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STANDING OF THE TERMINATED EMPLOYEE UNDER SECTION 4 OF THE CLAYTON ACT

Federal antitrust laws provide a dual system of enforcement by allowing both criminal and civil actions.¹ In civil litigation, treble damages provide an effective means of enforcing the antitrust laws.² Section 4 of the Clayton Act³ allows plaintiffs to recover treble damages for an injury to "business or property by reason of anything forbidden in the antitrust laws."⁴ In addition to its important compensatory function, an award of treble damages penalizes wrongdoers and deters future misconduct.⁵ The punitive and deterrent functions protect competition, thus fulfilling the primary purpose of the antitrust laws.

Although the courts have attempted to identify proper plaintiff classes in antitrust suits,⁶ the identification process is difficult.⁷

1. Criminal penalties are provided in the Sherman Act, 15 U.S.C. §§ 1, 2 (1976). Section 4 of the Clayton Act allows civil actions in which successful plaintiffs may recover treble damages. 15 U.S.C. § 15 (1976 & Supp. V 1981).

2. See Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 n.1 (1977). The United States Supreme Court also has recognized the value of treble damage suits. See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 485 (1977); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972); *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

3. 15 U.S.C. § 15 (1976 & Supp. V 1981).

4. *Id.*

5. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 485 (1977). See also Berger & Bernstein, *supra* note 2, at 809, 810 & nn.2-3.

6. The courts have identified direct and indirect purchasers, competitors, producers, and consumers as proper plaintiff classes.

7. A plaintiff must establish standing to maintain a private antitrust action. The doctrine of standing, as applied to antitrust actions, allows plaintiffs whose injuries are the result of the defendant's anticompetitive conduct to sue for treble damages, and is similar to the tort concept of proximate cause. Berger & Bernstein, *supra* note 2, at 811. See, e.g., *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955) (describing the standing test as a test of proximate causation). Standing is analytically distinct from the statutory requirements of § 4 of the Clayton Act, but courts have not observed the distinction in all cases. Berger & Bernstein, *supra* note 2, at 811 & n.8. The analysis of standing in an antitrust suit is also distinct from the constitutional analysis of standing. The threshold inquiry for determining constitutional standing is injury in fact. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 501 (1975). By alleging the statutory requirement of injury to business or property, the antitrust plaintiff moves beyond the constitutional standing issue to the substantive antitrust standing issue. See *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1148 (6th Cir. 1975).

Recently, courts have considered whether discharged employees have standing to maintain treble damage suits under section 4 of the Clayton Act. The United States Court of Appeals for the Seventh Circuit in *In re Industrial Gas Antitrust Litigation*⁸ and the United States Court of Appeals for the Ninth Circuit in *Ostrofe v. H.S. Crocker Co.*⁹ considered whether employees who were discharged for refusing to participate in their employers' anticompetitive activities had standing to bring treble damage actions against their employers. Both decisions focused on the policies¹⁰ underlying section 4 and the nature of the discharged employees' injuries.¹¹ The courts, however, reached opposite conclusions.¹²

Although the policies behind the antitrust laws and the judicial concept of antitrust injury¹³ appear to present distinct areas of inquiry, they involve similar considerations. The purpose of the antitrust laws is to further competition by protecting the free market system. Courts have allowed consumers to seek remedies under section 4 of the Clayton Act, therefore, because consumers are often the victims of anticompetitive activity.¹⁴ This adaptation of the antitrust laws serves the deterrent and compensatory purposes of the treble damage provision while furthering the antitrust laws' procompetitive policy.¹⁵

This Note examines the standing of terminated employees to maintain section 4 treble damage actions and concludes that employees terminated for refusing to participate in antitrust viola-

8. 681 F.2d 514 (7th Cir. 1982), *cert. denied sub nom. Bichan v. Chemetron Corp.*, 103 S. Ct. 1261 (1983).

9. 670 F.2d 1378 (9th Cir. 1982), *vacated*, 103 S. Ct. 1244 (1983). The Supreme Court remanded *Ostrofe* for reconsideration in light of *Associated Gen. Contractors v. California State Council of Carpenters*, 103 S. Ct. 897 (1983). *See infra* note 49.

10. *See In re Industrial Gas*, 681 F.2d at 519-20; *Ostrofe*, 670 F.2d at 1383-86.

11. *See In re Industrial Gas*, 681 F.2d at 516-17; *Ostrofe*, 670 F.2d at 1386-88. *See also* *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977).

12. The Seventh Circuit in *In re Industrial Gas* found that the employee did not have standing, 681 F.2d at 520, but the Ninth Circuit in *Ostrofe* allowed the plaintiff to maintain a treble damage action, 670 F.2d at 1386.

13. *See infra* text accompanying notes 50-57.

14. *See, e.g., Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968); *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378, 1383 (9th Cir. 1982), *vacated*, 103 S. Ct. 1244 (1983). *See also* Comment, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 571 (1964).

15. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 486 n.10 (1977).

tions do not have standing to sue for treble damages.¹⁶ A discharge from employment is not the kind of injury that the antitrust laws were designed to prevent. Neither the policies underlying treble damage antitrust actions nor the nature of the discharged employees' injuries justifies an extension of antitrust standing to terminated employees.

POLICY CONSIDERATIONS UNDERLYING SECTION 4 OF THE CLAYTON ACT

An important policy consideration underlying section 4 is the need to provide an effective means for private enforcement of the antitrust laws.¹⁷ As "private attorneys general," plaintiffs can enforce the laws, deter future anticompetitive conduct, and recover compensation for their injuries. Because the predatory nature of antitrust violations allows violators to reap profits through price-fixing or overpricing, the most effective method of enforcing the law is to allow the injured party to sue the violator directly.¹⁸ Courts measure damages by the profits that the violator unjustly acquires from his anticompetitive activities. By trebling the damages, private suits raise the cost of a violation beyond the profit margin and deter future misconduct by increasing the risk associated with anticompetitive acts. Additionally, the prospect of recovering treble damages provides a financial incentive for injured parties to challenge large corporations in lengthy antitrust litigation.¹⁹

The countervailing policy considerations are those common to all cases involving potentially complex litigation. Antitrust defendants need protection against exposure to multiple liability for a single wrongful act. An award of treble damages may destroy the antitrust violator financially by recapturing more than the illicit prof-

16. In Note, *Employee Standing Under Section 4 of the Clayton Act*, 81 Mich. L. Rev. 1846, 1847, 1860-66 (1983), the author reaches an opposite conclusion by following a policy analysis similar to the Ninth Circuit's approach in *Ostrofe*.

17. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 485 (1977); see also *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972). Legislative history indicates that the primary purpose of § 4 is remedial. See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 486 n.10 (1977) (summarizing the legislative history of § 4).

18. See *In re Industrial Gas*, 681 F.2d at 520; *Ostrofe*, 670 F.2d at 1383.

19. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 472, 474-75 (1980).

its. Courts also have a strong interest in protecting the recoverable funds for the greatest number of potential plaintiffs.²⁰ Finally, courts must be concerned with the administrative difficulties inherent in opening the floodgates of potentially unlimited treble damage litigation.²¹

These countervailing policies become more significant as courts recognize additional classes of potential antitrust plaintiffs. If one consumer recovers treble damages from a supplier who has illegally overcharged for the goods he has sold, for example, a wave of similar suits might follow. Therefore, a court's determination of standing in a particular case may have broad implications for other similarly situated parties.²² Because of these precedential effects, courts are wary of allowing section 4 actions by new classes of plaintiffs. Decisions in which the courts have addressed the standing of terminated employees to sue for treble damages reflect judicial awareness of these conflicting concerns.

ANTITRUST INJURY AND ANTITRUST STANDING

Antitrust violations produce a variety of injuries, but not all injured individuals may sue for treble damages.²³ To limit the potentially unmanageable number of treble damage actions, courts have developed antitrust standing doctrines which limit the right to sue to those persons that Congress intended to recover under section 4.²⁴

Confusion currently characterizes the antitrust standing doc-

20. Similar problems arise in other complex suits, such as mass tort litigation. Class actions, interpleader, and joinder are useless if a recovery by a prior plaintiff has exhausted available funds or if potential claims have forced the defendant to seek the protection of the bankruptcy laws. The Johns-Manville asbestosis litigation is a striking example.

21. *E.g.*, *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378, 1383 (9th Cir. 1982), *vacated*, 103 S. Ct. 1244 (1983).

22. *See, e.g.*, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

23. Potential plaintiffs must meet the statutory qualifications of an injury-in-fact to a business or property interest. 15 U.S.C. § 15 (1976 & Supp. V 1981).

24. *In re Industrial Gas Antitrust Litigation*, 681 F.2d 514, 515-16 (7th Cir. 1982), *cert. denied sub nom.* *Bichan v. Chemetron Corp.*, 103 S. Ct. 1261 (1983); *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378, 1383 (9th Cir. 1982), *vacated*, 103 S. Ct. 1244 (1983); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 125 (9th Cir.), *cert. denied sub nom.* *Morgan v. Automobile Mfrs. Ass'n*, 414 U.S. 1045 (1973); *Calderone Enters. v. United Artists Theatre Circuit*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). *See also* *Berger & Bernstein*, *supra* note 2, at 812.

trines. The lower federal courts do not apply any single test, nor do they apply the standards consistently.²⁵ The basic concept of standing in treble damage actions is that the plaintiff must have suffered a direct injury by reason of the antitrust violation.²⁶ Although no single method has emerged for determining whether a plaintiff has suffered a direct injury and whether he, therefore, has standing to sue for treble damages,²⁷ at least four broad tests have found general acceptance.²⁸

Tests for Determining Antitrust Standing

The target area test²⁹ examines the economic area affected by the defendant's anticompetitive conduct. To provide standing, the

25. Berger & Bernstein, *supra* note 2, at 820-35. See, e.g., *Ostrofe*, 670 F.2d at 1382 & n.7; *In re Multidistrict Vehicle Air Pollution*, 481 F.2d at 127-28.

26. See 15 U.S.C. § 15 (1976 & Supp. V 1981). One study has described the direct injury rule as "the illegitimate offspring of two early private antitrust cases," *Ames v. American Tel. & Tel. Co.*, 166 F. 820 (C.C.D. Mass. 1909), and *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910). Berger & Bernstein, *supra* note 2, at 813-14. Berger and Bernstein cite the direct injury rule as the cause of chaos in antitrust standing. Additionally, they find that the analytical methods applied by courts in determining direct injury—especially the practice of categorizing plaintiffs by class, or of examining the violator's target area—inadequately express the concerns supporting the standing doctrines. Although a new approach to the standing question would provide an opportunity for a more logical and uniform analysis, courts probably will not abandon the direct injury rule, especially in light of the Supreme Court's recognition of the direct-indirect injury dichotomy. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977). The Supreme Court has not clarified the standing analysis and has cited cases applying a variety of tests, often at odds with each other. See *Blue Shield v. McCready*, 457 U.S. 465, 476 (1982); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972). See also *In re Multidistrict Vehicle Air Pollution*, 481 F.2d at 126-27 & n.7 (reviewing a variety of approaches used in the lower federal courts and attempting to categorize the approach of each circuit).

27. *In re Multidistrict Vehicle Air Pollution*, 481 F.2d at 125. See also Berger & Bernstein, *supra* note 2, at 820.

28. *Blue Shield v. McCready*, 457 U.S. 465, 476 n.12 (1982); *In re Industrial Gas Antitrust Litigation*, 681 F.2d 514, 516 (7th Cir. 1982), *cert. denied sub nom. Bichan v. Chemetron Corp.*, 103 S. Ct. 1261 (1983).

29. See, e.g., *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); *Engine Specialties v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979), *aff'd per curiam on reh'g*, 615 F.2d 575 (1st Cir.), *cert. denied*, 446 U.S. 983 (1980); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975); *Calderone Enters. v. United Artists Theatre Circuit*, 454 F.2d 1292, 1295-96 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971); *Sanitary Milk Producers v. Bergjans Farm Dairy*, 368 F.2d 679 (8th Cir. 1966); *Warner Mgmt. Consultants v. Data Gen. Corp.*, 545 F. Supp. 956 (N.D. Ill. 1982); *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 545 F. Supp. 765 (N.D. Ill. 1982).

plaintiff's business or property injury must be within the area of the economy threatened by the breakdown of competition.³⁰ Incidental harm does not warrant the plaintiff's recovery of treble damages because only parties whose economic interests immediately suffer from the defendant's anticompetitive activities have standing to sue.³¹ Under the target area test, for example, farmers who claimed that automobile pollution reduced their crop yields did not have standing to sue automobile manufacturers for an alleged antitrust conspiracy to suppress the development of pollution control devices.³² Because the farmers had no commercial interest that fell within the economic area of developing air pollution control devices,³³ the farmers were not targets of the alleged conspiracy, and were not even on the "firing range."³⁴

The direct injury test³⁵ focuses on the relationship between the claimant and the antitrust violator. Generally, the claimant does not have standing under the test if an intermediate victim separates the claimant from the violator.³⁶ The direct injury test is analogous to the concept of privity, and forecloses claims of all but the most closely related parties. Under the direct injury test, for example, a supplier of refined asphalt had no standing to sue an asphalt producer for alleged antitrust pricing violations³⁷ because the supplier was "too far removed from the direct injury" to the buyer.³⁸

30. *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

31. *Berger & Bernstein*, *supra* note 2, at 830.

32. *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied sub nom. Morgan v. Automobile Mfrs. Ass'n*, 414 U.S. 1045 (1973).

33. 481 F.2d at 129.

34. *Id.*

35. *See, e.g., Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 729-31 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); *Kauffman v. Dreyfus Fund*, 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Productive Inventions v. Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910).

36. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

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

38. 308 F.2d at 395. Frequently, the direct injury test is simply a labelling process that denies standing to plaintiffs who fall into generally recognized categories, such as the injured party's landlord or creditor. *Compare, e.g., Calderone Enters. v. United Artists Thea-*

The zone of interests test³⁹ borrows heavily from administrative law principles of standing. The important public policies behind antitrust cases make the cases similar to public interest suits challenging governmental actions.⁴⁰ Some courts have reasoned that this public interest orientation justifies the application of the administrative law approach to standing in antitrust actions. The zone of interests test requires the plaintiff to demonstrate that his interests lie arguably within the zone of interests that the antitrust laws protect.⁴¹ In *Malamud v. Sinclair Oil Corp.*,⁴² the United States Court of Appeals for the Sixth Circuit recognized that investment companies had standing to sue a gasoline supplier.⁴³ The supplier's refusal to provide service station financing effectively foreclosed the investors' ability to expand their operations by building more gasoline stations.⁴⁴

The courts have applied these three tests in a variety of modified forms. Dissatisfaction with the various tests, however, has led some courts to take a more sweeping approach. In *Bravman v. Basset Furniture Industries*,⁴⁵ the United States Court of Appeals for the Third Circuit adopted a balancing test that examined "many constant and variable factors [in the] factual matrix presented by each case in light of the policies underlying the anti-

tre Circuit, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972), with *Congress Bldg. Corp. v. Loew's, Inc.*, 246 F.2d 587 (7th Cir. 1957). Although the cases were factually similar, the courts reached opposite results. In *Calderone*, the United States Court of Appeals for the Second Circuit held that the lessor of a theatre lacked standing as a matter of law to sue allegedly conspiring movie distributors. 454 F.2d at 1292. In *Congress Bldg.*, the United States Court of Appeals for the Seventh Circuit reached a contrary result, reasoning that the directness of the injury was a factual issue. 246 F.2d at 587. *See generally* Berger & Bernstein, *supra* note 2, at 819-24.

39. *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975). The United States Court of Appeals for the Sixth Circuit modified the zone of interests test in *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981), to include the antitrust injury requirements set forth in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977). *See infra* text accompanying notes 50-57. The modified test is difficult to distinguish from the target area test.

40. *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1151 (6th Cir. 1975).

41. *Id.*

42. 521 F.2d 1142 (6th Cir. 1975).

43. *Id.* at 1151-52.

44. *Id.*

45. 552 F.2d 90 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977).

trust laws.”⁴⁶ The Third Circuit recognized that “there is no talismanic test capable of resolving all section 4 standing problems.”⁴⁷ Unfortunately, however, the Third Circuit’s balancing test does little to guide trial courts. The balancing test provides no principled basis for deciding questions of standing,⁴⁸ but rather requires an ad hoc determination of standing. Although the United States Supreme Court has had opportunities to apply each of the various tests, the Court has not evaluated the relative utility of the tests for determining whether injured parties have standing to bring treble damage actions.⁴⁹

46. 552 F.2d at 99. See also *Mid-West Paper Prods. v. Continental Group*, 596 F.2d 573 (3d Cir. 1979).

47. 552 F.2d at 99.

48. For example, the United States District Courts for the Eastern and Western Districts of Pennsylvania have applied the *Bravman* balancing test and reached opposite results on similar facts. Compare *McNulty v. Borden, Inc.*, 542 F. Supp. 655 (E.D. Pa. 1982), and *Callahan v. Scott Paper Co.*, 541 F. Supp. 550 (E.D. Pa. 1982), with *Shaw v. Russell Trucking Line*, 542 F. Supp. 776 (W.D. Pa. 1982).

49. The Supreme Court recently noted the continuing confusion in antitrust standing doctrines. *Associated Gen. Contractors v. California State Council of Carpenters*, 103 S. Ct. 897, 907-08 (1983); *Blue Shield v. McCready*, 457 U.S. 465, 467 & n.12 (1982). In *Blue Shield*, the Court explicitly avoided evaluating the available tests. *Id.*

Although the Court did not offer a black-letter rule to guide the lower courts, the Court in *Associated Gen. Contractors* suggested that judges should analyze future antitrust standing issues in light of the factors set forth in that case. 103 S. Ct. 897, 907 n.33. The Court, however, did not delineate the relevant factors or limit the scope of lower court inquiries. The decision suggests that the Court considered the following factors: allegations in the complaint of a causal connection between the antitrust violation and the injury; antitrust injury; directness of the injury; the plaintiff’s suitability to enforce the public interest and collect damages; the speculative character of the alleged damages; and the potential for duplicative recovery in unmanageable litigation. The Court’s conclusion restates these concerns. *Id.* at 913. These factors are no different than the considerations underlying the existing antitrust standing doctrines, however, and each major test meets the Supreme Court’s standards.

When the Court vacated the decision in *Ostrofe v. H.S. Crocker Co.*, 103 S. Ct. 1244 (1983), the Court remanded the case to the Ninth Circuit for reconsideration in light of *Associated Gen. Contractors*. *Associated Gen. Contractors*, however, does not offer any new guidelines for the Ninth Circuit to apply in *Ostrofe*. In fact, the Supreme Court in *Associated Gen. Contractors* expressly sidestepped the issue of “whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market.” 103 S. Ct. at 910 n.44. Compare the Supreme Court’s contemporaneous denial of certiorari in *Bichan v. Chemtron Corp.*, 103 S. Ct. 1261 (1983). The Supreme Court’s action left intact the decision of the United States Court of Appeals for the Seventh Circuit in *In re Industrial Gas Antitrust Litigation*, 631 F.2d 514 (7th Cir. 1982), cert. denied *sub nom.* *Bichan v. Chemtron Corp.*, 103 S. Ct. 1261 (1983), that the plaintiffs lacked standing to

Antitrust Injury

In *Brunswick Corp. v. Pueblo Bowl-O-Mat*,⁵⁰ the United States Supreme Court established "antitrust injury" as a requirement for treble damage recoveries. To satisfy the antitrust injury requirement, a plaintiff must suffer an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."⁵¹ In *Brunswick*, bowling alley operators sued for damages allegedly resulting from Brunswick's acquisition of competing bowling centers in violation of the antitrust laws.⁵² The plaintiffs claimed that the local bowling centers would have gone out of business and that the plaintiffs' profits would have increased if Brunswick had not acquired the centers.⁵³ The Supreme Court denied recovery for the alleged injuries because the plaintiffs' lost profit opportunities were unrelated to the potential anticompetitive effects of the wrongful acquisition and thus were "of no concern to the antitrust laws."⁵⁴ The Court announced the general rule that the right to recover treble damages depended on the plaintiff's proof of an antitrust injury.⁵⁵

In *Brunswick*, the alleged basis of substantive liability was Brunswick's predatory power over small bowling centers. The plaintiffs, however, failed to meet the requirement that recoverable damages must be traceable to the predatory conduct itself. The recovery of lost profits based on continued competition would have been inconsistent with the goal of antitrust law, which is to foster competition and discourage anticompetitive predation.⁵⁶ Although the plaintiffs' lost opportunities were a direct result of Brunswick's unlawful acquisitions, they "did not occur 'by reason of' that which made the acquisitions unlawful."⁵⁷ Thus, a plaintiff has standing to

bring an antitrust suit. The Supreme Court's disposition of both cases suggests that the Ninth Circuit in *Ostrofe* may have analyzed correctly each factor necessary to effectuate antitrust policy, but nevertheless reached the wrong result by finding standing.

50. 429 U.S. 477 (1977).

51. *Id.* at 489.

52. *Id.* at 480.

53. *Id.* at 481.

54. *Id.* at 487.

55. *Id.* at 489.

56. See *supra* text accompanying notes 5 & 13.

57. 429 U.S. at 488. See Page, *supra* note 19, at 470. The antitrust injury requirement also may be phrased in economic terms: the plaintiff's injury must result from economic

bring a treble damage suit if he has suffered a direct injury, but can recover only if he has suffered an antitrust injury.

Distinguishing Antitrust Injury from Antitrust Standing

The plaintiff's ability to maintain an antitrust suit depends solely upon the court's determination of antitrust standing. In the analysis of standing, however, courts often consider the antitrust injury requirement as well.⁵⁸ A court can dispose of the difficult substantive determination of whether the plaintiff suffered an antitrust injury by finding that the plaintiff lacks standing. Conversely, a decision that the plaintiff has not suffered the kind of injury that the antitrust laws were designed to prevent allows a court to avoid the complicated analysis required by the standing tests.

Analytical differences, however, distinguish the two concepts. The concept of antitrust injury involves the substantive issue of whether the plaintiff's claim parallels the purposes of the antitrust laws.⁵⁹ Standing doctrines involve the remoteness of an economic injury and the propriety of allowing a specific party to sue for treble damages.⁶⁰ In fact, antitrust injury is another broad rule of standing that defines the type of harm compensable under section 4.⁶¹ A party who has not suffered an antitrust injury has no stand-

efficiency lost as a result of the defendant's acts. See Note, *Antitrust Injury and Standing: A Question of Legal Cause*, 67 MINN. L. REV. 1011 (1983).

58. The Supreme Court recently demonstrated the manner in which antitrust the standing and antitrust injury analysis may be combined. In *Associated Gen. Contractors v. California State Council of Carpenters*, 103 S. Ct. 897 (1983), the Court examined the policy considerations underlying actions for treble damages as well as the issues of directness of injury and the *Brunswick* antitrust injury requirement. See *supra* note 49.

59. *Berger & Bernstein*, *supra* note 2, at 836, 842; Page, *supra* note 19, at 497. See *supra* text accompanying notes 50-57.

60. *Associated Gen. Contractors v. California State Council of Carpenters*, 103 S. Ct. 897, 911 (1983); *Berger & Bernstein*, *supra* note 2, at 842; Page, *supra* note 19, at 497. See *supra* note 26 and accompanying text. See also Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 COLUM. L. REV. 979, 994-97 (1977) [hereinafter cited as Handler, *Changing Trends*]. See generally Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 24-31 (1971); Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U. L. REV. 374 (1976).

61. Antitrust injury focuses on the type of harm suffered, rather than the defendant's relationship with the plaintiff. Only injuries flowing directly from the economic dislocation are recoverable under § 4. "[T]reble-damages recovery should be linked to the procompetition policy of the antitrust laws." *Blue Shield v. McCready*, 457 U.S. 465, 482 (1982). See

ing to sue for treble damages.⁶²

Other considerations related to standing, such as the directness of the injury and the relationship of the parties, further narrow the field of potential plaintiffs by giving effect to other important policies. These considerations protect defendants from the risk of multiple liability, conserve the recoverable funds, and insulate the courts from overly complex litigation. Courts disallow treble damage suits by one party if the law seeks to protect a different party more closely associated with the defendant, or if a suit by another party would be a more effective use of section 4's deterrent potential.⁶³

To attach too much importance to the labels "antitrust injury" and "antitrust standing" is to fall into the same semantic trap that has surrounded the standing analysis. The insignificance of the label is manifested by the results that courts have reached when combining the analysis of antitrust injury and antitrust standing.⁶⁴ But the dismissal of an antitrust suit on the basis of the plaintiff's lack of standing, without an explanation that clarifies the policies underlying standing doctrines,⁶⁵ perpetuates the uncertainty sur-

Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1164 (1982).

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

63. *Associated Gen. Contractors v. California State Council of Carpenters*, 103 S. Ct. 897, 911 (1983); Page, *supra* note 19, at 497-500.

64. Decisions in the wake of *Brunswick* have combined the antitrust injury and standing tests, but retain elements of each as independent considerations. See, e.g., *Associated Gen. Contractors v. California State Council of Carpenters*, 103 S. Ct. 897 (1983); *Weit v. Continental Ill. Nat. Bank & Trust Co.*, 641 F.2d 457 (7th Cir.), *cert. denied*, 455 U.S. 988 (1982); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). In *Weit*, the United States Court of Appeals for the Seventh Circuit explicitly recognized the irrelevance of the antitrust injury and standing labels, because the plaintiff had established the required nexus between the defendant's actions and the resulting injuries. 641 F.2d at 469. See also *Lupia*, 586 F.2d at 1168.

Because legal analysis is essentially a process of classifying human behavior, the focus must remain on the behavior rather than the labels. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-6 (1949); Parker, *The Unique Role of Language in the Judicial Process: After-the-Fact Classifications of Human Behavior*, in PROCEEDINGS OF THE SECOND SUMMER CONFERENCE ON ARGUMENTATION (Speech Communication Ass'n) 209 (1981). See generally W. PROBERT, LAW, LANGUAGE AND COMMUNICATION (1972). If care is taken in considering all of the appropriate characteristics of a proper antitrust plaintiff, then labelling the classification as proving "antitrust injury" or "antitrust standing" will leave the result unchanged.

65. Professor Areeda discusses the apparent paradox of antitrust violations without injuries and antitrust injuries without damages, concluding that proper exposition of the reasons

rounding antitrust standing.

Whether courts consider the principles behind the doctrines of standing or antitrust injury, a decision that the plaintiff lacked standing or did not suffer an antitrust injury leads to the same result.⁶⁶ Courts should allow a plaintiff to recover under section 4, therefore, only after determining that the plaintiff has suffered a direct antitrust injury to his business or property as a result of the defendant's anticompetitive conduct.

EMPLOYEE STANDING

Terminated employees have faced antitrust standing issues in several contexts. Antitrust cases involving improperly discharged employees often follow a simple pattern in which the employee refuses to participate in an employer's illegal antitrust scheme. Acting alone or on the advice of coconspirators, the employer fires the recalcitrant employee. Seeking compensation and retribution for losing his job, the employee brings a treble damage action.

Earlier decisions that purport to establish general rules for employee treble damage actions are factually distinguishable from cases involving improperly discharged employees.⁶⁷ An examina-

behind the ruling can dissolve the apparent paradox. Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976). The Supreme Court in *Brunswick* noted that the plaintiff could not recover for injuries against which the antitrust laws did not protect. 429 U.S. at 487.

66. Eventually, one term should be selected to describe the criteria by which courts determine proper party plaintiffs under § 4. "Antitrust injury" is a workable phrase because a plaintiff must not only suffer an injury in fact, but an injury cognizable under the policies of antitrust law. In this sense, antitrust injury may be analogous to the tort concept of proximate cause. See Note, *supra* note 57. Antitrust injury also avoids confusing antitrust standing concerns with the issues resolved by other substantive standing doctrines. "Antitrust standing," on the other hand, readily lends itself to generic application, as it describes a variety of unconnected considerations. As the compositional elements of injury and standing are rid of their respective labels to form a comprehensive pattern of analysis, a plaintiff who lacked any of the elements could be described as "without standing."

This Note refers to the concept as "standing," except when specific reference is made to the *Brunswick* analysis. The terminated employee faces none of the traditional standing barriers of other injured parties, such as indirectness of injury or inadequate representation. The question essentially revolves around the *Brunswick* criteria: whether the injury is of the type that the antitrust laws were intended to prevent and whether the injury flows from unlawful antitrust behavior.

67. *E.g.*, *Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976); *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973);

tion of the facts of the earlier cases, however, reveals the development of antitrust standing doctrines that also arise in antitrust suits by discharged employees. A comparison of the cases illuminates the inadequacy of the existing analysis and the need to develop a new approach that meets the unique facts surrounding the termination of law-abiding employees.

Employee Treble Damage Suits for an Employer's Antitrust Injuries

Employees have sought to use section 4 treble damage suits to recover lost wages resulting from the harm that their employer suffered from another party's antitrust violation.⁶⁸ Employees usually seek recovery of lost wages resulting from the injured company's inability to pay the employee because of the company's lost business or profits. As early as 1942, corporate employees had standing to recover damages for lost salaries resulting from the diminished sales income of their employer.⁶⁹ The employer, of course, suffered the direct harm and had a right to sue the antitrust violator on its own behalf. The court's recognition of standing for employees, however, required an expansion of the direct injury requirement. By acknowledging the special interest of the employee in regular and continued employment, courts linked the employer's injuries directly to the employee's business interests.⁷⁰

As the direct injury test became the primary test of antitrust standing, courts developed a categorical approach to determine

Dailey v. Quality School Plan, 380 F.2d 484 (5th Cir. 1967); Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942); Broyer v. B.F. Goodrich Co., 415 F. Supp. 193 (E.D. Pa. 1976).

68. Berger & Bernstein, *supra* note 2, at 813.

69. Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942). See also Klein v. Sales-Builders, 1950-51 Trade Cas. (CCH) ¶ 62,600 (N.D. Ill. 1950); McWhirter v. Monroe Calc. Mach. Co., 76 F. Supp. 456, 460 (W.D. Mo. 1948). Corporate shareholders and other creditors traditionally have lacked standing to sue for injuries to the corporation. See Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910); Berger & Bernstein, *supra* note 2, at 815.

70. See, e.g., International Ass'n of Heat & Frost Insulators & Asbestos Workers v. United Contractors Ass'n, 483 F.2d 384 (3d Cir. 1973), *amended*, 494 F.2d 1353 (3d Cir. 1974) (granting standing to employee of antitrust victim).

In some cases, the plaintiff's employer was a participant in the antitrust scheme that harmed the employee. Nonetheless, sales agents who lost income or accounts to their employer's coconspirator were able to recover. See, e.g., Vines v. General Outdoor Advertising Co., 171 F.2d 487 (2d Cir. 1948); Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942).

whether an injury was direct.⁷¹ Under the direct injury test, the standing of an employee depended upon the court's scrutiny of the working relationship and the court's willingness to categorize the plaintiff as an independent businessman.⁷² The section 4 requirement that the plaintiff suffer an injury to his business or property⁷³ ostensibly blocked many employee suits for treble damages.⁷⁴ Independent contractors and commissioned sales agents had standing, however, because their positions exceeded traditional employer-employee relationships.⁷⁵

Employees also have sought to recover damages for loss of income resulting from antitrust violations that diminish competition in their employer's industry.⁷⁶ After an unlawful merger or acquisition, the surviving corporation often discharges unneeded employees. Terminated commissioned sales agents have recovered treble damages in some cases, but courts have found that other employees performing similar tasks lacked standing.⁷⁷ Both employees and commissioned sales agents lose the opportunity to sell their labor because of an illegal merger, however, and one injury is no less direct than the other.⁷⁸ Categorizing the plaintiff as a sales

71. See *supra* note 26 and text accompanying notes 35-36.

72. See, e.g., *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

73. 15 U.S.C. § 15 (1976 & Supp. V 1981).

74. Compare *Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir.) (no standing for corporate officer as an employee), *cert. denied*, 426 U.S. 935 (1976), and *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.) (salaried employees are not "quasi-businessmen"), *cert. denied*, 411 U.S. 938 (1973), with *Bravman v. Bassett Furniture Indus.*, 552 F.2d 90 (3d Cir.) (dictum characterizing plaintiff as agent rather than employee, thus allowing standing), *cert. denied*, 434 U.S. 823 (1977), and *Dailey v. Quality School Plan*, 380 F.2d 484 (5th Cir. 1967) (commissioned sales employee granted standing).

75. See, e.g., *Broyer v. B.F. Goodrich Co.*, 415 F. Supp. 193, 196 (E.D. Pa. 1976); *Bowen v. Wohl Shoe Co.*, 389 F. Supp. 572, 579 (S.D. Tex. 1975).

76. *Berger & Bernstein*, *supra* note 2, at 822.

77. Both *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973), and *Dailey v. Quality School Plan*, 380 F.2d 484 (5th Cir. 1967), involved employees discharged after mergers. The courts reached opposite results on the standing issue.

78. *Berger & Bernstein*, *supra* note 2, at 822-23. Successful arguments by employee plaintiffs often stretch the nature of the employment relationship far beyond its usual scope. See, e.g., *Broyer v. B.F. Goodrich Co.*, 415 F. Supp. 193, 196 (E.D. Pa. 1976) (no standing as an employee, but standing allowed for loss of sales commissions and bonuses as sales manager); *Bowen v. Wohl Shoe Co.*, 389 F. Supp. 572, 579 (S.D. Tex. 1975) (loss of salary impaired entrepreneurial capacity of plaintiff). A Seventh Circuit decision found impairment of a business indistinguishable from loss of employment, but the case involved an illegal no-

agent rather than an employee is an unsatisfactory method of determining standing because it ignores the policies underlying the antitrust laws and the considerations underlying antitrust standing. Unless an employee can demonstrate that his termination injured an independent business or commercial interest, however, courts usually will rely on precedent and find that a mere employee lacks standing to sue an antitrust violator.

Employee Suits Involving Employer Boycotts

Courts also have granted standing to employees subjected to boycotts or blacklisting by employers. Group boycotts directed at a single employee or trader are illegal per se under substantive provisions of the antitrust laws.⁷⁹ Similarly, employees have standing to sue for treble damages based on their lost wages after being victimized by agreements among violators not to hire former employees of a coconspirator.⁸⁰ Courts also have allowed former employees of nonconspiring competitors to sue for treble damages after being denied employment with the antitrust conspirators because of their past employment.⁸¹

Cases involving the direct application of illegal restraints against one or more employees do not involve a complicated standing analysis. When a party intentionally engages in anticompetitive activity against specific parties, the victims have standing to sue the violator. The requirements of antitrust injury clearly are satisfied, giving the victims standing to bring treble damage actions. If an employee is not the object of the anticompetitive conduct, how-

switching agreement that resulted in an industry boycott of the plaintiff. *Nichols v. Spencer Int'l Press*, 371 F.2d 332, 334 (7th Cir. 1967).

79. See *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 212-13 (1959); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 214 (1951); *Quinonez v. National Ass'n of Sec. Dealers*, 540 F.2d 824 (5th Cir. 1976).

Per se violations stem from "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue" are presumed unreasonable and illegal. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

80. *Nichols v. Spencer Int'l Press*, 371 F.2d 332 (7th Cir. 1967). Such agreements commonly are called "no-switching agreements."

81. In *Radovich v. National Football League*, 352 U.S. 445 (1957), for example, National Football League owners refused to hire a player who had competed in the rival All-American Conference football league. The Supreme Court held that the player had standing to challenge the conspiracy to monopolize professional football through player boycotts. *Id.* at 448.

ever, the situation is different. Without an independent illegal restraint of trade to create grounds for standing, the policies underlying antitrust laws come into play, and courts must consider the remoteness and antitrust nature of the injury in deciding whether the employee has standing to sue under the antitrust laws.

Victims of conduct that furthers an unlawful restraint of trade have standing to challenge the overall anticompetitive scheme in cases involving a unilateral or conspiratorial refusal to deal.⁸² For example, replacing one exclusive distributor with another is not necessarily a violation of the antitrust laws,⁸³ but cancelling the first distribution agreement at the urging of a competing distributor is a violation.⁸⁴ Similarly, cancelling a distributorship because the distributor refuses to participate in a resale price-fixing scheme gives the distributor standing to sue for treble damages based on the overall conspiracy.⁸⁵ To constitute an antitrust violation, the unilateral action need not amount to a total refusal to deal. Even the disruption of contractual expectations can generate antitrust liability.⁸⁶

Employees victimized by hiring boycotts, as well as displaced distributors, should have standing to bring treble damage actions. The plaintiff in *Lee-Moore Oil Co. v. Union Oil Co.*,⁸⁷ for example, was an independent jobber victimized by an antitrust conspiracy to close the market to independents. Lee-Moore had standing not only because it was discharged in furtherance of the illegal conspiracy, but because as a jobber it suffered the effects that the violators had intended—the closing of the field to all independent

82. See *Engine Specialties v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979) (plaintiff-distributor could challenge manufacturers' agreement to allocate territory because result of allocation was plaintiff's termination), *aff'd per curiam on reh'g*, 615 F.2d 575 (1st Cir.), *cert. denied*, 446 U.S. 983 (1980); *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299 (4th Cir. 1979) (discharged jobber allowed to sue on the basis of a conspiracy to drive out maverick jobbers). See also *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (distributorship cancelled because of plaintiff's refusal to adhere to fixed price).

83. *Engine Specialties v. Bombardier Ltd.*, 605 F.2d 1, 12 (1st Cir. 1979), *aff'd per curiam on reh'g*, 615 F.2d 575 (1st Cir.), *cert. denied*, 446 U.S. 983 (1980).

84. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979).

85. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

86. *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970); *Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967).

87. 599 F.2d 1299 (4th Cir. 1979).

jobbers.⁸⁸

Although displaced distributors and discharged employees suffer similar injuries, the causes of their injuries differ. The displacement of distributors is often the goal of an illegal antitrust scheme. The antitrust violator seeks to increase its own profits by destroying the competing firms. The displaced distributor suffers a direct injury from the scheme and comes within the target area of intended economic restriction. In contrast, the employees of a violator discharged in furtherance of an anticompetitive scheme are not the intended objects of the anticompetitive activities. Employees who refuse to participate in their employer's antitrust violations are merely obstacles that the employer must remove. Two federal circuit courts, however, have responded differently to cases involving employees who lost their jobs for refusing to participate in anticompetitive schemes.

Ostrofe v. H.S. Crocker Co.

In *Ostrofe v. H.S. Crocker Co.*,⁸⁹ the United States Court of Appeals for the Ninth Circuit allowed a terminated employee to bring a treble damage action against his former employer. Ostrofe was Crocker's sales manager for paper lithograph labels.⁹⁰ Ostrofe refused to comply with his employer's demand that he rig bids, fix prices, and aid in allocating territories.⁹¹ Crocker forced Ostrofe to resign, and prevented him from finding further employment in the labels industry.⁹² Although the district court originally upheld Ostrofe's claim against a motion to dismiss for lack of standing, the court later ruled against Ostrofe on the same issue on the defendant's motion for summary judgment.⁹³ Finding a sufficient rela-

88. *Id.* at 1304-07.

89. 670 F.2d 1378 (9th Cir. 1982), *vacated*, 103 S. Ct. 1244 (1983).

90. 670 F.2d at 1380.

91. *Id.*

92. *Id.* The independent antitrust violation involved in the industry boycott of Ostrofe might have given Ostrofe standing to sue his employer based on the overall anticompetitive scheme. In this sense, the case is indistinguishable from *Radovich v. National Football League*, 352 U.S. 445 (1957). See *supra* note 81. The issue of Ostrofe's right to sue for unilateral discharge as part of Crocker's implementation of the antitrust scheme is a distinct issue, and the court treated it as such. This Note addresses the standing of a terminated employee, however, not the standing of a boycott victim.

93. 670 F.2d at 1381.

tionship between the nature of the employer's wrongful acts and the resulting harm to the plaintiff,⁹⁴ the Ninth Circuit reversed the district court's order of summary judgment for the defendant.⁹⁵

The Ninth Circuit in *Ostrofe* noted the confusion surrounding antitrust standing and rejected a label-oriented approach.⁹⁶ The court's analysis of the standing issue purported to balance the importance of section 4 actions in enforcing the antitrust policies against the concerns of fairness and practicality that arise when the number of antitrust cases expands.⁹⁷ The court found that the policy considerations tipped the scales in favor of allowing standing.⁹⁸

Noting that most antitrust schemes are covert, the Ninth Circuit assumed that allowing discharged employees to sue for treble damages would encourage disclosure of antitrust violations.⁹⁹ Managerial employees such as *Ostrofe*, however, have little incentive to disrupt their employer's unlawful schemes, even if they potentially can recover treble damages. The paucity of cases demonstrates that few plaintiffs are as altruistic as *Ostrofe*. Additionally, the court offered no reason for its apparent belief that most sales or middle management employees realize that an antitrust violation is occurring when their employer orders changes in marketing practices.¹⁰⁰ Moreover, nothing indicated that *Ostrofe's* complaints led the Department of Justice to initiate an action against the conspiring paper label manufacturers.¹⁰¹

Assuming that the antitrust scheme could not have succeeded without the cooperation of all employees, the court reasoned that allowing discharged employees to seek treble damages would give

94. *Id.* at 1388.

95. *Id.* at 1389.

96. *Id.* at 1382-83.

97. *Id.* at 1383-84.

98. *Id.* at 1386.

99. *Id.* at 1384. See also *Berger & Bernstein, supra* note 2, at 847 n.172.

100. The court suggested that no conspiracy can be effective without the cooperation of responsible employees. 670 F.2d at 1384. The court, however, failed to explain why participating sales agents or managers necessarily would be aware of the conspiracy. They might simply be following orders without being included in the planning of the scheme.

101. See *United States v. H.S. Crocker Co.*, 1978-1 Trade Cas. (CCH) ¶ 61,883 (N.D. Cal. 1976); *United States v. H.S. Crocker Co.*, 1975-2 Trade Cas. (CCH) ¶ 60,615 (N.D. Cal. 1975). Consent decrees were entered without the taking of any testimony.

them an incentive to resist an employer's unlawful directions and would raise the stakes for the violators.¹⁰² The court's conclusion is speculative at best. An employer who decides to violate the federal antitrust laws probably would not allow one recalcitrant employee to foil the entire plan. The employer can use the employee in a capacity that will not hamper the anticompetitive scheme, thereby avoiding liability to the employee. Of course, retention of the employee may result in liability if the employee conveys information about the scheme to injured parties or to the government.

The Ninth Circuit also suggested that suits by discharged employees might prevent or mitigate injury to those who are the ultimate objects of the anticompetitive scheme.¹⁰³ Not only did the Ninth Circuit credit fired employees with an uncanny ability to disrupt illegal schemes by immediately filing successful antitrust suits,¹⁰⁴ but the court also overlooked the difficulties inherent in litigating private treble damage actions.¹⁰⁵ Finally, the interest of a discharged employee lies in proving the illegal termination of the employment relationship, not in establishing an antitrust violation that might have occurred after his discharge.

The court also concluded that the terminated employee suffers an immediate and direct injury as a result of his employer's violation of the antitrust laws.¹⁰⁶ According to the court, no plaintiff is better qualified than the employee to sue for the antitrust damages sustained by all victims of the conspiracy.¹⁰⁷ This conclusion begs

102. 670 F.2d at 1384.

103. *Id.* As the dissent recognized, if the plaintiff was not the object of the conspiracy, he would not have standing to challenge the violation. *Id.* at 1390 (Kennedy, J., dissenting).

104. 670 F.2d at 1384-85.

105. Studies indicate that the majority of successful civil antitrust suits follow Department of Justice proceedings, especially if the private plaintiff can use a final judgment as res judicata on the antitrust violation issue. See Note, *Nolo Pleas in Antitrust Cases*, 79 HARV. L. REV. 1475, 1481 (1966). Unless the terminated employee participated in the conspiracy, the burden of investigating and proving an antitrust violation may be overwhelming.

106. 670 F.2d at 1385.

107. *Id.* Chief Judge Browning cited the work of three commentators to support this argument. *Id.* at 1385 n.14. The commentators agree that the plaintiff in an antitrust suit should be the most proximate victim, but they do not address the issue of the standing of a discharged employee. See P. AREEDA & D. TURNER, 2 ANTITRUST LAW § 334 (1978); Lytle & Perdue, *Antitrust Target Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation*, 25 AM. U.L. REV. 795, 801 (1976); Page, *supra* note 19. Page views employees discharged in the course of a violation, such as post-merger consolidation or changes in exclusive distributorships, as lacking standing because no net

the question. The directness of the terminated employee's injury was not at issue, nor was his right to recover some form of compensation. The issues presented were whether the employer's action in discharging the plaintiff violated the antitrust laws and, if so, whether the court should allow the plaintiff to bring a treble damage suit. The court did not address these issues.

The Ninth Circuit also concluded that granting standing to Ostrofe would involve none of the adverse consequences usually present in cases addressing standing under section 4, such as broadening the defendant's liability or generating a flood of litigation.¹⁰⁸ If allowing suits by improperly discharged employees will not dramatically increase the amount of antitrust litigation, however, the deterrent effect of allowing such suits is questionable. Assuming that antitrust schemes usually remain undetected, employee suits may be so infrequent as to present an insignificant deterrent to antitrust violators. Additionally, discharged employees can recover at most only three times their employment-related damages, not three times the antitrust profits reaped by their employer.¹⁰⁹ Because these potential damage awards usually are not large enough to offset the potential profit of an antitrust scheme, employee suits have little deterrent effect.

Judge Kennedy's dissenting opinion¹¹⁰ criticized the majority for abandoning the target area test, the then prevailing test for antitrust standing in the Ninth Circuit.¹¹¹ In his view, the illegal restraint of trade in the labels industry did not injure the plaintiff, whose interests were not within the target area of the economy en-

decline in economic efficiency has occurred. *Id.* at 498.

108. 670 F.2d at 1385. *See also* *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *Calderone Enters. v. United Artists Theatre Circuit*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

109. Section 4 provides a remedy only for damages to the plaintiff's business or property. Assuming that the employee has a business or property interest that § 4 protects, the damage to the business or property interest is measured by his lost wages. The employer makes no illicit profits at the direct expense of the employee. Thus, illicit profits are not the proper measure of damages.

110. 670 F.2d at 1389 (Kennedy, J., dissenting).

111. The court originally adopted the target area test in *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952), and reaffirmed the test as a "logical and flexible tool" in *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 128 (9th Cir.), *cert. denied sub nom. Morgan v. Automobile Mfrs. Ass'n*, 414 U.S. 1045 (1973).

dangered by the violation.¹¹² Under the target area test, Ostrofe lacked standing to bring an antitrust action because his employment interest was not within the economic sphere that the conspiracy sought to exploit.

The dissent also distinguished Ostrofe's injuries from antitrust injuries. Ostrofe's injuries were outside the competitive area that his employer sought to restrict.¹¹³ Focusing on the antitrust injury requirements set forth by the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat*,¹¹⁴ the dissent would have granted standing to discharged employees only if the antitrust violation restricted the labor market.¹¹⁵

Unfortunately, the dissent's position unnecessarily narrowed the *Brunswick* analysis. The dissent read *Brunswick* as limiting antitrust standing under section 4 to competitors of the employer.¹¹⁶ The *Brunswick* analysis does not support the conclusion that only competitors can suffer antitrust injuries, nor do subsequent decisions by the Supreme Court support such a limitation.¹¹⁷ The dissent apparently determined the affected area of the economy by considering the economic areas in which the violator's competitors operated instead of defining the affected area without regard to the competitors.¹¹⁸

The target area analysis does not resolve the controversy surrounding standing. Ostrofe may have been part of the labels industry and a potential, if unforeseen, target of the conspiracy. Crocke's decision to fire Ostrofe, however, differed substantively from its decision to commit an antitrust violation. The critical issue is whether the economic breakdown injured Ostrofe in a manner that "the antitrust laws were designed to protect."¹¹⁹ The majority's interpretation of *Brunswick* and the antitrust injury component of

112. 670 F.2d at 1390 (Kennedy, J., dissenting).

113. *Id.*

114. 429 U.S. 477 (1977).

115. 670 F.2d at 1391 (Kennedy, J., dissenting).

116. *Id.* at 1389.

117. See, e.g., *Associated Gen. Contractors v. California State Council of Carpenters*, 103 S. Ct. 897, 909-10 (1983); *Blue Shield v. McCreedy*, 465 U.S. 477, 481-84 (1982). The Court in *Blue Shield* noted that the dampening of competition was only one type of injury that § 4 may redress. *Id.* at 482-83.

118. 670 F.2d at 1389 (Kennedy, J., dissenting).

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

standing were the foundations for the policy analysis that led the Ninth Circuit to grant standing in *Ostrofe*.¹²⁰

In *Ostrofe*, the majority concluded that the antitrust injury requirement enunciated in *Brunswick* was broad enough to allow recovery of damages for indirect injuries caused by the anticompetitive effects of an antitrust violation.¹²¹ The Ninth Circuit reached this conclusion although several earlier appellate decisions had interpreted *Brunswick* more narrowly.¹²² The court recognized that the Supreme Court in *Brunswick* sought to extend section 4 remedies only to plaintiffs whose recovery would serve the substantive purposes underlying the antitrust laws.¹²³ As the Court made clear in *Brunswick*, Congress intended that the treble damage remedy open the door for consumer antitrust actions,¹²⁴ even though the antitrust laws were designed primarily to protect competition.¹²⁵ The Ninth Circuit in *Ostrofe* was sensitive to both of these goals.¹²⁶

Unable to find that *Ostrofe* had standing based on the primary

120. 670 F.2d at 1386.

121. *Id.* at 1387.

122. See *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977). The court in *Ostrofe* did not mention *Lenore*, which held that a former beer distributor lacked standing to sue for treble damages resulting from his discharge in the course of the defendant's allegedly unlawful acquisitions and attempted monopoly. See also *Weit v. Continental Ill. Nat. Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). Additionally, the court in *Ostrofe* noted, without discussion, several pre-*Brunswick* cases supporting an opposite conclusion. See *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied sub nom. Morgan v. Automobile Mfrs. Ass'n*, 414 U.S. 1045 (1973); *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). See also *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973). Without addressing the effect of *Brunswick* on the issue of antitrust standing, the court in *Ostrofe* relied on claimed support from two earlier decisions, *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), and *Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967). The applicability of these cases after *Brunswick* is questionable; they are factually distinguishable from the discharged employee situation in *Ostrofe*.

123. 670 F.2d at 1387. "Antitrust injury" does not provide a method of neatly categorizing all parties who eventually will benefit from the prevention of anticompetitive behavior. The phrase links the plaintiff's recovery to the type of harm that flows from an antitrust violation.

124. 429 U.S. at 486 n.10. The Court reached its conclusion based on an analysis of the congressional debate over the original treble damage provision. *Id.* at 485-86.

125. *Id.* at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

126. 670 F.2d at 1387.

purpose of the antitrust laws, the Ninth Circuit looked for a secondary purpose. The court reasoned that the provisions for individual criminal liability demonstrated Congress' concern for individual conduct.¹²⁷ Even if Ostrofe had participated in the anticompetitive scheme only to the extent of fulfilling his employment duties, he might have been criminally liable.¹²⁸ The court reasoned that the congressional concern with punishing and deterring "bad" conduct by individuals justified rewarding "good" behavior by permitting a treble damage recovery.¹²⁹ This conclusion, however, hinged on the unsupported assertion that Ostrofe's cooperation was essential to the success of the anticompetitive scheme.¹³⁰ Additionally, if Ostrofe was an effective impediment to the anticompetitive plan, no antitrust violation could have occurred until after he was fired. Ostrofe could not have suffered an antitrust injury, therefore, if no antitrust violation occurred until after his discharge.

The court's conclusion that "[t]hese facts disclose the 'intimate relationship between circumstances which make the wrongdoer's conduct unlawful and the resulting harm which is the subject of the suit,' required by *Brunswick*"¹³¹ does not follow from the analysis. Crocker's unlawful conduct consisted of price-fixing arrangements which restrained competition and injured customers; the subject of Ostrofe's claim was his discharge. Although the parties were intimately related as employer and employee, *Brunswick* requires the presence of some relationship between the anticompetitive acts and the injuries sued upon.¹³² That nexus was not present in *Ostrofe*, and a more accurate reading of *Brunswick* would have led the court to deny Ostrofe standing to sue for treble damages.¹³³

127. *Id.* Criminal liability for antitrust violations is specified in 15 U.S.C. §§ 1, 2 (1976).

128. See *United States v. Wise*, 370 U.S. 405 (1962).

129. 670 F.2d at 1387-88.

130. *Id.* at 1388. See *supra* text accompanying notes 99-105.

131. 670 F.2d at 1388 (quoting Handler, *Changing Trends*, *supra* note 60, at 990).

132. 429 U.S. at 489.

133. The United States District Court for the Western District of Pennsylvania recently adopted the view of antitrust injury articulated in *Ostrofe*. In *Shaw v. Russell Trucking Line*, 542 F. Supp. 776 (W.D. Pa. 1982), a trucker who was discharged for refusing to participate in an overloading scheme had standing to sue his former employer under the federal antitrust laws. Finding questionable support in two pre-*Brunswick* cases decided by the Third Circuit, the district court adopted the analysis in *Ostrofe* without explanation. *Id.* at

In re Industrial Gas Antitrust Litigation

In *In re Industrial Gas Antitrust Litigation*,¹³⁴ the United States Court of Appeals for the Seventh Circuit decided that a discharged employee did not have standing to sue under section 4. Chemetron Corp. fired its employee, Bichan, from his position in Chemetron's gas division after he began a marketing program to compete for customers previously served by other producers.¹³⁵ Bichan sued Chemetron, alleging that an anticompetitive conspiracy existed among gas producers, and that he was fired for refusing to participate in the price-fixing scheme.¹³⁶ The court held that because the labor market was not the object of the restraint of trade, Bichan had not suffered an antitrust injury.¹³⁷

In the first part of its two-step analysis of standing,¹³⁸ the court examined whether Bichan's termination was an antitrust injury, as required by *Brunswick*.¹³⁹ In the second part of the analysis, the court considered whether Bichan was the proper party to bring a treble damage suit.¹⁴⁰ The court reasoned that it should allow antitrust standing only to plaintiffs who had suffered antitrust injuries

780. Although claiming to apply the balancing test used by the Third Circuit, *see supra* text accompanying notes 45-48, the court simply accepted the "balance of competing policy considerations" in the Ninth Circuit's opinion. 542 F. Supp. at 780.

The district court cited two cases to support its decision that the discharged trucker had standing. *Bravman v. Bassett Furniture Indus.*, 552 F.2d 90 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977), involved a former distributor-sales agent who was the object of an illegal restraint of trade. In dicta, the Third Circuit found standing and characterized the plaintiff as more of an agent than an employee. *Id.* at 96 n.7. In *International Ass'n of Heat & Frost Insulators & Asbestos Workers v. United Contractors Ass'n*, 483 F.2d 384 (3d Cir. 1973), *amended*, 494 F.2d 1353 (3d Cir. 1974), the Third Circuit granted standing to the employee of an antitrust victim. Given the factual context of *Shaw*, the district court's reliance on these cases was misplaced.

134. 681 F.2d 514 (7th Cir. 1982), *cert. denied sub nom.* *Bichan v. Chemetron Corp.*, 103 S. Ct. 1261 (1983).

135. 681 F.2d at 515.

136. *Id.*

137. *Id.* at 517.

138. *Id.* at 515.

139. *See* 429 U.S. 489. *See also* *Weit v. Continental Ill. Nat. Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982).

140. The Seventh Circuit cited *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Although not technically a decision concerning standing, *Illinois Brick* did address the necessity of choosing among many injured parties to find a proper antitrust plaintiff. 431 U.S. at 728 n.7. In *In re Industrial Gas*, the issue was the remoteness of the plaintiff's injury, a traditional standing consideration. 681 F.2d at 519.

and whose treble damage suits effectively achieved the deterrent goal of the antitrust laws.¹⁴¹

In contrast to the Ninth Circuit's use of a balancing test, the Seventh Circuit used a target area analysis to decide whether Bichan had suffered an antitrust injury.¹⁴² Bichan asserted that he had standing to sue for treble damages based on employee boycott cases.¹⁴³ Discharged employees in those cases, however, had standing only because their injuries resulted from the anticompetitive conduct itself. Unlike Bichan, boycotted employees were victims of conspiracies to restrain labor markets.¹⁴⁴ An antitrust injury flowing from the violator's restraints on competition in the labor market falls within the scope of the target area analysis.¹⁴⁵ The target area test, therefore, distinguishes between unfair treatment of employees and anticompetitive conduct directed toward them.¹⁴⁶

Bichan claimed that his actions increased competition and that the conspiracy would have ended if he had not been discharged.¹⁴⁷ The Ninth Circuit in *Ostrofe* accepted this argument,¹⁴⁸ but the

141. 681 F.2d at 516.

142. *Id.* at 517. The leading target area decisions in the Seventh Circuit that also acknowledged the antitrust injury analysis were *Weit v. Continental Ill. Nat. Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982), and *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). The type of test applied to determine standing, however, should not lead to the different outcomes reached by the Seventh and Ninth Circuits. See *supra* notes 64-66 and accompanying text.

143. See, e.g., *Radovich v. National Football League*, 352 U.S. 445 (1957). See also *Nichols v. Spencer Int'l Press*, 371 F.2d 332 (7th Cir. 1967); *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979). Although *McNulty* was not dismissed on a pretrial challenge to the plaintiff's standing, the court denied his post-trial motions for judgment. The district court recognized that although loss of employment was an injury to business or property under § 4, *Brunswick* required a more thorough analysis. *McNulty v. Borden, Inc.*, 542 F. Supp. 655, 660 (E.D. Pa. 1982) (effectively reversing the previous opinion). The second opinion, which found that *McNulty* lacked standing, considered *Ostrofe* but refused to extend the concept of standing to embrace the antitrust injury requirement without guidance from the Supreme Court or the Third Circuit. *Id.* at 661. The Seventh Circuit in *In re Industrial Gas* also distinguished the first *McNulty* decision. 681 F.2d at 518 n.4.

144. See *Radovich v. National Football League*, 352 U.S. 445 (1957). See *supra* note 81 for a discussion of *Radovich*.

145. See *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

146. 586 F.2d at 1169.

147. 681 F.2d at 518.

148. 670 F.2d at 1388.

Seventh Circuit rejected it.¹⁴⁹ More importantly, even if Bichan could have affected the conspiracy, his ability to promote competition was irrelevant in determining whether he suffered an antitrust injury.¹⁵⁰ Antitrust injuries must flow from the lessening of competition. Congress provided for treble damage suits to promote economic competition,¹⁵¹ not to protect employment.¹⁵² The possibility that Bichan's continued employment also might have promoted competition did not entitle him to standing to sue for treble damages. Although Bichan may have acted in the public interest, the policies limiting the scope of recovery under section 4 led to the conclusion that Bichan did not suffer an antitrust injury.¹⁵³

The Seventh Circuit found that no antitrust policy supported Bichan's assertion of standing. The Seventh Circuit rejected the holding in *Ostrofe*,¹⁵⁴ and found that the majority in *Ostrofe* ignored the teaching of *Brunswick*: the anticompetitive effects of the violation must cause an antitrust injury.¹⁵⁵ The court interpreted *Brunswick* as holding that the purpose of section 4 is to protect people injured as consumers or competitors in the marketplace or in the discrete area of the economy affected by the anticompetitive scheme. Unlike the Ninth Circuit, the Seventh Circuit refused to extend antitrust standing to all persons who are remotely affected by violations of the antitrust laws.¹⁵⁶

Congress enacted the antitrust laws to foster competition, not to prevent employee discharges.¹⁵⁷ Although Congress may have in-

149. 681 F.2d at 518.

150. *Id.*

151. See *supra* notes 1-5 and accompanying text.

152. *In re Industrial Gas*, 681 F.2d at 519; *Ostrofe*, 670 F.2d at 1392 (Kennedy, J., dissenting).

153. 681 F.2d at 515. See also *Parmalee Transp. Co. v. Keeshin*, 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961). To read § 4 literally as providing a remedy for every economic dislocation would lead to a morass of complex suits for injuries unrelated to the social cost of the violation. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977). Because of this danger, courts should expand the treble damage remedy only after a clear indication of congressional intent to do so. *Id.* (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972)).

154. 681 F.2d at 519. The Seventh Circuit approved of the "reasoned analysis" of Judge Kennedy in his dissent in *Ostrofe*. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

tended to benefit a large portion of the economically active population, only those parties suffering an antitrust injury have standing to pursue a section 4 right of action. Persons collaterally affected by antitrust violations must rely on the procompetitive results of suits by plaintiffs who suffer direct antitrust injuries.¹⁵⁸ The congressional concern with protecting competition requires more than a tenuous relationship between the antitrust violation and the injury. Only an injury resulting from the anticompetitive effects of the violation merits a treble damage recovery.¹⁵⁹ Bichan's injury did not result directly from his employer's anticompetitive practices and did not constitute an antitrust injury. Additionally, the remoteness of the relationship between Bichan's termination and the intended harmful effects of the anticompetitive scheme prevented Bichan from being an effective enforcer of the antitrust laws.¹⁶⁰ Injured consumers or competitors of the conspirators further the policies of the antitrust laws effectively because they recover three times the illegal profits made by the violators.¹⁶¹ Consumers and competitors are the appropriate antitrust plaintiffs, therefore, because their treble damage actions are a greater deterrent to parties who undertake anticompetitive activities.¹⁶²

The Seventh Circuit retreated from the *Brunswick* analysis in the final portion of its opinion. Attempting to bolster its decision by building on the notion of remoteness, the court undercut the logic of its initial analysis.¹⁶³ Even if Bichan had suffered an antitrust injury, the court nevertheless would have denied standing be-

158. *Id.* at 520.

159. *Id.* at 519; *see also* *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).

160. 681 F.2d at 518-20.

161. *Id.* at 520.

162. *Id.* Several courts have taken the same approach, although not all of them have relied on *In re Industrial Gas*. *See* *RJM Sales & Mktg. v. Banfi Prods. Corp.*, 546 F. Supp. 1368 (D. Minn. 1982) (terminated distributor had no standing to challenge tying arrangement because injury was not caused by the anticompetitive activity); *McNulty v. Borden, Inc.*, 542 F. Supp. 655 (E.D. Pa. 1982) (because Third Circuit has not extended standing as far as the Ninth Circuit, plaintiff must prove injury resulting from economic effects of the violation); *Callahan v. Scott Paper Co.*, 541 F. Supp. 550 (E.D. Pa. 1982) (section 4 is not an employee discharge remedy); *Booth v. Radio Shack Div., Tandy Corp.*, 1982-83 Trade Cas. (CCH) ¶ 65,001 (E.D. Pa. 1982) (employee's complaints, not the antitrust violation, caused termination); *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387 (S.D. Ind. 1982) (rejecting *Ostrove's* policy analysis in favor of existing Seventh Circuit precedent).

163. 681 F.2d at 519.

cause Bichan's injury was too far removed from the defendant's illegal conduct.¹⁶⁴ Traditional concepts of antitrust standing support this conclusion.¹⁶⁵ The court, however, cited cases following the categorization approach to support its analysis, rather than examining the policies underlying antitrust standing.¹⁶⁶

The proper concern of the antitrust standing analysis is the plaintiff's ability to enforce efficiently the policies underlying the antitrust laws. The Seventh Circuit noted that efficient enforcement is determined by balancing the interests of deterrence and redress against the goal of avoiding excessive treble damage litigation.¹⁶⁷ By relying on the categorization approach, the Seventh Circuit ignored the necessary policy considerations inherent in the determination of antitrust standing. A policy analysis is an essential part of the antitrust standing determination. The issue of the plaintiff's remoteness from the anticompetitive scheme and its effect on the plaintiff's capacity to enforce effectively the policies of the antitrust laws should complement the policy analysis, not serve as an alternative basis for determining antitrust standing.

Fortunately, the Seventh Circuit did not rely solely on the categorization approach and found a more appropriate method of choosing "the select class of plaintiffs that can impose the deterrent sting of treble damages at the smallest cost of enforcement."¹⁶⁸ The anticompetitive effects of Chemetron's antitrust violation did not cause Bichan's injury.¹⁶⁹ Aside from the antitrust injury requirement, Bichan's suit would not have served the policy goals that suits by other section 4 plaintiffs would serve. Allowing discharged employees to bring antitrust actions would increase the volume of antitrust litigation without any concomitant deterrent benefit.¹⁷⁰ The employee's right to a remedy should not override the inherent limitations of the substantive scope of antitrust poli-

164. *Id.*

165. *See supra* text accompanying notes 60-63.

166. 681 F.2d at 519 (reciting the general rules concerning "stockholders, employees and creditors").

167. *Id.* at 520.

168. *Id.*

169. *Id.* at 519.

170. *Id.* *See also* *Calderone Enters. v. United Artists Theatre Circuit*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

cies.¹⁷¹ An alternative remedy for discharged employees is a more reasonable solution because improper expansion of the antitrust laws dilutes the laws' ability to protect competition effectively. Unless Congress extends the reach of section 4, therefore, discharged employees should remain outside its remedial scope.¹⁷²

REMEDIAL ALTERNATIVES

The Seventh Circuit's analysis in *In re Industrial Gas* better reflects the post-*Brunswick* limitations of antitrust standing.¹⁷³ The analysis in *In re Industrial Gas* and *Brunswick*, however, failed to resolve one issue raised in *Ostrofe*. In *Ostrofe*, the employer fired the plaintiff for refusing to participate in illegal conduct.¹⁷⁴ Moreover, the employee's conduct furthered the public policies favoring competitive behavior and discouraged participation in illegal activities. Failing to construe the standing rules more broadly raises questions concerning the remedy that discharged employees should seek.

In *Ostrofe*, the Ninth Circuit concluded that the enforcement effects of allowing discharged employees to sue under section 4 outweighed the countervailing considerations of subjecting defendants to multiple litigation.¹⁷⁵ The dissent suggested, however, that another remedy would serve the goal of deterrence more effectively.¹⁷⁶ The dissent argued that the employee who was discharged for refusing to participate in an antitrust violation should have a cause of action for wrongful discharge.¹⁷⁷

The law of wrongful discharge is developing rapidly and disal-

171. 681 F.2d at 520. See also *Brunswick*, 429 U.S. at 487.

172. *Brunswick*, 429 U.S. at 488; *In re Industrial Gas*, 681 F.2d at 519. If the number of discharged employees promises to make them efficient enforcers of the antitrust laws, Congress may extend the scope of § 4 expressly to include suits by discharged employees.

173. Page, *supra* note 19, at 468. See also *In re Industrial Gas Antitrust Litigation*, 681 F.2d 514, 519 (7th Cir. 1982), *cert. denied sub nom. Bichan v. Chemetron Corp.* 103 S. Ct. 126 (1983); Handler, *Changing Trends*, *supra* note 60, at 995, 997.

174. See *supra* text accompanying notes 91-92.

175. 670 F.2d at 1384.

176. *Id.* at 1392 (Kennedy, J., dissenting).

177. *Id.* Wrongful discharge is a more accurate characterization of the facts in *Ostrofe* and *In re Industrial Gas*. The employees were discharged for a wrongful or improper purpose. Characterizing the discharges as injuries suffered as a result of the employers' anticompetitive activities, however, is unreasonable.

lowing discharged employees a treble damage remedy may encourage its development.¹⁷⁸ Denying plaintiffs such as *Ostrofe* an antitrust remedy will force the states to develop appropriate alternative remedies. If federal courts expand section 4 standing to include discharged employees, they might interfere with the development of the wrongful discharge action.¹⁷⁹ Although the dissent's concerns in *Ostrofe* with federal judicial interference with the state law of wrongful discharge may be exaggerated, those concerns are not specious.¹⁸⁰

Increasingly, state courts are recognizing actions for wrongful discharge.¹⁸¹ California, where the *Ostrofe* controversy originated, has recognized that discharged employees like *Ostrofe* have a cause of action for wrongful discharge.¹⁸² In *Tameny v. Atlantic Richfield Co.*,¹⁸³ for example, a case involving facts similar to *Ostrofe*, the California Supreme Court held that the employee's wrongful discharge gave rise to a cause of action in tort, thus entitling the employee to recover punitive damages. In *Tameny*, the court allowed a wrongful discharge action by a retail sales representative discharged for refusing to participate in a price-fixing scheme.¹⁸⁴ Although only a few jurisdictions have followed California's lead, the number is increasing.¹⁸⁵

178. *Id.*

179. *Id.*

180. *But see* 670 F.2d at 1384 n.12.

181. *Id.* at 1392 (Kennedy, J., dissenting). *See also* *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1821-24 (1980); Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777.

182. 670 F.2d at 1392 (Kennedy, J., dissenting). *See also* *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

183. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

184. *Id.* at 178, 610 P.2d at 1336-37, 164 Cal. Rptr. at 846.

185. *See, e.g.,* *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979); *Trombetta v. Detroit, T. & I.R.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978). *See generally* *Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Note, *Non-Statutory Causes of Action for an Employer's Termination of an "At Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship*, 24 N.Y.L. SCH. L. REV. 743 (1979).

A discussion of the advantages of developing a wrongful discharge remedy through state law is beyond the scope of this Note. If discharged employees like *Ostrofe* have neither an alternative remedy nor standing to bring an antitrust action, however, they will have no remedy for the wrong that they have suffered. This possibility concerned the court in *Ostrofe*. The Ninth Circuit decided that regardless of the state law concerning wrongful discharge, discharged employees had standing to seek treble damages under section 4.¹⁸⁶ The dissent in *Ostrofe* insisted that the wrongful discharge remedy precluded the federal remedy,¹⁸⁷ and argued that federal interference in an area of state concern was unwarranted.¹⁸⁸

The Supreme Court's opinion in *Brunswick* did not suggest that exceptions to the antitrust injury rule existed.¹⁸⁹ In fact, the Court explicitly refused to extend the scope of antitrust protection without an express mandate from Congress.¹⁹⁰ Courts should not stretch the rationale underlying the federal antitrust laws when state law can provide an appropriate remedy. Without a congressional mandate clearly articulating the public purposes of the antitrust laws, even less reason exists to distort the scope of section 4.

CONCLUSION

As a class, employees asserting a claim for treble damages under section 4 of the Clayton Act have faced a variety of impediments to standing. Employees discharged in the course of their employers' illegal antitrust schemes must satisfy not only the traditional direct injury or target area requirements of standing, but also must prove that they have suffered an antitrust injury. A close reading of the antitrust injury doctrine, along with a consideration of the remedial and deterrent purposes of the antitrust laws, reveals that discharged employees should not have standing to sue under section 4.

186. 670 F.2d at 1384 n.12.

187. *Id.* at 1389-92 (Kennedy, J., dissenting).

188. *Id.* at 1392. The Seventh Circuit in *In re Industrial Gas* did not address the state law issue, except to mention the possible availability of a state law remedy. 681 F.2d at 520.

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

190. *Id.* at 488.

Only a cavalier analysis of the antitrust policies and an expansion of the antitrust injury rule support a grant of standing to discharged employees. Without a clear expression of congressional intent that section 4 encompasses these plaintiffs, little justification exists for finding that they have antitrust standing. Moreover, the emerging right of action for wrongful discharge is an appropriate remedy for the injuries that discharged employees suffer. An employer's anticompetitive acts ordinarily do not injure discharged employees, and employees do not suffer the type of injuries that the antitrust laws were designed to prevent. The harmful effect that makes an employer's anticompetitive acts unlawful does not include the harm that results from a wrongful discharge. The discharge may be a means of advancing an illegal scheme, but the discharge itself is not an antitrust violation. This distinction is essential to the antitrust standing analysis, and is worth preserving.

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