *supra* note 105.

flexibly. Thus, although the structural framework of the new approach is to be applauded, one must look at the way in which it is likely to be applied in order to evaluate its overall merit.

The few courts that have spoken disagree over the number and identity of the factors addressed in *Associated General Contractors*.¹¹⁹ This disagreement is unnecessary, since the Court clearly did not intend to provide an exhaustive or even fixed set of "factors," but rather limited itself to those appropriate "[i]n this case."¹²⁰ Nonetheless, courts are closely following the Supreme Court's particularized analysis,¹²¹ signaling a danger that they will not apply the analysis as flexibly as the Court intended.¹²²

Similarly, courts may wrongly feel compelled to rely upon the descriptive phrases employed by the Court—"the directness or indirectness of the asserted injury"¹²³—as proxies for the actual policy concerns that underlay the Court's analysis.¹²⁴ Unfortunately, this would not be a surprising result as courts have long preferred such "bright line" tests in antitrust standing determinations to more nebulous ventures into policy consideration.¹²⁵

Ultimately, these potential problems can be traced to the courts' inability to fully understand and appreciate the policy rationale of *Associated General Contractors*. Admittedly, the Supreme Court might have put aside its "factors" and more clearly articulated the policies underlying its analysis. However, a reexamination of the Court's opinion permits the construction of a coherent analytical framework out of the various policies that form the foundation of the multifactoral analysis.

119. Compare, e.g., *Crimpers*, 724 F.2d at 296-97 (five factors: directness of plaintiff; directness of injury (antitrust injury); speculative damages; duplicative damages; best available plaintiff), with *Southhaven Land*, 715 F.2d at 1085, and *Province v. Cleveland Press Publishing Co.*, 571 F. Supp. 855, 864 (N.D. Ohio 1983) (six factors: the causal connection between the violation and harm and whether the harm was intended; the nature of alleged injury, including whether the plaintiff is a consumer or competitor in the relevant market; directness of injury; speculative damages; duplicative recovery or complex apportionment; more direct victims), and *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 964-65 (3d Cir. 1983) (three factors: nature of harm; causal connection; directness of injury), cert. denied, 52 U.S.L.W. 3610 (U.S. Feb. 21, 1984).

120. *Associated General Contractors*, 103 S. Ct. at 908. But see *id.* at 908 n.33 ("In our view, courts should analyze each situation in light of the factors set forth in the text [of this opinion].").

121. See *Crimpers*, 724 F.2d at 296-97; *Southhaven Land*, 715 F.2d at 1085-88; *Province v. Cleveland Press Publishing Co.*, 571 F. Supp. 855, 863-68 (N.D. Ohio 1983); see also *Chelson v. Oregonian Publishing Co.*, 715 F.2d 1368, 1370-71 (9th Cir. 1983) (treating only the antitrust injury requirement, but isolating three of the Supreme Court's factors as relevant to that inquiry and assiduously applying them).

122. See *supra* text accompanying note 117.

123. *Associated General Contractors*, 103 S. Ct. at 910.

124. See *infra* text accompanying notes 132-33.

125. See *supra* text accompanying notes 27-48; see also *supra* note 105. See generally *Berger & Bernstein, supra* note 9, at 819-35.

2. *The Policy Rationale of Multifactoral Standing Analysis*

Putting aside for the moment the Supreme Court's inquiry into antitrust injury,¹²⁶ its multifactoral analysis is best expressed and understood in terms of five fundamental antitrust standing policies:¹²⁷ (1) the avoidance of claims in which it is difficult to establish a causal connection between the injury alleged and the antitrust violation; (2) the avoidance of complex damages litigation; (3) the prevention of redundant recoveries; (4) the enforcement of the antitrust laws and the deterrence of future violations; and (5) the compensation of victims of antitrust violations.

In *Associated General Contractors*, the Court acknowledged the first three of these policies, although the discussion of each was subsumed within the broader heading of "directness of injury."¹²⁸ The Court's discussion of the fourth policy, enforcement and deterrence, lay hidden once again in its discussion of the directness of injury. The Court noted that any injuries suffered resulted from harms more directly inflicted upon contracting and subcontracting firms.¹²⁹ "The existence of an indentifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . [to sue]."¹³⁰ The fifth policy implicit in the decision, compensation, was also expressed negatively: since the union had an alternative remedy under the labor laws, section 4's compensation goals would not be offended by dismissal of the action.¹³¹

The manner in which the Court discussed these policies presents two problems. First, when the Court identified "directness" as the overarching concern, there is a risk that lower courts will come to rely

126. See *infra* text accompanying notes 153-91.

127. The Court's acknowledgement that the union had adequately alleged a causal connection between the defendants' action and the union's injury is of no independent significance to the antitrust standing doctrine, since it is already an article III requirement for standing. See C. WRIGHT, *supra* note 4, § 13.

128. *Associated General Contractors*, 103 S. Ct. at 910-12.

129. *Id.* at 910-11.

130. *Id.* at 911.

131. *Id.* Compensation values may also explain the Court's recognition of the defendants' intent as a relevant, though not controlling, factor in determining standing. *Id.* at 908. The interest in compensating a party injured by anticompetitive conduct seems greater when that party was the target of the defendants' conduct, or was the "tool" by which the violation was implemented. Cf. Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 27-31 (1971) (intent should be a dispositive factor), cited in *Associated General Contractors*, 103 S. Ct. at 908 n.35 (without approval of the suggestion that intent be dispositive). Conversely, where the defendant intends to harm the plaintiff, the interests in protecting him from double liability or burdensome litigation are possibly diminished.

unthinkingly on "indirectness" as an evil in itself.¹³² In fact, several courts already have treated directness as a separate factor, independent of its underlying policy justifications.¹³³ The danger is that these courts one day will end the inquiry upon finding indirectness, without examining whether the specific risks that indirectness creates are in fact present.¹³⁴ The ironic result of this would be the resurrection of the inflexible direct injury test.

The second problem arose from the Court's failure to explicitly address the fourth and fifth "positive" policies of enforcement and compensation. By almost exclusively focusing on the "negative" risks of granting standing, the Court risks having lower courts forget that section 4 also embodies policies that favor a grant of standing.

3. *Toward Implementation of a Policy-Based Balancing Test*

The preceding discussion demonstrates that five fundamental standing policies lie at the heart of *Associated General Contractors* and constitute the true "factors" of its multifactoral analysis.¹³⁵ Failure to adequately appreciate this poses several risks to the longrun success of the Court's new approach. Thus, this Comment proposes that in each standing determination, courts should explicitly balance the extent to which a grant of standing will further the positive goals of enforcement

132. See, e.g., *Crimpers Promotions v. H.B.O.*, 724 F.2d 290, 294 (2d Cir. 1983) (court appears to approve continued reliance on the direct injury test as applied to suppliers).

133. See *id.* at 294-95, 297; *Magic Chef, Inc. v. Rockwell Int'l Corp.*, 561 F. Supp. 732, 737 (N.D. Ill. 1983); cf. *Province v. Cleveland Press Publishing Co.*, 571 F. Supp. 855, 867 (N.D. Ohio 1983) (obliquely referring to the risk of speculative damages, but otherwise treating the issue as separate). On the other hand, at least one court has properly examined the directness of the plaintiff's injury in terms of the risks of duplication, speculation, and complex damages litigation. See *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085-88 (6th Cir. 1983); cf. *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 963-69 (finding that policies against duplicative recoveries and complex apportionment of damages favored extending the *Illinois Brick* rule to preclude a second-line distributor from suing the supplier under Sherman Act § 1 for attempts to control the market by penalties to the first-line distributor passed on to the second), *cert. denied*, 52 U.S.L.W. 3610 (U.S. Feb. 21, 1984).

134. One situation in which this danger could manifest itself would be that in which a supplier whose profits are wholly dependent on the demands of a particular group of buyers attempts to sue a third party who has restrained trade in the buyer's industry through anticompetitive restraints exercised directly against his buyers. While the supplier's harms are "indirect," his losses generally do not duplicate those of his buyers. Consequently, the risk of complex apportionment of damages is also absent. One possible exception would be where the supplier is paid through a "percentage contract," but even there, damages will be easily apportioned. Moreover, where the supplier is wholly dependent on the affected buyers, his injuries are not speculative. See, e.g., *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

135. This does not mean, however, that these are the only policies relevant to standing determinations; in future cases, courts may identify others. For instance, the interest in shielding defendants from liability so great that they could be eliminated as participants in the marketplace might counsel against a broad grant of standing in some cases.

and compensation, without undue exposure to the negative risks of speculative or duplicative recoveries and complex damages litigation. If courts make standing determinations in accordance with this analytical framework, they will reach more consistent results and will give direct effect to the policies underlying section 4 of the Clayton Act.

The approach suggested here is not entirely new. In an important article written seven years ago, Daniel Berger and Roger Bernstein advocated that courts determine standing by openly balancing the interests underlying the private antitrust remedy granted by section 4.¹³⁶ More recently, a panel on the Ninth Circuit adopted a policy-oriented approach to standing questions. In *Ostrofe v. H.S. Crocker Co.*,¹³⁷ the court announced that, at least in "less obvious cases," it would directly balance competing policy interests in standing determinations.¹³⁸ For each plaintiff, therefore, the court would consider the extent to which a grant or denial of standing would further policies favoring compensation, deterrence, and enforcement. Against this first assessment, the court would weigh the threat the plaintiff's claim posed to the interests of avoiding overkill, complex damages litigation, and speculative or duplicative claims.¹³⁹

In *Ostrofe*, the defendant terminated the plaintiff's employment because the plaintiff refused to participate in an illegal antitrust scheme. The court concluded that compensation policies favor rewarding an employee who objects to his or her employer's illegal actions. Further, private enforcement of the laws against price fixing and market allocation might well depend on the employee's ability to recover for refusing to participate, especially where the violations might not otherwise be prevented.¹⁴⁰ Since a grant of standing presented no "negative problems,"¹⁴¹ the balance of interests weighed in favor of a grant of standing, and *Ostrofe* was permitted to proceed.¹⁴²

136. Berger & Bernstein, *supra* note 9, at 844-65.

137. 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 1244 (1983).

138. *Id.* at 1383.

139. *Id.* at 1384-85.

140. *Id.*

141. The plaintiff's claim posed no threat of financial ruin, nor were his damages duplicative, speculative, difficult to calculate, or of a windfall nature. *Id.* at 1385-86.

142. *Ostrofe* was later vacated and remanded, 103 S. Ct. 1244 (1983), to the Ninth Circuit with cursory instructions to reconsider the decision in light of *Associated General Contractors*. It is difficult to discern the reason for the Supreme Court's action, but it may have disagreed with the lower court's finding of antitrust injury. See *infra* note 156.

It is useful to contrast the Ninth Circuit's purely policy-oriented approach with the factorial analyses used by the Third Circuit and the Supreme Court. The latter two courts have appeared to emphasize the directness of injury in denying standing under the multifactoral analysis, while under the Ninth Circuit's approach, "directness" does not constitute an independent factor. Compare *Associated General Contractors*, 103 S. Ct. at 910 and *Mid-West Paper Prod. Co. v. Continental Group*, 596 F.2d 573, 583-87 (3d Cir. 1979) with *Ostrofe*, 670 F.2d at 1384-85.

The analysis employed in *Ostrofe* highlights both the shortcomings of the Supreme Court's analysis in *Associated General Contractors* and the advantages of the balancing test advocated by this Comment. First, the Court implies that when plaintiffs are "indirect," their claims have no enforcement value.¹⁴³ In essence, such an approach assumes that when a plaintiff's injury is indirect, a more directly injured party will step forward to enforce the law. This generalization is, however, inconsistent with the individualized approach of *Associated General Contractors*. Rather, the real focus should be whether, in any particular case, more directly injured victims are likely to enforce the law.

In some cases more directly injured persons may not sue. Competitor firms, for instance, may fear retaliation from a competitor possessing monopoly power or simply may prefer the advantages of cordial relations with the monopolist. Similarly, potential "direct" plaintiffs may be dependent upon the defendant for a desirable product or market, and may be unwilling to risk these in order to sue.¹⁴⁴ Alternatively, there may be cases in which the "indirect" plaintiff, because of superior resources or organization, would be the better litigant.¹⁴⁵ In these situations, courts should accord the enforcement policies of section 4 increased weight.

The greatest obstacle to this more individualized inquiry may be the courts' reluctance to look beyond the pleadings in standing determinations. Yet courts are not so constrained,¹⁴⁶ and by refusing to look

143. See *Associated General Contractors*, 103 S. Ct. at 911; *supra* text accompanying note 129.

144. This situation would encompass suppliers or customers involved in such vertical restraints as illegal tying contracts, requirements contracts and exclusive dealing arrangements. In an illegal tying contract, the seller offers two products—the tying product and the tied product. The tying product is one that is so unique or desirable that the seller's control over its disposal gives him the power to coerce a simultaneous purchase of the less desirable tied product. Similarly, requirement contracts and exclusive dealing arrangements can be illegal when in their purpose and effect they are so like tying contracts as to constitute unreasonable restraints of trade. Because, by definition, the buyer must look to the violator for an otherwise unavailable product, he risks lost sales by suing. In those cases, the buyer may not want to sue, and an indirect plaintiff might indeed be the better enforcer. See, e.g., *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970) (allowing a percentage-based producer of tied films to sue for decreased rentals due to a tying arrangement), *cert. denied*, 402 U.S. 923 (1971).

145. Cf. *Buckley Towers Condominium, Inc. v. Buchwald*, 533 F.2d 934 (5th Cir. 1976) (non-profit condominium corporation without standing to charge developers with illegal tying sale to its homeowner members), *cert. denied*, 429 U.S. 1121 (1977).

146. See *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("[I]t is within the trial court's power to allow or require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing."). Moreover, the § 4 standing doctrine goes beyond traditional article III standing concerns, see *Chelson v. Oregonian Publishing Co.*, 715 F.2d 1368, 1370 (9th Cir. 1983) (citing *Associated General Contractors*, 103 S. Ct. at 907 n.31); *Berger & Bernstein*, *supra* note 9, at 813 n.11, cited in *Associated General Contractors*, 103 S. Ct. at 907 n.31, and thus may be an even more appropriate context in which to venture beyond the pleadings. It remains to be seen, however, whether the reluctance expressed by the Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977), to accommodate

beyond the pleadings they run the risk of underenforcement of the antitrust laws. Thus, courts should consider evidence produced by indirect plaintiffs to demonstrate that they are the best or the only likely enforcers of the antitrust laws.¹⁴⁷ The alternative to such consideration is artful pleading. By merely including an allegation that no other plaintiffs are likely to enforce the law, plaintiffs may be able to overcome the "directness" bar to antitrust enforcement.¹⁴⁸

Another shortcoming of *Associated General Contractors* lies in its failure to state whether the multifactoral analysis is a balancing test, or simply a collection of factors, some of which may by themselves be controlling.¹⁴⁹ So far lower courts have avoided this question, since they have only addressed claims that either satisfied all or failed to satisfy several of the factors identified by the Court.¹⁵⁰ However, the issue is certain to arise in future cases.

Courts might conclude that because standing analysis is designed to find the "best plaintiff," the presence of any countervailing factor requires dismissal. Such a conclusion, however, would be improvident. The goal of standing analysis is to isolate and eliminate those plaintiffs whose claims so threaten the effectiveness and fairness of the private enforcement scheme that they outweigh their potential to advance the compensation and enforcement goals of section 4.¹⁵¹ The very nature of the antitrust standing doctrine, therefore, mandates that it be implemented through a balancing process.¹⁵²

B. The Antitrust Injury Rule in Standing Analysis

Not only has the Supreme Court failed adequately to define "anti-

the possibility that more directly injured parties will not sue, will carry over into standing determinations in contexts where the special problems of "pass-ons" and indirect purchasers are absent.

147. Under the *Associated General Contractors* analysis, however, courts may be unwilling to do so. See 103 S. Ct. at 911 (relying, without inquiry, on "the existence of [others] whose self-interest would normally motivate them to [sue]"); cf. *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 968-69 (3d Cir. 1983) (in § 1 case with facts approximating those of *Illinois Brick*, the Third Circuit was unwilling to give weight to directly injured party's affidavits stating that it would not sue), *cert. denied*, 52 U.S.L.W. 3610 (U.S. Feb. 21, 1984).

148. See *Warth*, 422 U.S. at 501 ("For purposes of ruling on a motion to dismiss for want of standing, . . . courts must accept as true all material allegations of the complaint . . ."). But see *supra* note 146.

149. While the Court stated that no black letter rule could be formulated, 103 S. Ct. at 908, and concluded that several factors "weigh heavily" against a grant of standing, *id.* at 913, it did not state whether the presence of a single "negative" factor would by itself require dismissal.

150. See *supra* notes 104-06 and cases cited therein.

151. See *supra* text accompanying notes 6-23.

152. Cf. *Berger & Bernstein*, *supra* note 9, at 844, 858-65 (also endorsing a balancing approach) and *id.* at 844 n.154 (noting that balancing is peculiarly appropriate in an area of the law that consciously seeks to promote economic policy). See generally *supra* text accompanying notes 135-42.

trust injury,"¹⁵³ but it has also failed to clarify the role of the antitrust injury requirement in section 4 standing determinations.¹⁵⁴ Plaintiffs in both *Blue Shield* and *Associated General Contractors* either satisfied or failed both the traditional antitrust standing requirements and the antitrust injury test. Because neither of these opinions indicates how the Court will react to plaintiffs who meet traditional standing requirements but fail to satisfy the antitrust injury rule, the role of antitrust injury in the new balancing analysis remains unclear. One reading of *Associated General Contractors* implies that the presence or absence of antitrust injury represents but one factor to consider in determining a plaintiff's standing to sue.¹⁵⁵ However, an equally plausible reading suggests that the absence of such injury may well be controlling.¹⁵⁶ The latter reading is consistent with the lower courts' conviction that the absence of antitrust injury requires dismissal of the plaintiff's claim.

This Section questions the propriety and wisdom of incorporating antitrust injury analysis into a standing doctrine that generally limits itself to policy concerns. Recognizing that the requirement is likely to remain, however, this Section proposes that the courts treat antitrust injury as but one factor to be balanced in conjunction with traditional section 4 standing policies.

153. See *supra* text accompanying notes 107-08.

154. See *supra* note 149 and accompanying text.

155. *Associated General Contractors*, 103 S. Ct. at 908 (In determining standing under the antitrust laws, "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case."). The Court went on to analyze antitrust injury as one factor that "may be controlling." *Id.* And, in fact, although the plaintiff had not alleged antitrust injury, *id.* at 908-10, he also failed to satisfy all but two of the other factors the Court deemed relevant to a grant of standing. *Id.* at 908-12. Thus the Court was not confronting a case in which antitrust injury was the only element not satisfied.

156. The Court's remark that antitrust injury is one of the "factors [that] may be controlling," *id.* at 908, is ambiguous and may mean that its absence is controlling. Outside the confines of *Associated General Contractors*, there are other hints that the antitrust injury rule might be considered controlling. For instance, *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1983) was vacated and remanded, 103 S. Ct. 1244 (1983), for reconsideration in light of *Associated General Contractors*, even though the Ninth Circuit explicitly found that the plaintiff's injuries were not speculative, duplicative, or difficult to ascertain. 670 F.2d at 1385. Nor was there any question of the defendant's intent to injure the plaintiff, the causal connection between the defendant's acts and the plaintiff's injury, or the directness of injury. See *id.* at 1380-81, 1385. Thus, it seems likely that the remand reflects dissatisfaction with the lower court's finding of antitrust injury. Compare *supra* text accompanying notes 96-97, with *supra* text accompanying notes 80-83. By implication, then, it would appear that the Court considers antitrust injury, as it defines it, essential. In this sense, then, one could argue the Supreme Court has spoken in a case in which lack of antitrust injury was the only factor militating against standing, especially since it simultaneously denied certiorari in a very similar case that found antitrust injury lacking. See *In re Industrial Gas Antitrust Litigation*, 681 F.2d 514, 518-19 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983).

1. *The Dangers of Merging Questions of Substantive Protection and Standing*

Traditional antitrust standing analysis differs fundamentally from the antitrust injury doctrine. As originally conceived, antitrust standing analysis was intended to be a means of summarily excluding plaintiffs whose claims threaten the efficacy of the private enforcement scheme more than they advance the policies embodied in section 4's grant of a private right of action.¹⁵⁷ The antitrust injury rule, on the other hand, operates to limit recovery to those plaintiffs who have suffered the injuries with which Congress was most concerned when enacting the antitrust laws.¹⁵⁸ Thus, the policies that underlie this rule are entirely different from those that traditionally have shaped the antitrust standing doctrine. The antitrust injury rule does not measure the extent to which a claim unduly jeopardizes the vitality of the private enforcement scheme. Rather it narrows the scope of section 4 protection in accordance with judicial evaluations of the degree to which the plaintiff has a "protected interest." In this sense, the antitrust injury doctrine involves a substantive inquiry unrelated to the more "procedural" policies of traditional antitrust standing doctrine.¹⁵⁹ When courts employ the antitrust injury rule to deny plaintiffs standing, therefore, they expand antitrust standing analysis beyond its original policy justifications.

It is, of course, erroneous to equate the scope of substantive antitrust protection with the scope of antitrust standing. As the Fifth Circuit recently noted, standing analysis traditionally has been unconcerned with whether a plaintiff can ultimately succeed in his claim.¹⁶⁰ To use antitrust injury analysis in making standing determinations, wrote the court, "not only 'invites confusion,' but it drains the term 'standing' of any meaning."¹⁶¹ Other commentators have likewise decried the "mistaken equation of standing and substantive protection."¹⁶²

157. See *supra* text accompanying notes 6-23; see also *Calderone Enters. v. United Artists Theatre Circuit*, 454 F.2d 1292, 1295 (2d Cir.), *cert. denied*, 406 U.S. 930 (1971) (discussing the policies inherent in the court's choice of causation analysis).

158. See *Associated General Contractors*, 103 S. Ct. at 910; *Blue Shield v. McCready*, 102 S. Ct. 2540, 2550 (1982); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977).

159. Cf. *Berger & Bernstein*, *supra* note 9, at 835-40 (discussing the impropriety of causation tests that consider the extent of substantive protection afforded a particular plaintiff).

160. See *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 888 (5th Cir. 1982) (citing 13 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 3531, at 175-76 (1975)), *vacated and remanded*, 103 S. Ct. 1244, *aff'd on other grounds on reh'g*, 704 F.2d 785 (5th Cir.), *cert. denied*, 104 S. Ct. 393 (1983).

161. *Id.* at 889 (quoting *Handler*, *supra* note 83, at 996).

162. *Berger & Bernstein*, *supra* note 9, at 837. *Berger and Bernstein*, however, imply that justification for a substantive protection inquiry can be found in the doctrine of *jus tertii*, consist-

Admittedly, as Berger and Bernstein note, the two inquiries need not necessarily produce different results.¹⁶³ However, the danger of distorting standing analysis increases when courts draw upon case law addressing issues of substantive protection to support a decision on standing policy. By confusing two such analytically distinct questions, the scope of standing may be unjustifiably expanded or restricted, and the intended scope of substantive antitrust protection may be imperiled as well.¹⁶⁴ The merger of these two inquiries invites the misuse and abuse of both doctrines.

Moreover, the standing rule offers a convenient excuse for the early dismissal of claims that do not meet with judicial favor. This is perhaps the greatest danger posed by the addition of the antitrust injury rule to standing analysis. To apply the rule, courts must make three determinations: (1) what evils Congress meant to eliminate when it enacted the substantive antitrust provisions; (2) which private injuries Congress cared most about redressing when it enacted section 4; and (3) whether the plaintiff's injury falls within this core of congressional concerns. Each determination invites judges to inject into the standing determination their own values and views on both substantive antitrust law and the class of persons to whom the treble damages remedy ought to be extended.¹⁶⁵

Despite the dangers of incorporating the antitrust injury rule into standing analysis, courts have dismissed the distinction between standing and substantive protection. They have reasoned, for example, that if the plaintiff's failure to prove antitrust injury would ultimately result in a judgment for the defendant at trial, such failure necessarily com-

ing of the notion that, even if injured, one may not complain of an act against which only others are protected. *Id.* at 842 (citing *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975)).

163. Berger & Bernstein, *supra* note 9, at 836-38.

164. *Id.*

165. See, e.g., *Associated General Contractors*, 103 S. Ct. at 909-10:

As a general matter, a union's primary goal is to enhance the earnings and . . . working conditions of its membership [Given the development of federal labor laws, unions] will frequently not be part of the class the Sherman Act was designed to protect In this case, . . . the Union's labor-market interests seem to predominate and the *Brunswick* test is not satisfied.

See also *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir.) (seller of air-conditioning manufacturing division claiming defendant's breach of sale agreement was in furtherance of scheme to monopolize air-conditioning market, though within the Sixth Circuit's "zone of interests," nonetheless did not allege antitrust injury *qua* competitor, because it was no longer a competitor in that market), *cert. denied*, 454 U.S. 893 (1981); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1169 (7th Cir. 1978) (distributor forced to absorb manufacturer's illegal discount to favored retailers suffered only "harsh treatment," not antitrust injury), *cert. denied*, 440 U.S. 982 (1979); *Warner Management Consultants v. Data Gen. Corp.*, 545 F. Supp. 956, 965-66 (N.D. Ill. 1982) (computer distributor who suffered loss of profits as result of refusing manufacturer's illegal tying arrangement did not suffer antitrust injury because harms were not due to manufacturer's market power, as illustrated by fact that distributor refused tying arrangement).

pels a dismissal for want of standing.¹⁶⁶ Accordingly, they have made antitrust injury a standing requirement in every case.¹⁶⁷

2. *The Impact of the Antitrust Injury Requirement on Antitrust Standing*

As a practical matter, the addition of the antitrust injury rule to the standing equation has had little impact on the pool of plaintiffs permitted to maintain actions. This is because, by and large, courts have formulated the requirement so that it comports closely with their causation analyses.¹⁶⁸

However, the addition of the antitrust injury rule to the standing equation may have a significant impact as more courts begin to employ the policy balancing test endorsed by the Supreme Court. While the Court included antitrust injury as one of many "factors [that] may be controlling" in the standing equation,¹⁶⁹ it left unclear whether antitrust injury should always constitute a complete bar to an action under section 4, despite the particular factual context.

For example, if, after *Associated General Contractors*, courts continue to treat the absence of antitrust injury as a bar to standing, plaintiffs who pose few or no risks to the continued vitality of the private enforcement scheme may be prevented from maintaining private treble damage actions. Although their injuries are certain, their inability to convince a particular court that these injuries constitute "antitrust in-

166. *E.g.*, *Chrysler*, 643 F.2d at 1235.

167. *See, e.g.*, *id.* (though within zone-of-interests, plaintiff had suffered no antitrust injury); *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977) (although plaintiffs' injuries fell within target area, they had not alleged antitrust injury and thus lacked standing); *Warner Management Consultants*, 545 F. Supp. at 962 (though a target, plaintiff had no antitrust injury).

168. Those circuits that favor restrictive causation analysis tend to apply restrictive antitrust injury analysis. *See, e.g.*, cases cited *supra* note 68. This is because, as Professor Handler has noted, restrictive antitrust injury analysis incorporates restrictive causation analysis. Handler, *supra* note 83, at 994-96. The restrictive target area test works to limit the pool of plaintiffs to those who are the objects of antitrust violations; restrictive antitrust injury analysis, in turn, holds that only those persons suffer the type of injury that the particular antitrust law is designed to prevent. Restrictive antitrust injury and causation analyses are, therefore, compatible in both policy and application.

Those circuits that favor liberal causation analysis tend to employ a liberal antitrust injury analysis. Thus, although plaintiffs are generally required to allege harms due to decreased competition, *see supra* text accompanying notes 72-76, this requirement is not difficult to meet for the plaintiff who has met the liberal causation standard. Thus, harm to the liberal target area's "foreseeable plaintiff" will usually be held to reflect that decrease in competition, provided that it arises from the antitrust violation. *See also* cases cited *supra* note 74. Similarly, the foreseeable plaintiffs-as-means, while not so easily accommodated by the decreased competition test, *see supra* text accompanying note 72, satisfy the more liberal requirement that their injuries be intimately tied to the violation and not reflect an increase in competition, *see supra* text accompanying notes 80-83.

169. *Associated General Contractors*, 103 S. Ct. at 908.

jury" may bar their actions.¹⁷⁰ As a direct result, an injured party goes uncompensated, and section 4's key goals of enforcement and deterrence are frustrated.

The plight of plaintiffs-as-means—those who bring antitrust suits based on injuries suffered as a result of the defendant's efforts to implement an anticompetitive scheme—best illustrates this point. There are good reasons for allowing plaintiffs-as-means standing to sue. As with any plaintiff, recognizing that the plaintiff-as-means has standing promotes the positive goals of section 4.¹⁷¹

But there is an additional interest in granting standing to the plaintiff-as-means. This plaintiff plays an especially important role in promoting compliance with the antitrust laws because it is often in an excellent position to observe illegal conduct in progress.¹⁷² Its special position represents a potential threefold contribution to the enforcement objectives of section 4. First, its position may enable it to detect anticompetitive conduct earlier than the ultimate victims of such conduct. Thus, it can play a unique, preventive role in the enforcement scheme by acting to enforce the law and prevent serious competitive injury before it occurs.¹⁷³ Second, it may be able to detect violations that, because of their subtle, covert or complex nature, may go unnoticed by the ultimate victims.¹⁷⁴ Finally, because of its superior access to information and evidence, it may be in a better position to prove that a violation has occurred.¹⁷⁵

Moreover, granting standing to the plaintiff-as-means need not entail significant risks to the vitality of the private enforcement scheme. In many cases, its injuries will not duplicate those of others, suffer from a tenuous causal connection to the violation, require complex proof of

170. See *supra* notes 166-67 and accompanying text.

171. See *Blue Shield v. McCready*, 102 S. Ct. 2540, 2546 n.10 (1982).

172. See *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982) (employee terminated for refusal to participate in employer's price-fixing scheme), *vacated and remanded*, 103 S. Ct. 1244 (1983); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978) (distributor forced to absorb manufacturer's illegal discount to favored customers), *cert. denied*, 440 U.S. 982 (1979).

173. See *Ostrofe*, 670 F.2d at 1384-85.

174. See *id.* at 1384. In *Ostrofe*, the plaintiff alleged an oligopolistic scheme of customer allocation and price fixing that included plans for Ostrofe to rig bids, sell at agreed-upon prices, and deal only with customers allocated to Crocker. *Id.* at 1380. Had all the participants acted upon their plan, the ultimate victims—customers and competitors—might have remained ignorant of the conspiracy. Similarly, in *Lupia*, the distributor who was billed for the manufacturer's illegal discount to favored customers was in a better position to learn of the covert violation than were the disfavored retailers.

175. For instance, employees like Ostrofe may have superior knowledge about the details of the violation and sources of evidence, and in addition, have access to probative documents. The distributor in *Lupia*, on the other hand, had the invoice charging him for the illegal rebate. 586 F.2d at 1167.

damages, or threaten the defendant with financial ruin.¹⁷⁶

Despite these advantages, some courts deny standing to a plaintiff-as-means, because its injuries appear too peripheral to basic antitrust concerns to constitute "antitrust injury."¹⁷⁷ Such reasoning generates lost opportunities to further enforcement objectives. In many situations, the preservation of competitive conditions may depend on giving these very parties an economic incentive to refuse to comply with the demands of an antitrust violator and instead to "blow the whistle."¹⁷⁸ Moreover, unless such an incentive is provided to plaintiffs-as-means, these violations remain underground, as other victims who have more clearly suffered "antitrust injury" may be poorly situated or unwilling to sue.¹⁷⁹ Furthermore, courts turn such plaintiffs away with the implicit message that acquiescence in the violation is the better course, thus further subverting the policy goals of the antitrust laws.¹⁸⁰

In sum, both the application of the antitrust injury rule and the policy underlying it can be incompatible with the enforcement objectives of section 4. Unfortunately, by embracing antitrust injury as a controlling element of standing analysis, courts have resolved this tension in favor of the antitrust injury rule. Thus, they have shaped a section 4 standing doctrine that frustrates one of the primary goals of section 4. This is an unnecessary result. There is, as the next Subsection will argue, a better means of accommodating the conflicting inter-

176. See, e.g., *Ostrofe*, 670 F.2d at 1385-86 (plaintiff's injury was not duplicative, speculative, difficult to measure, nor financially ruinous to defendant); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978) (facts suggest that plaintiff's claim was clearly caused by defendant's action, was nonduplicative, easily calculated by reference to the invoice, and unlikely to ruin the defendant), *cert. denied*, 440 U.S. 982 (1979).

177. See *In re Industrial Gas Antitrust Litigation*, 681 F.2d 514 (7th Cir. 1982) (employee terminated for refusing to adhere to employer's illegal practices), *cert. denied*, 103 U.S. 1261 (1983); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978) (distributor charged for manufacturer's illegal rebate), *cert. denied*, 440 U.S. 982 (1979); see also *Warner Management Consultants v. Data Gen. Corp.*, 545 F. Supp. 956, 965-66 (N.D. Ill. 1982) (dealer who acceded to an illegal tying arrangement that caused him to lose profits did not suffer the requisite antitrust injury to maintain a per se claim because losses flowed not from the manufacturer's market power, but from its lack of market power); *RJM Sales & Marketing v. Banfl Prods. Corp.*, 546 F. Supp. 1368 (D. Minn. 1982) (beverage brokerage firm's contract terminated for refusal to aid a tying scheme).

178. See *Ostrofe*, 670 F.2d at 1384-85.

179. *Id.*

180. Such would be the case where a plaintiff like that in *Ostrofe* is denied standing. By acquiescing, the plaintiff loses little and may benefit in the long run by his employer's augmented market power and ability to charge supracompetitive profits. Should he later be implicated in a price-fixing action brought by other plaintiffs, costs of suit and any judgment will likely be absorbed by his employer. If the antitrust remedy is not available to him to sue for injuries stemming from his refusal to participate, he may well lack any remedy. See *id.* at 1384 n.12 ("The rights of private employees without contractual protection against arbitrary or retaliatory discharge are tenuous.") and cases cited therein. Thus a § 4 treble damages claim may pose the only incentive to an employee to refuse participation.

ests involved. This means permits courts to take into account the nature of a plaintiff's interest without significantly impairing the private enforcement scheme.

3. *The Role of Antitrust Injury in a Policy-Based Balancing Analysis*

Courts can avoid the compromising effect of the antitrust injury rule on section 4's positive goals by placing it in a role that is less harmful—and potentially more beneficial—to antitrust standing policies. This Comment recommends that the failure to allege an "antitrust injury" should be deemed a controlling factor in the balance of policies only when the plaintiff alleges a "prophylactic offense." Elsewhere, the absence of antitrust injury should be treated as but one factor to be balanced in conjunction with others against the positive values of section 4.

a. *Prophylactic Offenses*

The antitrust injury rule has special significance in the context in which it originated—claims based on one of the antitrust law's prophylactic provisions. These include those provisions that make certain mergers and instances of price discrimination unlawful. For example, to be illegal, a merger need only have the potential to substantially decrease competition.¹⁸¹ Thus, until an illegal merger manifests such anticompetitive effects, it can actually be procompetitive.¹⁸² Illegal price discrimination is similar in this regard. In order to create a market from buyers hesitant to pay prevailing rates, a seller may need to offer rates below those he offers to more willing buyers, which may increase competition and social benefits as new buyers enter the market.¹⁸³ Once again, until the illegal conduct actually harms competition, it may be procompetitive.¹⁸⁴

The prophylactic nature of such offenses makes the antitrust injury

181. Clayton Act § 7, 15 U.S.C. § 18 (1982). The purpose of making such conduct illegal is to "arrest in its incipency" anticompetitive conduct. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957). See generally L. SULLIVAN, *supra* note 3, §§ 202-214.

182. Between competitors within an existing market, a merger may facilitate economies of scale at the horizontal level; at the vertical level a merger may allow more efficient manufacture and distribution. A net benefit to society is the result. See L. SULLIVAN, *supra* note 3, §§ 204a, 210. Similarly, entry into a market by way of merger with an existing participant need not be illegal. Just as there is nothing inherently wrong with entering a market *de novo*, there is nothing inherently wrong with entering a market by acquisition. Both actions, in fact, are encouraged as being procompetitive.

183. See L. SULLIVAN, *supra* note 3, § 219.

184. See L. SULLIVAN, *supra* note 3, § 221 at 684-89 (criticizing the present state of the law under § 2(a) of the Clayton Act, 15 U.S.C. § 13(a) (1982), which allows a defendant to be held liable for illegal price discrimination without a showing of predation or structural harm to the economy).

doctrine an especially valuable rule when private plaintiffs seek to maintain section 4 actions for their violation. As the Supreme Court reasoned in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, it would be wholly antithetical to the purposes of the antitrust laws to permit plaintiffs to recover losses traceable to increased competition in the industry or market.¹⁸⁵ Placed in the standing context, *Brunswick* translates into a rule mandating dismissal of the complaint where a plaintiff fails to show that an illegal merger or price discrimination has created present competitive harm.

The antitrust injury test thus denies standing to plaintiffs who seek to recover for conduct that is not yet anticompetitive. Used in this fashion, the antitrust injury requirement may prevent private enforcement of laws governing mergers and price discriminations until the harm has been felt. But given the existence of alternative enforcement methods,¹⁸⁶ the cost to the enforcement values of section 4 seems comparatively small. In these cases, overarching substantive antitrust policies obtain paramount importance, and the procompetitive mandate of the antitrust laws becomes too clear to tolerate such claims.

b. Nonprophylactic Offenses

The concerns just discussed are, however, peculiar to those situations involving prophylactic offenses because only such offenses can be both illegal and procompetitive at once. Outside of those situations, conduct governed by the antitrust laws must be anticompetitive to be illegal.¹⁸⁷ Consequently, as long as the plaintiff's injury results from

185. 429 U.S. at 488. See P. AREEDA & D. TURNER, *supra* note 15, ¶¶ 335d, 339c, at 176, 203-04 (mergers may be illegal "despite possible economies, not because of them [Thus, there is little connection] between the rationale for finding the merger unlawful and any injuries suffered").

186. Plaintiffs may be able to obtain an injunction under § 16 of the Clayton Act, 15 U.S.C. § 26 (1982), and may not need to show present competitive harm to do so. See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561-62 (1981). Furthermore, the government can bring an action against the defendant. 15 U.S.C. §§ 4, 21 (1982). Alternatively, the plaintiff could simply wait and sue later when the anticompetitive effects of the violation finally occur.

187. Outside the context of prophylactic offenses, the antitrust law's substantive rules require a showing of restraint of trade or monopolization. Section 1 restraints will be presumed in per se offenses. See, e.g., *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (per se offenses are those "agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."). Offenses not treated to the per se rule nonetheless can be found anticompetitive under "rule of reason" analysis. See *Standard Oil v. United States*, 221 U.S. 1 (1911) (whether a restraint, which simply may be ancillary to achievement of an economically desirable end, is nonetheless so unreasonable that the damage to competition outweighs the benefits that might be realized from the action). Finally, where the plaintiff alleges monopolization under § 2 of the Sherman Act, it must show both monopoly power and either exclusionary conduct or the intent to use that power. See generally L. SULLIVAN *supra* note 3, §§ 33-48, at 94-132.

successful completion of the anticompetitive scheme, its damages will reflect a decrease in competition; if the plaintiff seeks redress as a plaintiff-as-means, its damages at least will not reflect an increase in competition. Thus, in "nonprophylactic" claims—and in claims brought under the prophylactic provisions, but which involve allegations of present competitive harm—the standing inquiry should be quite different.

Because the plaintiff cannot recover for losses arising from enhanced competition, the antitrust injury rule should focus on the extent to which the plaintiff's injury reflects a harm that Congress desired to prevent when it enacted the antitrust laws. As generally interpreted by the courts, this will be measured by the relationship between the alleged injury and the anticompetitive effects of the alleged violation.

In these cases, although the closeness of the relationship between the competitive harm and the plaintiff's injury will vary, the policies involved will not be so clearly at odds as they are in cases of prophylactic offenses. Taking again the *Ostrofe* plaintiff as an example, it may fairly be said that his injuries did not, in a narrow sense, reflect competitive harms. Moreover, unlike the *Blue Shield* plaintiff, *Ostrofe* was not an integral participant in the market the defendant sought to affect. Yet, unlike the *Brunswick* plaintiffs' losses, *Ostrofe*'s injuries did not reflect competitive enhancements. Rather, his injuries fell somewhere between the two ends of the spectrum. The Ninth Circuit realized the value of the plaintiff before it to section 4's enforcement goal,¹⁸⁸ and to the procompetitive policies of the antitrust laws. It thus developed a new formulation of antitrust injury in order to accommodate the claim.¹⁸⁹

The court, however, should not have been forced to construct such a formulation of antitrust injury. Rather, in cases such as *Ostrofe*, the absence of antitrust injury—however defined by a particular court—should not act as a complete bar to the action. Instead, it should be weighed with and against all of the other factors that bear on the standing issue, including compensation, enforcement, and deterrence, the ease with which damages can be computed, and the undesirability of speculative, duplicative, or ruinous recoveries.

4. *The Benefits of Treating Antitrust Injury as One of Many Factors in Standing Analysis*

Treating antitrust injury as just one of several considerations in standing determinations mitigates the most objectionable features of

188. See *supra* text accompanying notes 83, 140, 171-76.

189. See *supra* text accompanying notes 82-83.

antitrust injury analysis. Although there still must be a preliminary evaluation as to whether the plaintiff has a "protected interest,"¹⁹⁰ the dangers of a premature or biased resolution of that question are significantly reduced.

More important, if antitrust injury becomes one factor of many to consider, courts may become more sensitive to the doctrine's potential impact on enforcement values. To date, most lower courts have denied standing where antitrust injury, however defined, is lacking. They have avoided confronting the havoc the antitrust injury doctrine could wreak on standing policies by manipulating the definition of the rule to meet their chosen causation analyses. By placing antitrust injury on a par with other factors and juxtaposing them all in a balancing test, courts will have to reconcile the inherent conflict between the antitrust injury doctrine and the policies of section 4. As a result, courts may be more reluctant to allow the values underlying the antitrust injury doctrine alone to override the positive policies of section 4.

Finally, diminishing the overall importance of antitrust injury in standing analysis may force courts to reexamine the substance of the antitrust injury doctrine. Because the doctrine originally was conceived in the context of determining whether "damages" resulting from an increase in competition could be recovered, its application to antitrust standing analysis should be guided by careful thought. Instead, the doctrine has been subjected to the influence of those commentators who would shape it exclusively with economic efficiency analysis,¹⁹¹ and the fact that its justification is less compelling outside the prophylactic context has gone largely unnoticed. By modifying the role of antitrust injury analysis to better serve the policy goals of section 4, courts may eventually be forced to broaden their views of its significance and impact.

Thus, the different values underlying the antitrust injury and standing doctrines can potentially benefit from their union in the standing context. Considering the two doctrines together will make it easier to evaluate the impact of one determination on the other, and to confront and reconcile the conflicting policies of both the antitrust injury rule and the traditional antitrust standing doctrine.

CONCLUSION

This Comment has proposed that courts analyze antitrust standing by directly balancing the positive policies of section 4 against the nega-

190. See *supra* text accompanying notes 158-65.

191. See, e.g., Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980) (arguing for an economic efficiency approach to the concept of antitrust injury).

tive risks that an unlimited right of recovery would pose. The analytical framework adopted by the Supreme Court in *Associated General Contractors*, when properly understood, achieves the most complete integration of section 4 standing policies at the least expense to all parties. Plaintiffs seeking enforcement of the antitrust laws and compensation for their injuries will not be arbitrarily excluded, nor will defendants and courts be unduly burdened.

Similar benefits accrue if antitrust injury is not a conclusive element of the standing equation. Thus, this Comment proposes that courts should acknowledge the separate and often conflicting values underlying the traditional antitrust standing doctrine and the antitrust injury rule. A balancing analysis that treats antitrust injury as but one of many factors in the standing determination should be implemented. In this way, courts will have to confront the potential impact of the antitrust injury doctrine on section 4 enforcement goals, and may thus fairly reconcile the conflict.

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