Standing To Sue in Private Antitrust Litigation: Circuits in Conflict

I. Introduction

Few areas of the law have received such diverse treatment among the federal courts as that of standing to sue in private antitrust litigation. This continues to occur despite the manifestly unequivocal language of section 4 of the Clayton Act[1] which provides in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained . . . ."[2]

Notwithstanding the broad language of the Act, the federal courts have developed various tests under which a claimant must fit before he will be allowed to maintain a suit against an alleged antitrust violator.[3] These tests are based on the proximity of the claimant's injury to the alleged violation; therefore, standing is denied if the injury is too remote.

Although much has been written about the various approaches to standing, as well as the recommended interpretations of the Clayton Act,[4] very little has been written about the differing views that each of the eleven federal circuits has developed concerning the standing question, and more importantly, about the serious effects of these variations.

This Note will first briefly examine the various tests used in determining standing; then an analysis of each circuit's approach to the area will follow; and finally, the consequences of this incongruity will be explored in light of the liberal venue and jurisdictional provisions of the Clayton Act.

II. The Tests

Several dichotomies account for the varying degrees of limitation the courts have used in interpreting and applying the Clayton Act;

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[1] 15 U.S.C. §§ 12-27 (1970).

[2] *Id.* § 15.

[3] See notes 14-20 *infra* and accompanying text.

[4] *See, e.g.*, Alioto & Donnici, *Standing Requirements for Anti-Trust Plaintiffs: Judicially Created Exceptions to a Clear Statutory Policy*, 4 U.S.F.L. Rev. 205 (1970); Beane, *Antitrust: Standing and Passing On*, 26 Baylor L. Rev. 331 (1974); Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 Colum. L. Rev. 570 (1964).

the first is functional in nature and the others are judicially and statutorily induced.

Operationally, there exists the need for enforcement of the antitrust laws on the one hand, with the need to prevent spurious claims, "windfall recoveries," and the imposition upon businessmen of "liabilities of indefinable scope,"[5] existing on the other (the latter needs emerge primarily from the treble damage provision of the Act). A second dichotomy stems from the broad language of the Act itself, which allows "any person" receiving injury to his business or property from an antitrust violation to maintain a suit, contrasted with the first major judicial decision interpreting and applying the Act[6] which denied the plaintiff standing because he "did not receive any *direct injury* from the alleged illegal acts of the defendant."[7]

A final cause of the variance in approaching the standing issue emanates from the diverse treatment and significance which the lower courts have chosen to assign to the Supreme Court's dicta pertaining to the antitrust laws. For example, many courts[8] adhering to a nonrestrictive view of standing cite *Radovich v. National Football League*[9] in which the Court, referring to the Clayton Act said, "[T]his Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."[10] In marked contrast, courts[11] espousing a restrictive approach to standing often refer to the Supreme Court's decision in *Hawaii v. Standard Oil Co.*[12] in which the Court said, "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."[13]

The many and diverse tests presently being used to determine a potential litigant's right to sue reflect the lower courts' attempts to resolve the standing issue in the face of the diametrically opposed

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[5]Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956).

[6]Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910). A shareholder was denied standing to sue a competitor of the company in which he had an interest.

[7]*Id.* at 709 (emphasis added).

[8]*See, e.g.*, Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 699, 703 (D. Colo. 1970). This case allowed several employees to bring suit against their employer for alleged antitrust violations which resulted in a diminution of their wages and other compensation.

[9]352 U.S. 445 (1957).

[10]*Id.* at 454.

[11]*See, e.g.*, Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313, 316 (5th Cir. 1976).

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

[13]*Id.* at 263 n.14.

standards of policy and precedent suggested above. Currently, there are no less than seven approaches to standing, each of which differs from the others only in the degree of remoteness from the violation allowed the claimant. Listed functionally from the most restrictive to the least restrictive, they appear as follows: the "direct injury" approach,[14] the "target area" approach,[15] the "*Karseal* target area" approach,[16] the "proximate target area" approach,[17] the "foreseeable target area" approach,[18] the "zone of interest" approach,[19] and the "unrestricted" approach.[20]

Any appreciable differences between many of the above tests are largely semantic. It is for this reason that an adequate and meaningful analysis of each circuit's approach to standing cannot center around merely defining the above terms and then assigning one approach to each circuit. This is not to say that we cannot gain a general knowledge of the limitations that a certain court will utilize in interpreting section 4 of the Clayton Act by this "labelling" technique, but it is only to suggest that the most profitable determination of each circuit's approach to standing will most likely be made by analyzing the relevant cases of that particular circuit, focusing on the relationship between the parties involved as well as the generic approach emphasized by the particular court.

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[14]*See* Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910). Plaintiff was denied standing because he "did not receive any direct injury from the alleged illegal acts of the defendant." *Id.* at 709.

[15]*See* Conference of Studio Unions v. Loew's Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). In order to obtain standing a claimant "must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Id.* at 54-55.

[16]*See* Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955). "Turning now to the cases concerning the 'target area' . . . the rule is that one who is only *incidentally* injured by a violation of the antitrust laws,—the bystander who was hit but not aimed at,—cannot recover against the violator." *Id.* at 363.

[17]*See* South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966). "If a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby, then he has standing to sue under section 4." *Id.* at 418.

[18]*See* Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964). In order to recover under section 4 "the plaintiff must show that . . . plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy." *Id.* at 220.

[19]*See* Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975). The test requires that the plaintiff suffer injury in fact and that he be within the zone of interests to be protected by the statute in question.

[20]*See* Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 699 (D. Colo. 1970). This case held that no restrictions should be placed on the language of section 4 of the Clayton Act in deciding whether or not a plaintiff should obtain standing.

III. The Circuits

A. First Circuit

The federal courts of the First Circuit very likely adhere to the most narrow construction of section 4 of the Clayton Act utilized by the courts today. In fact, it is improbable that any claimant not in direct competition with the alleged conspirator will have an easy time obtaining standing to sue in the First Circuit.

Generally, the circuit follows the "direct injury" approach, which consistently denies recovery if an intermediary party is present between the plaintiff and the alleged violation. This choice of standing requirement apparently stems from the court's decision in *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*[21] In *Snow Crest* a supplier was denied standing to bring suit against a competitor of its largest customer. The defendant, by its Sherman and Clayton Act violations, allegedly caused substantial injury to the plaintiff-supplier since the directly injured customer accounted for over ninety percent of plaintiff's yearly sales. In dismissing the complaint, the court laid the groundwork for what was to remain a vary narrow approach to standing in the circuit by saying, "Courts . . . have been reluctant to allow those who were not in direct competition with the defendant to have a private action even though as a matter of logic their losses were foreseeable."[22]

Shortly following the *Snow Crest* decision, the district court had the opportunity to reaffirm its narrow position in *Miley v. John Hancock Mutual Life Insurance Co.*,[23] a case which was to be later affirmed by the First Circuit Court of Appeals. In *Miley*, an insurance broker attempted to bring suit against several insurance companies because of an alleged conspiracy with an insurance commission which resulted in the commission awarding a contract to a competitor of the company which Miley had hoped to represent. The complaint was dismissed because the court held that Miley was not "directly injured by the alleged conspiracy . . . ."[24]

Although subsequent decisions of the circuit have continued to stay with the "direct injury" approach to standing,[25] the harshness of

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[21]147 F. Supp. 907 (D. Mass. 1956).

[22]*Id.* at 909.

[23]148 F. Supp. 299 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957).

[24]*Id.* at 302.

[25]*See, e.g.*, Automatic Radio Mfg. Co. v. Ford Motor Co., 35 F.R.D. 198 (D. Mass. 1964), in which defendant's motion for summary judgment was denied solely because a question of fact remained as to whether plaintiff and defendant were in competition with each other; Robinson v. Stanley Home Prods., Inc., 178 F. Supp. 230 (D. Mass.), *aff'd*, 272 F.2d 601 (1959), in which the plaintiff who sold defendant's products was

results which many feel accompanies use of the test is most clearly demonstrated by an analysis of a recent district court opinion of the First Circuit. In *Carroll v. Protection Maritime Insurance Co.*,[26] several fishermen, whose services were effectively boycotted by the defendants' alleged antitrust activity, were denied standing because they were not—as in most boycott situations—in competition with the defendants.

By requiring competitive injury before recovery, the circuit is further narrowing the already restrictive "direct injury" approach, which in its usual application allows standing to those in privity of contract with the alleged conspirators as well as those in direct competition with them. The First Circuit should certainly be the last forum to which a potential antitrust litigant should look when not in direct competition with the defendant, should an alternate forum exist.

B. Second Circuit

Presently, the Second Circuit employs what appears to be a conservative "target area" approach to standing. The "target area" approach focuses on the area of the economy which is affected by the alleged antitrust activity rather than on the relationship between the litigants; a plaintiff to obtain standing need only lie within the affected area. The Second Circuit has generally so restrictively defined the "target area" that, functionally, use of the test within the circuit differs very little in terms of results from use of the "direct injury" approach originally advocated by the circuit.

Until the late 1960's, there was little question that the circuit espoused the "direct injury" test in determining standing.[27] A leading case of the circuit during this period was *Productive Inventions v. Trico Products Corp.*[28] In *Productive Inventions*, a patentee attempted to bring suit against the defendant whose alleged antitrust violations injured the plaintiff's licensee. The licensee was then unable to pay the royalties which a freely competitive market would have commanded. In dismissing the complaint the appellate court stated, "[O]nly those at whom the violation is *directly* aimed, or who have been *directly* harmed may recover."[29]

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found to have sustained no direct injury by reason of the defendant's negotiating directly with the second defendant thus eliminating plaintiff's chance for commissions.

[26]377 F. Supp. 1294 (D. Mass. 1974), *modified*, 512 F.2d 4 (1st Cir. 1975).

[27]*See, e.g.*, New Sanitary Towel Supply v. Consolidated Laundries Corp., 211 F. Supp. 276 (S.D.N.Y. 1962), *adhered to on reargument*, 213 F. Supp. 123 (S.D.N.Y. 1963). To suffer an "actionable wrong" under the antitrust laws "[t]he injury must be direct." *Id.* at 279; Schwartz v. Broadcast Music, Inc., 180 F. Supp. 322 (S.D.N.Y. 1959). "[T]he courts have restricted the right to sue [under Section 4 of the Clayton Act] to those persons who are directly injured . . . ." *Id.* at 327.

[28]224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

[29]*Id.* at 679 (emphasis added).

During this same period, the district court reached an unusual decision in *Erone Corp. v. Skouras Theatres Corp.*,[30] applying what appeared to be the "direct injury" approach. The court in *Erone* allowed several non-operating owner-lessors of various movie theatres to bring suit against their lessees and other exhibitors for a conspiracy which allegedly reduced the rent received by the owner-lessors. The court felt that the alleged conspirators had acted "to the direct injury of the respective businesses and properties of each of the plaintiffs."[31] The decision is unique in that the "direct injury" approach would normally serve to deprive lessors of the right to sue for damages caused to their leased premises, and was later questioned in *Lieberthal v. North Country Lanes, Inc.*[32] and overlooked in *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*,[33] subsequent district court decisions of the Second Circuit.

The disparity between *Erone* and the *Radio-Keith-Orpheum* and *Lieberthal* decisions is demonstrative of the uncertainty with which private antitrust litigants are faced when attempting to bring suit against a non-competitor, especially when they fall into certain categories regarding which the circuit may not have had any prior decisions. Because of the varying approaches taken by the different circuits, the plaintiff's claim may hinge upon the court's determination of which circuit's decisions should be followed. The court in *Erone* followed the *Congress Building Corp. v. Loew's, Inc.*[34] decision of the Seventh Circuit, whereas the courts in *Lieberthal* and *Radio-Keith Orpheum* chose the *Harrison v. Paramount Pictures, Inc.*,[35] and *Melrose Realty Co., Inc. v. Loew's, Inc.*,[36] line of authority of the Third Circuit.

Since the mid-1960's, the Second Circuit has employed the "target area" approach to standing, at least in name. Operationally, however, the use of the test by the circuit has been closely akin to the "direct injury" test both in definition and results, with few excep-

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[30] 166 F. Supp. 621 (S.D.N.Y. 1957).

[31] *Id.* at 623.

[32] 221 F. Supp. 685 (S.D.N.Y. 1963), *aff'd*, 332 F.2d 269 (2d Cir. 1964). "In this Court, Judge Cashin has declined to follow the Third Circuit and, feeling that there was no direct authority in this Circuit, followed the Congress decision of the Seventh Circuit. Erone Corp. v. Skouras Theatres Corp . . . ." *Id.* at 690. "[M]y conclusion is that this Circuit a landlord may not recover for anti-trust violations affecting the business of his tenant . . . ." *Id.*

[33] 193 F. Supp. 401 (S.D.N.Y. 1961). In attempting to obtain standing "[t]he fact that plaintiffs were the landlords of the theatres avails them nought." *Id.* at 407.

[34] 246 F.2d 587 (7th Cir. 1957) (discussed at text accompanying note 100 *infra*).

[35] 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954) (discussed at text accompanying notes 51-56 *infra*).

[36] 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956) (discussed at text accompanying notes 52-56 *infra*).

tions.[37] In *SCM Corp. v. Radio Corp. of America*,[38] for example, the court held that the defendant patentee could not counterclaim for injuries sustained by his licensee, allegedly caused by the plaintiff, because "the [only] people in the 'target area' are plaintiff's competitors . . . ."[39] The need for competitive injury is associated with the "direct injury" approach,[40] not the "target area" approach. In addition to *SCM*, several other more recent decisions of the circuit have intimated that competitive injury continues to be a requisite for standing to sue in the circuit.[41]

The Second Circuit, in addition to denying standing to lessors[42] and patentees,[43] continues to dismiss claims made by suppliers,[44] franchisors[45] and others[46] who suffer injuries that are one step removed from the direct injury. Prospects for a "loosening" of the narrow approach utilized by the Second Circuit appear to be slim in light of past decisions. In a recent case,[47] the court impliedly rejected any movement toward the "foreseeable target area" approach of the Ninth Circuit by denying the plaintiff standing even though its injuries may have been "both immediate and foreseeable . . . ."[48]

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[37]*See, e.g.*, Carnivale Bag Co. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287 (S.D. N.Y. 1975), in which the court expressly rejected a "competitors only" standing requirement in allowing a manufacturer standing to sue for a violation which occurred two steps away on the chain of distribution; Data Digest, Inc. v. Standard & Poor's Corp., 43 F.R.D. 386 (S.D.N.Y. 1967), in which the court gave standing to an employee of a company which was injured by the defendant's alleged antitrust activity.

[38]407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969).

[39]*Id.* at 169.

[40]*Cf., e.g.*, Cromar Co. v. Nuclear Materials & Equip. Corp., 395 F. Supp. 198 (M.D. Pa. 1975); Minersville Coal Co. v. Anthracite Export Ass'n, 335 F. Supp. 360 (M.D. Pa. 1971).

[41]*See, e.g.*, GAF Corp. v. Circle Floor Co., 463 F.2d 752 (2d Cir. 1972), *petition for cert. dismissed*, 413 U.S. 901 (1973). "This court has emphasized that, to recover, the plaintiff must allege and prove that the illegal restraint of trade injured his *competitive position* . . . ." *Id.* at 758.

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

[43]SCM Corp. v. Radio Corporation of America, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969).

[44]Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

[45]*Id.*

[46]*See, e.g.*, GAF Corp. v. Circle Floor Co., 463 F.2d 752 (2d Cir. 1972), *petition for cert. dismissed*, 413 U.S. 901 (1973), in which a manufacturer was denied standing to sue a major purchaser allegedly engaged in a conspiracy in restraint of trade aimed at the manufacturer.

[47]Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976). In *Long Island* a purchaser was denied standing to sue for injuries suffered as the result of an alleged boycott among suppliers located at a point one step removed from plaintiff along the chain of distribution.

[48]*Id.* at 1274.

C. *Third Circuit*

The Third Circuit has remained one of the most restrictive circuits in finding that plaintiffs have standing, second perhaps only to the First Circuit. The narrow interpretation of the Clayton Act within the decisions of the circuit, in all likelihood, takes place because the case of *Loeb v. Eastman Kodak Co.*,[49] which marked the origin of the "direct injury" test, was decided in this circuit.

Unlike most circuits, which have gradually reduced the restrictions placed upon potential litigants, the Third Circuit in recent cases has actually increased the requirements to an almost "competitors only" approach.[50] This narrowing result occurs in the wake of *Harrison v. Paramount Pictures, Inc.*[51] and *Melrose Realty Co. v. Loew's, Inc.*[52] two Third Circuit decisions which are often equated with each other[53] but which differ dramatically in their implications.

In both *Harrison* and *Melrose*, the unsuccessful claimants were non-operating lessors of movie theatres leased on percentage-of-gross-receipts bases; furthermore, both claimants averred that as the result of illegal conspiracies their lessees were only permitted to show second- and third-run movies which, of course, had the effect of reducing profits made by the lessors under their respective lease agreements. The cases are clearly distinguishable from each other, however, in that one of the alleged conspirators in *Melrose* was the lessee of the theatre, whereas in *Harrison*, only the lessee's competitors were made parties to the action. It has been said that although the *Harrison* decision is squarely in line with the "direct injury" approach,[54] "it is hard to imagine a more direct injury than

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[49]183 F. 704 (3d Cir. 1910) (discussed at text accompanying note 14 *supra*).

[50]*See* Cromar Co. v. Nuclear Materials & Equip. Corp., 395 F. Supp. 198 (M.D. Pa. 1975), in which a supplier was denied standing to sue purchasers which allegedly sought to force supplier out of business; Minersville Coal Co. v. Anthracite Export Ass'n, 335 F. Supp. 360 (M.D. Pa 1971) (discussed at text accompanying note 58 *infra*).

[51]115 F. Supp. 312 (E.D. Pa. 1953), *aff'd*, 211 F.2d 405 (3d Cir. 1954), *cert. denied*, 348 U.S. 828 (1954).

[52]234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956).

[53]*See, e.g.*, Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972), in which the court cited both cases in support of the proposition "that a non-operating landlord lacks standing to seek treble damages from its tenant and others for alleged antitrust violations which decreased its theatre rentals." *Id.* at 1297; VTR, Inc., v. Goodyear Tire & Rubber Co., 303 F. Supp. 773 (S.D.N.Y. 1969), in which the court equated the two decisions in making a comparison with a third to show the lack of accord lower courts have had in applying a standing doctrine. *Id.* at 782 n.6.

[54]*See* Higginbotham, *Some Judicial Adjustments to the Rights of Recovery Under the Federal Antitrust Laws*, 26 ALA. L. REV. 309 (1974). "The underlying basis for the requirement that a plaintiff in order to have standing must show that a defendant's acts directly injured him was explained . . . in *Harrison* . . . ." *Id.* at 312-13.

the one allegedly suffered by the plaintiff in *Melrose.*"[55] The *Melrose* decision, in fact, "has the effect of creating a 'competitors only' standing doctrine for antitrust actions."[56]

Although the Third Circuit generally follows the "direct injury" approach, allowing both competitors and others directly injured to obtain standing,[57] repercussions of the extremely narrow view taken in *Melrose* continue to pervade opinions of the circuit. The binding effects of *Melrose* can be seen in *Minersville Coal Co. v. Anthracite Export Association,*[58] in which a supplier was denied standing apparently because it was not in direct competition nor in privity of contract with the defendant. Judge Muir expressed the dilemma often faced in the standing area today between precedent and trend when he said:

> Were we not of the opinion that the law of this Circuit is still that laid down in *Melrose Realty,* we would be inclined to follow the approach of the Fourth Circuit in South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir. 1966), in which it was held that standing to sue is not limited to those in direct contractual or competitive status with the defendant . . . .[59]

D. Fourth Circuit

Very few standing cases have been decided in the Fourth Circuit, but those that have been suggest that the circuit follows a non-restrictive approach to the issue.

The major decision of the circuit pertaining to standing is *South Carolina Council of Milk Producers, Inc. v. Newton.*[60] In *Newton,* several milk producers sought to bring suit against certain wholesale and retail grocers whose alleged conspiracy had the effect of destroying the market price of milk in the area. The defendants asserted that the milk producers were not their competitors and therefore were too remotely injured to maintain an action under section 4 of the Clayton Act. Judge Bryan disagreed with defendants' assertion and originated the "proximate target area" approach in holding the plaintiffs had standing: "If a plaintiff can show himself within the sector of the economy in which the violation threatened a

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[55]Cromar Co. v. Nuclear Materials & Equip. Corp., 395 F. Supp. 198, 202 (M.D. Pa. 1975).

[56]*Id.*

[57]*See, e.g.,* Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727 (3d Cir. 1970), *cert. denied,* 401 U.S. 974 (1971); Deaktor v. Fox Grocery Co., 332 F. Supp. 536 (W.D. Pa. 1971), *aff'd,* 475 F.2d 1112 (3d Cir. 1973).

[58]335 F. Supp. 360 (M.D. Pa. 1971).

[59]*Id.* at 365.

[60]360 F.2d 414 (4th Cir.), *cert. denied,* 385 U.S. 934 (1966).

breakdown of competitive conditions *and that he was proximately injured thereby,* then he has standing to sue under section 4."[61]

Although the court in *Newton* did not explain the effect that the proximate injury element was to have on the "target area" approach as originated in *Conference of Studio Unions v. Loew's, Inc.*,[62] it appears that it forms the cornerstone of the test. "The pivot of decision presently is whether the defendants' asserted conduct was the proximate cause of the plaintiffs' asserted injury."[63] Functionally, the test may frequently bring the same results as the standard "target area" approach.[64]

Subsequent decisions of the circuit have continued to obtain the liberal results warranted by the *Newton* decision.[65] It is clear that a potential litigant need not fear bringing suit in the Fourth Circuit, as he may in the First, Second, and Third Circuits, merely because he is not in privity of contract or direct competition with the defendant.

E. Fifth Circuit

Until very recently, an antitrust claimant seeking standing in the Fifth Circuit would likely meet with uncertain results if not in direct competition or privity of contract with the defendant. There was a split of authority within the circuit that caused some courts[66] to use the "direct injury" approach and others[67] to utilize the more liberal "proximate target area" approach of the Fourth Circuit. The divergence of approaches was ostensibly the result of the circuit's decisions in *Martens v. Barrett*[68] and *Dailey v. Quality School Plan, Inc.*[69]

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[61]*Id.* at 418 (emphasis added).

[62]193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952) (discussed at text accompanying note 15 *supra* and note 124 *infra*).

[63]360 F.2d at 419.

[64]*Compare* Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967), in which an employee was granted standing under the "proximate target area" approach, *with* Data Digests, Inc. v. Standard & Poor's Corp., 43 F.R.D. 386 (S.D.N.Y. 1967), in which an employee was permitted to bring suit under the traditional "target area" test.

[65]*See, e.g.*, Midway Enterprises, Inc. v. Petroleum Marketing Corp., 375 F. Supp. 1339 (D. Md. 1974), in which a retailer was found to have standing to sue a supplier of one of his suppliers for alleged violations causing passed on price increases to the plaintiff.

[66]*See, e.g.*, Tugboat, Inc. v. Seafarers Int'l Union, 398 F. Supp. 1131 (S.D. Ala. 1975), *rev'd*, 534 F.2d 1172 (5th Cir. 1976). "In order to have standing to sue . . . a private party must have suffered a *direct injury* to his business or property . . . ." *Id.* at 1132 (emphasis added).

[67]*See, e.g.*, Buckley Towers Condominium, Inc. v. Buchwald, 399 F.Supp. 38 (S.D. Fla. 1975), *aff'd*, 533 F.2d 934 (5th Cir. 1976). "Thus for the plaintiff to have standing, the alleged tie-in must be the *proximate cause* of the plaintiff's liability . . . ." *Id.* at 40 (emphasis added).

[68]245 F.2d 844 (5th Cir. 1957).

[69]380 F.2d 484 (5th Cir. 1967).

In *Martens*, stockholders were denied standing to sue for injuries suffered by the corporation in which they had an interest. The court broadly declared the basis for its decision:

> [I]t is universal that where the business or property allegedly interfered with by forbidden practices is that being done and carried on by a corporation, it is that corporation alone, and not its stockholders (few or many), officers, directors, creditors or licensors, who has a right of recovery, even though in an economic sense real harm may well be sustained . . . .[70]

Subsequent decisions of the circuit greatly broadened the scope and impact of *Martens;* in addition to being used as support for denying standing to stockholders,[71] it became authority for denying the right to employees,[72] a corporate management company[73] and even to several unions.[74]

The counter-trend of decisions in the Fifth Circuit, which adopts the "proximate target area" approach to standing, is the offspring of the *Dailey* decision. In *Dailey,* an employee who was terminated as the alleged results of an illegal merger was given standing to sue the company which had acquired Dailey's former employer. The appellate court, in reversing the district court's decision, emphasized "proximate cause,"[75] as did the *Newton* court of the Fourth Circuit,[76] rather than emphasizing a determination of the "sector of the economy in which the violation threatened a breakdown of competitive conditions . . . ."[77]

Several recent decisions of the circuit have continued to follow the "proximate target area" approach[78] while others have chosen to apply

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[70]245 F.2d at 846 (footnotes omitted).

[71]*See* Mendenhall v. Fleming Co., 504 F.2d 879 (5th Cir. 1974); Schaffer v. Universal Rundle Corp., 397 F.2d 893 (5th Cir. 1968); Campo v. National Football League, 334 F. Supp. 1181 (E.D. La. 1971).

[72]Centanni v. T. Smith & Son, Inc., 216 F. Supp. 330 (E.D. La.), *aff'd,* 323 F.2d 363 (5th Cir. 1963).

[73]Harsh v. CPC Int'l, Inc., 395 F. Supp. 578 (N.D. Tex. 1975).

[74]Tugboat, Inc. v. Seafarers Int'l Union, 398 F. Supp. 1131 (S.D. Ala. 1975), *rev'd,* 534 F.2d 1172 (5th Cir. 1976).

[75]Dailey v. Quality School Plan, Inc., 380 F.2d 484, 487 (5th Cir. 1967).

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

[77]*Id.* at 418.

[78]Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974), *cert. denied,* 419 U.S. 1110 (1975), in which several funeral homes and directors were granted standing to sue a funeral insurance company and its subsidiary; Buckley Towers Condominium, Inc. v. Buchwald, 399 F. Supp. 38 (S.D. Fla. 1975), in which a nonprofit condominium corporation was denied standing to sue several condominium developers; Southern Concrete Co. v. United States Steel Corp., 394 F. Supp. 362 (N.D. Ga. 1975), in which a producer of concrete was unable to sue a competitor and its supplier for their alleged

the traditional "target area" test.[79] Use of the "direct injury" approach within the circuit, however, may have come to an end with the recent decision of *Tugboat, Inc. v. Seafarers International Union.*[80] In *Tugboat*, the Fifth Circuit reversed a lower court's holding that several unions did not have standing because they were not in direct competition with the alleged conspirators. The appellate court opted for use of the "proximate target area" approach rather than the "direct injury" approach used by the district court, and found appellants did have standing: "The plaintiff need show only that he is threatened by injury proximately caused by the defendant."[81] This decision may mark the end of the divergent approaches previously used in the circuit and thus may make the Fifth Circuit a more predictable one in which to bring suit for a remote antitrust injury.

F. Sixth Circuit

Notwithstanding that few standing cases have come out of the Sixth Circuit,[82] a recent decision has established the circuit as a pioneer in the modern search for new approaches to private antitrust standing to sue. In *Malamud v. Sinclair Oil Corp.*,[83] the Sixth Circuit Court of Appeals rejected both the "direct injury" and "target area" approaches to standing and allowed an investment company to maintain an antitrust suit against a large oil company even though the two were not competitors. The court said that "as standing doctrines both theories really demand too much from plaintiffs at the pleading stage of a case."[84]

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antitrust violations since it had not been proximately injured thereby. This case also presents an excellent analysis of the application of the "proximate target area" test to several distinct antitrust violations.

[79] Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975), in which telephone subscribers' injuries were found not to be within the "target area" of a telephone company's alleged antitrust violations; *In re* Yarn Process Patent Validity & Anti-Trust Litigation, 398 F. Supp. 31 (S.D. Fla. 1975), in which a manufacturer of yarn processing machinery was found not to be within the "target area" of antitrust violations occurring among yarn throwsters and purchasers allegedly limiting the growth of the processing industry; Freeman v. Eastman-Whipstock, Inc., 390 F. Supp. 685 (S.D. Tex. 1975), in which a former employee of two companies allegedly engaging in antitrust violations was found to be within the "target area" of their illegal activity.

[80] 534 F.2d 1172 (5th Cir. 1976), *rev'g* 398 F. Supp. 1131 (S.D. Ala. 1975).

[81] *Id.* at 1174.

[82] In addition to those mentioned in the text, two other recent decisions of the Sixth Circuit have dealt with the standing question. The first, Tennessee Consol. Coal Co. v. UMW, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970), followed the Fourth Circuit's "proximate target area" approach. The second, Former Stockholders of Barr Rubber Prods. Co. v. McNeil Corp., 325 F. Supp. 917 (N.D. Ohio 1970), *aff'd*, 441 F.2d 1169 (6th Cir. 1971), merely denied a stockholder the right to sue.

[83] 521 F.2d 1142 (6th Cir. 1975).

[84] *Id.* at 1149.

Prior to *Malamud*, the leading case of the circuit, *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*,[85] in which a supplier of an injured party was denied standing, led some commentators[86] to believe that this circuit espoused the "direct injury" approach. The court in *Malamud* quelled this supposition: "Contrary views notwithstanding, the *Volasco* decision is not a delineation of this Court's view of the doctrine of standing in antitrust suits. . . . [T]he opinion does not have the effect of placing this Circuit among those that adhere to the 'direct injury' approach to standing."[87]

Malamud is the first private antitrust suit in which the "zone of interest" test was used to determine a claimant's standing to bring the action. The test was introduced in 1970 by the United States Supreme Court in two cases[88] brought under the Administrative Procedure Act.[89] The *Malamud* court felt that the Act was sufficiently analogous to section 4 of the Clayton Act to permit the "zone of interest" test to be applied to those seeking standing under the Clayton Act.

The "zone of interest" approach, as used in *Malamud*, is two-pronged in nature; it requires first, "that the plaintiff allege that the defendant caused him injury in fact,"[90] and second, that "the interest sought to be protected . . . [b]e arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[91] The court made certain that use of the new test was not to be merely a matter of semantics by undertaking a step-by-step application of the test to the facts of the case.[92]

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[85]308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

[86]*See, e.g.*, Beane, *Antitrust: Standing and Passing On*, 26 BAYLOR L. REV. 331, 352 (1974). The author has placed a table at the end of his article in which he succinctly expresses what he considers to be each circuit's test of standing based on a leading case from the circuit.

[87]521 F.2d at 1150-51.

[88]Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970).

[89]The pertinent section of the Administrative Procedure Act is 5 U.S.C. § 702, which states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

[90]521 F.2d at 1151.

[91]*Id.*, *quoting* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. at 153.

[92]The court began its analysis by determining whether the plaintiff had actually suffered an injury and if so whether any nexus existed between this injury and the defendant's alleged violation; this injury and nexus satisfied the first prong of the test. The court then looked to the specific antitrust provisions allegedly violated by the defendant, section 1 of the Sherman Act and section 3 of the Clayton Act, and considered the interests that these provisions were intended to protect. The court concluded the second prong analysis by finding that the plaintiff's injury arguably fell within the area of these interests. 521 F.2d at 1151-52.

At this point it is too early to determine what the effects of *Malamud* will be on subsequent private antitrust suits. To the Sixth Circuit, the decision may mark the beginning of a lenient and exact view of standing if followed in both form and function. Unfortunately, however, for the standing problem in general, the decision will probably add more confusion by its introduction of another standing doctrine into the plethora of tests already in use throughout the federal judiciary. The Seventh Circuit has already given its support to the new approach. In a recent decision,[93] the Seventh Circuit Court of Appeals cited *Malamud* and used the "zone of interest" test in reversing a lower court decision which had denied standing to plaintiffs under the "target area" approach.

G. Seventh Circuit

It is clear from the decisions of the Seventh Circuit that the circuit advocates an unrestricted view of standing. Although the circuit pays lip service to a form of the "target area" approach,[94] a categorical analysis must be made of the claimants who have been awarded standing in the circuit to fully understand the frequency with which the circuit has found standing.

The circuit has continued to advocate a liberal approach to standing since it decided *Roseland v. Phister Manufacturing Co.*[95] in 1942. In *Roseland*, the court allowed a general sales agent to bring suit against a company for which he sold, and in so doing expressed the attitude which has continued to underlie standing decisions of the Seventh Circuit: "The language of the statute [Clayton Act] is general and all inclusive. It includes any person who shall be injured in his business or property."[96] In 1967, the circuit expanded on the *Roseland* decision and allowed an employee of an alleged conspirator to maintain an antitrust action.[97]

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[93]Illinois v. Ampress Brick Co., 536 F.2d 1163 (7th Cir. 1976), *rev'g* 67 F.R.D. 461 (N.D. Ill. 1975) (discussed *infra* at notes 106-13 and accompanying text).

[94]*See, e.g.*, General Beverage Sales Co.—Oshkosh v. East Side Winery, 396 F. Supp. 590 (E.D. Wis. 1975). The court in *East Side Winery* stated, "The Seventh Circuit believes in the 'target area' approach to standing but has formulated its own standards." *Id.* at 596.

> To attain standing, a plaintiff must thus allege that the antitrust violation injured a commercial enterprise of the plaintiff in the area of the economy in which the elimination of competition occurred. Standing is denied, on the other hand, if the claimant's commercial activity occurred outside that area of the economy . . . .

Id., quoting In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 128 (9th Cir. 1973).

[95]125 F.2d 417 (7th Cir. 1942).

[96]*Id.* at 419.

[97]Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332 (7th Cir. 1967).

In addition to allowing sales agents and employees standing, the circuit has adopted the liberal view that lessors should not be denied standing.[98] This view, as clearly expressed in *Congress Building Corp. v. Loew's, Inc.*,[99] is contrary to the views of other courts: "We . . . decline to follow the rule laid down by the Third Circuit in the Harrison[100] and Melrose[101] decisions."[102]

Another category of potential antitrust litigants concerning which the circuit has taken a definitive position is that of consumers. In *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*,[103] the court refused to allow the State of Illinois to intervene in a suit brought by several public utility companies alleging price fixing and other illegal activity on the part of several manufacturers of electrical equipment. The state was bringing the action on behalf of its citizens who allegedly became the true victims of the violations by being forced to pay higher utility rates. The court held that the consumers' injuries were too remote to afford them standing to maintain the action themselves; therefore,the state could not intervene on their behalf.

Several years later, the circuit handed down what appears to be a contradictory decision in *Boshes v. General Motors Corp.*[104] by holding that consumers purchasing automobiles from retailers had standing to sue automobile manufacturers for antitrust violations which raised the cost of the cars to the retailers, an increase which was passed on to the consumers. The apparent contradiction in decisions was first explained away in *Illinois v. Ampress Brick Co.*[105] in which the district court held that although an *ultimate consumer's*[106] injuries are too remote to be afforded Clayton Act relief, standing can be obtained for injuries caused to an *immediate consumer*[107] or a *final consumer.*[108]

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[98]Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957); Sandidge v. Rogers, 156 F. Supp. 286 (S.D. Ind. 1957), *rev'd on other grounds*, 256 F.2d 269 (7th Cir. 1958).

[99]246 F.2d 587 (7th Cir. 1957).

[100]Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954) (discussed at text accompanying notes 51-59 *supra*).

[101]Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956) (discussed at text accompanying notes 52-59 *supra*).

[102]246 F.2d at 595 (footnotes added).

[103]315 F.2d 564 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963).

[104]59 F.R.D. 589 (N.D. Ill. 1973).

[105]67 F.R.D. 461 (N.D. Ill. 1975), *rev'd*, 536 F.2d 1163 (7th Cir. 1976).

[106]"[One] who obtains a finished product from a middleman that has altered or added to the goods received from the manufacturer." *Id.* at 466.

[107]"[One] who usually acts as a middleman, reselling either the same goods or a refined product to another consumer." *Id.*

[108]"[One] who obtains goods from the manufacturer or from a subsequent

The district court decision in *Ampress Brick* was later reversed in part and the circuit's lenient approach to standing further expanded when the Seventh Circuit held that ultimate consumers, as well as immediate and final consumers, could obtain standing in the circuit if they could prove injury in fact.[109] This injury in fact element became the distinguishing factor between the circuit's holdings in *Ampress Brick* and *Boshes* and that in *Commonwealth Edison.*[110]

Although the *Ampress Brick* opinion will probably not serve to establish any particular test of standing in the Seventh Circuit, since it combined a liberal application of the Sixth Circuit's "zone of interest" test[111] with dictum representing the Ninth Circuit's "foreseeable target area" approach,[112] it certainly does place the circuit among the most liberal in the grant of standing to remotely injured plaintiffs.

H. Eighth Circuit

The few standing decisions decided in the Eighth Circuit indicate that the circuit has adopted the *"Karseal*[113] target area" approach originated in the Ninth Circuit. "Under this approach a private litigant has standing to sue if he 'was within the target area of the illegal practices,' and 'was not only hit, but was aimed at.' "[114]

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consumer, but who in either case acquires the goods in the same condition as originally made and sold by the manufacturer." *Id.*

[109]536 F.2d 1163 (7th Cir. 1976), *rev'g* 67 F.R.D. 461 (N.D. Ill. 1975).

[110]"[T]he decision in *Commonwealth Edison* . . . rests on the failure to prove that the violations damaged the plaintiffs." *Id.* at 1166.

[111]In Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975), the court in using the "zone of interest" test required not only that injury in fact be alleged but also that the causal connection between the violation and the injury be pled. "The first prong of the . . . test is that the plaintiff allege that the defendant caused him injury in fact." *Id.* at 1151. However, in Illinois v. Ampress Brick Co., 536 F.2d 1163 (7th Cir. 1976), although the court required injury in fact, it expressly rejected the need for a showing of causation to obtain standing. "The error in defendants' reading of . . . *Commonwealth Edison* is that they view the failure to show that antitrust violations caused plaintiffs' injury as an element of standing. It is not." *Id.* at 1166.

[112]"[Plaintiffs] have shown that they were 'within the area of the economy which [defendants] reasonably could have or did foresee would be endangered by the breakdown of competitive conditions.' " 536 F.2d at 1167, *quoting In re* Western Liquid Asphalt Cases, 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied sub nom.* Standard Oil Co. v. Alaska, 415 U.S. 919 (1974).

[113]Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955) (discussed at text accompanying notes 126-27 *infra*).

[114]Minnesota v. United States Steel Corp., 299 F. Supp. 596, 602 (D. Minn. 1969), *vacated on other grounds*, 438 F.2d 1380 (8th Cir. 1971), *quoting* Karseal Corp. v. Richfield Oil Corp., 221 F.2d at 365.

One major decision of the circuit in which the *Karseal* approach was utilized made it clear that the test does not require the claimant to be in privity of contract with the alleged violator. In *Missouri v. Stupp Brothers Bridge & Iron Co.*,[115] the court allowed the plaintiff standing even though it had had no direct dealings with the defendant. "We can not read into Section 4 of the Clayton Act a requirement of privity . . . ."[116]

Another leading decision of the circuit in which the "*Karseal* target area" approach was utilized is *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*[117] The court in *Sanitary* allowed a supplier of milk to sue a competitor of his purchaser for alleged antitrust violations injuring the purchaser. The court distinguished *Sanitary* from decisions of other circuits denying standing to suppliers[118] on the basis that Sanitary was not a raw material supplier selling to a manufacturer, but rather was selling a finished product to its purchaser. This supposedly "demonstrates that there was directness of competition between Bergjans [defendant] and Sanitary . . . ."[119] This reasoning is indicative of the "escape devices" the courts use in the standing area rather than applying standing requirements which they feel are harsh or unfair.

In addition to allowing a supplier to bring suit, the circuit has also granted standing to a lessor to sue for injuries affecting his lessees and the rented premises.[120] As in all circuits, exactly where the line can be drawn in the Eighth Circuit between a sufficient injury and an insufficient injury to obtain standing is unclear; however, it is manifest from recent decisions of the court that the line can be drawn to exclude citizens suing on behalf of their injured municipality.[121]

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[115]248 F. Supp. 169 (W.D. Mo. 1965). In *Stupp Bros.* the plaintiff was allowed standing to sue the defendants, who had sold structured steel to prime contractors who in turn used the steel to make bridges for the plaintiff.

[116]*Id.* at 174.

[117]368 F.2d 679 (8th Cir. 1966).

[118]Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956).

[119]368 F.2d at 688-89.

[120]Johnson v. Ready Mix Concrete Co., 318 F. Supp. 930 (D. Neb. 1970). This opinion presents an excellent example of the confusion with which the courts are plagued as a result of the many different approaches used in the standing area. For example, the court said in one instance, "[s]tanding to sue under Section 4 is strictly limited to those individuals who have been *directly* injured . . . . This is known as the 'target area' doctrine." *Id.* at 932 (citations omitted).

[121]*See* Cosentino v. Carver-Greenfield Corp., 433 F.2d 1274 (8th Cir. 1970); Ragar v. T. J. Raney & Sons, 388 F. Supp. 1184 (E.D. Ark.), *aff'd*, 521 F.2d 795 (8th Cir. 1975).

I. Ninth Circuit

The Ninth Circuit is the most progressive in dealing with the standing issue. Many legal writers feel that the circuit's "foreseeable target area" approach to standing comes the closest of all tests to the true intent of Congress in drafting, as well as to the view of the Supreme Court in applying, section 4 of the Clayton Act.[122] The test is easily the most nonrestrictive of those used today in determining a claimant's standing to assert an antitrust violation since the injury need not be direct or arise from privity but need only be an objectively foreseeable consequence of the defendant's illegal activity.

The Ninth Circuit became the front-runner of those circuits advocating a broader approach than the "direct injury" test with its decision in *Conference of Studio Unions v. Loew's, Inc.*[123] Although the court in *Loew's* denied the plaintiffs standing, it originated the "target area" approach with its statement:

> [I]n order to state a cause of action under the antitrust laws a plaintiff must show . . . that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry.[124]

A short time after *Loew's* the "target area" test was modified in *Karseal Corp. v. Richfield Oil Corp.*[125] In *Karseal* a manufacturer was given standing to sue for injuries caused by the defendant to independent retailers who bought plaintiff's products through wholesale distributors. The impact of *Karseal* stretched far beyond the remoteness of the plaintiff from the violation. In *Karseal*, the court concluded "that Karseal was within the target area of the illegal practices of Richfield; that Karseal was not only hit, but was *aimed at*, by Richfield."[126] These words were later to form the origin of the "foreseeable target area" test.

Nine years later, in *Twentieth Century Fox Film Corp. v. Goldwyn*,[127] the court allowed a distributor of motion pictures to sue several buyers of motion pictures who had allegedly colluded for purposes of demanding and receiving lower rates and better terms

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[122]*See, e.g.*, Alioto & Donnici, *Standing Requirements for Antitrust Plaintiffs: Judicially Created Exceptions to a Clear Statutory Policy*, 4 U.S.F.L. REV. 205 (1970). The authors state, "This new approach is significantly more liberal and permissive than the older cases, and as such, is more in line with the intent behind § 4 and the Supreme Court's liberal construction thereof." *Id.* at 212-13.

[123]193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

[124]*Id.* at 54-55.

[125]221 F.2d 358 (9th Cir. 1955).

[126]*Id.* at 365 (emphasis added).

[127]328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964).

from distributors. Referring to the "target area" approach as modified in *Karseal*, the court focused on the words "aimed at" and said:

> [I]n using the words "aimed at" this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather, it was intended to express the view that the plaintiff must show that, whether or not then known to the conspirators, plaintiff's affected operation was actually in *the area which it could reasonably be foreseen would be affected* by the conspiracy.[128]

Adding foreseeability to the "target area" test provides an extremely uninhibited approach to standing, as demonstrated by subsequent decisions of the circuit which have granted standing to: an officer of an injured financial institution,[129] governmental agencies not in privity with defendant manufacturers,[130] lessors,[131] suppliers,[132] as well as others[133] whose injuries are remote by most standards. In fact, the only parties denied standing in the Ninth Circuit are those whose injuries are extremely remote under any standards.[134]

J. Tenth Circuit

The Tenth Circuit decisions dealing with the standing question can best be described as polar. Although the court of appeals has espoused the very narrow "direct injury" approach,[135] two recent

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[128]*Id.* at 220 (emphasis added).

[129]Harman v. Valley Nat'l Bank, 339 F.2d 564 (9th Cir. 1964).

[130]Washington v. American Pipe & Constr. Co., 274 F. Supp. 961 (S.D. Cal. 1967).

[131]Hoopes v. Union Oil Co., 374 F.2d 480 (9th Cir. 1967).

[132]Bray v. Safeway Stores, Inc., 392 F. Supp. 851 (N.D. Cal. 1975).

[133]*See, e.g.*, Blankenship v. Hearst Corp., 519 F.2d 418 (9th Cir. 1975), in which a newspaper distributor was given standing to sue a newspaper publisher for an alleged attempt to fix the retail price at which carriers supplied by the distributor could sell to their customers; Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), in which the owner of some films was granted standing to sue the purchaser for alleged antitrust violations which served to diminish the owner's potential profit on the sale.

[134]*See, e.g.*, Contreras v. Grower Shipper Vegetable Ass'n, 484 F.2d 1346 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974), in which plaintiffs who farmed lettuce were denied standing to maintain a suit against an association of lettuce sellers for alleged antitrust activity which resulted in a decreased demand for lettuce and thus less work for plaintiffs; *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973), in which farmers were denied standing to sue automobile manufacturers whose alleged antitrust violations resulted in an absence of pollution devices on automobiles supposedly resulting in lower crop yields.

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

district court opinions have opted for the opposite end of the issue and have used the "foreseeable target area" approach[136] and a completely "unrestricted" approach.[137]

In *Nationwide Auto Appraiser Service, Inc. v. Association of Casualty & Surety Cos.*,[138] the Tenth Circuit Court of Appeals denied standing to a franchisor who attempted to recover for alleged antitrust violations directly affecting his franchisees. In dismissing the complaint, the court based its use of the "direct injury" test on the fact that Congress has made no changes in the law despite the advent and use of the test by other courts:

> The directness rule has been criticized, but it appears to be through the years a practical application of the Clayton Act, and in view of the lapse of time, it must be assumed that it accords with the intention of Congress. . . . If the times have changed, and the needs of business have changed to bring about a need to extend the right of recovery to others, Congress would have so indicated.[139]

Notwithstanding that many subsequent cases[140] of the circuit have reaffirmed use of the narrow approach of *Nationwide*, disposition of the issue within the circuit is not quite as predictable as may appear at first blush. In *Wilson v. Ringsby Truck Lines, Inc.*,[141] for example, the court refused to add any restrictions to the language of the Clayton Act and allowed several employees standing to sue their employer.

A very liberal approach was also taken in *H. F. & S. Co. v. American Standard, Inc.*,[142] in which the plaintiff was allowed standing to sue a franchisor for antitrust activity which allegedly diminished the profit plaintiff received on the sale of a portion of his business. In allowing the claim the court stated, "[T]he defendant could reasonably foresee that plaintiff's operation would be affected in the form of diminution in value received under the new sales agreement."[143] Even though the court in *American Standard* felt the

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[136]H.F. & S. Co. v. American Standard, Inc., 336 F. Supp. 110 (D. Kan. 1972).

[137]Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 699 (D. Colo. 1970).

[138]382 F.2d 925 (10th Cir. 1976).

[139]*Id.* at 929.

[140]*See, e.g.*, Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973), in which the plaintiff was denied standing because he had "suffered no direct injury"; Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289 (D. Colo. 1969). "The gist of the private antitrust action is found in the requirement of *direct injury* to business or property." *Id.* at 306 (emphasis added).

[141]320 F. Supp. 699 (D. Colo. 1970).

[142]336 F. Supp. 110 (D. Kan. 1972).

[143]*Id.* at 116.

decision was in line with *Nationwide*, the "foreseeable target area" approach used in *American Standard* may serve in the future to allow a less restrictive approach to standing by the Tenth Circuit.

K. District of Columbia Circuit

The District of Columbia Circuit has the fewest recent decisions in the standing area. From the two cases analyzed, it appears that the circuit espouses use of the "target area" approach in one form or another.

In one recent decision,[144] the circuit used the "proximate target area" approach of the Fourth Circuit in allowing standing to several plaintiffs who alleged a conspiracy to drive them out of business. The court defined the issue of standing as being "merely a question of whether the pleadings present a triable antitrust issue and allege injury to the plaintiffs which is proximately caused by defendants' conduct . . . ."[145]

In a more recent decision, *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*,[146] the district court made use of the "target area" approach as used in *Conference of Studio Unions v. Loew's Inc.*[147] The court in *Stern* denied standing to several former hospital patients who averred a conspiracy between the hospital and several financial institutions, which allegedly increased the price of health services charged by the hospital. "Plaintiffs' activity, as the 'purchasers of hospital health services,' was not within the area of the economy in which the elimination of competition occurred, and thus plaintiffs lack standing to sue."[148]

IV. Conclusion

From the foregoing analyses of the circuits' approaches to standing, it is apparent that a wide degree of variation exists in the area today. What may not be as readily apparent are the present effects that this concurrent utilization of the several different standing doctrines may have on potential litigants in terms of forum shopping, and on the courts in terms of difficulty in trying cases concerning standing.

The mere fact that a potential claimant knows that he may be able to achieve differing results by bringing his claim in different forums does not in and of itself allow forum shopping; there is the need to obtain venue and personal jurisdiction before one can litigate

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[144]Pacific Seafarers, Inc. v. Pacific Far East Line, 48 F.R.D. 347 (D. D.C. 1969).
[145]*Id.* at 351.
[146]367 F. Supp. 536 (D. D.C. 1973).
[147]193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).
[148]367 F. Supp. at 539.

in any forum. In most types of litigation in which the defendant is an individual, these concerns will limit the possible choices of courts in which suit can be maintained to only one or two. However, in antitrust suits brought against corporate defendants, this is not the case; depending on the size of the corporation, there may be several possible districts in which suit can be brought. Section 11 of the Clayton Act provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.[149]

Considering that "venue and personal jurisdiction are virtually congruent"[150] within this section as well as the large number of districts in which the modern corporation frequently is incorporated, found or transacts business, it will usually be the situation that a potential antitrust claimant will have several forums from which to choose in bringing suit under section 4 of the Clayton Act. When we combine this wide choice of possible forums with the diverse doctrines of standing that different courts advocate, who can disagree that a potential antitrust plaintiff one step or more removed from the violation would not be wise to choose carefully the district in which to litigate?

Would it not be foolish for a supplier to take the risk of having his suit summarily dismissed in the First,[151] Second,[152] or Third[153] Circuit if he alternatively could have brought suit in the Fourth,[154] Eighth,[155] or Ninth Circuit?[156] Would not an employee be better off attempting to gain standing in the Fifth[157] or Seventh[158] Circuit than

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[149]15 U.S.C. § 22 (1970).

[150]Pacific Tobacco Corp. v. American Tobacco Co., 338 F. Supp. 842, 844 (D. Ore. 1972).

[151]*See* Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956).

[152]*See* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

[153]*See* Minersville Coal Co. v. Anthracite Export Ass'n, 335 F. Supp. 360 (M.D. Pa. 1971).

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

[155]*See* Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966).

[156]*See* Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955).

[157]*See* Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967).

[158]*See* Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332 (7th Cir. 1967).

he would be in the Second;[159] or a lessor in the Seventh,[160] Eighth,[161] or Ninth[162] than in the Second[163] or Third?[164] It is equally certain that a final consumer's chances of obtaining standing are much greater in the Seventh Circuit[165] than they are in, for instance, the District of Columbia Circuit.[166]

In general terms, what has emerged today from the disparity with which the circuits have handled the standing question is a situation where, if the choice exists, a potential private antitrust litigant who has been in any way remotely injured would be much wiser to opt for the nonrestrictive views of the Fourth,[167] Sixth,[168] Seventh,[169] Eighth,[170] or Ninth[171] Circuits, than for the uncertain approaches of the Fifth,[172] Tenth,[173] and District of Columbia[174] Circuits. Care should be taken especially to avoid the restrictive views of the First,[175] Second,[176] and Third[177] Circuits if possible.

Finally, to gain an understanding of the problems with which the courts today are faced in dealing with the standing issue and the remotely injured claimant we need only look to a recent decision[178] of the Tenth Circuit in which the court expressed its futile position in applying section 4 of the Clayton Act, "We must confess at the outset that we find antitrust standing cases more than a little confusing and certainly beyond our powers of reconciliation."[179]

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[159]*See* GAF Corp. v. Circle Floor Co., 329 F. Supp. 823 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 752 (2d Cir. 1972), *petition for cert. dismissed*, 413 U.S. 901 (1973).

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

[161]*See* Johnson v. Ready Mix Concrete Co., 318 F. Supp. 930 (D. Neb. 1970).

[162]*See* Hoopes v. Union Oil Co., 374 F.2d 480 (9th Cir. 1967).

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

[164]*See* Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956).

[165]*See* Illinois v. Ampress Brick Co., 536 F.2d 1163 (7th Cir. 1976).

[166]*See* Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries, 367 F. Supp. 536 (D. D.C. 1973).

[167]See notes 60-65 *supra* and accompanying text.

[168]See notes 82-93 *supra* and accompanying text.

[169]See notes 94-112 *supra* and accompanying text.

[170]See notes 113-21 *supra* and accompanying text.

[171]See notes 122-34 *supra* and accompanying text.

[172]See notes 66-81 *supra* and accompanying text.

[173]See notes 135-43 *supra* and accompanying text.

[174]See notes 144-48 *supra* and accompanying text.

[175]See notes 21-26 *supra* and accompanying text.

[176]See notes 27-48 *supra* and accompanying text.

[177]See notes 49-59 *supra* and accompanying text.

[178]Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 699 (D. Colo. 1970).

[179]*Id.* at 701.

Antitrust standing law today is truly beyond anyone's "powers of reconciliation"—except those of Congress and of the United States Supreme Court. For only if Congress or the Court takes a definitive position on the issue can resolution possibly take place. Time certainly has not done the job. In fact, with the periodic emergence of new standing doctrines combined with strict adherence to the old, time has only added to the confusion surrounding the area. The answer—until a uniform and definite approach is handed down by the Court or enacted by Congress—comes in the form of an admonition to the potential antitrust litigant suffering indirect injury: Choose your forum carefully!

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