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IMPLIED RIGHT OF ACTION UNDER THE ANTITRUST LAWS

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Too often those who have suffered economic harm as the result of anticompetitive conduct by antitrust violators go uncompensated. A literal reading of the private remedy section of the antitrust laws portends a different result. Section 4 of the Clayton Act provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor and shall recover threefold the damages by him sustained "[1]

This language leaves little doubt that Congress intended to provide, without limitation, a cause of action to "any person" who is "injured in his business or property" by an antitrust violation.[2] With rare exceptions,[3] the federal courts consistently have interpreted standing to bring a private cause of action under the antitrust laws[4] more narrowly than its literal language suggests. Using the rubrics of "direct injury"[5] or "target area,"[6] the federal courts have left numerous classes of persons injured by antitrust violations without an effective private remedy [7] Despite recognizing both the compensatory and deterrent role of the private cause of action,[8] the United States Supreme Court repeatedly has allowed various limi-

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1. Clayton Act § 4, 15 U.S.C. § 15 (1970).

2. Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90, 96 (3d Cir. 1977).

3. The cases that have attempted to give § 4 of the Clayton Act its broadest possible interpretation have been based on either a literal reading of the statute, *e.g.*, Vines v. General Outdoor Advertising Co., 171 F.2d 487, 491 (2d Cir. 1948) (L. Hand, J.) (quoting language of § 4 as unambiguous in giving "any person" injured by antitrust violation a right of action), or a misapplication of the law of standing. *E.g.*, Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151 (6th Cir. 1975) (applying the Administrative Procedures Act "zone of interest" test).

4. Section 1 of the Clayton Act, 15 U.S.C. § 12 (1970), defines antitrust laws as used under § 4 of the Clayton Act. These laws include the Sherman Act, the Wilson Tariff Act, and the Clayton Act, as amended by the Robinson-Patman Act.

5. *See* notes 36-39 *infra* & accompanying text.

6. *See* notes 40-45 *infra* & accompanying text.

7. Some commentators believe that not every injury resulting from an antitrust violation should be compensated. *See, e.g.*, Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976).

8. *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

tations on section 4 to go unreviewed.[9]

In recent years, the decisions of *Illinois Brick Co. v Illinois,*[10] *Brunswick v. Pueblo Bowl-O-Mat, Inc.,*[11] and *Hawaii v. Standard Oil Co. of California*[12] have cast further doubt on the Supreme Court's commitment to providing a broad private remedy as an intricate part of the nation's antitrust policies.[13] The source of this judicial restraint is fear of ruinous or windfall recoveries, which can be a side effect of a literal reading of section 4.[14] In the recent case of *City of Lafayette v. Louisiana Power & Light Co.,*[15] Justice Blackmun's dissent from the majority opinion allowing a private antitrust action against municipalities graphically illustrated the concern over the ruinous effect of treble damages. The basis of Justice Blackmun's dissent was the inflexible language of section 4 of the Clayton Act mandating recovery of treble damages.[16]

The conflict between the broad language of section 4 of the Clayton Act, with its dual compensatory and deterrent roles, and the judicial reluctance to give broad-scale application to the treble

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9. The courts of appeal have been virtually unfettered in their attempt to limit antitrust private remedies. For example, in Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972), the Second Circuit noted,

> In a series of decisions over the last 15 years, in all of which certiorari was denied by the Supreme Court, this court has committed itself to the principle that in order to have "standing" to sue for treble damages under § 4 of the Clayton Act, a person must be within the "target area" of the alleged antitrust conspiracy

Id. at 1295.

10. 431 U.S. 720 (1977).

11. 429 U.S. 477 (1977).

12. 405 U.S. 251 (1972).

13. *See, e.g.,* Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972); Conference of Studio Unions v. Loew's Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952). The Supreme Court's recent decision, Reiter v. Sonotone Corp., 99 S. Ct. 2326 (1979), is perhaps a softening of the restrictive trend. In *Reiter,* the Court held that the "business or property" limitation in § 4 of the Clayton Act must be read in the disjunctive. The Court allowed consumers the right to sue for damage to "property" without requiring that the injury be commerical in nature.

14. Concern over the ruinous propensities of the treble damage remedy has caused one commentator to suggest, contrary to the clear language of § 4, that under certain limited circumstances federal courts have the discretion not to award treble damages. Ross, *Recognizing the Reliance Interest in Awarding Damages Under Section 4 of the Clayton Act: Of Mitigation and Prospectivity,* 12 GA. L. REV. 193 (1978).

15. 435 U.S. 389 (1978).

16. *Id.* at 442-43.

damage remedy has produced great confusion over who may recover for antitrust violations.[17] The purpose of this Article is neither to reconcile the various decisions under section 4 of the Clayton Act nor to offer suggestions for analysis under the statutory private remedy [18] Rather, this Article suggests that the judiciary can reconcile, within existing legal doctrine, the internal conflicts between the two valid public policies reflected by the broad private remedy contemplated by Congress in passing section 4 of the Clayton Act and the judicial trepidation over the possibility of ruinous windfall treble damages. The judicially created doctrine of implication provides an analytical framework whereby the judiciary can fashion a compensatory remedy that provides the victims of antitrust violations with a viable remedy, further deters antitrust violators, and reduces the risk of ruinous recoveries. The thesis of this Article is that an implied remedy for actual compensatory damages exists for any person injured by antitrust violations.

Private Antitrust Remedies - An Unfulfilled Promise

Before consideration of the availability of an implied remedy, an examination of the scope of the existing express remedy for violations of the antitrust laws is necessary [19] The antitrust laws of the United States proscribe various anticompetitive activities and provide a private remedy for their violation.[20] Despite its promise, this express private remedy fails to provide an expansive tool for compensating persons injured by reason of antitrust violations while further deterring antitrust violations. To understand the extent of this failure, the legislative history of the antitrust laws and the

17. Numerous articles have analyzed conflicting antitrust standing decisions. *See, e.g.*, Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809 (1977) [hereinafter cited as Berger & Bernstein]; 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); Note, *Standing to Sue in Private Antitrust Litigation: Circuits in Conflict*, 10 Indiana L. Rev. 532 (1977).

18. For such a discussion, see Berger & Bernstein, *supra* note 17, at 858-65.

19. The antitrust laws referred to in § 4 of the Clayton Act include §§ 12, 13, 14-21, 22-27 of title 15 of the United States Code. *See* note 4 *supra*.

20. Private litigants have remedies available for both damages, 15 U.S.C. § 15 (1970), and equitable relief, 15 U.S.C. § 26 (as amended 1976). This Article focuses on damages; an examination of standing to maintain an action for equitable relief, however, offers a basis for comparison of the influence the prospect of treble damages has had on courts determining standing. *See* notes 78-91 *infra* & accompanying text.

private remedy in particular must be reviewed and compared with the limitations the courts have placed on the remedy

Legislative History

Section 4 of the Clayton Act permits recovery by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." The predecessor to section 4 of the Clayton Act was section 7 of the Sherman Act, which provided for private actions under the Sherman Act only The effect of the Clayton Act was to reenact section 7 to include all the antitrust laws.[21]

Neither the legislative history of section 7 of the Sherman Act nor section 4 of the Clayton Act reveals any standing limitation. Senator Sherman originally introduced the Sherman Act on August 4, 1888. In a week-long debate in March 1890, Senator Sherman stated, "The section of the bill provides that any person or corporation injured or damnified by such a combination may sue for and recover in any court of the United States of competent jurisdiction, of any person or corporation a party to such combination, all damages sustained by him."[22] In the words of Senator Sherman, the purpose of this section was "to give to private parties a remedy for personal injury caused by such a combination."[23] Although the legislative history is relatively sparse, the record is replete with statements supporting a broad antitrust remedy Congress intended that the private antitrust remedy be "available to the people."[24] The same intentions were manifest in 1914 when Congress considered section 4 of the Clayton Act. Section 4 was intended to open "the door of Justice to every man, whenever he may be injured by those who violate the antitrust laws."[25]

The legislative history further reveals that the intent of both section 7 of the Sherman Act and its successor, section 4 of the Clayton Act, was to serve two equally important functions: compensation to persons injured by antitrust violations[26] and deterrence of antitrust

21. Congress repealed § 7 of the Sherman Act in 1955 as superfluous. Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283.

22. 21 CONG. REC. 2456 (1890).

23. *Id.*

24. *Id.* at 3146 (remarks of Sen. Reagan).

25. 51 CONG. REC. 9073 (1914) (remarks of Rep. Webb).

26. 21 CONG. REC. 1767-68, 3146 (remarks of Sen. George).

violators.[27] These functions indicate that Congress intended to provide a broad remedy [28] If antitrust victims are denied a broad remedy, the courts have found no justification for such denials in the legislative history

Section 4 — Who Can Sue?

The private antitrust remedy has not been as free of limitations as its legislative history indicates it should be. The courts have employed two major methods to limit the private antitrust remedy· standing and the indirect purchaser doctrine.[29] This Article focuses primarily on the standing limitation, which has developed under the negative influence of the treble damage provision.[30] The indirect purchaser doctrine, firmly advanced by the Supreme Court in *Illinois Brick Co. v. Illinois*,[31] has been rationalized as a means to avoid complex litigation,[32] prevent duplicative recoveries,[33] limit dilution of the plaintiff's incentive to maintain private litigation,[34] and avoid overburdening the courts.[35] To the extent these concerns can be reconciled with the strong compensatory policies of the antitrust laws, the indirect purchaser doctrine is also discussed.

Standing Analysis Under Section 4

From the beginning, the federal courts attempted to develop an analysis that would narrow the broad language of section 4. In the seminal standing case, *Loeb v. Eastman Kodak Co.*,[36] the Third

27. *Id.* at 2571 (remarks of Sen. Hiscock).

28. The compensation role clearly is compelling support for a broad antitrust remedy. Deterrence also mandates a broad antitrust remedy; too broad a remedy, however, may discourage the more directly injured plaintiffs by reducing recovery amounts and destroying incentive.

29. In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the Supreme Court held that only persons who dealt directly with an antitrust violator are entitled to sue that violator for antitrust damages. The Court held that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of [section 4 of the Clayton Act]." *Id.* at 729.

30. This analysis centers on those whom the courts have denied the express private remedy rather than on those who have been able to maintain a private action. For an exhaustive critique of the law of standing under § 4, see Berger & Bernstein, *supra* note 17.

31. 431 U.S. 720 (1977).

32. *Id.* at 732.

33. *Id.* at 731.

34. *Id.* at 745.

35. *Id.* at 740.

36. 183 F 704 (3d Cir. 1910). Although some courts have regarded this case as the seminal

Circuit first introduced the "direct injury" analysis of standing. In *Loeb*, the plaintiff was a stockholder and creditor of a photographic supply company that Eastman Kodak allegedly ruined. The court denied the plaintiff standing and noted that "it is manifest that the plaintiff did not receive any *direct injury* from the alleged illegal acts of the defendant."[37] The court characterized the plaintiff's alleged injury as "indirect, remote, and consequential."[38] Although avoidance of duplicative recovery appeared to be the court's motivation for formulating the direct injury test, other courts readily adopted the test and extended it to deny relief to all but those who could be characterized as immediate antitrust victims.[39]

Some courts, apparently dissatisfied with the direct injury analysis, adopted an analysis that ascertained whether the plaintiff was within the "target area"[40] of the antitrust violation. That label first appeared in *Karseal Corp. v. Richfield Oil Corp.*,[41] a Ninth Circuit decision. The Second Circuit adopted the same analysis in *Calderone Enterprises Corp. v United Artists Theatre Circuit, Inc.*[42] The court in *Karseal* allowed the plaintiff standing; but in *Calderone* the Second Circuit denied standing to a nonoperating landlord of motion picture theatres to maintain an action for conspiracy against certain theatre operators and movie exhibitors. In denying the landlord standing as not being in the target area, the court stated as follows:

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standing case, *see, e.g.*, Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1149 (6th Cir. 1975), an earlier decision on standing was Ames v. American Tel. & Tel. Co., 166 F 820 (C.C.D. Mass. 1909). This case was decided under § 7 of the Sherman Act. Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) (repealed 1955).

37. 183 F at 709 (emphasis supplied).

38. *Id.*

39. This statement could not have been made with any certitude until the 1950's. A line of pre-1950 cases analyzed standing with reference to the "by reason of" language of § 4 without any reference to "the direct injury" requirement. *E.g.*, D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 173-75 (1915); Farmers Co-op Oil Co. v. Socony-Vacuum Oil Co., 133 F.2d 101, 103 (8th Cir. 1942); Tivoli Realty, Inc. v. Paramount Pictures, 80 F Supp. 800, 805 (D. Del. 1948). In a series of cases in the 1950's the courts removed any doubts about application of the direct injury requirement as a standing doctrine. Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292, 294-95 (2d Cir. 1958); Productive Inventions, Inc. v. Trico Prods. Corp., 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

40. Two commentators have labeled the "target area" test as another species of the direct injury test. Berger & Bernstein, *supra* note 17, at 830.

41. 221 F.2d 358, 364-65 (9th Cir. 1955).

42. 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

> [T]o have "standing" to sue for treble damages under § 4 of the Clayton Act, a person must be within the "target area" of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with "targets" or with participants in an alleged antitrust conspiracy, rather than by being "targets" themselves.[43]

The rationale for this standing analysis was that damages sustained by nontargets are "usually much more speculative and difficult to prove" than those suffered by immediate antitrust victims.[44] To avoid entangling judges and juries in a morass of speculative damages this "reasonable and easily identifiable cutoff"[45] was necessary.

Other variations on the theme of these two tests exist;[46] whatever the analysis, however, one thing is clear: Courts dismiss a large number of antitrust cases on the basis of standing.[47] When one real-

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43. *Id.*

44. *Id.*

45. *Id.* at 1296. The court used the "enormous expansion of potential treble damage liability" as a second reason for this analysis. *Id.* at 1295. Interestingly, both reasons offered for the target area analysis also are applicable to the direct injury test.

46. The Ninth Circuit, for example, has added a "foreseeability" factor to the target area test. *See, e.g.,* Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073 (9th Cir. 1970), *cert. denied,* 402 U.S. 923 (1971).

47. *See, e.g.,* First Circuit: Miley v. John Hancock Mut. Life Ins. Co., 148 F Supp. 299, 302-03 (D. Mass.), *aff'd per curiam,* 242 F.2d 758 (1st Cir.), *cert. denied,* 355 U.S. 828 (1957).

Second Circuit: Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269 (2d Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976); 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); GAF Corp. v. Circle Floor Co., 463 F.2d 752, 759 (2d Cir. 1972), *cert. denied,* 413 U.S. 901 (1973); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972); Fields Prods., Inc. v. United Artists Corp., 432 F.2d 1010 (2d Cir. 1970) (per curiam), *cert. denied,* 401 U.S. 949 (1971); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187-89 (2d Cir. 1970), *cert. denied,* 401 U.S. 923 (1971); SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), *cert. denied,* 395 U.S. 943 (1969); Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292, 295 (2d Cir. 1958); Productive Interventions, Inc. v. Trico Prods. Corp., 224 F.2d 678 (2d Cir. 1955), *cert. denied,* 350 U.S. 936 (1956); Sulmeyer v. Seven-Up Co., 411 F Supp. 635 (S.D.N.Y. 1976); Esposito v. Mister Softee, Inc., 1976-1 Trade Cas. ¶ 60,786 (S.D.N.Y. 1976); W.T. Grant Co. v. Christensen, 1975-1 Trade Cas. ¶ 60,324 (S.D.N.Y. 1975); Kemp Pontiac-Cadillac, Inc. v. Hartford Auto. Dealers' Ass'n, Inc., 380 F Supp. 1382, 1386-88 (D. Conn. 1974); Raubal v. Engelhard Minerals & Chem. Corp., 364 F Supp. 1352, 1355-58 (S.D.N.Y. 1973); Hans Hansen Welding Co. v. American Ship Bldg. Co., 1973-2 Trade Cas. ¶ 74,739 (S.D.N.Y. 1973); Bywater v. Matshushita Elec. Indus. Co., 1971 Trade Cas. ¶ 73,759, at 91,202-03 (S.D.N.Y. 1971); United Egg Producers v. Bauer Int'l Corp., 312 F Supp. 319, 321

izes that the disposition of a case on the standing issue ensures that the actual merits of that case are not reached, the restrictive standing analysis is distressing. Persons injured by violations of the antitrust laws go uncompensated despite the relatively clear legislative

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(S.D.N.Y. 1970); Lieberthal v. North Country Lanes, Inc., 221 F Supp. 685, 689-90 (S.D.N.Y. 1963), *aff'd on other grounds*, 332 F.2d 269 (2d Cir. 1964).

Third Circuit: Pitchford v. PEPI, Inc., 531 F.2d 92 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); Ash v. International Business Machs., Inc., 353 F.2d 491 (3d Cir. 1965), *cert. denied*, 384 U.S. 927 (1966); Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), *cert denied*, 352 U.S. 890 (1956); Wolfson v. Artisans Bank, 428 F Supp. 1315 (D. Del. 1977); Cromar Co. v. Nuclear Materials & Equip. Corp., 1975-1 Trade Cas. ¶ 60,373 (M.D. Pa. 1975); Minersville Coal Co. v. Anthracite Export Ass'n, 335 F Supp. 360, 362-66 (M.D. Pa. 1971); Harrison v. Paramount Pictures, Inc., 115 F Supp. 312, 316-17 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

Fifth Circuit: Universal Brands, Inc. v. Philip Morris, Inc., 546 F.2d 30 (5th Cir. 1977); Tugboat, Inc. v Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976); Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975); Turner v. American Bar Ass'n, 407 F Supp. 451 (N.D. Tex. 1975), *aff'd sub nom.* Pilla v American Bar Ass'n, 542 F.2d 56 (5th Cir. 1976); Harsh v. CPC Int'l Inc., 395 F Supp. 578 (N.D. Tex. 1975); Southern Concrete Co. v. United States Steel Corp., 394 F Supp. 362, 367-71, 376-78 (N.D. Ga. 1975), *aff'd*, 535 F.2d 313 (5th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); Campo v. National Football League, 334 F Supp. 1181, 1184-85 (E.D. La. 1971).

Sixth Circuit: Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); Vermillion Foam Prods. Co. v. General Elec. Co., 386 F Supp. 255, 259-60 (E.D. Mich. 1974); Searer v. West Mich. Telecasters, Inc., 381 F Supp. 634, 640-43 (W.D. Mich. 1974); Zenith Vinyl Fabrics Corp. v. Ford Motor Co., 357 F Supp. 133 (E.D. Mich. 1973), *aff'd*, No. 73-1537 (6th Cir. June 6, 1974), *cert. denied*, 419 U.S. 967 (1974); Barr Rubber Prods. Co. v. B.F Goodrich Co., 325 F Supp. 917 (N.D. Ohio 1970), *aff'd per curiam*, 441 F.2d 1169 (6th Cir. 1971).

Seventh Circuit: Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564, 567 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963); Amerace Corp. v. USM Corp., 1975-1 Trade Case. ¶ 60,255 (N.D. Ill. 1975); J.O. Pollack Co. v. L.G. Balfour Co., 1973-1 Trade Cas. ¶ 74,339, at 93,592 (N.D. Ill. 1972).

Eighth Circuit: Ragar v. T.J. Raney & Sons, 388 F Supp. 1184, 1186-87 (E.D. Ark.), *aff'd per curiam*, 521 F.2d 795 (8th Cir. 1975).

Ninth Circuit: Contreras v Grower Shipper Vegetable Ass'n, 484 F.2d 1346 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 125-31 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); Pandola v. Texaco Inc., 1975-1 Trade Cas. ¶ 60,232 (C.D. Cal. 1975); Webber v. Shell Oil Co., 1975-1 Trade Cas. ¶ 60,215 (C.D. Cal. 1975); San Francisco Seals, Ltd. v National Hockey League, 379 F Supp. 966, 971-72 (C.D. Cal. 1974); Southern Cal. Testing Lab., Inc. v. Operating Eng'rs Local 12, 1973-2 Trade Cas. ¶ 74,678, at 94,972 (C.D. Cal. 1972).

Tenth Circuit: Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *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).

D.C. Circuit: Council for the Advancement of the Psychological Professions & Sciences, Inc. v. Blue Cross Ass'n, 383 F Supp. 984 (D.D.C. 1974); Stern v. Lucy Webb Hayes Nat'l Training School, 367 F Supp. 536, 537-40 (D.D.C. 1973).

history indicating a contrary result.[48]

Attempting to apply these tests, courts have denied standing to corporate creditors,[49] general partners,[50] shareholders suing in their own right,[51] lessors,[52] suppliers,[53] employees,[54] patentees,[55] and franchisors.[56] Apparently, the courts are uncomfortable with these limitations. Some courts have granted standing to suppliers,[57] lessors,[58] and employees[59] under circumstances in which they have denied standing to others. Although these cases are logically irreconcilable, they are explainable when viewed as the consequence of vigorous application of judicial realism. The courts fear the potentially negative effects of a widespread application of treble damage actions. A combination of the enticement of a recovery thrice one's provable damages and the possibility of ruinous verdicts has caused the courts to develop tortured analysis of what is a clear, straightforward statutory remedy

Fear of Treble Damages

No clearly enunciated judicial proclamation declares that the treble damage provision is the primary reason the federal courts have narrowed the standing requirement under section 4 of the Clayton Act. Rather, the conclusive evidence must be gleaned in a more subtle manner. This evidence lies buried in the Act, in the tradi-

48. *See* notes 21-28 *supra* & accompanying text.

49. *E.g.*, Martens v. Barrett, 245 F.2d 844, 846 (5th Cir. 1957).

50. *E.g.*, Coast v. Hunt Oil Co., 195 F.2d 870 (5th Cir.), *cert. denied*, 344 U.S. 836 (1952).

51. *E.g.*, Pitchford v. PEPI, Inc., 531 F.2d 92, 96-97 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976).

52. *E.g.*, Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); Melrose Realty Co. v. Loew's Inc., 234 F.2d 518, 519 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956).

53. *E.g.*, Volasco Prods. Co. v. Lloyd A. Frye Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

54. Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973).

55. *E.g.*, SCM v. Radio Corp. of America, 276 F Supp. 373 (S.D.N.Y. 1967), *aff'd*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969).

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

57. Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966). The plaintiff in this case was a supplier and competitor. The court apparently granted standing on the basis of the plaintiff's competitor status.

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

59. Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967).

tional judicial reluctance to impose punitive damages as a matter of course, and in the case law

The treble damage feature of the Clayton Act creates an inconsistency in the express legislative history of the private remedy Despite apparent equal emphasis on the twin roles of compensation and deterrence in the legislative history, Congress virtually insured that the primary focus by the courts in private antitrust cases would be on deterrence by providing that an antitrust victim recover threefold its provable damages. The provision for treble damages requires that two-thirds of every antitrust award in private actions be punitive in nature.[60] These punitive damages are closely analogous to punitive damages in general tort law, which are often criticized as producing a windfall for the plaintiff.[61] Because punitive damages are a windfall, they generally are not recoverable except in the exercise of the sound discretion of the jury [62] This jury discretion is unavailable in antitrust cases. Indeed, in most circuits the jury is not informed of the trebling provision.[63] The mandatory aspect of the trebling provision magnifies the general judicial concern over the windfall benefits of punitive damages and its alter ego, ruinous judgments.[64]

The federal courts occasionally have acknowledged that the spectre of treble damages has influenced their interpretation of who can maintain an action under section 4 of the Clayton Act.[65] In *Ames*

60. *E.g.*, Clark Oil Co. v. Phillips Petroleum Co., 148 F.2d 580, 582 (8th Cir. 1945). *But see* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) (indicating treble damages intended to be punitive in part but also to encourage litigation).

61. W PROSSER, THE LAW OF TORTS § 2, at 13 (4th ed. 1971).

62. *Id.* at 13-14.

63. *See, e.g.*, Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 955 (5th Cir. 1975); Semke v. Enid Auto. Dealers Ass'n, 456 F.2d 1361, 1370 (10th Cir. 1972). *Contra*, Bordonaro Bros. Theaters, Inc. v. Paramount Pictures, Inc., 203 F.2d 676 (2d Cir. 1953).

64. The concern over windfall recoveries is part of the same general concern over ruinous judgments. The former focuses on an undeserved benefit to the plaintiff; the latter focuses on an undeserved detriment to the defendant. The courts rarely have attempted to articulate the reasons for the narrowed construction of the antitrust remedy so virtually no analytical distinction has been made between the effect of windfall recoveries or ruinous judgments on the decisions narrowing the private antitrust remedy.

65. Congress apparently was not concerned over the ruinous nature of the treble damage provision. Senator Sherman's original proposal was for double damage recovery, but the Senate Judiciary Committee reported the bill out of committee with a treble damage remedy. *Compare* 21 CONG. REC. 2901 (bill containing treble damage provision) *with id.* at 2455 (earlier version of this bill with double damage provision).

v. American Telephone & Telegraph Co.,[66] a federal district judge first expressed the concern that implicitly has been responsible for limitations on the private antitrust remedy In *Ames*, the plaintiff stockholder alleged that an illegal acquisition of the company by the defendant rendered his stock worthless. The district court denied the stockholder standing because his injury would be duplicative of any injury sustained by the company[67] and stated that a contrary result would "subject the defendant not merely to treble damages, but to sextuple damages, for the same unlawful act."[68] Despite this early reference to the dire consequences of the treble damage provision, direct references to this concern in subsequent reported decisions have been infrequent.

In *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*,[69] the Second Circuit denied standing to a nonoperating landlord of motion picture theatres to maintain a private antitrust action against certain motion picture distributors and exhibitors. In holding the plaintiff outside the target area[70] of the alleged conspiracy, the court explained why it chose to ignore the broad language of section 4 of the Clayton Act as follows:

> [I]f the flood-gates were opened to permit treble damage suits by every creditor stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery, implemented by the availability of the class suit as facilitated by the amendment of Rule 23 F.R.C.P., would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress.[71]

Similarly, the Fifth Circuit in *Jeffrey v. Southwestern Bell*,[72] denied telephone subscribers standing to sue for damages from an alleged conspiracy between the telephone company and two of its subsidiaries. The court believed that a limitation on those who could sue

66. 166 F 820 (C.C.D. Mass. 1909). This case was decided under § 7 of the Sherman Act.

67. General corporate law also explains the court's analysis. Traditional corporate law doctrine holds that only the corporation and not its stockholders may sue for injury to the corporation. 13 W FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 5910-5911 (rev. perm. ed. 1975).

68. 166 F at 823.

69. 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). *See* note 42 *supra*.

70. Target area is the rubric for one of several antitrust standing tests. *See* notes 42-43 *supra* & accompanying text.

71. 454 F.2d at 1295.

72. 518 F.2d 1129 (5th Cir. 1975).

under section 4 was justified to ensure "against potentially disastrous recoveries by those only tenuously hurt."[73]

Another insight into the federal judiciary's concern over the potential effects of the treble damage provision is found in the recent Supreme Court case, *City of Lafayette v. Louisiana Power & Light Co.*[74] The Court apparently was so concerned about the onerous effect of the treble damage remedy that it implied single damages might be permitted in cases in which municipalities were found liable.[75] Justice Blackmun's dissent further underscored the Court's concern over the treble damage remedy The exclusive rationale of Blackmun's dissent was the concern over making "governmental units potentially liable for massive treble damages"[76] in light of the "magnitude of the treble damages remedy provided by the antitrust laws."[77] Justice Blackmun would have had the Court refuse to extend antitrust liability to municipalities engaged in clearly "proprietary" activities solely because of the potentially large verdicts available under the existing antitrust remedy

Perhaps the strongest evidence of the intimidating influence the treble damage provision has had on the federal courts' interpretation of section 4 of the Clayton Act comes from a comparative analysis of the judicially interpreted standing requirements for a private litigant seeking injunctive relief under section 16 of the Clayton Act[78] and the standing requirements under section 4. This comparison offers a controlled experiment in which the only significant analytical difference between the two sections is the treble damage provision.

Several courts have interpreted the standing requirement under section 16 to be much broader than the requirement under section 4.[79] Little support for this distinction exists in the legislative history

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73. *Id.* at 1131.

74. 435 U.S. 389 (1978).

75. In leaving open the question of single damages against municipalities, the Court stated, "But those cases do not necessarily require the conclusion that remedies appropriate to redress violations by private corporations would be equally appropriate for municipalities; nor need we decide any question of remedy in this case." *Id.* at 401-02.

76. *Id.* at 442.

77. *Id.*

78. 15 U.S.C. § 26 (1970). This section provides, "Any person shall be entitled to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws "

79. *E.g.*, Universal Brands, Inc. v. Philip Morris, Inc., 546 F.2d 30, 34 (5th Cir. 1977). Under § 16, the plaintiff need only show injury or threatened injury proximately caused by

of the two acts,[80] and the primary reason for the differing interpretations is the absence of treble damages under section 16.[81] In *In re Multidistrict Vehicle Air Pollution,*[82] the Ninth Circuit felt that the distinction between the two sections was justified: "In contrast to section 4, section 16 does not involve punitive and potentially disastrous judgments for treble damages and attorneys' fees."[83] Likewise, the Fifth Circuit rationalized a broader standing requirement for injunctive relief in *Jeffrey v. Southwestern Bell*[84] by noting "Section 16 carries none of the risk of potentially disastrous monetary judgments or duplicative recoveries."[85] Despite language differences between section 5 and section 16 that arguably could justify different standing requirements,[86] these courts still felt obliged to base broader standing under section 16 on the lack of the treble damage provision.

The federal courts have expressed strong reservations over providing a broad standing requirement for section 4. Courts have denied standing because recovery was thought to be speculative,[87] ruinous,[88] duplicative,[89] or a windfall.[90] Although different policy reasons underlie concern over the various results identified by these labels,[91]

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the defendant. *But see* Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269, 1274 (2d Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976) (target area test applicable to §§ 4 and 16).

80. *See* Malina, *The Second Circuit Review, 1973-74 Term: Antitrust,* 41 BROOKLYN L. REV. 889, 889-95 (1975).

81. Some courts have based their findings of different standing requirements on language differences in the two sections. *E.g.,* Hawaii v. Standard Oil Co., 405 U.S. 251, 260-64 (1972).

82. 481 F.2d 122 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973).

83. *Id.* at 130.

84. 518 F.2d 1129 (5th Cir. 1975).

85. *Id.* at 1132.

86. *See* note 81 *supra.*

87. *E.g.,* Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269, 1273-74 (2d Cir. 1975), *cert. denied.,* 423 U.S. 1073 (1976).

88. Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972).

89. *E.g.,* Hawaii v. Standard Oil Co., 405 U.S. 251, 262-64 (1972).

90. Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d at 1295-96.

91. The policy against duplicative recoveries, for example, stems from the traditional prohibition against double recovery for the same injury. The concern over ruinous recoveries is founded on the fear that nonduplicative recoveries would be so numerous that when trebled, the judgment would result in overkill. *E.g.,* Jeffrey v. Southwestern Bell, 518 F.2d at 1131.

the one common denominator in each case is the treble damage provision. Courts apparently are convinced these adverse results would be greatly reduced, if not eliminated, by curtailment of the treble damage provision.

Illinois Brick Limitation

In addition to the narrowed standing requirements, the Supreme Court established another major limitation to section 4 in *Illinois Brick Co. v. Illinois.*[92] The *Illinois Brick* doctrine disallows indirect purchasers the opportunity to prove the impact of an antitrust violation and effectively eliminates consumers as beneficiaries of the express private antitrust remedy [93] This has broad implications for the nation's antitrust policy Perhaps twenty-five percent of the total private treble damage cases since 1960 involved only indirect purchasers, and fully two-thirds of the cases partially involved indirect purchasers.[94] Even the deterrence aspect of the express private antitrust remedy is hampered by the *Illinois Brick* decision.

Before *Illinois Brick* the Supreme Court repeatedly emphasized the two broad purposes of section 4: compensation[95] and deterrence.[96] Numerous Supreme Court decisions underscored the broad nature of the private antitrust remedy [97] Although the Supreme Court never has embraced expressly the restrictive standing tests of the lower courts,[98] it has found other ways to narrow the broad anti-

92. 431 U.S. 720 (1977). See note 29 *supra.*

93. *Id.* at 748-50, 764 (Brennan, J., dissenting).

94. *Proposed Antitrust Enforcement Act of 1979: Hearings on S. 300 Before the Senate Committee on the Judiciary,* 96th Cong., 1st Sess. 37 (1979) (testimony of Barry Bosworth, Staff Director of the President's Council on Wage and Price Stability).

95. *E.g.,* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977) (treble damage provisions designed primarily as a remedy).

96. *E.g.,* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

97. *E.g.,* Reiter v. Sonotone, 99 S. Ct. 2326 (1979). In Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948), the Court held that "[s]ection 4] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

98. Some courts, however, have interpreted the Supreme Court's denial of certiorari as approval of the standing limitations. *E.g.,* Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972). The Supreme Court has couched the limitations placed on § 4 in terms of type of damages rather than standing. *Illinois Brick,* for example, was not a standing decision but rather a determination of the type of proof acceptable under § 4. 431 U.S. at 729. *See also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (proof of lost profits as a result of acquiring

trust remedy The most recent and most devastating of those methods was *Illinois Brick*.

Illinois Brick reflects the Court's concern over the potentially disastrous consequences of widespread application of the treble damage remedy [99] In light of the history of antitrust litigation before *Illinois Brick*,[100] these concerns seem more theoretical than real and hardly seem to justify the Court's departure from the clear language and legislative history of section 4.[101] The decision has triggered a strong legislative effort to repeal it.[102] With the future of the legislation uncertain, perhaps the judiciary can solve the problem consistent with the holding in *Illinois Brick* through the use of an implied remedy for compensatory damages.

An Implied Remedy Under the Antitrust Laws

The preceding discussion has demonstrated that federal courts have construed narrowly the express private antitrust remedy provided by section 4. This limitation is clearly narrower than either the language of section 4 or its legislative history permits. A major

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defendant and not allowing acquired companies to fold is not sufficient "injury" under § 4). *Cf.* Reiter v. Sonotone, 99 S. Ct. 2326 (1979) (holding that consumer whose money has been diminished by reason of an antitrust violation has been injured in his "property" within meaning of § 4).

99. *See* notes 31-35 *supra.*

100. *See* note 94 *supra.* In addition to the volume of litigation filed by indirect purchasers, indirect purchasers arguably have more incentive because of their lack of concern with ongoing business relationships, which permeate the supplier-middleman relationship. In the tetracycline litigation that resulted in a $250,000,000 settlement, for example, indirect purchasers, not the directly purchasing pharmacists, provided the major impetus. This is not surprising when one considers the following statement by a pharmacist-middleman cited by the district court in West Va. v. Charles Pfizer & Co., 314 F Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971):

> Any pharmacy claiming damages is, in my opinion, guilty of lying. All pharmacies base their retail prices for drugs on their costs, either using a fixed percentage or a professional fee. Either way, they do not suffer damages due to higher wholesale costs of these drugs. If anyone has a complaint, it would be the individual consumer, not the pharmacists.

Id. at 746.

101. The Court apparently ignored the recent legislative intent expressed in passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified at 15 U.S.C. § 15c (1976)). The Senate report on the bill specifically described the legislation as "the legislative response to the restrictive judicial interpretations of rights of consumers and States to recover damages under section 4." S. Rep. No. 94-803, 94th Cong., 2d Sess. 40-41 & n.2 (1976).

102. *See Proposed Antitrust Enforcement Act of 1979, supra* note 94.

motivation for this judicial restraint is the treble damage provision of section 4. The result has been that the compensatory function of the antitrust laws has been thwarted, and many of those who have been injured by antitrust violations have been left without a remedy

Many have suggested legislative reform to correct at least part of the problem. The Supreme Court even hinted at a single damage remedy by judicial fiat in *City of Lafayette v. Louisiana Power & Light Co.*,[103] but a more traditional judicial solution can be found.

The Doctrine of Implication

The doctrine of implication is a creation of the judiciary whereby a private right of action is implied from a statute that makes no provision for one.[104] Implication, which originated in English jurisprudence,[105] first was adopted by the United States Supreme Court in *Texas & Pac. Ry v. Rigsby* [106] The Supreme Court, in a simplified definition, set forth the basis for implication of remedies: "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied."[107] The Supreme Court noted that the doctrine of implication is nothing more than application of the maxim *ubi jus ibi remedium*.[108] This means that where there is a right, there is a remedy The maxim has broader application than the doctrine of implication. The federal courts have used this maxim to fashion an appropriate remedy in numerous activities not normally suitable for

103. 438 U.S. 389 (1978).

104. Implied private rights of action can be for declaratory, injunctive, or damage remedies. This Article examines implied rights of action for damages. Except to the extent it contributes to the understanding of implied actions for damages, analysis of cases involving exclusively declaratory or injunctive relief is omitted. An implied private remedy may be more likely when prospective relief is sought instead of damages. *E.g.*, Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., 349 F Supp. 670, 679 (D. Neb. 1972).

105. Couch v. Steel, 118 Eng. Rep. 1193 (Q.B. 1854). The present efficaciousness of the remedy in England is in doubt. *See* Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MOD. L. REV. 233 (1960).

106. 241 U.S. 33 (1916). This case implied a private remedy for violation of the Federal Safety Appliance Act. Later decisions removed the remedy under that statute. *E.g.*, Crane v. Cedar Rapids & Iowa City Ry., 395 U.S. 164 (1969).

107. 241 U.S. at 39.

108. *Id.*

the judiciary [109] *Ubi jus ibi remedium* was formulated in the more sophisticated stage of a later trend of jurisprudence that emphasized the classification of substantive rights and creation of appropriate remedies to enforce them.[110] One method of creating an appropriate remedy, implying a private right of action from a statutorily created duty, is the basis for the doctrine of implication.

The justification for implication as a component of judicial activism is that the judiciary is in a better position to determine the need for an implied remedy than the legislature was at the time of enactment.[111] The major rationale for implication of private remedies is that when society labels certain behavior as bad, those who violate that standard should be held accountable to those who were injured by the violation.[112] Before attempting to apply the doctrine of implication to the antitrust laws, a closer examination of its scope and limitations is necessary [113]

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109. Tindell v. Hardin, 337 F Supp. 563, 564 (W.D. Pa. 1972). In applying the maxim *ubi jus ibi remedium*, the courts have been derisively referred to as "super draft boards," Witmer v. United States, 348 U.S. 375, 380 (1955); super legal-aid bureaus, Uveges v. Pennsylvania, 335 U.S. 437, 450 (1948); super boards of education, McCollum v. Board of Educ., 333 U.S. 203, 237 (1948); and as super legislatures, Burns Banking Co. v. Bryan, 264 U.S. 504, 534 (1924).

110. 335 U.S. at 450 (citing R. POUND, V JURISPRUDENCE 441-50 (1959)). Legal scholars have noted that the maxim *ubi jus ibi remedium* sprang from a later jurisprudential trend of analyzing and classifying substantive rights before fashioning remedies. In both Roman and common law systems, remedies or creation of causes of action came first.

111. *See* Friendly, *In Praise of Erie and of the New Federal Common Law,* 39 N.Y.U.L. REV. 383, 412-19 (1964).

112. Arguments against the doctrine of implication stem from fear of a flood of litigation caused by judicial activism, but as Justice Harlan countered in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), "Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests." *Id.* at 411. For the Court to make such a value judgment concerning the relative importance of legal rights normally is a legislative judgment, which traditionalists would reserve for Congress.

113. Implication must be distinguished from the related, but potentially confusing, concepts of standing, federal common law, negligence per se, and the general rules of statutory interpretation. The doctrine of standing to sue is founded in either the constitutionally mandated doctrine of justiciability or the rules of self-restraint adopted by the judiciary to prevent unwise and excessive use of its power. *E.g.,* Warth v. Seldin, 422 U.S. 490, 498 (1975). Application of the doctrine of standing presupposes a cause of action and focuses merely on whether those seeking to maintain a cause of action are affected sufficiently to be involved in a "case or controversy" to justify the court's use of its powers on their behalf. Implication involves a judicial search for the existence of a cause of action.

The doctrine of implication also differs from federal common law, which is based upon legislative jurisdictional grants. *See, e.g.,* Textile Workers Union v. Lincoln Mills, 353 U.S.

Ubi jus ibi remedium is not a general rule of statutory interpretation. Opponents to its general application have attempted to construe it as merely an instrument for interpreting legislative intent.[114] This is evident in the numerous times opponents of implication urge application of the concept of statutory interpretation *expressio unius est exclusio alterius* to defeat implication in a legislative scheme which includes limited private remedies.[115] This phrase means that the expression of one thing implies the exclusion of another. If the doctrine of implication were merely a tool for interpreting legislative intent, the result would be denial of implied remedies if a statute provided limited express remedies. The doctrine, however, is based on judicial interpretation and springs from the flexible role the judiciary has played in using private remedies to solve public problems, a major contribution of Anglo-American jur-

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448 (1957). Both are applications of the maxim *ubi jus ibi remedium;* the distinction, however, is in the source of the right. The common law right is judicially created; the implication right springs from a federal statute. The federal common law derived from jurisdictional grants has its only statutory basis in the general grant of jurisdiction to courts by a statute. Courts that are actually developing common law, that is, a judicially created cause of action without a statutory basis, have invoked the maxim of *ubi jus ibi remedium. E.g.,* Daily v. Parker, 152 F.2d 174, 176 (7th Cir. 1945). Development of federal common law is much more imaginative than the application of the doctrine of implication. *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (federal common law of nuisance).

The doctrine of implication is also related to but distinct from the concept of negligence per se. In the seminal implication case, Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916), the Supreme Court relied on the negligence per se analogy without attempting to distinguish it. Implication and negligence per se have different theoretical bases and failure to distinguish the two can only lead to confusion and undue restriction of implied remedies. Negligence per se is based on the premise that reasonable men obey the law and one who fails to do so must be negligent. In applying negligence per se, the court is adopting a presumptive standard for an extant cause of action. The doctrine of implication, of course, involves the creation of a cause of action from a statute that does not provide for one. Implication is broader in its application than negligence actions that are the limited basis for application of the concept of negligence per se. Additionally, the central point of negligence per se cases is the breach of duty by the defendant. If implication of remedies were predicated upon negligence per se, the existence of a duty would become the focus of the inquiry. The real source of the doctrine of implication, *ubi jus ibi remedium,* is a right. Existence of a right instead of a duty is the basis for implying a remedy, resulting in a more expansive role for the doctrine of implication in American jurisprudence.

114. *E.g.,* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

115. Some commentators have rejected its application absent a clear intention of the legislature to provide a private remedy. *E.g.,* W PROSSER, THE LAW OF TORTS § 36, at 191 (4th ed. 1971). This rejection misconstrues the basis of the doctrine. Implication is a judicially created doctrine that examines legislative intent as part of the analysis but is not dependent upon clear, positive legislative pronouncements for its legitimacy.

isprudence.[116] If legislative intent to create a private remedy were necessary before implication of a remedy, then the doctrine of implication would be superfluous. Judicial inquiry would be limited to statutory interpretation. This would indeed be an anomaly because the unreliability of statutory interpretation is a major reason the doctrine of implication developed.[117]

Conceptual difficulties with the implication doctrine have caused confusion in application. The doctrine of implication has a convoluted history of inconsistent application from *Texas & Pac. Ry v. Rigsby*[118] to *Cort v. Ash*[119] and its progeny [120] Federal courts have used the doctrine in determining that an implied right of action exists under the Safety Appliance Act,[121] the Railway Labor Act,[122] the Securities Exchange Act,[123] the Communications Act of 1934,[124] the Civil Aeronautics Act of 1938,[125] the Rivers and Harbors Act,[126] the Wagner-Peyser Act,[127] the fourth[128] and fifth[129] amendments to the Constitution, the Hill Burton Act,[130] the Patent Act,[131] the Natu-

116. The genius of the common law always has been its ability to solve problems through private remedies rather than government regulation. W LIPPMAN, THE GOOD SOCIETY 268-73, 282 (1973).

117. *See* H. HART & H. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 135-38 (10th ed. 1958).

118. *See* note 106 *supra.*

119. 422 U.S. 66 (1975).

120. *E.g.,* Olsen v. Shell Oil Co., 561 F.2d 1178 (5th Cir. 1977).

121. Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916).

122. Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944) (45 U.S.C. § 151 (1970)); Burke v. Compania Mexicana De Aviacion, 433 F.2d 1031 (9th Cir. 1970) (45 U.S.C. § 152 (1970)).

123. *E.g.,* J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (Section 14(a) of the Securities Exchange Act of 1934); Kardon v. National Gypsum Co., 69 F Supp. 512 (E.D. Pa. 1946) (rule 10b-5 S.E.C. Regulations).

124. Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947) (47 U.S.C. § 605 (1970)).

125. Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956) (49 U.S.C. § 401 (1970)); Wills v. Trans World Airlines, Inc., 200 F Supp. 360 (S.D. Cal. 1961) (49 U.S.C. § 1374(b) (Supp. V 1975)).

126. Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) (33 U.S.C. § 401 (1970 & Supp. V 1975)).

127. Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969) (29 U.S.C. § 49 (1970 & Supp. V 1975)).

128. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

129. Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978).

130. Euresti v. Stenner, 458 F.2d 1115 (10th Cir. 1972) (42 U.S.C. § 291 (Supp. V 1975)).

131. LeBlanc v. Spector, 378 F Supp. 301 (D. Conn. 1973); Arnesen v. Raymond Lee Organization, Inc., 333 F Supp. 116 (C.D. Cal. 1971) (35 U.S.C. § 31 (Supp. V 1975)).

ral Gas Act,[132] and the Federal Trade Commission Act.[133] Federal courts have declined to find an implied remedy under numerous federal laws including the Federal Motor Carrier Act,[134] and Small Business Act,[135] certain provisions of the Securities Exchange Act,[136] criminal statute 18 U.S.C. § 610,[137] the Amtrak Act,[138] and the Outer Continental Shelf Lands Act.[139] Unfortunately, this overview contributes little to an understanding of the doctrine of implication. An examination of various federal decisions both granting and denying implication is necessary in order to synthesize the holdings into a framework for analyzing the application of the doctrine of implication to the antitrust laws.[140]

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132. Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., Inc., 349 F Supp. 670 (D. Neb. 1972), *aff'd,* 486 F.2d 315 (8th Cir. 1973). *But see* McClellan v. Montana-Dakota Util. Co., 104 F Supp. 46 (D. Minn. 1952), *aff'd,* 204 F.2d 166 (8th Cir.), *cert. denied,* 346 U.S. 825 (1953).

133. Kipperman v. Academy Life Ins. Co., 554 F.2d 377 (9th Cir. 1977) (39 U.S.C. § 3009 (1970)); Guernesy v. Rich Plan of the Midwest, 408 F Supp. 582 (N.D. Ind. 1976) (15 U.S.C. § 45 (Supp. V 1975)). *But see* Carlson v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973).

134. T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959) (49 U.S.C. § 316 (1970)).

135. Royal Serv., Inc. v. Maintenance, Inc., 361 F.2d 86 (5th Cir. 1966) (15 U.S.C. § 631 (1970)).

136. *E.g.,* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977)(§ 14 of the Securities Exchange Act of 1934).

137. Cort v. Ash, 422 U.S. 66 (1975).

138. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

139. Olson v. Shell Oil Co., 561 F.2d 1178 (5th Cir. 1977) (43 U.S.C. § 1331).

140. In Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916), the United States Supreme Court first enunciated the doctrine of implication. The case involved a suit to recover damages for personal injuries sustained by a railroad worker who was injured while descending from a railroad car. A defective "grab iron" or ladder rung broke, injuring the plaintiff. Failure to provide secure grab irons violated § 2 of the Safety Appliance Act. The statute provided no express remedy. The Court was offered no analytical structure for determining the existence of an implied remedy but did note that the plaintiff would have a right of action regardless of the statute. This suggestion of a common law basis for the action with a statutory duty providing the standard of conduct is virtually synonymous with negligence per se. Other than adding the previously quoted lofty rhetoric and analytically confusing the doctrine of implication with the concept of negligence per se, this original implication case contributed little to the doctrinal underpinnings of implied remedies.

The Supreme Court next construed a federal statute as providing an implied private remedy in Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944). *Tunstall* was an action by black union members against the union for discriminatory treatment in violation of the Railway Labor Act. With even less discussion than was present in *Rigsby,* the court held that the plaintiffs were asserting a right that was derived from a duty imposed upon the union by the statute. This sparse, perhaps even simplistic, analysis was adopted and refined by the lower federal courts.

In *Kardon v. National Gypsum Co.*[141] and *Reitmeister v. Reitmeister,*[142] Judges Kirkpatrick and Learned Hand set forth an analytical structure for determining the propriety of implying a remedy which survived for approximately eighteen years before being modified by the United States Supreme Court.[143] In *Kardon,* Judge Kirpatrick wrote the most prolific implication opinion in American jurisprudence.[144] The court in *Kardon* found, for the first time,[145] an implied remedy for damages under section 10(b) of the Securities Exchange Act of 1934 and rule X-10b-5, which implements it. Noting that there was no provision for a private civil action and citing only the Restatement of Torts[146] and *Texas & Pac. Ry v. Rigsby,*[147] the court implied a private right of action for two allegedly defrauded sellers of securities. The defendants urged that the provision of express civil remedies under other sections of the Act evidenced congressional intent to deny the remedy [148] The court rejected that argument. The simplicity of Judge Kirkpatrick's analysis of implication is compelling:

> [T]he right [doctrine of implication] is so fundamental and so deeply ingrained in the law that where it is not expressly denied the intention to withhold it should appear very clearly and plainly [The issue is] whether an intention can be implied

141. 69 F Supp. 512 (E.D. Pa. 1946).

142. 162 F.2d 691 (2d Cir. 1947).

143. *See* note 176 *infra.*

144. This case began an avalanche of private securities litigation. Federal courts have given remedies to purchasers, *e.g.,* Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961); Fischman v. Raytheon, 188 F.2d 783 (2d Cir. 1951), and sellers, *e.g.,* Hooper v. Mountain States Sec. Corp., 282 F.2d 195 (5th Cir. 1960); Errion v. Connell, 236 F.2d 447 (9th Cir. 1956); Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953), for violation of § 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)). Courts have found other sections of the Securities Act to provide implied rights of action. *E.g.,* J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (section 14(a) of the Securities Exchange Act of 1934) (15 U.S.C. § 78n(a) (1970)). As the Fifth Circuit has noted, "[O]ne can scarcely find an issue of the advance sheets of the Federal Supplement and Federal Reporter that does not contain an opinion on § 10(b)." Rekant v. Desser, 425 F.2d 872, 877 (5th Cir. 1970).

145. *But see* Decker v. Independence Shares Corp., 311 U.S. 282 (1940). *Deckert,* which preceded *Kardon* by six years, involved implication of a private right of action for injunctive relief under the Securities Act of 1933.

146. "The violation of a legislative enactment by doing a prohibited act, makes the actor liable for an invasion of the interest of another if; (a) the intent of the enactment is exclusively or in part to protect the interest." 69 F Supp. at 513.

147. *Id.*

148. *Id.* at 514.

> to deny a remedy and to wipe out a liability which, normally, by virtue of basic principles of tort law accompanies the doing of the prohibited act. In other words, in view of the general purpose of the Act, the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies.[149]

Although the analysis in *Kardon* continues to effect securities litigation,[150] its influence over general implication analysis has waned in the last five years.[151]

In *Reitmeister v. Reitmeister*,[152] the court addressed the issue whether the Communications Act of 1934,[153] which imposed criminal liability on anyone who intercepted and published telephone communications, also imposed civil liability through an implied private right of action.[154] In holding that an implied private right of action existed, Judge Hand stated:

> Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class although the only express sanctions are criminal.[155]

The court founded its analysis on the Restatement of Torts[156] and a line of cases based on the early English implication case, *Couch v. Steel*.[157] Although *Reitmeister* referred only to penal statutes as a source for implied remedies, its analysis is compatible with the straightforward implication analysis of *Kardon* in which the source of the remedy was an agency regulation. Read together, these cases

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149. *Id.*

150. The Supreme Court clearly addressed the problem of implied remedies in securities cases in J.I. Case v. Borak, 377 U.S. 426 (1964). In *Borak*, the Court implied a remedy under § 14(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78 n(a)). *Borak* is discussed more fully in text accompanying notes 176-83 *infra*. *Kardon* has remained the touchstone of rule 10b-5 litigation. *E.g.*, Eason v. General Motors Acceptance Corp., 490 F.2d 654, 657 (7th Cir. 1973); Rekant v. Desser, 425 F.2d 872 (5th Cir. 1970).

151. *E.g.*, Cort v. Ash, 422 U.S. 66 (1975); National R.R. Passengers Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974). *See* notes 216-23 *infra* & accompanying text.

152. 162 F.2d 691 (2d Cir. 1947).

153. 47 U.S.C. § 151 (1970).

154. 162 F.2d at 694.

155. *Id.*

156. *Id.*

157. *Id.* *See* note 105 *supra*.

strongly suggest that implication is a function of the judiciary, which in the absence of express legislative intent to the contrary, will provide a private remedy for those who have been injured by breach of a federal statute.

Obiter dictum in *Bell v. Hood*,[158] decided by the United States Supreme Court a few months before *Kardon*, apparently influenced both Hand and Kirkpatrick. In *Bell*, the plaintiffs were attempting to bring an implied cause of action against agents of the Federal Bureau of Investigation for violation of their fourth and fifth amendment rights.[159] The Supreme Court stated that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[160] This attitude, that the federal courts will do what is necessary to provide a remedy for those whose federal rights have been violated, whether the source of the right is the Constitution, an agency regulation, or a penal statute, initiated a period of judicial activism that resulted in the judiciary involving itself in many nonjudicial activities.[161] This commitment to a remedy is also the wellspring of a simple implication analysis that presumes an implied remedy. The "presumption analysis," appealing as its simplicity may be, never has been completely adequate in cases considering implication.[162]

158. 327 U.S. 678 (1946).

159. The court in *Bell v. Hood* decided only the narrow issue whether the federal courts had jurisdiction to entertain a cause of action for violation of an individual's fourth and fifth amendment rights. Not until twenty-five years later did the Court finally decide that an implied remedy for violation of one's fourth amendment rights existed. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). *See* note 193 *infra.*

160. 327 U.S. at 684.

161. *See* note 109 *supra.*

162. In a series of cases, Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951); McClellan v. Montana-Dakota Util. Co., 104 F Supp. 46 (D. Minn. 1952), *aff'd*, 204 F.2d 166 (8th Cir.), *cert. denied*, 346 U.S. 825 (1953); and T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959), decided under the Federal Power Act, the Natural Gas Act, and the Interstate Commerce Act, respectively, the federal courts held that no private compensatory action could be implied for violation of rate regulations. These cases departed from an extension of presumption analysis, which permitted a judicially created remedy in the absence of an available administrative remedy. In all three cases, the courts refused to allow a private remedy to recover past unreasonable rates even though the respective enforcement agencies could issue only prospective orders. Two plausible explanations exist for this line of cases. First, rate cases are anomalous among implied remedy cases because the concern over inequality of rates between those who successfully litigate lower rates and those who do not litigate at all results in rate cases traditionally being prospective in nature. All three of the

Primary jurisdiction analysis,[163] the application of which generally resulted in denial of implied remedies, developed apart from, but was influenced by, the more promising presumption analysis. This influence was underscored by the case of *Fitzgerald v Pan American World Airways*.[164] The plaintiffs in *Fitzgerald*, three blacks who alleged racial discrimination for the airline's refusal to allow them to reboard a continuation of a flight, sought to recover damages on an implied rule of action under the Civil Aeronautics Act.[165] Judge Frank, speaking for the court, expressly adopted the presumption analysis of *Reitmeister* and found an implied private cause of action for violation of the statute.[166] Absent clearly enunciated legislative intent to the contrary, this was the predictable result of the presumption analysis. The most enlightening item in *Fitzgerald* was that the statute contained both penal provisions and a prospective administrative remedy Judge Frank rejected a proffered primary jurisdiction analysis that was based on the presence of an administrative remedy Because the basis of *Reitmeister* was a penal statute and the primary jurisdiction cases construed a statute that contained a prospective administrative remedy, *Fitzgerald* demonstrated the continued viability of presumption analysis.

At the time of the *Fitzgerald* decision, presumption analysis reigned supreme. Obviously, if presumption analysis had remained intact to date, it would have simplified the inquiry of this Article; in its repeated application, however, the federal courts began to develop the analysis into a functional one involving more detailed inquiry [167] In several cases through the 1960's, the federal courts

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statutory schemes provided express remedies for prospective relief. Second, the cases are explainable as invocations of the doctrine of primary jurisdiction.

163. In T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959), the Supreme Court deemed implied private actions and common law actions "incompatible with a statutory scheme in which the courts have no authority to adjudicate the primary question in issue." *Id.* at 474. This is not a necessary interpretation of the doctrine of primary jurisdiction because a court confronted with an issue within the expertise of an administrative agency can refer that issue to the agency as part of the adjudicative process. *E.g.*, Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, 89 (1962). A detailed examination of the doctrine of primary jurisdiction and its effect on the doctrine of implication is beyond the scope of this paper.

164. 229 F.2d 499 (2d Cir. 1956).

165. 49 U.S.C. § 401 *et seq.* (repealed 1958).

166. 229 F.2d at 501.

167. This trend culminated in the full development of a functional analysis for implication by the United States Supreme Court in Cort v. Ash, 422 U.S. 66 (1975). *See* notes 195-204 *infra* & accompanying text.

gradually foreshadowed the development of a functional analysis by supplementing the original simple presumption analysis with detailed inquiries.

In *Wills v. Trans World Airlines, Inc.*,[168] the district court implied a remedy under section 404(b) of the Civil Aeronautics Act of 1938.[169] This is the same provision under which the court in *Fitzgerald* implied a private right of action.[170] The court noted the presumption analysis of *Fitzgerald*[171] but proceeded to make further inquiry before declaring that a private right of action existed under the statute. The court examined the purpose of the statute,[172] enhancement of that purpose by a private right of action,[173] the availability of state remedies,[174] and the effectiveness of administrative relief.[175] The result was the same as *Fitzgerald*, but the analysis was more complicated. The inquiry in *Wills* was the beginning of a functional analysis in which federal courts no longer automatically presumed the existence of a private right of action.

The trend toward a more complex analysis was a gradual one. In the watershed securities opinion, *J.I. Case Co. v. Borak*,[176] the United States Supreme Court made its most searching inquiry of

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168. 200 F Supp. 360 (S.D. Cal. 1961).

169. 49 U.S.C. § 484(b), *as amended by* Act of Aug. 23, 1958, Pub. L. No. 85-726, § 404 (amended 1972).

170. *See* note 165 *supra.*

171. The court in *Wills* noted the following:

> The rationale of the decision in Fitzgerald, *supra,* is that inasmuch as the Civil Aeronautics Act makes it a Federal crime to violate its provisions the case falls within the doctrine which permits treatment of a criminal statute as creating a Federal cause of action in favor of members of the class for whose protection the statute was enacted.

200 F Supp. at 363-64.

172. *Id.* at 364.

173. *Id.*

174. In rejecting the alternate choice of relegating the plaintiffs to a state court remedy, the court in *Wills* stated as follows:

> Of course, the alternative to a Federal cause of action for the aggrieved airline passenger is to remit a plaintiff to his remedy in the State courts, based upon a State-created cause of action. But this recourse would fall far short of effectuating the purposes of the Act. Left with a cause of action under State law for breach of contract, a passenger would rarely be able to prove actual damage commensurate with the wrong

Id. at 365.

175. *Id.* at 364. The plaintiffs also sought injunctive relief, but the court refused to grant equitable relief because the plaintiffs failed to exhaust administrative remedies. *Id.* at 366.

176. 377 U.S. 426 (1964).

implication up to that time. The Court did not refer directly to the line of cases that formed the basis of presumption analysis[177] but implied a private remedy under section 14(a) of the Securities Exchange Act of 1934.[178] The Supreme Court's analysis consisted of examining the statutory scheme,[179] the purposes of the legislation,[180] and the effect of an implied private action on the statute's purposes.[181] The Court rejected any limitation on the power of the federal courts to fashion the most appropriate remedy [182] *Borak* can be read to support the principle that if a duty that affects the plaintiff's interests is violated and damages can be proved, normal tort principles will support a damage recovery as readily as any other remedy [183]

Despite the apparent viability, with alterations, of presumption analysis, other implication decisions during this same time forbode difficulties for presumption's analytical structure in later cases.[184] In

177. This is particularly curious because *Kardon*, a presumption analysis case, was the first implied damage action under the Securities Exchange Act of 1934. Although *Kardon* involved an action under § 10(b) of the Act and *Borak* was concerned with § 14(a), presumption analysis would have been applicable to the facts in *Borak*. The Court's failure to cite *Kardon* may be explained by the fact that *Kardon* was only a district court opinion.

178. 15 U.S.C. § 78n(a) (1970).

179. 377 U.S. at 431.

180. *Id.* at 431-32.

181. *Id.* at 432.

182. *Id.* at 434-35.

183. A narrower reading of *Borak* is also possible. The unique composition of the federal securities laws allows those who would limit the application of *Borak* a colorable argument. Implication of a civil remedy from the securities laws can be justified on the limited basis that the statute's language itself suggests such a remedy. Sections of the Federal Securities Act provide that every contract made in violation of the act or the performance of which would involve a violation is "void." *E.g.*, 15 U.S.C. § 78(b) (1970); 15 U.S.C. § 80(b)-6-15 (1970). These sections allow a limited use of the Securities Act in private litigation. This impression is reinforced by the 1938 amendment to the Securities Exchange Act of 1934, which provided that certain contracts should not be deemed void "in any action maintained in reliance upon this subsection." 15 U.S.C. § 78cc(b) (1970). Because this subsection makes no express provision for private remedies, Congress assumedly contemplated the availability of implied remedies under the Act.

184. Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967), demonstrates the gradual trend toward a more complex implication analysis. In a case for damages brought by the United States against the owners of sunken vessels for the cost of raising the vessels, the Supreme Court implied a private right of action for damages under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.* (1970), despite the presence of criminal (33 U.S.C. § 409) and vessel forfeiture penalties (33 U.S.C. § 409). The Court, using the language of presumption analysis and relying on the inadequacy of the express remedies in light of the purposes of the statute, implied a remedy. Notably absent was the detailed inquiry characteristic of the evolving functional analysis foreshadowed in *Borak* and *Fitzgerald*.

decisions more reflective of traditional statutory interpretation with its deference to the legislature than the doctrine of implication with its basis of general judiciary powers,[185] federal courts denied implied private actions for damages under the Communications Act of 1939[186] and the Small Business Act.[187] Neither opinion exhibited any sensitivity to the function of the doctrine of implication, and both courts were satisfied with ending the inquiry after finding no congressional intent to create an implied private right of action.[188]

The United States Supreme Court furthered the trend toward corruption of presumption analysis in *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers (Amtrak).*[189] Although this decision involved an attempt to imply a private remedy for injunctive relief instead of compensatory damages, the Court's refusal to allow the implied remedy illustrates the tendency of courts during the reign of presumption analysis to view the doctrine of

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In Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969), a case granting a private right of action to migratory farm workers under the Wagner-Peyser Act, 29 U.S.C. § 49 *et seq.* (1970 & Supp. V 1975), the Fifth Circuit affirmed the continued viability, with slight alterations, of presumption analysis throughout the 1960's. The court examined the legislative history and language of the statute and regulations to determine if the migratory workers had a vested right to be protected from violation of the regulations promulgated under the statute. Once the court answered that question in the affirmative, it concluded that "[t]his Act, its setting and the regulations call imperatively for implied remedies here if the purpose of the regulations — the protection of migratory farm workers — is to be achieved." *Id.* at 576.

185. *See* notes 141-49 *supra* & accompanying text.

186. Daly v. Columbia Broadcasting Sys., Inc., 309 F.2d 83 (7th Cir. 1962) (47 U.S.C. § 315(a)).

187. Royal Servs., Inc. v. Maintenance, Inc., 361 F.2d 86 (5th Cir. 1966) (15 U.S.C. §§ 631-647)).

188. In *Daly,* the court stated as follows:

> [T]here is nothing to indicate the Sec. 315(a) of the Act we are considering was intended by Congress to specifically benefit a special class of persons.
>
> We hold that neither Sec. 315(a) of the Act in particular, nor the entire Act in general, created or authorized the bringing of a private cause of action to recover damages

309 F.2d at 85-86.

The court in *Daly* relied on legislative intent to determine whether the statute was intended to protect the plaintiffs and whether Congress intended to create a private right of action. The former is part of presumption analysis, and the latter is antithetical to it.

In *Royal Services,* the court was even more graphically concerned about congressional intent stating, "We think had Congress intended to give a civil remedy it would have done so, either by express provision or by clear implication. It did not do so in the Small Business Act." 361 F.2d at 92.

189. 414 U.S. 453 (1974).

implication as a conventional tool of statutory interpretation if the court was inclined to deny the remedy In *Amtrak*,[190] the National Association of Railroad Passengers sought to maintain an implied right of action under the Amtrak Act to enjoin Amtrak from discontinuing certain rail passenger service. The Amtrak Act expressly authorized the Attorney General to sue Amtrak for certain statutory violations and permitted employees to maintain actions involving a labor agreement.[191] Treating the doctrine of implication as nothing more than a tool of statutory interpretation, the Court held that the presence of other remedies invoked the ancient principle of statutory interpretation, *expressio unius est exclusio alterius*.[192] In denying an implied right of action, the Court limited itself to conventional statutory interpretation.[193] Under presumption analysis, the proper inquiry was whether a judicially created private right of action would further the congressional purpose, not whether Congress intended that there be one. Congressional intent was probative only of whether the plaintiffs were protected by a duty or included in a right created by the statute.

Inquiry into whether Congress intended to imply a remedy is

190. *National Railroad Passenger Corp.* is referred to as *Amtrak*.

191. 45 U.S.C. § 547(a).

192. 414 U.S. at 458. The Court also found an intention in the legislative history to preclude private action.

193. This restrictive analysis in *Amtrak* is particularly frustrating when viewed in light of an earlier Supreme Court case, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). This case involved implication of a private action for damages against federal agents for breach of the plaintiffs' fourth amendment rights. The major focus in the doctrine of implication is the rights of the plaintiff rather than the duty of the defendant, which is the focus of negligence per se cases. Thus, analysis in statutory implication cases is coterminous with analysis in implication of constitutional remedies. In *Bivens*, the Supreme Court used presumption analysis with a little window dressing to allow an implied right of action for damages under the fourth amendment. In Justice Harlan's concurring opinion, the Court recognized that the doctrine of implication is not merely a tool of statutory construction.

> The exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction The notion of "implying" a remedy, therefore, as applied to cases like *Borak*, can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law

Id. at 403 n.4 (citation omitted).

Despite this positive statement of the special role of the doctrine of implication separate from conventional statutory interpretation, *Amtrak* demonstrated that something more definitive than presumption analysis and lofty rhetoric was needed to clarify the doctrine.

particularly unavailing for any analysis of implication. The basic premise underlying the search is that Congress intended to provide an implied remedy This is a legal fiction. When an express civil remedy is omitted, Congress most probably did not consider the remedy at all, or if Congress did consider a remedy, it rejected one.[194] Perhaps the major failing of presumption analysis is that its straightforward approach makes it easy to misconstrue. In the hands of a court not inclined to imply a remedy, the analysis is readily distorted. An inquiry into legislative intent to provide a private remedy furnishes a hostile court with a ready excuse to avoid implying a remedy

As the frequent relapses into traditional statutory interpretation demonstrated, the federal courts needed more guidance in analyzing the doctrine of implication than presumption analysis provided. The culmination of the trend toward a more functional, detailed implication analysis was *Cort v. Ash*,[195] which enunciated a four-step inquiry to determine whether a remedy would be implied from a statute. In *Cort v. Ash*, the Supreme Court refused to imply a remedy for damages in favor of a corporate shareholder against corporate directors for violation of a criminal statute prohibiting corporations from making "a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors are to be voted for."[196] The relevant questions[197] posed by

194. Professor Prosser states that when legislators failed to mention a civil remedy, "they either did not have the civil suit in mind at all, or deliberately omitted to provide for it." W PROSSER, *supra* note 61, at 191.

195. 422 U.S. 66 (1975).

196. 18 U.S.C. § 610 (repealed 1976).

197. The District of Columbia Court of Appeals previously had fashioned a similar analysis in denying implication under the Federal Trade Commission Act. In Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973), the court of appeals phrased the test as containing five relevant factors:

> (1) a Federal statutory or constitutional prohibition against the acts complained of; (2) inclusion of the defendant in the class upon which the duty of statutory compliance has been imposed; (3) legislative intent to place the party claiming injury within the ambit of the statute's protection or to confer a substantive benefit or immunity upon him; (4) injury or threatened harm proximately resulting from the defendant's breach of duty; and (5) unavailability or ineffectiveness of alternative avenues of redress.

Id. at 989.

Despite this detailed functional analysis, the first court to imply a remedy under the Federal Trade Commission Act did so by resorting to an analysis more akin to the presumption analysis and cited *Bivens v. Six Unknown Named Agents* and *J.I. Case v. Borak* as

the Court were the following:

> First does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?
>
> Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[198]

This more detailed analysis, though not as expansive as presumption analysis, helps prevent corruption through unwarranted reliance on conventional rules of statutory interpretation in determining whether a remedy should be implied.[199] Unfortunately, many courts that have applied the *Cort v. Ash* test have refused to allow an implied remedy[200] while courts that have allowed implication since *Cort v. Ash* have ignored the analysis.[201]

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authority. Guernsey v. Rich Plan of the Midwest, 408 F Supp. 582 (N.D. Ind. 1976). The proper test according to the court in *Guernsey* is whether "(1) the provision violated was designed to protect a class of persons including the plaintiffs from the harm of which the plaintiffs complain, and (2) it is appropriate in light of the statute's purposes to afford plaintiffs the remedy sought." *Id.* at 586. The D.C. Circuit should not feel slighted because the district court in *Guernsey* also ignored the *Cort v. Ash* functional analysis in favor of a quasi-presumption analysis.

198. 422 U.S. at 78.

199. *E.g.*, National R.R. Passenger Ass'n v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974). *See* notes 192-93 *supra*. The Supreme Court cited *Amtrak* as supportive of the second factor in the functional analysis; the second factor in the *Cort v. Ash* analysis, however, simply made the presence of legislative intent to grant or deny a private remedy a relevant factor in implication analysis. Justice Harlan's comments in *Bivens v. Six Unknown Named Agents*, help place the factor of legislative intent in perspective:

> The contention that the federal courts are powerless to accord a litigant damages for a claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment.

403 U.S. at 402.

Implication simply is not a process that reduces the judiciary to attempting to discern the will of the legislature. Rather, implication is an exercise by the judiciary in selection of traditional remedies available under an act of positive law.

200. *E.g.*, Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977) (denying unsuccessful tender offeror implied right of action under § 14(e) of Securities Exchange Act of 1934 or Securities and Exchange Commission's Rule 10b-6); Olsen v. Shell Oil Co., 561 F.2d 1178 (5th Cir. 1977) (injured employees denied right of action under Outer Continental Shelf Act).

201. *E.g.*, Guernsey v. Rich Plan of the Midwest, 408 F Supp. 582 (N.D. Ind. 1976). *See*

When the functional analysis of *Cort v. Ash* is read in light of its origins from the presumption analysis developed in *Kardon, Reitmeister, Borak,* and *Bivens,* an expansive reading of the doctrine of implication is clearly justified, if not mandated. The four factors of *Cort v. Ash* are not terminally rigid tests to be applied as exclusionary criteria. These four factors should be part of the general inquiry by the court to determine the precise substantive social policy embodied in the legislation and whether traditional judicial remedies are consistent with those policies. Legislative history is relevant to this inquiry, but not controlling. What is controlling is whether the substantive policies reflected by the legislation are compatible with traditional judicial remedies. With the history of the doctrine of implication firmly established and the analytical structure offered by *Cort v. Ash* placed in its proper context, consideration of the doctrine of implication to aid the antitrust laws is possible.

Despite express references to the compensatory nature and the broad statutory language of the private antitrust laws, numerous classifications of persons have been denied their compensatory rights under the express antitrust remedy.[202] Indirect purchasers, employees, lessors, and others have been denied the right to be compensated for their injuries.[203] This situation is precisely what the concept of *ubi jus ibi remedium* was intended to remedy The tortious nature of an antitrust action is well recognized.[204] The origins of the doctrine of implication in the law of tort make it particularly suitable for application to antitrust cases. This conclusion is supported by applying the analysis of *Cort v. Ash* to the express private antitrust laws.

Does the Statute Create a Federal Right in Favor of the Plaintiff?

Traditional implication analysis involves examining a statute section to determine whether the section creates a federal right in favor of the plaintiff.[205] Federal courts have implied remedies by examining an entire statutory scheme to determine the plaintiff's right.[206]

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note 211 *infra.*

202. *See* notes 46-59 *supra* & accompanying text.

203. *Id.*

204. *See, e.g.,* Solomon v. Houston Corrugated Box Co., 526 F.2d 389 (5th Cir. 1976); Tondas v. Amateur Hockey Ass'n, 438 F Supp. 310, 315 (W.D.N.Y. 1977).

205. *E.g.,* Wills v. Trans World Airlines, Inc., 200 F Supp. 360 (S.D. Cal. 1961).

206. *E.g.,* J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

Despite this, an implied remedy under the antitrust laws is a unique situation.[207] The antitrust laws are a matrix of duties and rights combining the prohibition of the various liability sections with the express rights for compensation under section 4 for "any person" injured "by reason of" antitrust violations. The uniqueness stems from the necessity of reading these statutory sections together. The duties created for defendants by the liability sections carry with them the implication that those who are injured by the violation have a right to be compensated. Because the legislative history of the general liability sections is sparse, an examination of the legislative history of section 4 of the Clayton Act answers the question whether the statute creates a right in favor of any plaintiff. This express remedy is as definitive a statement of whether the antitrust laws create a right in plaintiffs as can be expected in any statutory scheme. Only the causal language "by reason of" was intended to limit the express remedy Thus "any person" injured by reason of antitrust violations was intended to have a right of action for compensation.

Congress apparently intended to create a general right in the public to be free from antitrust violations and to provide a remedy to all persons so injured. Whether a federal right created by the antitrust laws protects any particular plaintiff requires an inquiry into whether the person was injured by reason of an antitrust violation. This broad approach focuses on injury in fact.

In tort law, the plaintiff must introduce proof that forms a reasonable basis for the conclusion that the conduct of the defendant more likely than not was a substantial factor in the injury of which the plaintiff complains.[208] This proof of causation in fact often is confused with the question whether the defendant should be legally responsible for the injury The concept is referred to as the standard of proximate causation,[209] a limitation on recovery in negligence actions.

Antitrust violations are intentional torts. The proper causation standard for an intentional tort is similar to the standard used by

207. Implication under the securities laws is probably the most analogous application of the doctrine of implication. Even with the securities cases, however, substantial differences exist. *See* note 183 *supra.*

208. W PROSSER, *supra* note 61, at 241.

209. *Id.* at 244.

Judge Learned Hand in *Vines v. General Outdoor Advertising Co.*[210] In *Vines*, Judge Hand rejected an indirect injury barrier holding that the only relevant question under section 4 was the factual existence of an injury caused by an antitrust violation.[211]

The only other standing limitation under the broad approach authorized by the antitrust laws is the constitutional limitation of justiciability[212] and its concomitant standard of standing. Courts must determine whether the plaintiff has a "particular concrete injury"[213] that gives him a "personal stake in the outcome"[214] of the adjudication meeting the constitutional and judicially prudent requirements of injury in fact.[215] If the plaintiff meets this standard of injury in fact, then no restriction on maintaining an action remains other than by policy reflected in the particular statute. As previously indicated under the antitrust laws, the express policy favors no further limitation.

Is There Any Indication of Explicit or Implicit Legislative Intent to Create a Remedy?

The doctrine of implication is not a tool of statutory interpretation but rather a judicial doctrine based upon the unique position of the judiciary to determine the necessity of an implied remedy The second factor of the analysis in *Cort v. Ash,* the search for legislative intent, ignores the doctrine's function. Implicit in the search for legislative intent to create an implied remedy is that Congress considered the feasibility of implied remedies at all. As Professor Prosser observed, that presumption is erroneous.[216]

In analyzing the application of implication under the antitrust laws, that inquiry is superfluous. The legislative history reveals that Congress intended to create a broad antitrust remedy If courts had given the express remedy the breadth reflected in the statute's language and legislative history, little need for an implied remedy

210. 171 F.2d 487 (2d Cir. 1948). In an antitrust case, Judge Hand concluded that a sales agent who lost an account to his employer's coconspirator in a market division scheme had a legally cognizable remedy under the antitrust laws. Of course, the impact of this case was short-lived with the development of the direct injury and target area tests.

211. *Id.* at 491.

212. *See* note 113 *supra.*

213. United States v. Richardson, 418 U.S. 166, 177 (1974).

214. Baker v. Carr, 369 U.S. 186, 204 (1962).

215. *See, e.g.,* Sierra Club v. Morton, 405 U.S. 727, 732-40 (1970).

216. *See* note 194 *supra.*

would exist. Congress intended any persons injured in their business or property by reason of antitrust violations to have a remedy for treble damages. Certainly, silence as to an implied remedy is insufficient to mitigate against the implication of an implied remedy for compensatory damages.

Is it Consistent With the Purposes of the Legislative Scheme to Imply Such a Remedy for the Plaintiff?

Given the broad topic of this Article, the existence of an implied remedy under the antitrust laws, the consideration of this element is difficult because it requires juxtaposition of the purposes of the antitrust laws with the identity of the particular plaintiff to determine whether implying a remedy for that plaintiff is consistent with the legislative purpose.[217] The legislative history of the liability sections of the antitrust laws is relatively sparse. Its role has been identified modestly by Congress as the "basic guardia[n] of our free enterprise system."[218] The two purposes of the express private remedy under the antitrust laws were to compensate for private harm and to deter antitrust violators. The intent of the private remedy was to make "available to the people,"[219] particularly consumers and "small men engaged in competition,"[220] an antitrust weapon. Debates over the private remedy provision revealed a strong congressional interest in creating a meaningful remedy for those injured by antitrust violations.[221]

As the previous discussions reveal,[222] numerous classifications of victims of antitrust violators go uncompensated because of the judicial restraints placed on the broad express remedy An implied remedy for nontreble damages would comport with the compensatory policy underlying the antitrust laws. Without expressing any concern for the antitrust victims, but apparently fearful of the ruinous effects of an overbroad antitrust remedy, the courts have denied compensation for alleged antitrust violations to corporate creditors,

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217. This consideration also is relevant to a determination of whether the statute creates a federal right in the plaintiff, the first element of the *Cort v. Ash* analysis. *See* notes 206-15 *supra* & accompanying text.

218. S. REP. No. 94-803, 94th Cong., 2d Sess. 9 (1976).

219. 21 CONG. REC. 3146 (1890) (remarks of Sen. Reagan).

220. *Id.* at 3147 (remarks of Sen. George).

221. *See* notes 21-28 *supra* & accompanying text.

222. *See* notes 38-91 *supra* & accompanying text.

general partners, shareholders suing in their own right, lessors, suppliers, employees, patentees, franchisors, and indirect purchasers.[223] If the alleged violations occurred and these victims in fact were injured because of the violation, to allow these plaintiffs to recoup their actual losses is consistent with the purposes of the legislative scheme.

Is the Cause of Action One Traditionally Relegated to State Law?

The large body of decisional law formulated under the antitrust laws in federal courts tends to diminish greatly the relevance of this factor to the application of the doctrine of implication to the antitrust laws. Still, the major motivation for the invocation of the doctrine of implication is the absence of an effective remedy for those injured by violation of laws intended for their protection. Although these antitrust violations clearly are not the type of injury traditionally relegated to state law, if effective state law remedies are available for the same injury, implication might be inappropriate.

Two possible types of state remedies exist, state antitrust laws and state tort laws, which could provide a compensatory remedy to antitrust victims. Closer scrutiny reveals these possibilities are illusory. In a broad review of state antitrust laws one commentator has noted that they are not uniform and, on the whole, provide ineffective remedies.[224]

Certain business torts, such as intentional interference with a business relationship, offer a potential compensatory remedy for some antitrust victims. The cause of action centers on bad motive[225] and is subject to the defense of privilege[226] and other technical limitations that greatly reduce its effectiveness in remedying the injury caused by antitrust violations. Clearly, these difficulties indicate that an implied right of action offers a remedy more effective and flexible than that provided by a purely state remedy

Other Considerations

Although an implied remedy under the antitrust laws is analyti-

223. *See* notes 49-59 *supra* & accompanying text.
224. Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653 (1974).
225. W PROSSER, *supra* note 61, at 927-28.
226. *Id.* at 933.

cally sound, other considerations must be addressed as part of the decision to adopt this approach. The Supreme Court has expressed concern over the negative effects of a multiplicity of litigation that might result from too broad an interpretation of section 4 of the Clayton Act. In *Hawaii v. Standard Oil Co. of California*[227] and *Illinois Brick Co. v. Illinois*[228] the Court noted that a broad interpretatin of section 4 could result in duplicative recoveries, overcomplication of the litigation, overburdening of the courts, and lack of incentive for worthier plaintiffs. The decision in *Illinois Brick* strongly emphasized the latter two problems. The history of litigation prior to *Illinois Brick* indicates these concerns are illusory under traditional section 4 litigation. Litigation prior to *Illinois Brick* greatly narrowed the law of standing. Under an implied antitrust remedy, the standing limitation is stripped away Thus, past experience does not necessarily remove the concerns in this context.

Multiplicity of litigation is unlikely to result from implementation of the implied remedy Statutory attorneys fees and treble damages presumably are effective incentives for the prosecution of private antitrust actions. The absence of these incentives[229] in the proposed implied remedy should make plaintiffs less likely to file "strike suits" or otherwise pursue questionable liability cases. The implied remedy is likely to be used only in cases in which liability generally would be clearer than in many section 4 cases. One might expect that in such cases, a section 4 case would be pending by one or more traditional plaintiffs. Indeed, one expects that most actions under this implied remedy would be pled in the alternative with a section 4 treble damage claim. The obtuse nature of the standing analysis under section 4 would seem to encourage that practice. If used in the alternative, the implied remedy adds flexibility to the litigation by allowing the courts to ascertain more accurately the plaintiff worthier of recovering treble damages under a narrow standing test while still compensating injured plaintiffs under the implied remedy This is certainly more palatable than the current practice of limiting the plaintiffs at the pleading stage.

227. 405 U.S. 251 (1971).

228. 431 U.S. 720 (1977).

229. It is well established that in the absence of a statute or contract provision authorizing recovery of attorneys fees, they are not awardable as an element of damage or cost item. *E.g.*, Burgess v. Williamson, 506 F.2d 870, 877 (5th Cir. 1975); Wolf v. Cohen, 379 F.2d 477, 480 (D.C. Cir. 1967).

To the extent duplicative recoveries are a risk, care should be taken to avoid them, but not at the expense of allowing injured antitrust victims to go uncompensated.[230] The courts can take necessary steps to avoid duplicative recoveries by apportioning damages at trial[231] or by prohibiting recovery for damages previously recovered in similar private litigation. Stronger measures than these should not be used. The threat of duplicative recoveries should not be employed to frustrate the strong compensation policy of American jurisprudence generally and the antitrust laws specifically

Fear of overburdening the courts is suggested by some to be a specious reason for narrowing standing.[232] This fear is also a poor reason for refusing to imply a remedy for previously uncompensated antitrust victims. The rather uncomplicated analysis inherent in the proposed implied remedy and the lack of section 4 type incentives makes this concern even more speculative in the implication context than it is in section 4 cases.

CONCLUSION

The four factors enunciated in *Cort v. Ash* are to be analyzed to determine exactly the substantive social policy embodied in antitrust legislation and whether traditional judicial remedies are consistent with those policies. As the previous discussion discloses, the substantive social policy to be vindicated, compensation to heretofore remediless antitrust victims, is consistent with an implied private remedy for antitrust violations.

The history of the doctrine of implication reveals that a private remedy should be readily implied if it is necessary to right a wrong. Individuals have been injured by antitrust violations but denied compensation for their injury because of policy considerations

230. One commentator discussing duplicative recoveries in the context of § 4 noted that avoidance of duplicative recoveries is a sound policy consideration but denial of standing is too blunt an instrument to promote this interest sensitively. Berger & Bernstein, note 17 *supra*, at 851.

231. *See, e.g.*, Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667-68 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *accord*, Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1206-07 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976).

232. Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970). In the opinion of Professor Davis, "Opening the doors to anyone 'injured in fact' will not appreciably increase the number of parties who seek to litigate. It will cause an enormous drop in the huge volume of litigation in the federal courts about the complexities of the law of standing." *Id.* at 471.

mainly fostered by the treble damage provision of section 4 of the Clayton Act. If some means exists to reconcile the policy considerations in order to provide the excluded victims a remedy, it is incumbent upon the courts to find it. The doctrine of implication is such a method. To continue to deny antitrust victims some compensatory remedy because of concern over treble damages would be inconsistent with the highest principles of American jurisprudence. As Chief Justice John Marshall once stated, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury "[233]

233. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).