

PRIVATE ANTITRUST STANDING: A SURVEY AND ANALYSIS OF THE LAW AFTER *ASSOCIATED GENERAL*

INTRODUCTION

Section 4 of the Clayton Act provides the potent remedy of treble damages¹ to a party injured by any activity proscribed by the antitrust laws.² Despite the apparent breadth of section 4,³ courts limit potential recoveries in several ways,⁴ the most important of which is the amor-

1. After the trier of fact determines the amount of damages suffered by a victorious private litigant, the court automatically multiplies the award by three. Clayton Act § 4, 15 U.S.C. § 15 (1976 & Supp. V 1981). For a discussion of the policy reasons underlying treble damage awards, see *infra* notes 45-52 and accompanying text.

Private parties may also sue to enjoin activity which violates the antitrust laws. 15 U.S.C. § 26. Understandably, however, most private suits seek treble damages under § 4. L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 769 (1977). Although courts more readily grant standing to sue to litigants seeking injunctive relief under § 26, see, e.g., *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), this Note is limited to consideration of standing questions under § 4.

2. Clayton Act § 4, 15 U.S.C. § 15 (1976 & Supp. V 1981). Section 4(a) of the Clayton Act provides in pertinent part:

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

Id. § 15(a). This section was originally enacted as § 7 of the Sherman Act, ch. 647, 26 Stat. 210 (1890) (current version at 15 U.S.C. § 15 (1976 & Supp. V 1981)).

3. Some courts have urged a literal reading of § 4. See, e.g., *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487, 491 (2d Cir. 1948). The legislative history of the Sherman Act supports this position. The drafters envisioned private treble damage awards 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." 51 CONG. REC. 9073 (1914) (remarks of Rep. Webb). For a discussion of the Act's legislative history as it relates to standing, see Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 811-13 (1977); Note, *The Third Circuit's "Functional Analysis": Patrolling the Portals to Treble Damage Actions Brought Under Section 4 of the Clayton Act*, 21 B.C.L. REV. 659, 661-62 (1980); Comment, *Consumer Standing in Antitrust Actions: Reiter v. Sonotone Corp.*, 58 WASH. U.L.Q. 717, 720-21 (1980). See also Alioto & Donnici, *Standing Requirements for Antitrust Plaintiffs: Judicially Created Exceptions to a Clear Statutory Policy*, 4 U.S.F.L. REV. 205 (1970) (standing limitations frustrate the clear purpose of § 4). See generally THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 13-30 (E. Kintner ed. 1978); H. THORELLI, THE FEDERAL ANTITRUST POLICY 164-210 (1955).

4. The Supreme Court approved of judicial constraints on § 4 in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), when it stated: "The lower courts have been virtually unanimous in

phous doctrine of antitrust standing.⁵ Commentators blame the Supreme Court for much of the confusion⁶ concerning the doctrine.⁷

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." *Id.* at 263 n.14.

To sue successfully, a plaintiff must demonstrate an actual injury to business or property. The requirement of an actual injury is the source of the much disputed "passing on" defense and "indirect purchaser" doctrine created by the Supreme Court in *Hanover Shoe Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The Court held that indirect purchasers do not suffer an injury within the meaning of § 4. *See* 2 P. AREEDA & D. TURNER, *ANTITRUST LAW* § 337c-e (1978); Berger & Bernstein, *supra* note 3, at 811. The Court modified the doctrine in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) which held that consumers have standing within § 4. The debate surrounding the "indirect purchaser" doctrine is beyond the scope of this Note. *See generally* Comment, *supra* note 3.

Requiring injury to "business or property" limits the class of antitrust litigants in two ways. First, plaintiffs precluded from entering into business in the market affected by the defendant's violations are often denied recovery. *See, e.g.*, *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Martin v. Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966). If, however, the potential entrant has taken sufficient steps toward entry into the threatened market, courts allow suit. *See, e.g.*, *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir. 1982), *vacated*, 103 S. Ct. 1244 (1983), *reaff'd on remand*, 704 F.2d 785 (5th Cir. 1983); *T.V. Signal Co. v. American Tel. & Tel.*, 617 F.2d 1302 (8th Cir. 1980); *Solinger v. A. & M. Records, Inc.*, 586 F.2d 1304 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979).

The "business or property" requirement also prevents suits where only non-commercial interests of the plaintiff are involved. *See* 2 P. AREEDA & D. TURNER, *supra* note 4, § 334b. Thus, a state may not sue for injury to its general economy by reason of any activity in violation of the antitrust laws. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). Similarly, a taxpayer may not sue for injuries to a municipality. *See Ratliff v. Burney*, 657 F.2d 640 (4th Cir. 1981); *Cosentino v. Carver-Greenfield Corp.*, 433 F.2d 1274 (8th Cir. 1970). *See generally* 2 P. AREEDA & D. TURNER, *supra* note 4, § 336.

5. Antitrust standing is similar, but not identical, to constitutional standing. Constitutional standing requirements are easier to satisfy than antitrust standing requirements, which more closely resemble the requirement of proximate cause in torts. *See infra* notes 18-41 and accompanying text. Many courts confuse the two causation requirements. *See, e.g.*, *La Chappel v. United Shoe Mach. Corp.*, 90 F. Supp. 721, 722-23 (D. Mass. 1950). *See generally* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 244 (4th ed. 1971).

To have standing under the Constitution, a plaintiff need only show an injury in fact. This requires a palpable injury, *see United States v. Richardson*, 418 U.S. 166, 177 (1974), causally linked to the defendant, *see United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-90 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 734-41 (1972), and availability of an adequate remedy, *see Duke Power Co. v. North Carolina Env'tl. Study Groups, Inc.*, 438 U.S. 59, 90-92 (1978); *Warth v. Seldin*, 422 U.S. 490, 504-08 (1975). This constitutional rubric is met by the antitrust plaintiff with a showing of "injury to business or property." Cause in fact is rarely a problem to the antitrust plaintiff today and is not considered in this Note.

6. Antitrust standing under § 4 of the Clayton Act has been aptly described as a "decisional morass." Berger & Bernstein, *supra* note 3, at 840. *See also Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1147-51 (6th Cir. 1975); *Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1298 (2d Cir. 1971) (Levet, J., dissenting), *cert. denied*, 406 U.S. 930 (1972); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 191 (2d Cir. 1970) (Waterman, J., dissenting), *cert.*

Until recently, the Court abdicated responsibility for antitrust standing to the Federal Circuit Courts of Appeal,⁸ an approach which led to a proliferation of standing tests and conflicting results.⁹

In two recent cases¹⁰ the Supreme Court attempted to synthesize the divergent standing tests.¹¹ Part I of this Note describes the various standing tests courts employ. Part II discusses the recent Supreme Court cases and Part III predicts their effect on the law of antitrust standing in each federal circuit. Understanding each circuit's approach

denied, 401 U.S. 923 (1971); *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1219 (S.D.N.Y. 1981); *International Rys. of Cent. Am. v. United Brands Co.*, 358 F. Supp. 1363, 1370 (S.D.N.Y. 1973), *aff'd on other grounds*, 532 F.2d 231 (2d Cir. 1976); *Wilson v. Ringsby Truck Lines, Inc.*, 320 F. Supp. 699, 701 (D. Colo. 1970).

The commentators are equally critical. See, e.g., Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits — The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1 (1971); 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 (1976); Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U. L. REV. 374 (1976); Tyler, *Private Antitrust Litigation: The Problem of Standing*, 49 U. COLO. L. REV. 269 (1978); Letter from Eleanor M. Fox to Editors of New York University Law Review, *reprinted in* 51 N.Y.U. L. REV. 1102 (1976).

7. See, e.g., Berger & Bernstein, *supra* note 3, at 841-42; Note, *Standing To Sue in Private Antitrust Litigation: Circuits in Conflict*, 10 IND. L. REV. 532, 533 (1977).

8. The Court's steadfast refusal to take a position on the antitrust standing tests took two forms. First, the Court occasionally declined explicitly to decide the standing issue. See, e.g., *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (Brennan, J., dissenting); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972); *Radovich v. National Football League*, 352 U.S. 445 (1957). Second, the Court often refused to grant certiorari in antitrust standing cases involving open conflicts between the circuits. See, e.g., *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir.), *cert. denied*, 102 S. Ct. 388 (1981); *Tose v. First Pa. Bank, N.A.*, 492 F. Supp. 246 (E.D. Pa.), *aff'd*, 648 F.2d 879 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981); *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342 (5th Cir.), *cert. denied*, 450 U.S. 1030 (1980); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1979); *Solinger v. A. & M. Records, Inc.*, 586 F.2d 1304 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976); *Calderone Enter. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

9. For a discussion of the various standing tests developed by courts, see *infra* notes 20-59 and accompanying text. For inter-test conflicts, compare *infra* notes 23-32 (results under direct injury test) with *infra* notes 37 (results under traditional target area tests), 38 (results under foreseeable target area test), 44 (results under policy balancing test) & 57 (results under zone of interests test). For intra-test conflicts, see Berger & Bernstein, *supra* note 3, at 833-34.

10. *Associated Gen. Contractors v. California State Council of Carpenters*, 103 S. Ct. 897 (1983); *Blue Shield v. McCready*, 457 U.S. 465 (1982).

11. The Court's approach in *Associated General* takes elements from each of the traditional standing tests described *infra* notes 16-59. See *infra* notes 68-90 and accompanying text.

to antitrust standing is essential for two reasons. First, the variety of standing tests currently in use,¹² coupled with the liberal venue provisions of the antitrust laws,¹³ encourage forum shopping.¹⁴ Knowledge of each circuit's approach to antitrust standing enables counsel to better control the outcome of antitrust litigation. Second, the ambiguous nature of the Court's recent pronouncements leaves much room for interpretation of the new test by the circuit courts using their prior case law.¹⁵ As a result, antitrust counsel must understand the past and current law in order to anticipate its development.

I. TYPES OF STANDING TESTS

Courts have developed three approaches to antitrust standing: proximate cause, policy-balancing, and zone of interests. While these approaches often overlap in practice,¹⁶ they are conceptually distinct.¹⁷

12. See *infra* notes 16-59.

13. Clayton Act § 12, 15 U.S.C. § 22 (1976 & Supp. IV 1980) provides:

Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Id. See *supra* note 2 for partial text of 15 U.S.C. § 15(a), the Clayton Act's private treble damage award provision, which is to be read in conjunction with 15 U.S.C. § 22 for purposes of jurisdiction. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 429 F. Supp. 139, 141 (N.D. Ill. 1977).

Although substantial contacts are required, see *ABC Great States, Inc. v. Globe Ticket Co.*, 310 F. Supp. 739, 742 (N.D. Ill. 1970), antitrust venue is liberally construed, see *Learning Sys. Inc. v. Sol Levin*, 351 F. Supp. 532, 533 (E.D. Mo. 1972). The general test is that of whether the "average businessman" would view the contacts as substantial. *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252, 256 (E.D. Pa. 1968). Thus, sufficient "transacted business" in the forum is easily shown. See, e.g., *National Constr. Ass'n v. National Elec. Contractors Ass'n Inc.*, 498 F. Supp. 510, 527 (D. Md. 1980) (\$44,000 transaction in seven year period sufficient); *C.C.P. Corp. v. Wynn Oil Co.*, 354 F. Supp. 1275, 1278 (N.D. Ill. 1973) (transactions of approximately \$12,000-85,000, \$14,000, and \$15,000 each adequate); *Illinois v. Harper & Row Publishers, Inc.*, 308 F. Supp. 1207, 1210 (N.D. Ill. 1969) (\$45,000, \$24,000, \$8600 sales in forum in three years sufficient). The absence of offices, agents, and real estate in the forum district is not fatal. *School Dist. v. Harper & Row Publishers Inc.*, 267 F. Supp. 1006, 1009 (E.D. Pa. 1967).

14. See Lieberman, *A Motion Picture Producer's Standing to Recover Treble Damages From a Movie Distributor for Block Booking*, 1980 BEV. HILLS B.J. 185, 186; Note, *supra* note 7, at 532; Comment, *Standing Under Clayton § 4: A Proverbial Mystery*, 77 DICK. L. REV. 73, 83 (1972-73).

15. See *infra* notes 79-83 and accompanying text.

16. Courts often apply elements of several tests. A recent example is *Blue Shield v. McCready*, 457 U.S. 465 (1982). Though the Supreme Court explicitly declined to adopt a standing test, *id.* at 476-78, the Court did identify the general inquiry by stating: "[W]e look . . . to the physical and economic nexus between the alleged violation and the harm to the plaintiff . . ." *Id.* at 478. The Court upheld the circuit court's grant of standing to an insured suing her insurer

Courts originally drew upon the tort concept of proximate cause to mark the limits beyond which a plaintiff's injury would be considered too remote and standing denied.¹⁸ As with proximate cause, courts use a variety of result-oriented formulae¹⁹ to measure remoteness.

There are three basic standing tests based on the notion of proximate cause.²⁰ Courts first developed the "direct injury" test, which denies standing to plaintiffs not in a direct relationship with the defendant.²¹ While the direct injury test does not require privity of contract between the plaintiff and defendant,²² it is the most restrictive of the antitrust

for illegally refusing to cover the fees of psychologists when the fees of psychiatrists were covered. The Court's reasoning included elements of the target area test, *id.* at 479-80, the foreseeable target area test, *id.*, and the policy balancing test, *id.* at 472-73.

17. Each category of tests focuses on a different aspect of statutory limitations. The proximate cause approach denies standing on the ground of the plaintiff's remoteness from the source of the injury. As with proximate cause in tort law, this theory is grounded in notions of common sense and fairness. Also as in tort law, the proximate cause approach requires a metaphysical determination of when an injury is too tenuously linked to its cause. *See infra* notes 19-41 and accompanying text. *See generally* W. PROSSER, *supra* note 5, at 236-37, 244-46 (discussion of proximate cause).

The policy balancing approach is based on the theory that the antitrust laws should enhance social and economic goals. The focus is therefore on practical considerations of the effect of granting standing in particular cases. *See infra* notes 44-53 and accompanying text. *See generally* Berger & Bernstein, *supra* note 3, at 858-83 (suggested policy balancing framework).

The zone of interests approach is borrowed from courts' efforts to delineate a standing test under the Administrative Procedure Act, 5 U.S.C. § 702 (1976). *See infra* notes 54-59 and accompanying text.

18. *Blue Shield v. McCready*, 457 U.S. 465, 477-78 & n.13 (1982).

19. Berger & Bernstein, *supra* note 3, at 842-44.

20. Courts and commentators disagree on the number of standing tests derived from the concept of proximate causation. *Cf., e.g.,* Note, *supra* note 3, at 666 (author describes seven tests).

21. The direct injury test originated in two early antitrust cases in which courts denied standing to shareholders of injured corporations. *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910), *Ames v. American Tel. & Tel. Co.*, 166 F. 820 (C.C.D. Mass. 1909).

For a discussion of the origin and early application of the direct injury test, see 2 P. AREEDA & D. TURNER, *supra* note 4, § 334c; Berger & Bernstein, *supra* note 3, at 813-19; Note, *supra* note 3, at 661-63 & nn.19-43.

Courts have generally abandoned the direct injury test, although similar results are still achieved under the traditional target area test. *See infra* notes 33-37 and accompanying text. The direct injury approach may reemerge as a result of the Supreme Court's recent cases, which focused attention on the directness of the plaintiff's injury. Whether "directness" in this sense signals approval of the old approach remains to be seen.

22. Some courts required privity. *See, e.g.,* *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); *City of Denver v. American Oil Co.*, 53 F.R.D. 620, 631 (D. Colo. 1971); *South Carolina Council of Milk Producers, Inc. v. Newton*, 241 F. Supp. 259, 263 (E.D.S.C. 1965), *rev'd*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

Courts generally rejected this requirement as overly strict. *See, e.g., In re Western Liquid*

standing tests. Under the direct injury test courts have denied standing to suppliers,²³ shareholders,²⁴ patent licensors or franchisors,²⁵ creditors,²⁶ lessors,²⁷ ultimate consumers,²⁸ taxpayers,²⁹ employees,³⁰ and as-

Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); Clark Oil Co. v. Phillips Petroleum Co., 148 F.2d 580 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945); FLM Collision Parts, Inc. v. Ford Motor Co., 406 F. Supp. 224 (S.D.N.Y. 1975), *rev'd on other grounds*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *In re Boshes v. General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973); *In re Master Key Antitrust Litig.*, 1973-2 Trade Cases (CCH) ¶ 74,680 (D. Conn. 1973). *See generally* 2 P. AREEDA & D. TURNER, *supra* note 4, § 334c; Berger & Bernstein, *supra* note 3, at 819.

23. *See, e.g.*, GAF Corp. v. Circle Floor Co., 463 F.2d 752 (2d Cir. 1972), *aff'g*, 329 F. Supp. 823 (S.D.N.Y. 1971), *cert. dismissed*, 413 U.S. 901 (1973); Volasco Prod. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43 (D. Del. 1974); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956). *See generally* 2 P. AREEDA & D. TURNER, *supra* note 4, §§ 339, 340a-e.

24. *See, e.g.*, Pitchford v. PEPI, Inc., 531 F.2d 92 (3d Cir. 1976), *cert. denied*, 426 U.S. 935 (1976); Mendenhall v. Fleming Co., 504 F.2d 879 (5th Cir. 1974); Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); Schaffer v. Universal Rundle Corp., 397 F.2d 893 (5th Cir. 1968); Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1 (9th Cir. 1963); Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292 (2d Cir. 1958); Peter v. Western Newspaper Union, 200 F.2d 867 (5th Cir. 1953); Ames v. American Tel. & Tel. Co., 166 F. 820 (C.C.D. Mass. 1909); Campo v. National Football League, 334 F. Supp. 1181 (E.D. La. 1971); Former Stockholders of Barr Rubber Prods. Co. v. McNeil Corp., 325 F. Supp. 917 (N.D. Ohio 1970), *aff'd without opinion*, 441 F.2d 1169 (6th Cir. 1971); Moore v. Penn-Dixie Cement Corp., 1971 Trade Cas. (CCH) ¶ 73,581 (N.D. Ga.), *aff'd per curiam*, 1971 Trade Cas. (CCH) ¶ 73,746 (5th Cir. 1971); Walder v. Paramount Publix Corp., 132 F. Supp. 912 (S.D.N.Y. 1955); Gerli v. Silk Ass'n of Am., 36 F.2d 959 (S.D.N.Y. 1929).

Courts have even denied standing to sole shareholders under the direct injury test. *See, e.g.*, Pitchford v. PEPI, Inc., 531 F.2d 92 (3d Cir. 1976), *cert. denied*, 426 U.S. 935 (1976); Martens v. Barrett, 245 F.2d 844 (5th Cir. 1957); Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., 193 F. Supp. 401 (S.D.N.Y. 1961); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956).

See generally 2 P. AREEDA & D. TURNER, *supra* note 4, § 336d; Berger & Bernstein, *supra* note 3, at 815.

25. *See, e.g.*, Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos., 382 F.2d 925 (10th Cir. 1967). *See generally* 2 P. AREEDA & D. TURNER, *supra* note 4, § 341.

26. *See, e.g.*, Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910); Walder v. Paramount Publix Corp., 132 F. Supp. 912 (S.D.N.Y. 1955); Gerli v. Silk Ass'n of Am., 36 F.2d 959 (S.D.N.Y. 1929). *But see* Perkins v. Standard Oil Co., 395 U.S. 642 (1969); Michelman v. Clark-Schwebel Fiber Glass Corp., 1974-1 Trade Cas. (CCH) ¶ 74,974 (S.D.N.Y. 1974), *rev'd on other grounds*, 534 F.2d 1036 (2d Cir. 1976). *See generally* P. AREEDA & D. TURNER, *supra* note 4, § 336c; Berger & Bernstein, *supra* note 3, at 815-18.

27. *See, e.g.*, Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956); Lieberthal v. North Country Lanes, Inc., 221 F. Supp. 685 (S.D.N.Y. 1963), *aff'd*, 332 F.2d 269 (2d Cir. 1964); Erone v. Skouras Theatres Corp., 166 F. Supp. 621 (S.D.N.Y. 1957); Westmoreland Asbestos Co. v. Johns-Manville Corp., 30 F. Supp. 389

sociations suing on behalf of their members.³¹ Application of this test is difficult because of problems inherent in identifying which injuries are sufficiently "direct."³²

The inherent difficulties in application and the restrictive nature of the direct injury test led courts to create the more liberal "target area test."³³ Two variations of this test are currently in use.³⁴ Both allow a court to grant standing to a plaintiff within the area of the economy endangered by the defendant's allegedly illegal acts.³⁵ The traditional target area test requires, in addition, that the defendant "aim at" the plaintiff.³⁶ This version of the test is difficult to apply because of the problems inherent in defining the term "aim," which has led courts to discuss the test using unhelpful, albeit colorful, metaphors.³⁷

(S.D.N.Y. 1939), *aff'd per curiam*, 113 F.2d 114 (2d Cir. 1940). *But see* Perkins v. Standard Oil Co., 395 U.S. 642 (1969) (owner/lessor has standing); Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957) (lessor has standing). *See generally* 2 P. AREEDA & D. TURNER, *supra* note 4, § 341; Berger & Bernstein, *supra* note 3, at 823-24.

28. *See, e.g.*, United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970). *See generally* 2 P. AREEDA & D. TURNER, *supra* note 4, § 337; Berger & Bernstein, *supra* note 3, at 825-30.

29. *See generally* 2 P. AREEDA & D. TURNER, *supra* note 4, § 336b.

30. *See, e.g.*, Pitchford v. PEPI, Inc., 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976); Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973). *But see* Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967). *See generally* 2 P. AREEDA & D. TURNER, *supra* note 4, §§ 338-39; Berger & Bernstein, *supra* note 3, at 821-23.

31. *See, e.g.*, Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co., 497 F.2d 1151 (2d Cir.), *cert. denied*, 419 U.S. 968 (1974); Farmer's Co-op Oil Co. v. Socony-Vacuum Oil Co., 133 F.2d 101 (8th Cir. 1942); Northern Cal. Monument Dealers Ass'n v. International Ass'n, 120 F. Supp. 93 (D.C. Cal. 1954); Alabama Indep. Serv. Station Ass'n v. Shell Petroleum Corp., 28 F. Supp. 386 (N.D. Ala. 1939).

32. *See* Berger & Bernstein, *supra* note 3, at 819.

33. *See* 2 P. AREEDA & D. TURNER, *supra* note 4, § 334d; Berger & Bernstein, *supra* note 3, at 830.

34. Courts and commentators disagree how to classify variations of the target area test. *See supra* notes 7, 8, & 21; 1981 *Ariz. St. L.J.* 1105, 1107-8 (1981).

35. An antitrust plaintiff has standing to sue under the target area test if he is "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

36. *See* 2 P. AREEDA & D. TURNER, *supra* note 4, § 334d.

Intent to injure the plaintiff, however, is a question of fact. Such intent is not a requisite element of the traditional target area test. *See, e.g.*, Blue Shield v. McCready, 457 U.S. 465, 479 n.15 (1982); Schwimmer v. Sony Corp. of Am., 637 F.2d 41, 47-48 (2d Cir. 1980); Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073, 1075-76 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

37. *See, e.g.*, Yoder Bros. Inc. v. California-Fla. Plant Corp., 537 F.2d 1347, 1361 (5th Cir. 1976) (need not be "sitting on the bull's eye"), *cert. denied*, 429 U.S. 1094 (1977); *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 129 (9th Cir.) (not on "firing range"), *cert. denied*, 414

The second variety of the target area test requires that the plaintiff be a "foreseeable" victim of the defendant's allegedly anticompetitive conduct.³⁸ This version of the test, created by the Ninth Circuit,³⁹ has since achieved much popularity in other circuits.⁴⁰ Despite its popularity, courts and commentators criticize the foreseeable target area test on both theoretical and practical grounds.⁴¹

Dissatisfaction with proximate cause approaches led courts⁴² and commentators⁴³ to advocate a policy-balancing approach, in which courts weigh competing antitrust policies on a case-by-case basis to determine if a plaintiff has antitrust standing.⁴⁴ On one hand, the drafters

U.S. 1045 (1973); *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073, 1076 (9th Cir. 1970) ("hit . . . squarely," not "sideswiped or struck by carom shot"), *cert. denied*, 402 U.S. 923 (1971); *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10, 19 (S.D.N.Y. 1975) ("direct line of fire"), *aff'd on other grounds*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977); *International Rys. of Cent. Am. v. United Brands Co.*, 358 F. Supp. 1363, 1370 (S.D.N.Y. 1973) ("rifle range metaphor . . . excludes the shotgun"), *aff'd*, 532 F.2d 231 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

For a discussion of the application of the traditional target area test to particular types of plaintiffs, see *infra* notes 98, 106-11, 161-73, 211-20, 257-58 & 264-66 and accompanying text.

38. See 2 P. AREEDA & D. TURNER, *supra* note 4, § 334d; *Berger & Bernstein*, *supra* note 3, at 831.

39. In *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964), the court stated that the "[p]laintiff must show . . . [the] affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy." *Id.* at 220.

40. See *infra* notes 113-14, 140, 200 & 222 and accompanying text.

41. Professors Areeda and Turner argue that not all foreseeable injuries were intended to be remediable under the antitrust laws. 2 P. AREEDA & D. TURNER, *supra* note 4, § 334d. This criticism suggests that foreseeability is not strict enough. *Berger and Bernstein* argue that, because antitrust violations are intentional, the use of the negligence-based theory of foreseeability is inappropriate. *Berger & Bernstein*, *supra* note 3, at 835. This criticism suggests that foreseeability is too restrictive because the burden of proving intentional wrongs is less than the burden of proving negligence.

As with other proximate cause based terms, foreseeability is hard to define. See *Berger & Bernstein*, *supra* note 3, at 835.

42. The Third Circuit uses a functional approach in which it considers the policy impact of granting standing to particular classes of antitrust plaintiffs. See *supra* notes 120-21 & 124. Other circuits have increased the weight they give to policy considerations in making standing decisions. See *infra* notes 145, 155, 201-03, 224, 237-39 & 252 and accompanying text. The Supreme Court, in *Blue Shield v. McCready*, 457 U.S. 465 (1982), gave an unusually important role to competing antitrust policies. See *supra* note 16. In *Associated Gen. Contractors v. California State Council of Carpenters*, 103 S. Ct. 897 (1983), the Court expressly made policy a part of its antitrust standing test. See *infra* note 75.

43. See, e.g., 2 P. AREEDA & D. TURNER, *supra* note 4, §§ 334e-342; *Berger & Bernstein*, *supra* note 3, at 858-83; *Handler*, *supra* note 6, at 30-31.

44. The policy-balancing approach is the standing test most tied to the particular facts of the case at hand. Such an approach avoids the inflexibility of other standing tests which often force facts into the narrow confines of prior case law. On the other hand, the flexibility of the policy-

of what is now section 4 of the Clayton Act, and courts construing the provision, recognized the importance of the private remedy for deterrence⁴⁵ and compensation⁴⁶ purposes. On the other hand, several factors militate against unlimited access to the treble damage remedy. Courts and commentators cite fears that unlimited access will result in duplicative⁴⁷ and ruinous recoveries,⁴⁸ windfalls to plaintiffs,⁴⁹ specula-

balancing test inhibits predictability in the standing area. Such uncertainty is especially frustrating in the field of antitrust where litigation is extraordinarily costly to pursue.

45. Drafters of both the Sherman and Clayton Acts were adamantly concerned with providing a remedy to the private litigant. See Berger & Bernstein, *supra* note 3, at 845-50. The Supreme Court has repeatedly stressed the important enforcement role played by the treble damage remedy. See, e.g., *Blue Shield v. McCready*, 457 U.S. 465, 472 (1982); *Pfizer, Inc. v. India*, 434 U.S. 308, 313 (1978); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965).

For scholarly discussion of the importance of treble damages for deterrence, see 2 P. AREEDA & D. TURNER, *supra* note 4, § 343; M. HANDLER, H. BLAKE, H. GOLDSCHMIDT, & R. PITOFSKY, *CASES AND MATERIALS ON TRADE REGULATION* 153-54 (2d ed. 1983); Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1127 (1976); Berger & Bernstein, *supra* note 3, at 848-50; Handler, *Antitrust — Myth & Realty in an Inflationary Era*, 50 N.Y.U. L. REV. 211, 239 (1975); Loevinger, *Private Action — The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 168-69 (1958); MacIntyre, *The Role of the Private Litigant in Antitrust Enforcement*, 7 ANTITRUST BULL. 113, 128-29 (1962); Wham, *Antitrust Treble-Damage Suits: The Government's Chief Aid in Enforcement*, 40 A.B.A. J. 1061, 1062 (1954); Note, *Closing the Door on Consumer Antitrust Standing*, 54 N.Y.U. L. REV. 237, 261-62 (1979); Comment, *Denial of Standing to Private Noncommercial Consumers Under Section 4 of the Clayton Act*, 31 VAND. L. REV. 1531, 1545-46 (1978); Comment, *supra* note 3, at 726; Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1061-62 (1952).

46. See *Blue Shield v. McCready*, 457 U.S. 465, 472 (1982); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1978); *Radovich v. National Football League*, 352 U.S. 445, 454 (1957); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

Congress designed the treble damages remedy to protect the free enterprise system, see *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958), and courts sometimes use the remedy to restore a competitive market. See *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971). See generally 2 P. AREEDA & D. TURNER, *supra* note 4, § 343; Berger & Bernstein, *supra* note 3, at 846-48.

47. Duplicative recoveries are possible when a single antitrust violation injures many people similarly situated (e.g., consumers and shareholders) or the general economy. In such a case, courts usually deny standing. See, e.g., *Blue Shield v. McCready*, 457 U.S. 465 (1982); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *Engine Specialties Inc. v. Bombardier, Ltd.*, 605 F.2d 1 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980). See generally 2 P. AREEDA & D. TURNER, *supra* note 4, §§ 334c, 334-343; Berger & Bernstein, *supra* note 3, at 850-51.

48. Ruinous recoveries, or "overkill," can occur when courts allow numerous, non-duplicative awards. If the defendant is unable to bear the burden of such liability, these rewards can hinder the overall competitive situation. See *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131

tive awards,⁵⁰ and an avalanche of suits burdening the courts.⁵¹ Under the policy-balancing approach, courts recognize the unique nature of each plaintiff's claim and discard the notion that an inflexible formula is appropriate to every case.⁵² In practice, courts use the policy-balancing approach to supplement other tests and provide a flexible component to the determination of antitrust standing.⁵³

Courts have derived the third distinct approach to antitrust standing from the standing test used by administrative agencies and courts under the Administrative Procedure Act (APA).⁵⁴ To demonstrate standing under the APA, the complainant must suffer an injury falling within the zone of interests Congress sought to protect by the substantive statute.⁵⁵ Until very recently, the Sixth Circuit used the "zone of interests" test.⁵⁶ The Sixth Circuit, however, created the test before the Supreme Court promulgated the antitrust injury requirement.⁵⁷

(5th Cir. 1975); *Calderone Enter. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). *See generally* Berger & Bernstein, *supra* note 3, at 851-52.

49. Windfall recoveries result when a remotely situated plaintiff, although injured, is awarded treble damages. The theory suggests that it is somehow unfair to compensate plaintiffs for indirect injuries. For cases and analysis concerning the policy against windfall recoveries, see 2 P. AREEDA & D. TURNER, *supra* note 4, §§ 334e-343; Berger & Bernstein, *supra* note 3, at 853-54.

50. Though not a frequently invoked policy concern in antitrust litigation, courts sometimes cite the danger of speculative damages to limit standing. *See, e.g.*, *Blue Shield v. McCready*, 457 U.S. 465, 475 (1982). Commentators argue that the danger is properly addressed in a challenge to the adequacy of proof of damages, not in the preliminary determination of standing. 2 P. AREEDA & D. TURNER, *supra* note 4, §§ 334e-343; Berger & Bernstein, *supra* note 3, at 854-55.

51. Courts fear opening the floodgates to antitrust litigation. *See, e.g.*, *Mid-west Paper Prod. Co. v. Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979); *Calderone Enter. Inc. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). *See also* Berger & Bernstein, *supra* note 3, at 855-58.

52. *Cf.* *Blue Shield v. McCready*, 457 U.S. 465, 472-73 (1982) (limitations on standing only permissible if justified in particular case).

53. *See supra* note 16.

54. Standing before an administrative agency is governed by § 702 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976), which grants standing to any person "aggrieved by agency action within the meaning of a relevant statute." *Id.*

55. *See* *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970); *Barlow v. Collins*, 397 U.S. 159, 164 (1970).

56. *See* *J.F. Reed Co. v. K-Mart Corp.*, 1982-1 Trade Cas. (CCH) ¶ 64,501 (E.D. Mich. 1982). The Sixth Circuit recently replaced the zone of interests test with the approach outlined by the Supreme Court in *Associated Gen. Contractors v. California State Council of Carpenters*, 103 S. Ct. 897 (1983). *See* *Southaven Land Co., Inc. v. Malone & Hude, Inc.*, 715 F.2d 1079 (1983). *See generally infra* notes 174-85 and accompanying text.

57. The Sixth Circuit adopted the zone of interests test in 1975 in *Malamud v. Sinclair Oil*

Though the courts in the Sixth Circuit attempted to distinguish anti-trust injury from the zone of interests test,⁵⁸ the requirements are not conceptually distinct.⁵⁹

II. RECENT SUPREME COURT DECISIONS

In *Blue Shield v. McCready*,⁶⁰ the United States Supreme Court affirmed a Fourth Circuit decision allowing a Blue Shield subscriber to sue Blue Shield for failing to cover treatment by a psychologist while reimbursing subscribers for services provided by psychiatrists.⁶¹ In finding that standing was appropriate under section 4 of the Clayton Act,⁶² the Court stressed the plaintiff's status as a consumer.⁶³ Though it noted the myriad of antitrust standing tests currently employed by the Federal Circuit Courts of Appeal,⁶⁴ the Court did not expressly

Corp., 521 F.2d 1142 (6th Cir. 1975). The Supreme Court announced the antitrust injury requirement in 1978 in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1978).

After *Brunswick*, only antitrust injuries are remediable under § 4 of the Clayton Act. An antitrust injury is one which the antitrust laws were designed to remedy. See 2 P. AREEDA & D. TURNER, *supra* note 4, § 346. In *Brunswick*, the Court held that a plaintiff could not sue for injuries caused by illegal acts which kept a competitor of the plaintiff in business. 429 U.S. at 496-97. The Court reasoned that the plaintiff's injury resulted from procompetitive activity. *Id.*

58. See *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1234-35 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981); *J.F. Reed Co., v. K-Mart Corp.*, 1982-1 Trade Cas. (CCH) ¶ 64,501 at 72,769 (E.D. Mich. 1982).

59. Under the zone of interests test, the plaintiff must show an "essential connection between the injury and the aims of the antitrust laws." *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir.) (quoting *A.D.M. Corp. v. Sigma Instruments Inc.*, 628 F.2d 753, 754 (1st Cir. 1980), *cert. denied*, 102 S. Ct. 388 (1981)). Similarly, the antitrust injury requirement requires that the plaintiff's "injury was of a type that Congress sought to redress in providing a private remedy for violation of the antitrust laws." *Blue Shield v. McCready*, 457 U.S. 465, 483 (1982).

60. 457 U.S. 465 (1982).

61. *Id.* at 468. Plaintiff alleged that Blue Shield conspired with psychiatrists to exclude psychologists from receiving compensation under Blue Shield plans. Such a conspiracy restrains trade in violation of § 1 of the Sherman Act.

62. 457 U.S. at 472.

63. The Court stated, "[W]e have refused to engraft artificial limitations on the § 4 remedy." *Id.* The Court illustrated this broad reading of § 4 by referring to *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). The Court stated:

[*Reiter*] rejected the argument that the § 4 remedy is available only to redress injury to commercial interests. In that case we afforded the statutory term "property" its "naturally broad and inclusive meaning," and held that a consumer has standing to seek a § 4 remedy reflecting the increase in the purchase price of a good that was attributable to a price-fixing conspiracy.

457 U.S. at 473. See also *Associated Gen. Contractors v. California State Council of Carpenters*, 103 S. Ct. 897, 908-09 (1982) (analyzing *McCready*).

64. 457 U.S. at 476 n.12.

endorse any particular theory.⁶⁵ The Court did, however, grant standing to the plaintiff because she fell within the target area of the economy endangered by Blue Cross' illegal conduct.⁶⁶ This result seems to adopt tacitly the target area approach to antitrust standing; alternatively, the Court may have merely applied the antitrust standing test employed by the lower court. Because of the ambiguity surrounding its interpretation, *McCready* does little to clarify the law of antitrust standing.⁶⁷

In *Associated General Contractors v. California State Council of Carpenters*,⁶⁸ the Supreme Court reversed a decision by the Ninth Circuit Court of Appeals which had granted a union standing to sue a multi-employer association for conduct allegedly restraining the union's business activities in violation of the antitrust laws.⁶⁹ The Court admitted that the defendant's actions probably violated the law,⁷⁰ but held that only individual union members could properly bring suit.⁷¹

The Court identified several factors that should be considered in determining if a claimant should be granted standing under section 4 of the Clayton Act:⁷² the nature of the plaintiff's injury,⁷³ the directness

65. *Id.*

66. *Id.* at 480-81. The Court stated:

As a consumer of psychotherapy services entitled to financial benefits under the Blue Shield plan, we think it clear that *McCready* was "within that area of the economy . . . endangered by [that] breakdown of competitive conditions" resulting from Blue Shield's selective refusal to reimburse.

Id. (quoting *Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 129 (9th Cir. 1973)).

67. The Court stated, "We have no occasion here to evaluate the relative utility of any of these possibly conflicting approaches toward the problem of remote antitrust injury." 457 U.S. at 476 n.12. Courts addressing the issue of antitrust standing after *McCready* continued to apply their prior caselaw and standing tests. See *infra* notes 95-274 and accompanying text.

68. 103 S. Ct. 897 (1983).

69. The union alleged that the association's members conspired with each other and non-union members to weaken the union through various trade practices. These practices included refusing to enter collective bargaining agreements and breaching existing collective bargaining agreements. *Id.* at 899-902.

70. *Id.* at 903.

71. *Id.* at 913.

72. The Court reviewed the various approaches to standing used by the circuit courts of appeal and stated: "In our view, courts should analyze each situation in light of the factors set forth in the text *infra*." *Id.* at 908 n.33.

It is not clear whether the enumerated factors are exhaustive or merely illustrative. See *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1086 n.9 (6th Cir. 1983).

73. 103 S. Ct. at 908. The Court concluded:

Set against this background, a union, in its capacity as bargaining representative, will

of injury,⁷⁴ and policy considerations.⁷⁵ The Court set forth these factors because of the inconsistent results reached under the divergent standing tests employed by the lower federal courts.⁷⁶ Although several courts have since adopted the Supreme Court's *Associated General* standing analysis,⁷⁷ the ambiguity inherent in the doctrine of antitrust standing⁷⁸ will probably continue to generate inconsistent results in the

frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains. In each case its alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* In this case, particularly in light of the longstanding collective bargaining relationship between the parties, the Union's labor-market interests seem to predominate, and the *Brunswick* test is not satisfied.

Id. at 910. The *Brunswick* test is the test of antitrust injury. See *supra* notes 57-59 and accompanying text; *infra* note 94. To the extent that the antitrust injury and the zone of interests tests are identical, see *supra* note 59 and accompanying text, Sixth Circuit cases decided under the zone of interests test should provide an understanding of how courts will apply this factor of *Associated General*. See *infra* notes 175-80 & 185 and accompanying text.

74. 103 S. Ct. at 910. The union's claim in *Associated General* failed to satisfy this requirement because there were other parties more directly affected by the association's illegal activities.

The Court stated:

The existence of an identifiable 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 such as the Union to perform the office of a private attorney general. Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.

Id. at 911. Because the inquiry focuses on remoteness, this factor incorporates the proximate cause standing tests, though it does not purport to adopt any specific variation. See *supra* notes 18-41 and accompanying text.

75. Courts increasingly consider several policy factors germane to the determination of antitrust standing. See *supra* notes 44-51 and accompanying text.

In *Associated General*, the Court determined that the following policy concerns militated against granting standing to the union: the speculative nature of the damages, difficulty with judicial management of the litigation's complexity, possibility of duplicative recoveries, and problems concerning apportionment of damages. *Id.* at 911-12.

76. *Id.* at 907-08 n.33. For reference to previous inconsistent results, see *supra* note 9 and accompanying text.

77. See *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, No. 83-7364 (2d Cir. Dec. 12, 1983); *McDonald v. Johnson & Johnson*, No. 82-1594 (8th Cir. Nov. 16, 1983); *Chelson v. Oregonian Publ. Co.*, 715 F.2d 1368 (9th Cir. 1983); *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 704 F.2d 785 (5th Cir. 1983); *In re Wheat Rail Freight Rate Antitrust Litig.*, No. 534 (N.D. Ill. Dec. 8, 1983).

78. The Court admitted the impossibility of establishing a rigid standing test when it compared antitrust standing to proximate cause in tort law. The Court stated:

It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. In both situations 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. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

federal circuits.⁷⁹

This intrinsic inconsistency springs in part from courts' inability to define the scope of proximate cause as an element of antitrust standing. Almost all federal circuit courts already require proximate cause, yet reach differing results depending on their formulation of the test of remoteness.⁸⁰ Because the Supreme Court's suggested approach establishes no specific formula for determining remoteness of injury, courts are likely to adhere to their current proximate cause formulation. Some circuits appear to have abandoned their old standing tests entirely;⁸¹ others may explicitly incorporate their own tests,⁸² or may purport to adopt the Supreme Court's approach while continuing to apply their own case law.⁸³

Despite its failure to resolve the disputes surrounding antitrust standing, the approach recommended by the Supreme Court in *Associated General* does have important ramifications. An important aspect of the Court's approach is the explicit adoption of policy considerations as relevant to antitrust standing.⁸⁴ This factor has gained considerable acceptance in the circuits.⁸⁵ Although balancing policy considerations is a salutary move away from overly rigid standing tests,⁸⁶ it necessarily enhances the likelihood of conflicting lower court results.⁸⁷

Additionally, in denying the union standing to sue, the Court noted Congress' desire in adopting section 4 of the Clayton Act to protect

103 S.Ct. at 907-08.

79. The Supreme Court remanded several cases for reconsideration in light of *Associated General*. See *Crocker Co. Inc. v. Ostrofe*, 103 S. Ct. 1244 (1983), remanding 670 F.2d 1378 (9th Cir. 1982); *Mitsui & Co. Ltd. v. Industrial Inv. Dev. Corp.*, 51 U.S.L.W. 3633 (U.S. Feb. 28, 1983), remanding 677 F.2d 113 (5th Cir. 1983). In each of these cases, the court of appeals can apply the Supreme Court's standing test and reach the same result as before the remand. See *infra* notes 102 & 154 and accompanying text.

80. 103 S. Ct. at 907-08 n.33. See *supra* notes 20-42 and accompanying text.

81. See e.g., *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, No. 83-7364 (2d Cir. Dec. 12, 1983); *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983).

82. This is the approach of at least one court in the wake of *Associated General*. See *Magic Chef, Inc. v. Rockwell Int'l Corp.*, 561 F. Supp. 732 (N.D. Ill. 1983). The court acknowledged *Associated General*, but nevertheless applied the Seventh Circuit's target area test. See *infra* notes 207-09 and accompanying text. See also *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983); *Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc.*, 710 F.2d 752 (11th Cir. 1983).

83. See *infra* notes 154-57 and accompanying text.

84. See *supra* note 75 and accompanying text.

85. See *supra* notes 42 & 45-49 and accompanying text.

86. See *supra* note 78 and accompanying text.

87. See *supra* notes 78-79 and accompanying text.

consumers.⁸⁸ This emphasis reiterates the Court's position in *McCready*.⁸⁹ In *Associated General*, however, the Court denied standing to plaintiffs because they were not consumers. It is likely that some courts will use the consumer protection rubric similarly, to limit the class of antitrust plaintiffs granted standing.⁹⁰

Finally, prior to *Associated General*, though the cases were by no means unanimous, most courts and commentators regarded antitrust injury as a factor distinct from antitrust standing.⁹¹ Even in cases addressing both antitrust injury and antitrust standing, courts evaluated the requirements separately.⁹² Now, in light of the Supreme Court's suggestion that a court should balance antitrust injury with other standing factors,⁹³ it seems theoretically possible for courts to permit suits by plaintiffs who have suffered no antitrust injury if proximate cause and policy factors weigh strongly enough in their favor.⁹⁴

III. APPLICATION OF TESTS BY CIRCUIT

A. First Circuit

The First Circuit employs the traditional target area test to limit private antitrust standing.⁹⁵ The most recent case decided by the court of appeals is *Engine Specialities, Inc. v. Bombardier Ltd.*⁹⁶ Though the case primarily concerned the antitrust injury requirement of section 4, the court made clear its acceptance of the traditional target area test.⁹⁷

88. 103 S. Ct. at 908-09. The Court stated: "As the legislative history shows, the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market." *Id.*

89. See *supra* notes 72-76 and accompanying text.

90. See *McDonald v. Johnson & Johnson*, No. 82-1594 (8th Cir. Nov. 16, 1983) (*Associated General* read as requiring plaintiff suing under § 4 be either a consumer or a direct competitor of defendant); *United States v. Stauffer Chemical Co.*, No. 4-82-990 (D. Minn. Oct. 21, 1983).

91. Though courts often confused antitrust injury with standing, antitrust injury presented a distinct requirement under § 4 of the Clayton Act. 2 P. AREEDA & D. TURNER, *supra* note 4, § 346.

92. See, e.g., *Blue Shield v. McCready*, 457 U.S. 465 (1982).

93. See *supra* notes 72-75 and accompanying text.

94. From a practical standpoint it is unlikely that a court would grant standing in the absence of antitrust injury. Antitrust injury commonly requires prohibited conduct detrimental to competition. See *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1978); *supra* note 57. Courts probably would not entertain a suit alleging that pro-competitive actions violate the antitrust laws.

95. *Blue Shield v. McCready*, 457 U.S. 465, 478 n.14 (1982).

96. 605 F.2d 1 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980).

97. The court in *Bombardier* stated: "Recovery of treble damages is potent ammunition in-

The First Circuit has applied this test in a strict manner, granting standing to an insured doctor, but not to a distributor.⁹⁸

Unlike other circuits, the First Circuit only recently adopted the target area test, relying previously on the direct injury test.⁹⁹ The unusual resilience of the direct injury approach in the First Circuit is probably attributable to the fact that this circuit created the test.¹⁰⁰ The circuit's courts have reaffirmed their allegiance to this approach several times.¹⁰¹

While the First Circuit has yet to address the standing question in the aftermath of *Associated General*, its current approach is consistent with the Court's recent decisions.¹⁰² As a result, it is unlikely that the circuit's approach to antitrust standing will change significantly after

tended not only to protect the aggrieved, but to deter the wrongdoer. The courts have attempted to keep the range of the barrage within the target area thought to have been intended by Congress in passing the antitrust legislation." *Id.* at 17.

98. Compare *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980) (distributor of injured party without standing because hit but not aimed at) with *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d 3 (1st Cir. 1977), *aff'd*, 438 U.S. 531 (1978) (insured doctors have standing to sue insurance company).

99. See, e.g., *Carroll v. Protection Maritime Ins. Co.*, 377 F. Supp. 1294 (D. Mass. 1974) (fishermen lack standing to sue insurance company boycotting their services), *modified*, 512 F.2d 4 (1st Cir. 1975).

100. See *Ames v. American Tel. & Tel. Co.*, 166 F. 820 (D. Mass. 1909).

101. See *Robinson v. Stanley Home Prods., Inc.*, 178 F. Supp., 230 (D. Mass.) (salesman without standing to sue manufacturer for negotiating directly with buyer and eliminating salesman's commission), *aff'd*, 272 F.2d 601 (1st Cir. 1959); *Miley v. John Hancock Mut. Life Ins. Co.*, 148 F. Supp. 299 (D. Mass.) (insurance broker without standing to sue insurance company for conspiring with insurance commission to give contract to competitor of company broker hoped to represent), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956) (third party without standing to sue for injury to party in privity with plaintiff).

102. While the First Circuit may change the wording of their traditional target area test, the results are not likely to change dramatically. The First Circuit already requires antitrust injury pursuant to *Brunswick*, see *supra* notes 57-59 and accompanying text, though it does not balance the requirement with other standing considerations as proposed by *Associated General*. For a discussion of the likely affect of balancing antitrust injury, see *supra* notes 91-94 and accompanying text.

The second component of the Supreme Court's balancing approach concerns the proximate cause of the injury. Because the First Circuit already evaluates proximate cause through use of the target area test, *Associated General* will probably not significantly affect standing disputes in this circuit. See *supra* notes 80-83 and accompanying text.

The Supreme Court's standing analysis emphasizes the importance of the policy implications of granting or denying standing. While the traditional target area test does not include an evaluation of policy questions, many courts currently supplement their own tests with such an evaluation. See *supra* notes 42-53 and accompanying text. Although a policy analysis seemingly makes standing tests more flexible, it does not significantly affect results because courts tend to use policy

Associated General. Courts in the First Circuit may now discuss policy concerns in their evaluation of standing, but are likely to do so simply to reinforce conclusions reached under the target area test.¹⁰³

B. Second Circuit

From 1967 until very recently, the Second Circuit also used the traditional target area test to evaluate standing to sue under section 4.¹⁰⁴ Prior to 1967, the circuit employed the direct injury test, which it applied in a very conservative manner.¹⁰⁵ The circuit's shift to the traditional target area test,¹⁰⁶ however, did not produce results appreciably different from those achieved using the direct injury test. Under the traditional target area test the Second Circuit continued to deny standing to patentees,¹⁰⁷ lessors,¹⁰⁸ suppliers,¹⁰⁹ purchasers,¹¹⁰ and licensors.¹¹¹

Until 1980, courts in the Second Circuit routinely rejected the for-

arguments in a result-oriented manner, to bolster predetermined conclusions. *See supra* notes 84-88.

103. *See supra* notes 84-87 and accompanying text.

104. *Blue Shield v. McCready*, 457 U.S. 465, 478 n.14 (1982).

105. *See Note, supra* note 7, at 536-37.

106. *See Data Digest, Inc. v. Standard & Poor's Corp.*, 43 F.R.D. 386 (S.D.N.Y. 1967) (employee with standing). *See also SCM Corp. v. Radio Corp. of Am.*, 407 F.2d 166 (2d Cir.) (3d party in privity with victim has no standing), *cert. denied*, 395 U.S. 943 (1969).

Courts in the Second Circuit have applied the direct injury test as recently as 1972. *See, e.g., GAF Corp. v. Circle Floor Co.*, 463 F.2d 752 (2d Cir. 1972), *aff'g*, 329 F. Supp. 823 (S.D.N.Y. 1971), *cert. dismissed*, 413 U.S. 901 (1973); *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971); *SCM Corp. v. Radio Corp. of Am.*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969); *United Egg Producers v. Bauer Int'l Corp.*, 312 F. Supp. 319 (S.D.N.Y. 1970).

107. *SCM Corp. v. Radio Corp. of Am.*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969).

108. *Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

109. *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *petition for cert. dismissed*, 413 U.S. 901 (1971); *Levitch v. C.B.S., Inc.*, 495 F. Supp. 649 (S.D.N.Y. 1980), *aff'd*, 697 F.2d 495 (2d Cir. 1983).

110. *Schwimmer v. Sony Corp. of Am.*, 637 F.2d 41 (2d Cir. 1980), *cert. denied*, 103 S. Ct. 362 (1982); *Reading Indus. v. Kennecott Copper Corp.*, 631 F.2d 10 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981); *Long Island Lighting Co. v. Standard Oil Co.*, 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976). *But see Commerce Tankers Corp. v. National Maritime Union*, 553 F.2d 793 (2d Cir.) (potential buyers of employer's vessels were targets of provision of bargaining agreement that if employers sold a vessel to an American flag shipper not already under contract with union, the ship would be sold with a crew provided by union), *cert. denied*, 434 U.S. 923 (1977).

111. *Western Geophysical Co. of Am., Inc. v. Bolt. Assocs.*, 584 F.2d 1164 (2d Cir. 1978).

seeability approach to the target area test pioneered by the Ninth Circuit.¹¹² In *Schwimmer v. Sony Corp. of America*,¹¹³ however, the court of appeals made frequent reference to Ninth Circuit cases in holding that an indirect purchaser is a "target" of a seller's price discrimination if there is evidence to show that the discrimination foreseeably affected the indirect purchaser.¹¹⁴

Schwimmer sparked concern among the circuit's district courts that the court of appeals would adopt the foreseeable target area test.¹¹⁵ The district courts have not applied the foreseeable target area test in light of *Schwimmer*.¹¹⁶ The court of appeals, however, never addressed the post-*Schwimmer* controversy.¹¹⁷ The court appears to have adopted the Supreme Court's new approach to antitrust standing in *Crimpers Promotions, Inc. v. Home Box Office, Inc.*¹¹⁸ In *Crimpers*, the circuit court granted a boycott victim standing under section 4, finding he met the requirements set forth in *Associated General*.¹¹⁹

C. Third Circuit

The Third Circuit employs a balancing approach to antitrust standing¹²⁰ in which a variety of factors are analyzed on a case-by-case basis.¹²¹ The Third Circuit first enunciated its balancing test in *Cromar*

112. *Long Island Lighting Co. v. Standard Oil Co.*, 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976); *Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Reaemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546 (S.D.N.Y. 1980).

113. 637 F.2d 421 (2d Cir. 1980), *cert. denied*, 103 S. Ct. 362 (1982).

114. *Id.* at 423.

115. See *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203 (S.D.N.Y. 1981); *Pollack v. Citrus Assocs.*, 512 F. Supp. 711 (S.D.N.Y. 1981); *Chatham Brass Co. v. Honeywell Inc.*, 512 F. Supp. 108 (S.D.N.Y. 1981).

116. See *supra* cases cited note 115.

117. In *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203 (S.D.N.Y. 1981), the district court followed *Reading Indus. v. Kennecott Copper Corp.*, 631 F.2d 10 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981), erroneously declaring *Reading* to be the most recent court of appeals case in the circuit. 519 F. Supp. at 1221.

118. No. 83-7364 (2d Cir. Dec. 12, 1983).

119. The Second Circuit read *McCready* as liberalizing standing requirements under the target area test; *Associated General* did not undermine *McCready*, according to the court. *Id.* Peculiarly, however, the court then rejected the target area test and limited two important target area cases to their facts. *Id.*

120. *Blue Shield v. McCready*, 102 S. Ct. 2540, 2547 n.12 (1982). The test is alternatively labelled a "balancing approach," "factual matrix," and "functional approach."

121. *Id.* This approach rejects the fundamental premise of the proximate cause approaches that a uniform standard is applicable to all cases. See *supra* notes 42-53 and accompanying text.

Co. v. Nuclear Materials & Equipment Corp.,¹²² after reviewing the disparate results achieved using the direct injury and target area tests.¹²³ Under the circuit's balancing approach, a court considers the plaintiff's relationship to the defendant, the plaintiff's position in the area of the economy threatened by the defendant's alleged violation, the effect of the alleged violation on the plaintiff, the nature of the industry, and competing policy concerns.¹²⁴

Since *Cromar*, the Third Circuit has twice employed the balancing approach. In *Bravman v. Bassett Furniture Industries*,¹²⁵ the court allowed a manufacturer's sales representative to sue two manufacturers for exclusive dealing and attempted imposition of territorial restrictions.¹²⁶ Applying the *Cromar* factors, the court found that the alleged violations affected the plaintiff directly, and that the defendants' conspiracy "aimed" at the plaintiff.¹²⁷

The most recent Third Circuit standing decision is *Mid-west Paper Products Co. v. Continental Group*.¹²⁸ In *Mid-west*, the court denied standing to two classes of plaintiffs: indirect purchasers,¹²⁹ and a plaintiff who had no direct relationship with the defendants, even though he was a direct purchaser of a competitor of the defendants.¹³⁰

Several district courts in the Third Circuit have applied the balancing approach, with mixed results. Courts have granted standing to a member of a professional association suing the association,¹³¹ employees,¹³² and the owner of a football club suing for injury to the club;¹³³

122. 543 F.2d 501 (3d Cir. 1976).

123. *Id.* at 506. For a discussion of the development of antitrust standing in the Third Circuit prior to adoption of the balancing test, see *id.* at 506; Callahan v. Scott Paper Co., 541 F. Supp. 550, 553-56 (E.D. Pa. 1982); Note, *supra* note 3, at 659; Note, *supra* note 7, at 539.

124. 543 F.2d at 508. See also *Mid-west Paper Prod. Co. v. Continental Group*, 596 F.2d 573 (3d Cir. 1979); Callahan v. Scott Paper Co., 541 F. Supp. 550 (E.D. Pa. 1982); Randolph Assocs. v. Wakefern Food Corp., 527 F. Supp. 599 (D.N.J. 1981); Tose v. First Pa. Bank, 492 F. Supp. 246 (E.D. Pa.), *aff'd*, 648 F.2d 879 (3d Cir. 1980), *cert. denied*, 454 U.S. 893 (1981). See generally Note, *supra* note 3, at 676-79.

125. 552 F.2d 90 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977).

126. *Id.* at 100.

127. *Id.*

128. 596 F.2d 573 (3d Cir. 1979). In *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983), the Third Circuit discussed *McCready* and *Associated General*, but only in connection with the indirect purchaser doctrine of *Illinois Brick*. See *supra* note 4.

129. *Id.* at 578-80.

130. *Id.* at 587.

131. *Bogus v. American Speech & Hearing Ass'n*, 582 F.2d 277 (3d Cir. 1978).

132. *Shaw v. Russell Trucking Line, Inc.*, 542 F. Supp. 776 (W.D. Pa. 1982); *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979). *But see* Callahan v. Scott Paper Co., 541 F. Supp.

they have also denied standing to shareholders¹³⁴ and consumers.¹³⁵ By balancing factors which incorporate the directness¹³⁶ and policy¹³⁷ requirements of *Associated General*, the Third Circuit's approach closely follows the Supreme Court's recommended analysis. The circuit fails only to consider antitrust injury as an element of standing.¹³⁸ Incorporation of this element would not significantly change the results reached under the Third Circuit's current approach.¹³⁹

D. Fourth Circuit

The Fourth Circuit Court of Appeals has consistently adhered to the foreseeable target area test of antitrust standing.¹⁴⁰ The court of appeals first addressed antitrust standing in *South Carolina Council of Milk Producers v. Newton*.¹⁴¹ The court adopted the foreseeable target area test¹⁴² and granted standing to raw milk producers who lost profits as a result of a conspiracy by retailers to sell milk as loss leaders.¹⁴³

The court of appeals reaffirmed the *Newton* approach in 1981 in *Ratliff v. Burney*.¹⁴⁴ In the interim, the Federal District Court in Maryland twice suggested that courts balance competing antitrust policies to supplement the circuit's foreseeable target area test.¹⁴⁵

550 (E.D. Pa. 1982) (conjectural damages not within target area tip balance against granting standing); *Herrin v. L.M. Collins & Assocs.*, 483 F. Supp. 288 (W.D. Pa. 1980) (employee without antitrust injury).

133. *Tose v. First Pa. Bank*, 492 F. Supp. 246 (E.D. Pa.), *aff'd*, 648 F.2d 879 (3d Cir. 1980), *cert. denied*, 454 U.S. 893 (1981).

134. *Athlete's Foot Inc. v. Ralph Libonati Co.*, 445 F. Supp. 35 (D. Del. 1977).

135. *Mid-west Paper Prods. Co. v. Continental Group*, 596 F.2d 573 (3d Cir. 1979).

136. *See supra* note 74 and accompanying text.

137. *See supra* note 75 and accompanying text.

138. *See supra* notes 57-69 & 73 and accompanying text.

139. *See supra* notes 91-94 and accompanying text.

140. *Shapiro v. General Motors Corp.*, 472 F. Supp. 636, 654 (D. Md. 1979), *cert. denied*, 451 U.S. 909 (1981).

141. 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

142. *Id.* at 419. The court stressed both causation and foreseeability:

The pivot of decision presently is whether the defendants' asserted conduct was the proximate cause of the plaintiff's asserted injury. If the damage was merely incidental or consequential, or if the defendants' antitrust acts are so removed from the injury as to be only remotely causative, the plaintiffs have not been injured "by reason of anything forbidden in the antitrust laws" as contemplated by the Clayton Act.

Id.

143. *Id.* at 418-19. A "loss leader" involves the sale of one item at an unprofitable price to induce purchase of another item.

144. 657 F.2d 640 (4th Cir. 1981) (reaffirming *Newton* without stating test).

145. *Shapiro v. General Motors Corp.*, 472 F. Supp. 636 (D. Md. 1979) (urging adoption of

Most recently, the Supreme Court affirmed the Fourth Circuit's decision in *McCready v. Blue Shield*.¹⁴⁶ Under the foreseeable target area approach, the Fourth Circuit grants standing to buyers,¹⁴⁷ consumers,¹⁴⁸ sellers,¹⁴⁹ and distributors.¹⁵⁰ Courts in the Fourth Circuit have denied standing to taxpayers¹⁵¹ and patent holders suing for infringement.¹⁵²

Courts in the Fourth Circuit have not addressed the issue of antitrust standing in the aftermath of *Associated General*. While other circuits have abandoned the foreseeable target area test in light of *Associated General*,¹⁵³ the test is not necessarily inconsistent with the Court's recommended approach.¹⁵⁴ As such, the status of the law in the Fourth Circuit is unclear.

E. Fifth Circuit

The Fifth Circuit adopted the Supreme Court's recommended analysis in *Industrial Investment Development Corp. v. Mitsui & Co.*,¹⁵⁵ which

Third Circuit's balancing approach), *cert. denied*, 451 U.S. 909 (1981); *Midway Enter., Inc. v. Petroleum Mktg. Corp.*, 375 F. Supp. 1339 (D. Md. 1974) (urging policy component to target area test).

146. 649 F.2d 228 (4th Cir. 1981), *aff'd*, 102 S. Ct. 2540 (1982). *See supra* notes 60-67 and accompanying text.

147. *Midway Enters. Inc. v. Petroleum Mktg. Corp.*, 375 F. Supp. 1339 (D. Md. 1974).

148. *McCready v. Blue Shield*, 649 F.2d 228 (4th Cir. 1981), *aff'd*, 102 S. Ct. 2540 (1982).

149. *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

150. *Hughes Automotive, Inc. v. Mid-Atlantic Toyota Dists., Inc.*, 543 F. Supp. 1056 (D. Md. 1982).

151. *Ratliff v. Burney*, 657 F.2d 640 (4th Cir. 1981).

152. *Shapiro v. General Motors Corp.*, 472 F. Supp. 636 (D. Md. 1979), *cert. denied*, 451 U.S. 909 (1981).

153. *See, e.g., Crimpers Promotions Inc. v. Home Box Office Inc.*, No. 83-7364 (2d Cir. Dec. 12, 1983) (movement toward foreseeable target area test halted); *Chelson v. Oregonian Publishing Co.*, 715 F.2d 1368 (9th Cir. 1983) (*Associated General* factors utilized).

154. *Associated General* reversed a grant of standing under the foreseeable target area test. The case can be read as disapproving a particular application of the foreseeability approach, rather than as a repudiation of the test itself. The only difference between the traditional and the foreseeable target area tests is their wording of the directness requirement. *See supra* notes 34-42 and accompanying text. Under the foreseeability approach, the harm to the plaintiff must have been reasonably foreseeable to the defendant. *Id.* This test does not require the defendant to actually know of or intend harm to the plaintiff. *Id.* Intent is irrelevant to antitrust standing. *Associated Gen. Contractors v. California State Council of Carpenters*, 103 S. Ct. 897, 908 (1983); *Blue Shield v. McCready*, 102 S. Ct. 2540, 2548 (1982). The Supreme Court's standard of directness, or proximate cause, is broad enough to include the foreseeable target area test. *See supra* notes 79-84 and accompanying text.

155. 704 F.2d 785 (5th Cir. 1983).

had been remanded by the Supreme Court for reconsideration in light of *Associated General*. It is not clear, however, that *Associated General* will alter the Fifth Circuit's antitrust standing analysis.¹⁵⁶ After adopting the Supreme Court's suggested approach,¹⁵⁷ the Fifth Circuit reaffirmed its prior decision in *Mitsui*.¹⁵⁸

Prior to *Mitsui*, the Fifth Circuit courts took divergent approaches to antitrust standing.¹⁵⁹ Most courts, however, applied the traditional target area test.¹⁶⁰ In 1976 the court of appeals supplanted the direct injury test by explicitly applying the target area test in *Tugboat, Inc. v. Mobile Towing Co.*¹⁶¹

Under the traditional target area test, some courts in the Fifth Circuit use a two-step procedure to evaluate antitrust standing questions. First, these courts identify the area of the economy endangered by the allegedly illegal conduct. Second, the courts determine if the plaintiff's injury is within that target area or if the defendant "aimed at" the plaintiff.¹⁶²

156. Because the Fifth Circuit's traditional target area test, *see infra* note 160 and accompanying text, is not inconsistent with the Supreme Court's wording of the test of antitrust standing, the Fifth Circuit will probably continue to draw upon its own case law for guidance. *See supra* notes 80-83 and accompanying text.

157. 704 F.2d at 786. The Fifth Circuit stated:

Because of the Court's analysis of antitrust injury and the necessary causal connection between violation and injury for recovery, our discussion of standing [prior to remand] was faulty. Whether or not the inquiry is termed "antitrust standing," the Court teaches the appropriateness of an initial evaluation of plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them tested by the Court's explication of relevant factors of antitrust redress.

Id.

158. *Id.*

159. *See Note, supra* note 7, at 541-43.

160. *See Blue Shield v. McCreedy*, 102 S. Ct. 2540, 2547 n.12 (1982).

161. 534 F.2d 1172 (5th Cir. 1976), *rev'g*, 398 F. Supp. 1131 (S.D. Ala. 1975). The court of appeals reversed the lower court's denial of standing to a union and tugboat employees who sought to sue the employer and a competing union for conspiring to provide cheap labor. The district court had used the direct injury test. *Id.* at 1174.

162. *See, e.g., In re Municipal Bond Reporting Antitrust Litig.*, 672 F.2d 433 (5th Cir. 1982); *Industrial Inv. Dev. Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876 (5th Cir. 1982), *vacated*, 103 S. Ct. 1244 (1983); *Guzik v. State Bar*, 659 F.2d 528 (5th Cir. 1981); *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266 (5th Cir. 1979); *Yoder Bros. Inc. v. California-Fla. Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975); *Hardwick v. Nu-Way Oil Co.*, 443 F. Supp. 940 (S.D. Tex.), *aff'd*, 589 F.2d 806 (5th Cir. 1978), *cert. denied*, 444 U.S. 836 (1979); *In re Yarn Process Patent Validity & Antitrust Litig.* 398 F. Supp. 31 (S.D. Fla. 1974); *Freeman v. Eastman-Whipstock, Inc.*, 390 F. Supp. 685 (S.D. Tex. 1975).

Other courts in the circuit require that the plaintiff show a "proximate" injury in addition to the above requirements.¹⁶³ Because the target area approach necessarily involves an analysis of the remoteness of the plaintiff's injury,¹⁶⁴ any difference in these formulations of the target area test is superficial. Whether or not they explicitly require a showing of proximate injury, courts usually grant standing to lessors,¹⁶⁵ insurees,¹⁶⁶ frustrated market entrants,¹⁶⁷ and employees.¹⁶⁸ Courts in the Fifth Circuit have denied standing to manufacturer's representatives,¹⁶⁹ parties related to the immediate victim,¹⁷⁰ consumers,¹⁷¹ and associations suing on behalf of their members.¹⁷² These results indicate that the Fifth Circuit interprets the traditional target area test more liberally than other circuits.¹⁷³

F. Sixth Circuit

In 1975 the Sixth Circuit abandoned the direct injury and target area tests¹⁷⁴ in *Malamud v. Sinclair Oil Corp.*,¹⁷⁵ adopting in their place the

163. See, e.g., *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967); *Tim W. Koerner & Assoc., Inc. v. Aspen Labs Inc.*, 492 F. Supp. 294 (S.D. Tex. 1980), *aff'd without opinion*, 683 F.2d 416 (5th Cir. 1982); *Buckley Towers Condo., Inc. v. Buchwald*, 399 F. Supp. 38 (S.D. Fla. 1975), *aff'd*, 533 F.2d 934 (5th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); *Tugboat, Inc. v. Mobile Towing Co.*, 398 F. Supp. 1131 (S.D. Ala. 1975), *rev'd*, 534 F.2d 1172 (5th Cir. 1976); *Southern Concrete Co. v. United States Steel Corp.*, 394 F. Supp. 362 (N.D. Ga. 1975), *aff'd*, 535 F.2d 313 (5th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).

164. See *supra* notes 18-41 and accompanying text.

165. *Hayes v. Solomon*, 597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980).

166. *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

167. *Industrial Inv. Dev. Corp. v. Mitsui & Co. Ltd.*, 671 F.2d 876 (5th Cir.), *vacated*, 103 S. Ct. 1244 (1982).

168. *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967); *Tugboat, Inc. v. Mobile Towing Co.*, 398 F. Supp. 1131 (S.D. Ala. 1975), *rev'd*, 534 F.2d 1172 (5th Cir. 1976); *Freeman v. Eastman-Whipstock, Inc.*, 390 F. Supp. 685 (S.D. Tex. 1975). *But see* *Ingram v. South Cent. Bell Tel. Co.*, 516 F. Supp. 65 (D. Miss. 1980) (no antitrust injury when termination from reduction in competition).

169. *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266 (5th Cir. 1979); *Tim W. Koerner & Assoc., Inc. v. Aspen Labs, Inc.*, 492 F. Supp. 294 (S.D. Tex. 1980), *aff'd without opinion*, 683 F.2d 416 (5th Cir. 1982).

170. *Buckley Towers Condo. Inc. v. Buchwald*, 533 F.2d 934 (5th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).

171. *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975).

172. *Chatham Condo. Ass'ns v. Century Village, Inc.*, 597 F.2d 1002 (5th Cir. 1979).

173. See *supra* notes 105-11 and accompanying text.

174. The Sixth Circuit formerly used both the direct injury and target area tests. For examples of the direct injury test, see *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th

zone of interests test.¹⁷⁶ Until recently, courts in the Sixth Circuit continued to follow the zone of interests test¹⁷⁷ despite widespread criticism of its transplantation from administrative law.¹⁷⁸ For example, in 1981, in *Chrysler Corp. v. Fedders Corp.*,¹⁷⁹ the court held that a seller of air conditioners who alleged antitrust injury fell within the zone of interests Congress sought to protect in passing the antitrust statutes.¹⁸⁰

The Sixth Circuit recently abandoned the zone of interests test in favor of the Supreme Court's new standing approach. In *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*,¹⁸¹ the court of appeals read *McCready* and *Associated General* together and denied a lessor standing to sue a lessee for refusing to honor an agreement to cancel the lease, allegedly in restraint of trade.¹⁸² The court held that the plaintiff's injury was not sufficiently direct to meet the new test's requirements.¹⁸³ In a subsequent case, the Sixth Circuit denied a shareholder standing under section 4, overruling *Chrysler Corp. v. Fedders Corp.*¹⁸⁴ These results, however, are not appreciably different from those achieved under the zone of interests test.¹⁸⁵

Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Former Stockholders of Barr Rubber Prods. Co. v. McNeil Corp.*, 325 F. Supp. 917 (N.D. Ohio 1970), *aff'd without opinion*, 441 F.2d 1169 (6th Cir. 1971). *See generally* Note, *supra* note 7, at 543-45.

175. 521 F.2d 1142 (6th Cir. 1975).

176. *See supra* notes 54-59 and accompanying text. The Sixth Circuit applied the zone of interests test in two steps. First, the plaintiff must show injury in fact. Second, "the interest sought to be protected . . . (must be) arguably within the zone of interests to be protected or regulated by the statute . . ." 521 F.2d at 1151 (quoting *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 151, 153 (1970)).

177. *See, e.g.*, *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981); *J.F. Reed Co., Inc. v. K Mart Corp.*, 1982-1 Trade Cas. (CCH) ¶ 64,501 (E.D. Mich. 1982); *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859 (M.D. Tenn. 1980).

178. *See supra* notes 58-59 and accompanying text.

179. 643 F.2d 1229 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981).

180. *Id.* at 1235.

181. 715 F.2d 1079 (6th Cir. 1983).

182. *Id.* at 1085-88.

183. *Id.*

184. *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 293 (6th Cir. 1983).

185. In another case, the District Court for the Northern District of Ohio applied the new standing test and granted standing to an employee of a defunct newspaper. *Province v. Cleveland Press Publ. Co.*, 571 F. Supp. 855 (N.D. Ohio 1983).

Under the zone of interests test, the Sixth Circuit granted standing to employees but not to representatives. *See J.F. Reed Co., Inc. v. K-Mart Corp.*, 1982-1 Trade Cas. (CCH) 64,501 (E.D. Mich. 1982) (manufacturer's representative is within zone of interests but without standing due to lack of antitrust injury); *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859 (M.D. Tenn. 1980) (former employee had standing to sue on the basis of lost employment opportunity).

G. Seventh Circuit

Historically, the Seventh Circuit has taken a liberal approach to anti-trust standing.¹⁸⁶ Since the decision in *Roseland v. Phister Manufacturing Co.*,¹⁸⁷ in which the court permitted a sales agent to sue his former employer,¹⁸⁸ the Seventh Circuit has expanded the class of plaintiffs accorded standing under section 4. Parties with standing include employees,¹⁸⁹ lessors,¹⁹⁰ consumers,¹⁹¹ and distributors.¹⁹²

Courts in the Seventh Circuit have generally employed the target area approach.¹⁹³ Recently, however, these courts have disagreed about the proper antitrust standing analysis.¹⁹⁴ In *Repp v. F.E.L. Publications, Ltd.*,¹⁹⁵ the court of appeals declared that the circuit had not yet chosen between the direct injury and target area tests.¹⁹⁶ The court's indecisiveness makes little difference, however, for it held that the two tests are identical.¹⁹⁷

Other recent court of appeals¹⁹⁸ and district court¹⁹⁹ cases explicitly

186. See Note, *supra* note 7, at 545.

187. 125 F.2d 417 (7th Cir. 1942).

188. *Id.* at 418-19.

189. *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967). *But see Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387 (S.D. Ind. 1982) (employee lacks standing because firing not direct result of alleged violations).

190. *Congress Bldg. Corp. v. Loew's Inc.*, 246 F.2d 587 (7th Cir. 1957).

191. *Illinois v. Ampress Brick Co.*, 536 F.2d 1163 (7th Cir. 1976), *rev'g*, 67 F.R.D. 461 (N.D. Ill. 1975), *rev'd on other grounds*, 431 U.S. 720 (1977); *Boshes v. General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973). *But see Weit v. Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981) (holders of bank's charge cards without standing to sue another bank for conspiracy regarding issuance of cards), *cert. denied*, 102 S.Ct. 1615 (1982).

192. *Warner Management Consultants v. Data Gen. Corp.*, 545 F. Supp. 956 (N.D. Ill. 1982).

193. See Note, *supra* note 7, at 545.

194. See *Weit v. Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457, 469 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1168-69 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

195. 688 F.2d 441 (7th Cir. 1982).

196. *Id.* at 444-45.

197. *Id.* at 447.

198. *In re Industrial Gas Antitrust Litig.*, 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983); *Weit v. Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457, 469 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1610 (1982); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1168-69 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

199. Compare *Warner Management Consultants v. Data Gen. Corp.*, 545 F. Supp. 956, 963 (N.D. Ill. 1982) (foreseeable target area test); *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 545 F. Supp. 765, 774 (N.D. Ill. 1982) (foreseeable target area test) with *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387, 1389-90 (S.D. Ind. 1982) (traditional target area test); *General Beverage Sales Co. v. East Side Winery*, 396 F. Supp. 590, 596 (E.D. Wis. 1975) (modified traditional target area test).

utilize the target area test, though it is unclear to what degree foreseeability is an element of standing in the Seventh Circuit.²⁰⁰ Additionally, courts in the Seventh Circuit increasingly rely upon policy considerations in evaluating the standing of particular litigants. In *In re Industrial Gas Antitrust Litigation*²⁰¹ the court of appeals balanced the competing policy concerns of deterrence and avoidance of excessive damages²⁰² and denied standing to a corporation's president terminated and blacklisted for engaging in pro-competitive activities in contravention of his company's allegedly illegal policies.²⁰³ *Industrial Gas* conflicts with a Ninth Circuit case, *Ostrofe v. H.S. Crocker Co.*²⁰⁴ The Supreme Court refused to hear *Industrial Gas*, and vacated and remanded *Ostrofe* in light of *Associated General*.²⁰⁵ *Associated General* will not necessarily eliminate this conflict because each circuit can reaffirm its prior result under the Supreme Court's suggested antitrust standing approach.²⁰⁶

In *Magic Chef, Inc. v. Rockwell International Corp.*,²⁰⁷ the Federal District Court for the Northern District of Illinois cited *Associated General* and applied the target area test,²⁰⁸ thereby explicitly incorporating its own test into the Supreme Court's suggested standing approach.²⁰⁹

200. Compare *Weit v. Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457 (7th Cir.) (foreseeable target area test), *cert. denied*, 102 S. Ct. 1610 (1981) with *In re Industrial Gas Antitrust Litig.*, 681 F.2d 514 (7th Cir. 1982) (traditional target area test), *cert. denied*, 103 S. Ct. 1261 (1983) and *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978) (traditional target area test), *cert. denied*, 440 U.S. 982 (1979).

201. 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983).

202. *Id.* at 520. See *supra* notes 45 & 47-50 and accompanying text.

203. 681 F.2d at 515.

204. 670 F.2d 1378 (9th Cir. 1982), *vacated*, 103 S. Ct. 1244 (1983). See *infra* notes 229-40 and accompanying text.

205. *In re Industrial Antitrust Gas Litig.*, 681 F.2d 514 (7th Cir. 1982), *cert. denied sub nom. Bichan v. Chemetron Corp.*, 102 S. Ct. 1261 (1983); *Ostrofe v. H.S. Crocker, Inc.*, 670 F.2d 1378 (9th Cir. 1982), *vacated*, 103 S. Ct. 1244 (1983).

206. See *supra* note 154.

207. 561 F. Supp. 732 (N.D. Ill. 1983). The court granted a potential purchaser standing to sue a producer for a joint venture allegedly in violation of § 2 of the Sherman Act.

208. *Id.* at 737. The court stated:

[T]he causal relationship between Rockwell's conduct and Magic Chef's injuries was direct enough to satisfy the "target area" requirement. See *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 907-08, 909-10 (1983), which in the course of denying antitrust standing to a union plaintiff reconfirmed the standing of customers who are direct victims of the coercive practices

.....

Id.

209. See *supra* note 80 and accompanying text.

A later case, also from the Northern District of Illinois, adopted the standing approach of *Associated General*.²¹⁰ The court of appeals, however, has not yet passed on the issue.

H. Eighth Circuit

Until recently the status of antitrust standing in the Eighth Circuit was unclear. In *Sanitary Milk Producers v. Bergans Farm Dairy*,²¹¹ the court of appeals allowed a milk producer to sue a competitor of one of its buyers. Though the court failed to identify explicitly the standing test it employed,²¹² most courts read the decision as approving the target area test as formulated by the Ninth Circuit²¹³ in *Karseal Corp. v. Richfield Oil Corp.*²¹⁴ In *Karseal*, the Ninth Circuit required the defendant to "aim" at the plaintiff.²¹⁵ Under this test, the Eighth Circuit has granted standing to producers suing competitors of their customers,²¹⁶ lessors,²¹⁷ associations,²¹⁸ employees,²¹⁹ and consumers.²²⁰

Recently, the Eighth Circuit consensus on antitrust standing has broken down. Since 1978, courts have analyzed antitrust standing using the target area test,²²¹ the foreseeable target area test,²²² the direct in-

210. *In re* Wheat Rail Freight Rate Antitrust Litig., No. 534 (N.D. Ill. Dec. 8, 1983) (parties agreed to apply *Associated General* factors).

211. 368 F.2d 679 (8th Cir. 1966).

212. *Id.* at 688-89.

213. *See, e.g.*, *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1208 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 2108 (1983); *RJM Sales & Mktg. v. Banfi Prods. Corp.*, 546 F. Supp. 1368, 1379-80 (D. Minn. 1982); *McDonald v. Johnson & Johnson*, 537 F. Supp. 1282, 1325 (D. Minn. 1982), *vacated*, No. 82-1594 (8th Cir. Nov. 16, 1983); *Reiter v. Sonotone Corp.*, 435 F. Supp. 933, 934-35 (D. Minn. 1977), *rev'd*, 579 F.2d 1077 (1978), *rev'd on other grounds*, 442 U.S. 330 (1979); *H.F.&S. Co. v. American Standard, Inc.*, 336 F. Supp. 110, 114-15 (D. Kan. 1968); *Johnson v. Ready-Mix Concrete Co.*, 318 F. Supp. 930, 932 (D. Neb. 1970); *Minnesota v. United States Steel Corp.*, 299 F. Supp. 596, 602 (D. Minn. 1969), *vacated on other grounds*, 438 F.2d 1380 (8th Cir. 1971).

214. 221 F.2d 538 (9th Cir. 1955).

215. *Id.* at 362.

216. *See Sanitary Milk Producers v. Bergans Farm Dairy, Inc.*, 368 F.2d 679 (8th Cir. 1966).

217. *See Johnson v. Ready-Mix Concrete Co.*, 318 F. Supp. 930 (D. Neb. 1970).

218. *See Alexander v. National Farmers Org.*, 687 F.2d 1173 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 2108 (1983).

219. *See McDonald v. Johnson & Johnson*, 537 F. Supp. 1282 (D. Minn. 1982), *vacated*, No. 82-1594 (8th Cir. Nov. 16, 1983).

220. *See Reiter v. Sonotone Corp.*, 579 F.2d 1077 (1978), *rev'd on other grounds*, 442 U.S. 330 (1979).

221. *See Alexander v. National Farmers Org.*, 687 F.2d 1173 (8th Cir. 1982).

222. *See McDonald v. Johnson & Johnson*, 537 F. Supp. 1282, 1285-87 (D. Minn. 1982), *vacated*, No. 82-1594 (8th Cir. Nov. 16, 1983).

jury test,²²³ and a "matrix" approach.²²⁴

The Eighth Circuit halted the proliferation of standing tests in *McDonald v. Johnson & Johnson*,²²⁵ in which it adopted the *Associated General* analysis.²²⁶ It is unclear, however, if the new approach will yield consistent results within the circuit. The existing case law provides a wealth of precedents under various tests which, when applied to specific fact situations, may produce ambiguous, or even inconsistent, results.²²⁷

I. Ninth Circuit

The Ninth Circuit clearly applied the foreseeable target area test²²⁸ of antitrust standing until *Ostrofe v. H.S. Crocker, Inc.*²²⁹ in 1982. Under the foreseeable target area approach, the Ninth Circuit courts

223. See *Associated Gen. Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 687 (8th Cir. 1979).

224. *TV Signal Co. v. American Tel. & Tel.*, 617 F.2d 1302, 1306 (8th Cir. 1980) ("something more than remote, is not derivative but direct, and is the proximate result of [Defendant's] misdoing."); *Ardito v. Johnson & Johnson*, 1982-2 Trade Cas. (CCH) ¶ 64,954, 72,904 (D. Minn. 1982) ("physical and economic nexus between the alleged violation and the harm to the plaintiff"); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 437 F. Supp. 1268, 1295 (D. Neb. 1977) ("causal connection between plaintiffs' injury and defendants' antitrust violations"), *modified*, 585 F.2d 877 (8th Cir. 1978).

225. No. 82-1594 (8th Cir. Nov. 16, 1983).

226. *Id.* See also *United States v. Stauffer Chem. Co.*, No. 4-82-990 (D. Minn. Oct. 21, 1983) (adopting *Associated General* analysis).

227. See *supra* notes 216-23 and accompanying text.

228. The court of appeals first espoused the test in *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 220 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964). Since that time, courts in the Ninth Circuit have regularly followed the foreseeable target area test. See, e.g., *Program Eng'g, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1191 (9th Cir. 1980); *California Computer Prods., Inc. v. International Business Mach. Corp.*, 613 F.2d 727, 732 (9th Cir. 1979); *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1044 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495, 499 (9th Cir. 1977); *Blankenship v. Hearst Corp.*, 519 F.2d 418, 426 (9th Cir. 1975); *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 129 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073, 1076 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971); *Hoopes v. Union Oil Co.*, 374 F.2d 480, 485 (9th Cir. 1967); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 497 F. Supp. 218, 222 (C.D. Cal. 1980); *In re Airport Car Rental Antitrust Litig.*, 474 F. Supp. 1072, 1104 n.34 (N.D. Cal. 1979); *Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851, 862 (N.D. Cal.), *dismissed*, 403 F. Supp. 412 (N.D. Cal. 1975); *Washington v. American Pipe & Constr. Co.*, 274 F. Supp. 961, 963-64 (S.D. Wash. 1967); *cf.* *California State Council of Carpenters v. Associated Gen. Contractors, Inc.*, 648 F.2d 527, 537-38 (9th Cir. 1980) (even if injury is unforseeable, court should grant standing if antitrust policies furthered), *rev'd*, 103 S. Ct. 897 (1983).

229. 670 F.2d 1378 (9th Cir. 1982), *vacated*, 103 S. Ct. 1244 (1983).

granted standing to lessors,²³⁰ sellers,²³¹ government agencies,²³² associations,²³³ potential market entrants,²³⁴ and representatives and officers of injured corporations.²³⁵ Courts denied standing to shareholders, creditors, and employees of corporate targets.²³⁶

In *Ostrofe*,²³⁷ the Ninth Circuit Court of Appeals balanced competing antitrust policies²³⁸ and granted standing to a former employee forced to resign and blacklisted for interfering with an anticompetitive scheme.²³⁹ Although the Supreme Court remanded *Ostrofe* in light of *Associated General*, there is no assurance that the court of appeals will alter its result on reconsideration.²⁴⁰

The Ninth Circuit courts have not agreed on the proper test of antitrust standing since *Ostrofe*. In *Aurora Enterprises v. National Broadcasting Co.*,²⁴¹ the court of appeals reaffirmed the foreseeable target area test and cited *Ostrofe* for the proposition that antitrust standing is not limited to competitors.²⁴² *Aurora* suggests that the Ninth Circuit

230. *Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967).

231. *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir. 1964), *cert. denied*, 379 U.S. 880 (1964).

232. *Washington v. American Pipe & Constr. Co.*, 274 F. Supp. 961 (W.D. Wash. 1967).

233. *California State Council of Carpenters v. Associated Gen. Contractors, Inc.*, 648 F.2d 527 (9th Cir. 1980), *rev'd*, 103 S. Ct. 897 (1983).

234. *Solinger v. A. & M. Records, Inc.*, 586 F.2d 1304 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979).

235. *Blankenship v. Hearst Corp.*, 519 F.2d 418 (9th Cir. 1975). *But see John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977) (representative without standing when injury to competition is minimal).

236. *Program Eng'g, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188 (9th Cir. 1980); *Gutierrez v. E. & J. Gallo Winery Co., Inc.*, 604 F.2d 645 (9th Cir. 1979); *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429 (9th Cir. 1979); *Solinger v. A. & M. Records, Inc.*, 586 F.2d 1304 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979); *Contrevas v. Grower Shipper Vegetable Ass'n*, 484 F.2d 1346 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974).

237. 670 F.2d 1378 (9th Cir. 1982), *vacated*, 103 S. Ct. 1244 (1983).

238. *Id.* at 1380-81.

239. *Id.* at 1383-84. The Court stated:

It is unnecessary and would be contrary to the purposes of Section 4, to erect an arbitrary and absolute bar to treble damage suits for injuries that result from a conspirator's efforts to implement the anticompetitive aspects of the conspiracy. The interests counseling restriction of private treble damage actions may outweigh the interests of antitrust enforcement in some such cases. But the interests of antitrust enforcement may predominate in others.

Id.

240. *See supra* notes 80-83 & 154 and accompanying text.

241. 688 F.2d 689 (9th Cir. 1982).

242. *Id.* at 692-93.

did not abandon the foreseeable target area test in *Ostrofe*.

In *Stein v. United Artists Corp.*,²⁴³ however, the court of appeals engaged in a lengthy discussion of policy concerns about duplicative recovery before reaffirming target area cases in which courts denied standing to stockholders.²⁴⁴ *Stein* suggests that the Ninth Circuit has incorporated a policy-balancing component into its foreseeable target area test.

Subsequently, in *Chelson v. Oregonian Publishing Co.*,²⁴⁵ the court of appeals purported to apply the *Associated General* analysis, but couched its discussion solely in terms of antitrust injury. The court allowed news dealers to sue their publisher for requiring an exclusive dealing agreement as a condition of news distribution.²⁴⁶ In *Park v. Watson*,²⁴⁷ however, the court of appeals read *Associated General* as supplementing the foreseeable target area test.²⁴⁸ These divergent readings of *Associated General* provide no consistent guidelines for antitrust standing in the Ninth Circuit.²⁴⁹

J. Tenth Circuit

There is no clear antitrust standing test in the Tenth Circuit. Courts have recently utilized the direct injury test,²⁵⁰ the traditional target area test,²⁵¹ and the policy-balancing approach.²⁵² In addition, some courts have declined to adopt any test and look only for "proximate cause."²⁵³

243. 691 F.2d 885 (9th Cir. 1982).

244. *Id.* at 896-97.

245. 715 F.2d 1368 (9th Cir. 1983).

246. *Id.* at 1370-72.

247. 716 F.2d 646 (9th Cir. 1983).

248. *Id.* at 658-59.

249. *Cf.* *Solinger v. A. & M. Records, Inc.*, 718 F.2d 298 (9th Cir. 1983) (*Associated General* reaffirms traditional approaches to antitrust standing).

250. *See, e.g.*, *Comet Mechanical Contractors, Inc. v. E.A. Cowen Constr., Inc.*, 609 F.2d 404 (10th Cir. 1980); *Jones v. Ford Motor Co.*, 599 F.2d 394 (10th Cir. 1979); *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir. 1973), *cert. denied*, 411 U.S. 938 (1973); *Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos.*, 382 F.2d 925 (10th Cir. 1967); *Sunergy Communities, Inc. v. Aristek Properties, Ltd.*, 535 F. Supp. 1327 (D. Colo. 1982); *Denver Petroleum Corp. v. Shell Oil Co.*, 306 F. Supp. 289 (D. Colo. 1969).

251. *See, e.g.*, *H.F. & S. Co. v. American Standard, Inc.*, 336 F. Supp. 110 (D. Kan. 1972).

252. *See, e.g.*, *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir.), *cert. denied*, 102 S. Ct. 1634 (1982).

253. *See, e.g.*, *Farnell v. Albuquerque Publishing Co.*, 589 F.2d 497 (10th Cir. 1978); *In re New Mexico Natural Gas Antitrust Litig.*, 1982-1 Trade Cas. (CCH) ¶ 64,685 (D.N.M. 1982); *Hecht Co. v. Southern Union Co.*, 474 F. Supp. 1022 (D.N.M. 1979); *Wilson v. Ringsby Truck Lines, Inc.*, 320 F. Supp. 699 (D. Colo. 1970). *See also supra* note 214.

Courts in the Tenth Circuit have sometimes used the direct injury test. These courts have denied standing to car dealers suing manufacturers,²⁵⁴ franchisors,²⁵⁵ and employees.²⁵⁶

In *H.F. & S. Co. v. American Standard, Inc.*,²⁵⁷ a district court employed the traditional target area test to grant a franchisee standing to sue a franchisor for alleged antitrust violations which reduced the value of the franchise.²⁵⁸

Some Tenth Circuit courts balance competing antitrust policies to ensure that a plaintiff's injuries are "proximately caused" by the defendant's allegedly illegal practices.²⁵⁹ The increasing importance of antitrust policies in the Tenth Circuit's determinations is consistent with the trend away from strict adherence to traditional standing tests,²⁶⁰ and in line with the approach recommended in *Associated General*.²⁶¹ The Tenth Circuit courts have used this approach to grant standing to employees.²⁶²

K. Eleventh Circuit

Although there is an understandable dearth of cases, it appears that the Eleventh Circuit will follow the traditional target area test of antitrust standing. District courts in the Eleventh Circuit used this test when they were part of the Fifth Circuit.²⁶³

The Georgia District Court reaffirmed its use of the traditional target area test in 1981 in *McDonald v. Saint Joseph's Hospital of Atlanta, Inc.*²⁶⁴ The court refused to grant a health clinic standing to sue hospi-

254. *Jones v. Ford Motor Co.*, 599 F.2d 394 (10th Cir. 1979).

255. *Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos.*, 382 F.2d 925 (10th Cir. 1967).

256. *Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336 (10th Cir.), *cert. denied*, 103 S. Ct. 576 (1982); *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir. 1982), *cert. denied*, 411 U.S. 938 (1973).

257. 336 F. Supp. 110 (D. Kan. 1972).

258. *Id.* at 116.

259. *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir.), *cert. denied*, 455 U.S. 1001 (1981); *Hecht Co. v. Southern Union Co.*, 474 F. Supp. 1022 (D.N.M. 1979).

260. *See supra* note 42 and accompanying text.

261. *See supra* notes 68-90 and accompanying text.

262. *Wilson v. Ringsby Truck Lines, Inc.*, 320 F. Supp. 699 (D. Colo. 1970).

263. *See, e.g.*, *Tugboat, Inc. v. Seafarers Int'l Union*, 398 F. Supp. 1131 (S.D. Ala. 1975), *rev'd*, 534 F.2d 1172 (5th Cir. 1976); *In re Yarn Process Patent Validity & Antitrust Litig.*, 398 F. Supp. 31 (S.D. Fla. 1975).

264. 524 F. Supp. 122 (N.D. Ga. 1981).

tals for conspiring to deny staff privileges to the clinic's doctors,²⁶⁵ concluding that the clinic was not the target of the hospitals' alleged violations.²⁶⁶

The Eleventh Circuit continues to use this test even in the wake of *Associated General*. In *Construction Transport, Inc. v. Florida Rock Industries, Inc.*,²⁶⁷ the court utilized the target area test to grant a rock hauler standing to sue a producer.²⁶⁸ The court stated that the *Associated General* approach would produce the same result.²⁶⁹

L. District of Columbia Circuit

Although the District of Columbia (D.C.) Circuit has not decided many antitrust standing cases, the limited case law suggests that the circuit follows the traditional target area test.²⁷⁰ For example, in *Stern v. Lucy Webb Hayes National Training School for Deaconesses & Missionaries*,²⁷¹ the district court denied standing to hospital patients who alleged a conspiracy by hospitals to raise prices.²⁷² *Reiter v. Sonotone Corp.*,²⁷³ may undermine this result, but it does not affect the D.C. Circuit's application of the traditional target area test.²⁷⁴

V. CONCLUSION

The United States Supreme Court in *McCready* and *Associated General* set forth guidelines for determining private antitrust standing under section 4 of the Clayton Act. These guidelines, however, leave

265. *Id.* at 126.

266. *Id.* at 125-26.

267. 710 F.2d 752 (11th Cir. 1983).

268. *Id.* at 765.

269. *Id.* See also *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989 (11th Cir. 1983) (conclusory statement of no proximate cause, citing *McCready* and *Associated General*).

270. See *Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses & Missionaries*, 367 F. Supp. 536 (D.D.C. 1973); *Pacific Seafarers, Inc. v. Pacific Far East Line*, 48 F.R.D. 347 (D.D.C. 1969). See also Note, *supra* note 7, at 552.

271. 367 F. Supp. 536 (D.D.C. 1973).

272. *Id.* at 539.

273. 442 U.S. 330 (1979). In *Reiter*, the Supreme Court limited the indirect purchaser doctrine and explicitly granted standing to consumers. For a discussion of the indirect purchaser doctrine, see Comment, *Consumer Standing in Antitrust Actions*, 58 WASH. U.L.Q. 717 (1980). The Supreme Court has often reiterated the consumer protection purpose of the antitrust laws. See *supra* notes 85-90 and accompanying text.

274. *Neumann v. Vidal*, 1982-2 Trade Cas. (CCH) ¶ 64,762 (D.D.C. 1982); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert denied*, 436 U.S. 956 (1978).

broad discretion in the federal circuit courts of appeal. Unless and until the Supreme Court clearly determines the standing status of each group of antitrust litigants, conflicts will exist among the circuits. Consequently, the forum in which a plaintiff initiates suit will remain of critical importance to the litigation.

The proliferation of private antitrust standing tests is a symptom of the inherent tension between the twin goals of the antitrust laws of promoting an efficient yet competitive economy. Liberal standing restrictions protect businesses and consumers from the evils of concentrated economic power but inhibit efficiency. The trend is clearly away from inflexible tests of standing which proved too narrowly focused for courts to apply to the infinite variety of fact patterns arising under section 4 of the Clayton Act. While courts' relaxation of standing requirements may better serve the goals of antitrust enforcement, potential litigants are left with little guidance.

Kevin D. Gordon

