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# ANTITRUST SUITS BY DISCHARGED EMPLOYEES

## *Bichan v. Chemetron Corp. (In re Industrial Gas Antitrust Litigation)*<sup>1</sup>

Federal courts have struggled to define the scope of standing to sue for private treble damages under section 4 of the Clayton Act.<sup>2</sup> The confusion surrounding antitrust standing appears in suits brought by individuals who claim that they have been discharged for refusing to commit antitrust violations for their employers.<sup>3</sup> The Ninth Circuit has granted standing<sup>4</sup> while the Seventh Circuit has denied it<sup>5</sup> in factually indistinguishable cases. District courts in the Third Circuit have split on the issue.<sup>6</sup> In light of recent Supreme Court pronouncements, the position taken by the Seventh Circuit in *Bichan v. Chemetron Corp.*<sup>7</sup> represents the correct approach. In *Bichan*, the court properly recognized that injuries caused by an antitrust violation but occurring outside the sector of the economy endangered by the anticompetitive effect are not antitrust injuries under section 4.<sup>8</sup> Moreover, the court correctly realized that suffering an antitrust injury does not necessarily confer standing.<sup>9</sup>

An overview of limitations on private treble damage suits illustrates the propriety of the *Bichan* reasoning. A plaintiff must allege an "antitrust injury" and prove "antitrust standing." The injury requirement is explained in *Bruns-*

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1. 681 F.2d 514 (7th Cir. 1982), cert. denied, 103 S. Ct. 1261 (1983).

2. "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1982). The "antitrust laws" for § 4 purposes are defined in *id.* § 12 & note. There is no private treble damage action for violations of section 3 of the Robinson-Patman Act, 15 U.S.C. § 13a (1982), or section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982). The term "standing" in this Note describes parties who are entitled to maintain private antitrust actions under § 4. See Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 813 n.11 (1977).

3. See generally Note, *Employee Standing in Private Antitrust Suits: A New Element in the Balance*, 51 U. CIN. L. REV. 878 (1982); Note, *Discharged Employees: Should They Ever Have Antitrust Standing Under Section 4 of the Clayton Act*, 34 HASTINGS L.J. 839 (1983); Note, *Employee Standing Under Section 4 of the Clayton Act*, 81 MICH. L. REV. 1846 (1983); Annot., 64 A.L.R. FED. 825 (1983).

4. See *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982), vacated and remanded mem., 103 S. Ct. 1244 (1983).

5. See *Bichan v. Chemetron Corp.*, 681 F.2d 514, 520 (7th Cir. 1982), cert. denied, 103 S. Ct. 1261 (1983); *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387, 1390 (S.D. Ind. 1982).

6. 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) and *Booth v. Radio Shack Div.*, 1982-83 Trade Cas. (CCH) ¶ 65,001 (E.D. Pa. Jan. 28, 1982) with *Shaw v. Russell Trucking Line*, 542 F. Supp. 776 (W.D. Pa. 1982).

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

8. *Id.* at 519.

9. *Id.* at 519-20.

*wick Corp. v. Bowl-O-Matic*<sup>10</sup> and *Illinois Brick Co. v. Illinois*.<sup>11</sup> In *Brunswick*, the plaintiffs, operators of bowling alleys, complained that the defendant's acquisition of several financially troubled bowling centers violated section 7 of the Clayton Act<sup>12</sup> by lessening competition or tending to create a monopoly.<sup>13</sup> The plaintiffs alleged that their profits would have increased if the defendant would not have made these acquisitions, for the alleys would have closed.<sup>14</sup> The Court denied recovery under section 4, finding that the plaintiffs' injuries resulted from the preservation of, rather than the elimination of, competition.<sup>15</sup> Thus, the plaintiffs had failed to prove an "antitrust injury"—harm that the antitrust laws were intended to prevent, flowing from the defendant's unlawful act.<sup>16</sup>

In *Illinois Brick*, the plaintiffs brought suit for treble damages under section 1 of the Sherman Act<sup>17</sup> against concrete block manufacturers for price fixing. The blocks had originally been sold to masonry contractors, who submitted bids to general contractors that bid on the plaintiffs' projects.<sup>18</sup> The Court found unacceptable the risk of duplicative recovery engendered by allowing both indirect and direct purchasers to claim damages resulting from a single overcharge.<sup>19</sup> The Court concluded that the masonry contractors, as direct purchasers, were the injured parties most likely to press their claims with the vigor that section 4 was intended to promote.<sup>20</sup> Although the plaintiffs suffered antitrust injury, the Court found that the risk of duplicative recovery, the difficulty in tracing damages to indirect purchasers, and the ability of other more direct plaintiffs to bring suit militated against allowing the plaintiffs' suit.<sup>21</sup> Thus, limitations similar to proximate cause in tort are part of the

10. 429 U.S. 477 (1977).

11. 431 U.S. 720 (1977).

12. 15 U.S.C. § 18 (1982).

13. 429 U.S. at 480.

14. *Id.* at 481.

15. *Id.* at 488-89.

16. *Id.* at 489.

17. 431 U.S. at 727. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982) provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

18. 431 U.S. at 726.

19. *Id.* at 730-31; see also *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-64 (1972) (denying recovery to state for damages to its general economy on the ground that such damages would duplicate recoveries by individual citizens and businesses); *Ames v. American Tel. & Tel. Co.*, 166 F. 820, 823 (D. Mass. 1909) (stockholder denied recovery since injury was duplicative of injury sustained by company). For a discussion on the economic repercussions of a single antitrust violation, see 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, 796-97 (1976). But cf. Tyler, *Private Antitrust Litigation: The Problem of Standing*, 49 U. COLO. L. REV. 269, 289-92 (1978) (threat of multiple liability is often illusory and econometric techniques can minimize risk).

20. 431 U.S. at 746.

21. *Id.* This principle is shown in suits by employees who have lost their jobs because corporations who employed them have been driven out of business or otherwise injured by antitrust violations. Standing is usually denied because the employee has been injured only in a derivative manner. See *Central Nat'l Bank v. Rainbolt*, 720 F.2d 1183, 1186 (10th Cir. 1983) (chairman of the board); *Program Eng'g, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1191-92

test for antitrust injury.

Concurrent with these cases, the lower courts formulated diffuse doctrines of "antitrust standing." Using various tests,<sup>22</sup> these courts tried to determine which injuries are too remote to support private treble damage actions. This complicated analysis applied the standing tests to various categories of plaintiffs to simplify the determination.<sup>23</sup> Nevertheless, the inclusion of numerous policy considerations precluded consistent results or uniform application. The

(9th Cir. 1980) (company president); *Jones v. Ford Motor Co.*, 599 F.2d 394, 397-98 (10th Cir. 1979) (president, general manager, and shareholder); *Bosse v. Crowell, Collier & McMillan*, 565 F.2d 602, 607 (9th Cir. 1977) (shareholders, officers, and directors); *Pitchford v. Pepsi, Inc.*, 531 F.2d 92, 97-98 (10th Cir.) (company president), *cert. denied*, 426 U.S. 935 (1976); *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 729-33 (10th Cir.) (employees), *cert. denied*, 411 U.S. 938 (1973); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 113 F.2d 114 (2d Cir. 1940) (per curiam) (employee and sole shareholder), *aff'g*, 30 F. Supp. 389, 391 (S.D.N.Y. 1939); *Athletes Foot of Del., Inc. v. Ralph Libonati Co.*, 445 F. Supp. 35, 52 (D. Del. 1977) (officers, directors, and shareholders); *Deaktor v. Fox Grocery Co.*, 332 F. Supp. 536, 541 (W.D. Pa. 1971) (shareholders and employees); *Centanni v. T. Smith & Son, Inc.*, 216 F. Supp. 330, 338 (E.D. La.) (employee), *aff'd*, 323 F.2d 363 (5th Cir. 1963); *Miley v. John Hancock Mut. Life Ins. Co.*, 148 F. Supp. 299, 302-03 (D. Mass.) (potential employee), *aff'd*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957); *Gerli v. Silk Ass'n of Am.*, 36 F.2d 959, 960-61 (S.D.N.Y. 1929) (employee and shareholder); *see generally* 2 P. AREEDA & D. TURNER, ANTITRUST LAW 198-201 (1978).

22. These tests included: (1) direct injury: "Those harmed only incidentally by antitrust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed, or who have been directly harmed may recover." *Productive Inventions, Inc. v. Trico Prod. Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); *see Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 394-95 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910).

(2) foreseeability of injury: the plaintiff must prove he was "within the area of the economy which [the defendant] reasonably could have or did foresee would be endangered by the breakdown of competitive conditions." *Alaska v. Standard Oil Co.*, 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974).

(3) zone of interests: the plaintiff must prove "that the defendant caused him injury in fact," and that "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1151-52 (6th Cir. 1975).

(4) target area: the plaintiff must show that "he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *see Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 546-47 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 17-19 (1st Cir. 1979); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *Calderone Enters. Corp. v. United Artist Theatre Circuit*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *SCM Corp. v. Radio Corp. of Am.*, 407 F.2d 166, 169 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969); *Sanitary Milk Producers v. Bergjans Farm Dairy*, 368 F.2d 679, 688-89 (8th Cir. 1966).

(5) balancing: section 4 standing analysis "is essentially a balancing test comprised of many constant and variable factors and . . . there is no capable talismanic test." *Brawman v. Basset Furniture Indus.*, 552 F.2d 90, 99-100 (3d Cir.) (considered "[plaintiff's] relationship to the defendants, his position in the area of the economy threatened by the alleged anticompetitive acts, the directness of his alleged injury and the Congressional policies"), *cert. denied*, 434 U.S. 823 (1977).

23. Consumers and competitors are frequently granted standing, while employees, shareholders, suppliers, and creditors of injured businesses are not. *See Berger & Bernstein, supra* note 2, at 820.

standing analysis is much broader than the antitrust injury question; mere antitrust injury does not guarantee that standing will be granted.

It was against this background that the Ninth Circuit addressed the issue of antitrust standing in a retaliatory discharge case. In *Ostrofe v. H.S. Crocker Co.*,<sup>24</sup> the court focused on balancing competing policy interests and granted the employee standing.<sup>25</sup> Frank Ostrofe, a former marketing director for the H.S. Crocker Co., brought a private treble damage action against his employer, a manufacturer of lithograph labels.<sup>26</sup> He alleged that the label manufacturers had conspired to fix prices, submit rigged bids, and allocate customers in violation of section 1 of the Sherman Act.<sup>27</sup> Ostrofe alleged that he was forced to resign for refusing to cooperate in the conspiracy, and that he was boycotted from further employment in the industry.<sup>28</sup> Crocker moved to dismiss on the ground that Ostrofe lacked standing. The district court granted the motion in part, holding that Ostrofe could not attack the agreement to fix prices, but that he could challenge the separate conspiracy alleged—the agreement to deny him further employment.<sup>29</sup> Crocker filed a motion for summary judgment supported by depositions and affidavits negating the existence of any agreement among label manufacturers not to employ Ostrofe. Ostrofe moved

24. 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded mem.*, 103 S. Ct. 1244 (1983).

25. *Id.* at 1386. Although some commentators have advocated a policy approach to antitrust standing, they have been unable to agree on what policies are relevant and the weight to be given to each in the "balancing" process. See Berger & Bernstein, *supra* note 2, at 845. Berger and Bernstein have identified two policies served by private antitrust suits: compensation for injury and deterrence of anticompetitive conduct. Five policies are identified for limiting standing: elimination of windfall recoveries, avoidance of ruinous recoveries, avoidance of duplicative recoveries, reduction of speculative recoveries, and reduction of judicial administrative costs. *Id.* at 850.

Professor Handler has listed ten factors that should be considered in determining standing: the nature and seriousness of the violation; the number of persons who have been harmed and their relationship to the defendant and to each other; the possibility of double recovery if everyone is permitted to sue; the possibility of protecting the interests of all those harmed by a single lawsuit; the specific intent of the defendant to cause injury to particular classes of persons; the reasonable foreseeability of injury; whether denial of standing in the particular case would frustrate the dominant purpose of private litigation as a means of enforcing the antitrust laws; the degree and extent of harm actually suffered by the plaintiff; the reliability of the monetary estimates of damage; and the fact that section 4 provides for treble damages. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 30-31 (1971). *But cf.* Lytle & Purdue, *supra* note 19, at 807 (Handler's approach "reduces standing decisions to a series of ad hoc determinations, often inconsistent and certainly unpredictable").

Professor Tyler has identified two policies served by private antitrust suits: compensation of victims and enforcement of national policy in favor of competition. He has stated that the primary and overriding justification for a liberal standing doctrine is deterrence. Tyler, *supra* note 19, at 277. Three policies are identified for limiting standing: the potential liability of defendants, added administrative and social cost, and the concern that a liberal standing rule may undermine the effectiveness of the antitrust laws. *Id.*

26. 670 F.2d at 1380.

27. Consent decrees prohibiting such practices had previously been issued against Crocker. United States v. H.S. Crocker Co., 1978-1 Trade Cas. (CCH) ¶ 61,883, at 73,702 (N.D. Cal. Nov. 30, 1976) (prohibiting allocating or dividing customers, territories or markets, fixing prices, or furnishing price information unless it is generally available to users of paper labels); United States v. H.S. Crocker Co., 1975-2 Trade Cas. (CCH) ¶ 60,615, at 67,703 (N.D. Cal. Nov. 25, 1975) (same).

28. 670 F.2d at 1380.

29. *Id.*

to amend his complaint to specifically allege a unilateral refusal by Crocker to deal with him. The district court denied Ostrofe's motion and granted summary judgment for Crocker.<sup>30</sup>

The Ninth Circuit reversed and held that Ostrofe had standing.<sup>31</sup> The court of appeals first stated that the district court erred in granting defendant's motion to dismiss.<sup>32</sup> Persons injured by refusals to deal as part of a conspiracy to restrain or monopolize trade or commerce have been permitted to challenge the conspiracy as a whole even though their injuries did not result from the restraint on competition that was the principal object of the conspiracy.<sup>33</sup> The court concluded, therefore, that Ostrofe had standing to challenge

30. *Id.* at 1380-81.

31. *Id.* at 1381-89.

32. *Id.* at 1381. The Ninth Circuit stated that the district court improperly viewed Ostrofe's original claim to allege two separate lawsuits: one challenging a conspiracy to fix prices and allocate customers, the other attacking an agreement to boycott Ostrofe from employment.

33. *Id.* at 1382. Judge Kennedy, dissenting in *Ostrofe*, criticized the majority's reasoning:

The cases cited for the proposition that persons have been permitted to challenge conspiracies as a whole even though their injuries resulted not from the principal object of the conspiracy . . . are quite inappropriate here, for they involved boycotts that were the same type as, and a part of, the larger conspiracy. . . . Here Ostrofe's discharge was a matter of employee coercion apart from the main price fixing scheme that the antitrust laws are designed to deter.

*Id.* at 1390-91 (Kennedy, J., dissenting). The majority cited *Radovich v. National Football League*, 352 U.S. 445 (1957); *Keifer-Stewart Co. v. Joseph E. Seagrams & Sons*, 340 U.S. 211 (1951); *Solinger v. A & M Records*, 586 F.2d 1304 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979); *Nichols v. Spencer Int'l Press*, 371 F.2d 332 (7th Cir. 1967); *Standard Oil of Calif. v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958). 670 F.2d at 1382. In *Radovich*, the plaintiff was the object of a conspiracy by NFL owners to boycott players and coaches from a competing league. 352 U.S. at 446-47. In *Nichols*, the plaintiff was the object of a no-switching agreement in which publishers restricted employment of each other's former employees. 371 F.2d at 333-34. In both cases, the alleged conspiracies were aimed directly at restricting labor markets and the claimed loss of employment resulted from the principal object of the antitrust violation. In *Keifer-Stewart*, the owner of a wholesale liquor business alleged that the defendants agreed not to sell liquor to the plaintiff unless he agreed to their prices. 340 U.S. at 212. In *Standard Oil*, a gasoline retailer claimed damages as a result of a conspiracy by oil companies to refuse to supply petroleum products. The plaintiff claimed that the object of the conspiracy was to restrain or monopolize gasoline sales. 251 F.2d at 196. In *Keifer-Stewart* and *Standard Oil*, the plaintiffs' injuries resulted from the restraints on competition that were the principle objects of the conspiracies.

*Solinger* further illustrates the erroneous use of precedent by the *Ostrofe* majority. In *Solinger*, the antitrust action was brought by the president of Independent Music Sales, Inc. (IMS), an independent distributor of records and tapes, against two record manufacturers. 586 F.2d at 1306-07. Solinger initiated negotiations to purchase IMS from its sole shareholder and contacted the defendants to see if they would retain IMS as their distributor after the purchase. Both companies indicated that they would not. As a result, Solinger claimed that he did not complete the purchase. Shortly thereafter, both manufacturers terminated IMS as a distributor, and without these contracts, the company went out of business. Solinger brought a private treble damage action alleging that the defendants refused to deal with IMS because, pursuant to his directions as president, IMS refused to comply with a territorial allocation plan agreed to by the defendants in violation of § 1 of the Sherman Act. The court held that as a prospective purchaser of a company and a new potential entrant into the market, Solinger might have standing to challenge the anticompetitive refusal to deal. 586 F.2d at 1309. Finding that Solinger was within the area of the economy endangered by defendants' antitrust violation, the court remanded the issue to the district court. The court distinguished Solinger's claim as an employee of IMS:

Solinger does not, however, have standing in his capacity as an *employee* of IMS to

the price-fixing conspiracy because he was boycotted from employment, pursuant to the larger conspiracy.<sup>34</sup>

The court of appeals also held that the district court had erred in denying Ostrofe leave to amend his complaint to allege standing on the grounds that he was unilaterally discharged by Crocker as a means of effectuating the scheme to fix prices and allocate customers.<sup>35</sup> Generally, parties injured by unilateral conduct of one conspirator in furtherance of an unlawful restraint of trade have been permitted to challenge the overall conspiracy.<sup>36</sup>

Crocker argued that it would extend liability too far if standing were given to persons injured by a refusal to deal by a single conspirator in furtherance of a price-fixing conspiracy.<sup>37</sup> Various tests have been used to limit the expansive liability that would flow from a literal interpretation of section 4. The court criticized these tests for producing inconsistent and unpredictable results.<sup>38</sup> At best, the Ninth Circuit reasoned, these tests are useful to resolve clear cases; less obvious cases require a balancing of competing policy interests.<sup>39</sup>

The court discussed the policies favoring standing for employees dis-

pursue his claims under Section 1. He is not within the area of the economy that the antitrust laws were designed to protect. . . . His loss of salary was merely incidental to the alleged antitrust violation and was not within the area of the economy that the defendants should have foreseen would be affected by its violation.

*Id.* at 1310-11 (citation omitted). On remand, the district court rejected Solinger's claim as a potential purchaser. On the second appeal, the Ninth Circuit affirmed: "Whatever value this theory may have had at the time it was advanced when this case first came before us, . . . its legal basis evaporated with the Supreme Court's reaffirmation of traditional views of standing in antitrust cases in *Associated General Contractors of California v. California State Council*. . . ." *Solinger v. A & M Records*, 718 F.2d 298, 299 (9th Cir. 1983) (per curiam); see notes 89-125 and accompanying text *infra* (discussion of *Associated General*).

34. At least one court has attempted to distinguish *Ostrofe* on the grounds that the plaintiff alleged an industry-wide conspiracy not to employ him, as opposed to a unilateral refusal by his prior employer. See *Callahan v. Scott Paper Co.*, 541 F. Supp. 550, 561 (E.D. Pa. 1982) (*Ostrofe* was decided incorrectly under either theory).

35. 670 F.2d at 1382.

36. *Id.* at 1382 n.5 (citing *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979); *Lee Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299 (4th Cir. 1979); *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), cert. denied, 402 U.S. 923 (1971); *Hoopes v. Union Oil Co.*, 374 F.2d 480 (9th Cir. 1967)). Judge Kennedy took exception to the majority's use of precedent:

[P]arties injured by unilateral conduct in furtherance of an unlawful restraint of trade have been permitted to challenge the overall scheme only when the unilateral conduct was part of, and created the same type of injury as, the main unlawful restraint conspiracy. . . . The plaintiff in the instant case was not in the target area of either the price fixing conspiracy or a unilateral discharge in direct furtherance of the elimination of competition, and his motion to amend was properly denied.

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

37. 670 F.2d at 1382.

38. *Id.* The same criticism is applicable to the Ninth Circuit's policy approach. See note 25 *supra*.

39. *Id.* at 1382-83. The majority did not indicate what would constitute a "clear" case. Cf. *Calderone Enters. Corp. v. United Artists Theatre Circuit*, 454 F.2d 1292, 1295 (2d Cir. 1971) ("[T]here are few 'bright lines' in the area, even experts who have devoted their entire professional lives to the practice of antitrust law often find it impossible to advise a client."), cert. denied, 405 U.S. 930 (1972).

charged for refusing to cooperate in antitrust violations. First, granting standing facilitates enforcement of the antitrust laws.<sup>40</sup> No conspiracy to fix prices and allocate customers can succeed without the cooperation of the responsible employees of each competitor. If the employee participates in the conspiracy, detection and criminal liability are unlikely. Standing increases the incentive for disclosure and facilitates detection of the conspiracy.<sup>41</sup> Second, granting standing prevents or mitigates injury to those who are the ultimate objects of the violation—competitors and consumers. A timely suit by a discharged employee may help prevent irreparable destruction of competitive conditions.<sup>42</sup> Third, the court reasoned that the harm suffered by the employee was not remote or indirect.<sup>43</sup>

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40. 670 F.2d at 1384.

41. *Id.* Judge Kennedy noted that deterrence can always be used to rationalize extending standing to a new and unregulated area of conduct. Congress, however, did not design the antitrust laws to reach employment relations as an enforcement mechanism. It made participation in the antitrust violation a criminal offense, and this is a more direct and proper deterrent than providing the windfall of treble damage recovery to the discharged employee. *Id.* at 1391-92 (Kennedy, J., dissenting). Denying standing to the discharged employee does not preclude competitors and consumers from challenging the conspiracy. Private actions are merely a part of the overall antitrust law enforcement scheme. Violations of the antitrust laws are subject to civil injunctive actions, 2 P. AREEDA & D. TURNER, *ANTITRUST LAW* 131-40 (1978), and, in many cases, criminal sanctions. *Id.* at 27-29; Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); see also L. SULLIVAN, *ANTITRUST* 751-59 (1977) (government enforcement); see generally S. OPPENHEIM & G. WESTON, *FEDERAL ANTITRUST LAWS: CASES AND COMMENTS* 22-27 (1968) (antitrust remedies); Lytle & Purdue, *supra* note 19, at 801.

Some commentators have questioned the effectiveness of private actions as a deterrent to antitrust violations. *E.g.*, Breit & Elzina, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 HARV. L. REV. 693, 705-06 (1973) (managers in modern oligopolistic industries are risk averse and are more likely to be deterred by a high financial penalty than by increased probability of detection and conviction where accompanying penalties are not severe); Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319, 1337 (1973) (private antitrust actions are not an effective deterrent); see generally Guilfoil, *Private Enforcement of United States Antitrust Law*, 10 ANTITRUST BULL. 747 (1965); Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy*, 3 N.M. L. REV. 286 (1973); Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365 (1970). *But see* Loewinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 168-69 (1958) (because of the treble damages provision, private suits may be a more effective deterrent than government enforcement); Tyler, *supra* note 19, at 269 n.2, 285 (deterrence is best achieved by removing obstacles to private suits).

In *Ostrofe*, Judge Kennedy noted that the employee discharged for refusing to violate antitrust laws has other causes of action to deter retaliatory discharge, including wrongful discharge in tort and breach of contract. 670 F.2d at 1392 (Kennedy, J., dissenting); see, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); see also notes 130-33 and accompanying text *infra* (erosion of the employment at will rule).

42. 670 F.2d at 1384-85.

43. *Id.* at 1385. The majority recognized that the Ninth Circuit had denied standing to employees who suffered injuries only incidental to an antitrust violation. Other circuits have granted employees standing, however, when they are able to show direct injury. The majority cited *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967), and *Nichols v. Spencer Int'l Press*, 317 F.2d 332 (7th Cir. 1967), as authority for the proposition that *Ostrofe* was directly injured and should be given standing as a former employee. 670 F.2d at 1385 n.13. These cases are inapposite because the employees given standing were within the area of the economy threatened by the anticompetitive result of the antitrust violation. In *Dailey*, a sales agent alleged a job loss as a result of the monopolistic acquisition of his employer. The court noted that as a



The court concluded that the disadvantages to allowing suit were minimal. Suits by employees discharged for refusing to commit antitrust violations are not so numerous as to cause a flood of litigation or impose ruinous financial burdens on defendants.<sup>44</sup> The court found that damages would be neither speculative nor difficult to calculate and that recovery would not be duplicative.<sup>45</sup> Furthermore, the penalty was not unfairly imposed because the conduct was clearly illegal.<sup>46</sup> Finally, allowing suit would satisfy the remedial purposes of the antitrust laws.<sup>47</sup>

After concluding that the policies weighed sharply in favor of granting standing, the Ninth Circuit attempted to reconcile its holding with *Brunswick*. *Brunswick* could be read as limiting section 4 suits to injuries caused by the anticompetitive effects of the particular antitrust violation.<sup>48</sup> This interpretation would prevent suits by employees injured by unilateral conduct of an employer acting in furtherance of the conspiracy.<sup>49</sup> The *Ostrofe* court rejected this construction.<sup>50</sup>

The plaintiff in *Brunswick* alleged injuries as a result of an antitrust vio-

commission sales agent with a distinct business interest in his sales territory, the plaintiff had a sufficient business or property interest under § 4 of the Clayton Act. The court distinguished the plaintiff's claim from cases where the business or property is that of the corporation and the claim asserted by the employee is derivative. Under the target area test, the plaintiff was "within the sector of the economy in which the violation threatened a breakdown of competitive conditions." 380 F.2d at 487. The fallacy in the majority's reliance on *Nichols* has been discussed. See note 33 and accompanying text *supra*.

44. 670 F.2d at 1385. *But cf.* note 19 *supra* (risk of duplicative recovery).

45. *Id.* Under treble damage recovery, only one-third of the award is compensatory. The remaining two-thirds are more punitive than remedial. Allowing discharged employees to recover would be redundant in that the punitive portion of the treble damage award would be duplicated in suits brought by competitors and consumers more directly injured by the antitrust violation. See Parker, *supra* note 41, at 287-88.

46. 670 F.2d at 1385. The majority failed to distinguish between the defendant's price fixing and the separate act of discharging the recalcitrant employee. Nevertheless, allowing actions for wrongful discharge would more fairly penalize the employer. See notes 130-33 and accompanying text *infra*.

47. *Id.* at 1386. Congress did not give standing to every citizen who, motivated by public spirit or possibly some baser reason, would set himself up as a watchdog of business behavior. *SCM Corp. v. Radio Corp. of Am.*, 407 F.2d 166, 171 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969). Allowing remote plaintiffs to recover treble damages under § 4 of the Clayton Act is a windfall. See *Calderone Enters. Corp. v. United States Theatre Circuit*, 454 F.2d 1292, 1295-96 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Wilson v. Ringsby Truck Lines*, 320 F. Supp. 699, 701 (D. Colo. 1970); *Snow Crest Beverages v. Recipe Foods*, 147 F. Supp. 907, 909 (D. Mass. 1956); *Harrison v. Paramount Pictures*, 115 F. Supp. 312, 317 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954); Note, *Antitrust—Treble Damage Actions—Private Litigant Whose Injury Was Reasonably Foreseeable Has Standing to Sue*, 24 VAND. L. REV. 803, 807 (1971). *But cf.* Tyler, *supra* note 19, at 289 ("[A]ll recoveries by plaintiffs in antitrust actions are windfalls because damages are trebled. The windfall is no greater because the plaintiff was injured only peripherally, rather than directly.").

48. See text accompanying notes 10-16 *supra*.

49. 670 F.2d at 1387. The majority acknowledged that similar language appears in lower court decisions. Judge Kennedy pointed out that two of the three cases footnoted by the majority for this proposition are Ninth Circuit opinions squarely contrary to the majority's theory. *Id.* at 1390 n.2 (Kennedy, J., dissenting); see generally Calvani, *The Mushrooming Brunswick Defense: Injury to Competition, Not to Plaintiff*, 50 ANTITRUST L.J. 319, 324-33 (1981).

50. 670 F.2d at 1387. *But see id.* at 1389 (Kennedy, J., dissenting).

lation affecting competition; however, the claim was not based upon injury stemming from conduct in furtherance of the antitrust violation.<sup>51</sup> The *Ostrofe* court stated that the controlling factor in both situations is congressional intent.<sup>52</sup> In a *Brunswick*-type violation, the congressional concern is with competitive conditions in the product market, so standing is limited to competitors and consumers directly injured by the breakdown in competition. Nevertheless, Congress is also concerned with the conduct of individuals acting on behalf of antitrust conspirators. This concern is evidenced by the imposition of criminal liability on the individuals effectuating the conspiracy.<sup>53</sup> The *Ostrofe* court reasoned that in retaliatory discharge cases the employee is injured as a result of his efforts to comply with the Sherman Act.<sup>54</sup> Thus *Ostrofe* suffered an "antitrust injury . . . of the type the antitrust laws were intended to prevent."<sup>55</sup> The court also noted that *Ostrofe's* injury did not result from increased competition, as was the case in *Brunswick*. *Ostrofe's* injury resulted from a conspirator's efforts to realize an anticompetitive purpose.<sup>56</sup> Finally, the *Ostrofe* court concluded that the discharged employee's injury was intimately related to the circumstances that made the conspirator's conduct unlawful.<sup>57</sup>

District courts in the Third Circuit have failed to agree on whether employees claiming retaliatory discharge have standing. In a case of first impression, the District Court for the Eastern District of Pennsylvania, in *McNulty v. Borden, Inc.*, (*McNulty I*)<sup>58</sup> denied the defendant's motion to dismiss a suit brought by an employee claiming that he was discharged when he complained of his company's discriminatory pricing practices.<sup>59</sup> The court found that the loss of employment was an injury to business or property,<sup>60</sup> that the loss was caused by reason of an antitrust violation, and that granting standing was consistent with congressional purposes for enacting section 4.<sup>61</sup> The court emphasized that Congress intended section 4 to be available to the people, and that deterrence is an important goal of the antitrust laws.<sup>62</sup>

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51. The majority footnoted three cases in which plaintiffs injured by conduct in furtherance of an unlawful restraint rather than its ultimate effect may have standing. 670 F.2d at 1387 n.25. The dissent pointed out, however, that standing in these cases has been allowed only where the injury suffered was the same type of injury as would result from the ultimate effect of the violation. *Id.* at 1391 (Kennedy, J., dissenting).

52. 670 F.2d at 1387.

53. *Id.* at 1387-88; see *United States v. Wise*, 370 U.S. 405 (1962); note 41 *supra*.

54. 670 F.2d at 1388.

55. *Id.*

56. *Id.* Nevertheless, the injury did not occur within the area of the economy threatened by the anticompetitive purpose. See notes 77-83 and accompanying text *infra*.

57. 670 F.2d at 1388 (citing Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 COLUM. L. REV. 979, 990 (1977)).

58. 474 F. Supp. 1111 (E.D. Pa. 1979), *modified*, 542 F. Supp. 655 (E.D. Pa. 1982).

59. *Id.* at 1113-14; see Robinson-Patman Act, § 2, 15 U.S.C. § 13(a) (1982).

60. 474 F. Supp. at 1116-17. The court reasoned that an employee who loses his job is injured in his property; job loss is so closely analogous to the interest invaded by damage to one's business that the two are indistinguishable. The plaintiff also alleged loss of bonus compensation as a result of diminished sales in his territory due to the alleged violation. *Id.* at 1117-18.

61. *Id.*

62. *Id.* at 1118. *But see* note 47 *supra*.

Three years later, in *Callahan v. Scott Paper Co.*,<sup>63</sup> the Eastern District reversed its position. Two former employees of the defendant alleged that they were fired for objecting to Scott's violation of the antitrust laws.<sup>64</sup> While recognizing that the injury was easily proved and that policy arguments supported granting the plaintiffs standing, the court granted the defendant's motion to dismiss.<sup>65</sup> The court found that there was no reason to engage in a policy debate because the antitrust laws were not designed to prevent the injury suffered by the plaintiffs.<sup>66</sup> Moreover, the plaintiffs were not injured because Scott violated the antitrust laws, but because they complained of the infraction. The *Callahan* court rejected *Ostrofe's* interpretation of *Brunswick*.<sup>67</sup> Rather than focusing on the congressional concerns underlying the substantive antitrust law allegedly violated, the court looked at whether the plaintiffs' damages were caused by the anticompetitive effect of the violation alleged.<sup>68</sup>

In *Shaw v. Russell Trucking Line*,<sup>69</sup> the Western District of Pennsylvania followed *Ostrofe's* policy approach. The plaintiff alleged that he was discharged from his position as a truck driver because he refused to transport overloaded trucks and threatened to alert law enforcement authorities of the practice.<sup>70</sup> The court held that the plaintiff's relationship with the defendants was immediate rather than indirect, and that the plaintiff's injury flowed directly from the alleged antitrust violation.<sup>71</sup> Citing *Ostrofe*, the *Shaw* court stated that the policies behind section 4 favored suits by discharged employees,<sup>72</sup> and denied the motion to dismiss the antitrust claim for lack of standing.<sup>73</sup>

In *Bichan*, the Seventh Circuit rejected the employee's position accepted in *Ostrofe* and *Shaw*. Robert Bichan brought a private treble damage action against his former employer, Chemetron, and other corporations in the indus-

63. 541 F. Supp. 550 (E.D. Pa. 1982).

64. The plaintiffs also alleged that their employer's unlawful practices caused them to suffer economic injury in the form of reduced bonuses and reduced opportunities for advancement. *Id.* at 553. The court denied standing, finding that: the employees' injuries were derivative of injuries suffered by non-favored consumers; the illegal acts were not aimed at the plaintiffs, and the damages alleged were conjectural. *Id.* at 557-60.

65. *Id.* at 560-61.

66. *Id.* at 560.

67. The court distinguished *Ostrofe* as involving a group boycott against an employee by all firms in the industry. *Id.* at 561. *But see* note 32 *supra* (Ninth Circuit rejected this characterization of *Ostrofe's* claim).

68. *Id.* *Callahan* was followed in *McNulty v. Borden, Inc.*, 542 F. Supp. 655 (E.D. Pa. 1982) (*McNulty II*) (overruling *McNulty I* as "unsupported by case law"), and *Booth v. Radio Shack Div.*, 1982-83 Trade Cas. (CCH) ¶ 65,001 (E.D. Pa. Jan. 28, 1982).

69. 542 F. Supp. 776 (W.D. Pa. 1982).

70. *Id.* The plaintiff alleged two related conspiracies: one to restrain trade and one to discharge him. Although the second conspiracy was not actionable under the antitrust laws, the plaintiff was granted standing to challenge his discharge as an act in furtherance of the restraint of trade. *Id.* at 780 n.5.

71. *Id.* at 780-81.

72. *Id.* at 780.

73. *Id.* at 781.

trial gas industry. He alleged that a conspiracy existed to fix prices, impose conditions of sales, and allocate customers.<sup>74</sup> Bichan claimed that he was fired from his position as president of Chemetron's Industrial Gas Division and blacklisted by the industry because he refused to adhere to these illegal practices. The district court dismissed the complaint.<sup>75</sup> The Seventh Circuit affirmed on the grounds that Bichan did not suffer an "antitrust injury," and that he was not the "proper party" to bring a treble damage action.<sup>76</sup>

Initially, the court of appeals noted that the plaintiff's injury was not directly caused by the anticompetitive effect of the antitrust violation.<sup>77</sup> Bichan's claim was distinguished from cases in which antitrust conspiracies are intended to restrict competitive conditions in the labor market, and cases where the injuries, restriction, or loss of employment are directly related to anticompetitive restraints.<sup>78</sup> The conspiracy in *Bichan* was aimed at competitors within the industry, and the direct injury of this anticompetitive conduct was limited to competitors and consumers.<sup>79</sup> Citing *Brunswick*, the court noted that standing did not exist merely because Bichan's injury was caused "by reason of" the antitrust conspiracy.<sup>80</sup> Applying the "target area" test for section 4 standing,<sup>81</sup> the court focused on the area affected by the defendant's anticompetitive conduct.<sup>82</sup> Because his injury did not flow from a lessening of competition, Bichan was not within the target area of the antitrust violation and did not suffer an "antitrust injury."<sup>83</sup>

74. 681 F.2d at 515.

75. Bichan v. Chemetron Corp., 1981-82 Trade Cas. (CCH) ¶ 64, 293, at 74,347-50 (N.D. Ill. Aug. 31, 1981), *aff'd*, 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983). The district court held that Bichan did not suffer an "antitrust injury" because he failed to establish that his loss of employment resulted from decreased competition. Moreover, he lacked standing because he was not a "target" of the anticompetitive conduct. *Id.*

76. 681 F.2d at 515-20.

77. *Id.* at 518.

78. *Id.* at 517; see *Radovich v. National Football League*, 352 U.S. 445 (1957); *Nichols v. Spencer Int'l Press*, 371 F.2d 331 (7th Cir. 1967); see also *Flood v. Kuhn*, 407 U.S. 258 (1972); *Anderson v. Shipowners Assoc.*, 272 U.S. 359 (1926); *Quinonez v. National Assoc. of Sec. Dealers, Inc.*, 540 F.2d 824 (5th Cir. 1976); *Union Circulation Co. v. FTC*, 241 F.2d 652 (2d Cir. 1957); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975). The Seventh Circuit also rejected Bichan's argument that *McNulty v. Borden, Inc. (McNulty I)*, 474 F. Supp. 1111 (E.D. Pa. 1979) supported the antitrust injury claim. In *McNulty I*, the plaintiff alleged that he was discharged for his refusal to commit an antitrust violation, and the court granted standing. *Id.* at 1118. The Seventh Circuit stated that *McNulty I* was based on "faulty reasoning." 681 F.2d at 517-18. The Eastern District of Pennsylvania has since reversed its position. See notes 63-68 and accompanying text *supra*.

79. Only consumers and competitors directly injured by the anticompetitive conduct of an antitrust violation have standing under § 4. See notes 113-20 and accompanying text *infra*.

80. 681 F.2d at 518-19.

81. The target area doctrine was first announced 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). The phrase "target area" was coined in *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 364-65 (9th Cir. 1955).

82. 681 F.2d at 518.

83. *Id.* at 518-19; see also *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 271 (5th Cir. 1979) (recovery available only to those injured by the lessening of competition that the antitrust laws were enacted to prevent); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970) (section 4 "by reason of" causation requirement must "link a specific form of illegal act to a plaintiff engaged in the sort of legitimate activities which the prohibition of this

The Seventh Circuit also held that antitrust injury is not the sole determinant of whether a plaintiff may maintain a treble damage suit.<sup>84</sup> Even if Bichan had proven an antitrust injury, he was not the proper party to bring a treble damage action.<sup>85</sup> While phrasing the discussion in terms of remoteness, the court expressed a desire to keep complex antitrust trials within judicially manageable limits. Allowing recovery to anyone injured by reason of an antitrust violation would flood the courts with litigation.<sup>86</sup> The court limited standing to those plaintiffs capable of efficiently enforcing the antitrust laws.<sup>87</sup> While noting that deterrence and redress are important, the Seventh Circuit recognized that these policies must be balanced against the need to avoid excessive treble damage litigation. The balance is achieved by granting standing only to consumers or competitors who suffer immediate injuries, excluding persons whose injuries are more indirectly caused by the unlawful conduct.<sup>88</sup>

*Bichan* is consistent with the Supreme Court's current view of section 4's limitations, as expressed in *Associated General Contractors, Inc. v. California State Council of Carpenters*.<sup>89</sup> In *Associated General*, the plaintiffs and defendants were parties to collective bargaining agreements in construction-related industries.<sup>90</sup> The named plaintiffs (Unions) represented 50,000 individuals employed by the defendants.<sup>91</sup> One of the defendants, Associated General Contractors of California, Inc. (Associated), was a multiemployer association composed of building and construction contractors.<sup>92</sup> The Unions alleged that Associated and its members had coerced third parties<sup>93</sup> and some of Associated's members to hire contractors and subcontractors who were not signatories to collective bargaining agreements with the Unions. The Unions claimed that Associated's actions adversely affected the trade of unionized firms, restraining the Unions' business activities.

The Unions brought a treble damage action alleging that Associated violated section 1 of the Sherman Act.<sup>94</sup> The district court dismissed the claim,<sup>95</sup>

type of violation was clearly intended to protect"), *cert. denied*, 401 U.S. 923 (1971).

84. 681 F.2d at 519.

85. *Id.*

86. *Id.*; see *Calderone Enters. Corp. v. United Artists Theatre Circuit*, 454 F.2d 1292, 1295 (2d Cir. 1971) (dangers of expanding standing), *cert. denied*, 406 U.S. 930 (1972); Lytle & Purdue, *supra* note 19, at 801 (same).

87. See text accompanying notes 17-21 *supra*.

88. 681 F.2d at 520.

89. 103 S. Ct. 897 (1983).

90. *Id.* at 900.

91. The two unions filed a class action claim on their own behalf and on behalf of their affiliated local unions and district councils. See *California State Council of Carpenters v. Associated Gen. Contractors, Inc.*, 404 F. Supp. 1067 (N.D. Cal. 1975), *rev'd*, 648 F.2d 527, 540-41 (9th Cir. 1980), *rev'd*, 103 S. Ct. 897 (1983); see generally P. AREEDA, *ANTITRUST ANALYSIS* 87-90 (3d ed. 1981); 7 & 7A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1751-1803 (1972 & Supp. 1983) (procedural aspects of antitrust class actions).

92. Associated, its individual members, and 1,000 unidentified co-conspirators were named as defendants. 103 S. Ct. at 900.

93. The third parties were identified as owners of land and others who let construction contracts. *Id.*

94. 15 U.S.C. § 1 (1982); see note 17 *supra*.

and the Ninth Circuit reversed.<sup>96</sup> The court of appeals held that: (1) the Unions alleged a group boycott in violation of the Sherman Act; (2) Associated's conduct was not within the antitrust exemption for labor activities; and (3) the Unions had standing to recover damages for injuries to their business activities caused by defendants' "industry-wide boycott against all subcontractors with whom the Unions had signed agreements."<sup>97</sup> The court reasoned that the Unions were within the area of the economy endangered by the breakdown of competitive conditions because the injuries were a foreseeable consequence of the antitrust violation and were specifically intended by the defendants.<sup>98</sup>

The Supreme Court reversed and held that the Unions did not have standing.<sup>99</sup> Assuming that the defendants' conduct violated the antitrust laws, the Court stated that it did not necessarily follow that the Unions were injured by a violation of the antitrust laws within the meaning of section 4.<sup>100</sup>

Initially, the Court examined the scope of section 4. If read literally, the statute would be "broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation."<sup>101</sup> The Court rejected this interpretation as contrary to congressional intent,<sup>102</sup>

95. *California State Council of Carpenters v. Associated Gen. Contractors, Inc.*, 404 F. Supp. 1067, 1070 (N.D. Cal. 1975), *rev'd*, 648 F.2d 527 (9th Cir. 1980), *rev'd*, 103 S. Ct. 897 (1983). The district court characterized the unions' claim as alleging that the defendants "violated the antitrust laws insofar as they declined to enter into agreements with plaintiffs." The court reasoned that the employers' refusal to enter into such agreements could not support an antitrust claim. *Id.*

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

97. *Id.* at 531-39.

98. *Id.* at 537-38.

99. 103 S. Ct. at 913.

100. *Id.* at 904.

101. *Id.*

102. *Id.* at 904-07. The Court acknowledged that prior cases had paraphrased the statute in an expansive way. For example:

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

*Mandeville Island Farms v. Sugar Co.*, 334 U.S. 219, 236 (1948) (citations omitted); *see also Blue Shield v. McCready*, 457 U.S. 465, 473 (1982) (absent "some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, we have applied § 4 in accordance with its plain language and its broad remedial and deterrent objectives"); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979) (in rejecting the argument that the § 4 remedy is available only to redress injury to commercial interest, the Court afforded "property" its "naturally broad and inclusive meaning," and held consumers have a § 4 remedy reflecting the increase in the purchase price of goods attributable to a price fixing conspiracy); *Pfizer Inc. v. India*, 434 U.S. 308, 312-15 (1978) (afforded the statutory phrase "any person" its "naturally broad and inclusive meaning," and extended it to include foreign sovereigns).

In *Associated General*, however, the Court noted that in these cases the "plaintiff was directly harmed by the defendants' unlawful conduct. The paraphrasing of the language of § 4 in those opinions added nothing to the even broader language that the statute itself contains." 103 S. Ct. at 904 n.19. *But cf. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961) (per curiam) (to state a claim under § 1 of the Sherman Act, "allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires"); *Radovich v. National Football League*, 352 U.S. 445, 454 (1957) ("[T]his

for Congress intended antitrust damages litigation to be subject to constraints analogous to accepted common law rules.<sup>103</sup> Early federal cases interpreting section 7 of the Sherman Act,<sup>104</sup> the forerunner of section 4 of the Clayton Act, had applied common law principles to restrict the literal meaning of the treble damages remedy.<sup>105</sup> When Congress enacted section 4 of the Clayton Act in 1914 and 1955, it adopted the language of section 7 and the judicial gloss that avoided a literal interpretation.<sup>106</sup> The Court noted that virtually all lower courts had concluded that Congress did not intend to provide an antitrust remedy for all injuries that might conceivably be traced to an antitrust violation.<sup>107</sup> Thus, the decision to grant standing could be determined only by examining the "plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them."<sup>108</sup>

The Court acknowledged the struggle to articulate tests for determining standing in antitrust treble damage actions.<sup>109</sup> Although it was impossible to announce a rule that would decide standing in every case, the Court set forth a framework for analyzing the factors that determine the appropriateness of granting standing. Two factors favored recognizing the Unions' claims: the plaintiffs alleged a causal connection between the antitrust violation and their

court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress.").

103. 103 S. Ct. at 905; *see* 21 CONG. REC. 2456 (1890) (remarks of Sen. Sherman) (bill "does not announce a new principle of law, but applies only well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government"); 21 CONG. REC. 3151-52 (1890) (remarks of Sen. Hoar) (courts will apply the common law meaning of the term "monopoly" to determine its legal significance).

104. Ch. 647, § 7, 26 Stat. 209, 210 (1890) (codified as amended at 15 U.S.C. § 15 (1982)). Section 7 was superseded by § 4 of the Clayton Act in 1914, which provided for private actions under all the antitrust laws. Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 15 (1982)). Section 7 was repealed in 1955. Act of July 7, 1955, ch. 283, § 3, 69 Stat. 282, 283. The treble damage provision in § 7 of the Sherman Act was not substantially changed by § 4 of the Clayton Act, which was reenacted in 1955. 69 Stat. 282.

105. 103 S. Ct. at 905-06. The Court reasoned that just as § 1 has not been interpreted literally, neither should § 7. "[Section] 1 of the Sherman Act . . . says that 'every' contract that restrains trade is unlawful. . . . [R]ead literally, § 1 would outlaw the entire body of private contract law. . . . Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations." *Id.* (quoting National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687-88 (1978)). The Court recognized the evolving nature of common law and stated that limitations on recoveries which existed in 1890 were not intended to be permanent. Nevertheless, legislators recognizing the role of common law could not have intended § 7 to be construed literally. 103 S. Ct. at 906 n.28.

106. 103 S. Ct. at 907; *see* *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1919) (denied § 7 treble damage recovery to creditor and stockholder of a corporation that was injured by a violation of the antitrust laws because the plaintiff's injury was "indirect, remote, and consequential"). In *Loeb*, the court noted that prior to the passage of § 7, the remedy for such an injury resided solely in the corporation. The court reasoned that despite § 7's comprehensive nature, it was passed "with full knowledge of existing law in that respect." *Id.*; *see also* *Ames v. American Tel. & Tel. Co.*, 166 F. 820, 822-23 (D. Mass. 1909) (applied "ordinary principles of law" and held that stockholder did not have standing against defendants for illegally acquiring the corporation and rendering plaintiff's stock worthless).

107. 103 S. Ct. at 907 (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972)).

108. *Id.*

109. *Id.*; *see* note 22 *supra*.

injury, and that the defendants intended to cause that injury.<sup>110</sup> Nevertheless, the Court observed that merely because the claim literally fell within section 4, it did not follow that standing was warranted.<sup>111</sup> Nor was the remedy a question of the specific intent of the conspirators.<sup>112</sup>

Other factors supported denying the Unions' treble damage action. Focusing on the nature of the alleged injury,<sup>113</sup> the Court found that the injury must be the type that the antitrust statute was intended to prevent.<sup>114</sup> After noting that the purpose of the Sherman Act is to assure customers the benefit of price competition and protect the economic freedom of competitors in the marketplace,<sup>115</sup> the Court held that the Unions were neither consumers nor competitors in the market in which trade was restrained.<sup>116</sup> Further, the Unions' goal of benefiting their members was not necessarily served by the uninhibited competition in the labor market.<sup>117</sup> Therefore, the antitrust laws were not designed to protect the Unions from the injury alleged.

The Court also found that it was appropriate to consider the "directness or indirectness of the asserted injury" as a standing factor.<sup>118</sup> The Unions alleged that the defendants had coerced third parties to divert business to non-union contractors. The Court reasoned that the Unions' harm was only an indirect result of whatever harm may have been suffered by the union contractors.<sup>119</sup> Because the Unions' injuries were indirect and may have been caused by other independent factors, the Court found the Unions' claims to be highly speculative.<sup>120</sup> As another factor weighing against standing, the Court noted that denying the Unions standing would not leave the antitrust violation unchecked. Parties injured more directly could sue to protect the public interest

110. 103 S. Ct. at 908.

111. *Id.*; see notes 101-06 and accompanying text *supra*.

112. 103 S. Ct. at 908. While proof of improper motive may support a plaintiff's treble damage claim in a particular factual situation, by itself it will not always be sufficient to withstand a motion to dismiss. *Id.* at 908 nn.35 & 36. On the other hand, the absence of a specific intent to harm the plaintiff will not necessarily render an injury too remote. *Id.* n.37; see *Blue Shield v. McCreedy*, 457 U.S. 465, 485 (1982) (granted standing to a consumer injured by a group boycott despite the defendants' claim that they merely intended to eliminate competitors from the market).

113. 103 S. Ct. at 908.

114. *Id.* at 910 (citing *Brunswick*, 429 U.S. at 487-88).

115. *Id.* at 908-09; see *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 619 (1972).

116. 103 S. Ct. at 909. The Court also found that the plaintiffs had failed to allege effects throughout "an entire competitive market," because the conduct was directed only at certain parties. *Id.* n.40.

117. The union's goal of increased wages and improved working conditions for its members is not necessarily served by uninhibited competition among employers to reduce costs and obtain a competitive advantage in the marketplace. This fact is recognized by exempting certain labor activities from the antitrust laws and by federal laws designed to protect labor unions. In light of this background, "a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains." *Id.* at 910.

118. *Id.*

119. *Id.* Because the complaint failed to specifically allege an injury, the Court was left to hypothesize, and reject as indirect, the plaintiffs' injuries. *Id.* n.46.

120. *Id.* at 911.



served by the enforcement of the antitrust laws.<sup>121</sup>

Finally, the Court felt that it was important to keep the scope of complex antitrust trials within judicially manageable limits.<sup>122</sup> The Court noted that prior cases have stressed the need to avoid duplicative recoveries<sup>123</sup> and complex apportionment of damages.<sup>124</sup> These factors weighed "heavily" against recognizing the Unions' antitrust claim.<sup>125</sup>

*Associated General* clarified the standards under section 4 of the Clayton Act.<sup>126</sup> The case signals a clear rejection of the mechanical tests the lower courts have used to determine standing.<sup>127</sup> While the Seventh Circuit can be faulted for such an approach in *Bichan*, the Ninth Circuit properly foresaw the demise of these outmoded tests in *Ostrofe*. Future decisions should use a case-by-case analysis based upon the *Associated General* criteria.<sup>128</sup> The amorphous distinction between antitrust injury and antitrust standing should diminish in importance.<sup>129</sup>

*Bichan* properly recognized that while the claims of employees discharged for refusing to participate in antitrust violations may be linked to anticompetitive conduct, their injuries are beyond the scope of section 4. In the past, the analysis has fallen under the rubric of "antitrust injury." The court also recognized that conduct is more efficiently challenged by directly injured parties, like competitors and consumers, a concept labeled in *Bichan* as "antitrust standing." Notwithstanding the questionable validity of these labels after *Associated General*, the court's conclusion is correct.

121. *Id.* Nevertheless, the Court questioned whether there were any direct victims of the alleged anticompetitive conduct. *Id.* n.47.

122. *Id.*

123. *Id.*; see, e.g., *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (denying recovery to indirect purchasers in price-fixing conspiracy case); see also notes 17-21 and accompanying text *supra*.

124. 103 S. Ct. at 912; see *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 493 (1968) (denying defendant's request to discount the plaintiffs' damages claim to the extent that overcharges had been passed on to the plaintiffs' customers).

125. 103 S. Ct. at 913.

126. See *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1084, 1086 n.9 (6th Cir. 1983) (*Associated General* "removed all doubt as to the relevant inquiries to be implemented by federal courts confronting the perimeters of § 4," although it is not clear whether the factors listed in the case are exhaustive).

127. The Sixth Circuit has renounced the zone of interest test in favor of *Associated General's* criteria. See *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 293 (6th Cir. 1983); *Southaven*, 715 F.2d at 1086. The Ninth Circuit, however, still uses the target area test to determine whether § 4's "by reason of" requirement is satisfied. If no clear answer emerges from the test, standing is determined by balancing the policy interests identified in *Associated General*. *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983). The Eleventh Circuit continues to use the target area test. *Construction Aggregate Transp. v. Florida Rock Indus.*, 710 F.2d 752, 762-66 (11th Cir. 1983).

128. See, e.g., *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1373-74 (8th Cir. 1983); *Mericam, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 965 (3d Cir. 1983); *Indium Corp. of Am. v. Semi-Alloys, Inc.*, 566 F. Supp. 1344, 1351 n.4 (N.D.N.Y. 1983).

129. See Note, *Standing of the Terminated Employee Under Section 4 of the Clayton Act*, 25 WM. & MARY L. REV. 341, 351 (1983) (the distinction between antitrust injury and standing is merely a semantic trap).

While antitrust standing doctrine should not be expanded to allow discharged employees to recover treble damages, redress for the employee's injury is compelling under other legal theories. A growing number of jurisdictions have recognized public policy limitations on the traditional employment at will doctrine.<sup>130</sup> Some courts have imposed an implied contractual duty on the part of the employer not to terminate employees for motives regarded as violative of public policy.<sup>131</sup> Another exception to the at will rule has been recognized by many courts in suits of a tort nature for retaliatory discharge.<sup>132</sup> Suits by employees under wrongful discharge theories have been more successful than claims based on section 4.<sup>133</sup> Expanding contract and tort theories to allow suits for wrongful discharge would achieve the policy benefits noted by the Ninth Circuit in *Ostrofe* as rationales for antitrust standing. These benefits would not accrue at the expense of distorting the congressional intent to limit the private treble damage remedy.

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130. See generally Bakely, *Erosion of the Employment At-Will Doctrine*, 8 J. CONT. L. 63 (1982); Heinsz, *The Assault on the Employment at Will Doctrine: Management Considerations*, 48 MO. L. REV. 855 (1983); Madison, *The Employee's Emerging Right to Sue for Arbitrary or Unfair Discharge*, 6 EMPLOYEE REL. L.J. 422 (1981); Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REF. 277 (1983).

131. See, e.g., *Petermann v. Int'l Bhd. of Teamsters*, 174 Cal. App. 2d 184, 188-89, 344 P.2d 25, 27-28 (1959) (refusal to commit perjury); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 453-54, 168 Cal. Rptr. 722, 729 (1980) (engaging in union organizing activities).

132. See, e.g., *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 184-85, 384 N.E.2d 353, 358-59 (1978) (filing workmen's compensation claim); *Trombetta v. Detroit, T. & I. Ry.*, 81 Mich. App. 489, 496, 265 N.W.2d 385, 388 (1978) (refusal to alter pollution control reports); *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 417, 390 A.2d 149, 150 (1978) (x-ray technician refused to perform catheterizations in violation of state law); *Nees v. Hocks*, 272 Or. 210, 219, 536 P.2d 512, 515 (1975) (taking leave for jury service); *Harless v. First Nat'l Bank*, 246 S.E.2d 270, 275 (W. Va. 1978) (bank employee dismissed for informing employer of bank's failure to comply with state and federal consumer credit protection laws). Other courts have shown a willingness to allow recovery if the discharged employee can show malicious intent by the employer. See *Sheets v. Teddy's Frosted Foods*, 179 Conn. 471, 473, 427 A.2d 385, 389 (1980) (retaliation for employee's insistence that employer comply with food and drug law).

133. See *Shaw v. Russell Trucking Line*, 542 F. Supp. 776, 779-80 (W.D. Pa. 1982) (dismissing treble damage action but allowing wrongful discharge cause of action under Pennsylvania law); *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387, 1387-88 (S.D. Ind. 1982) (employee discharged for refusing to violate § 1 of Sherman Act does not have treble damage action standing but does have action under Indiana law for wrongful discharge); *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1118-20 (E.D. Pa. 1979) (employee discharged for refusing to violate antitrust laws has wrongful discharge action under Pennsylvania contract law). In *Ostrofe*, the dissent argued that under California law *Ostrofe* had contract and tort causes of action for wrongful discharge. 670 F.2d at 1392 (Kennedy, J., dissenting); see also *Parnar v. Americana Hotels*, 65 Hawaii 370, 652 P.2d 625 (1982) (wrongful discharge action allowed employee whose employer induced her to leave the jurisdiction to prevent her from testifying before a grand jury investigating antitrust violations); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 171, 610 P.2d 1330, 1332, 164 Cal. Rptr. 839, 841 (1980) (wrongful discharge action allowed against employer by former retail sales representative who alleged he was discharged for refusing to participate in an illegal price fixing scheme). But cf. *Callahan v. Scott Paper Co.*, 541 F. Supp. 550, 561-63 (E.D. Pa. 1982) (no cause of action under Pennsylvania law for employee alleging wrongful discharge based on refusal to commit antitrust violation).