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Comments and Casenotes

LEGAL CAUSE IN TREBLE DAMAGE ACTIONS UNDER THE CLAYTON ACT

By ROBERT M. WRIGHT

Since the enactment of the antitrust laws in 1890 plaintiffs seeking recovery under the treble damage provisions have been relatively unsuccessful. One difficulty facing many such plaintiffs has been that of establishing standing under the restrictive requirements of the decisional law. However, decisions in the past year may indicate that the courts are ready to redefine these requirements so as to permit suit by certain classes of plaintiffs who, in the past, have been denied relief due to their inability to show an “injury” under the treble damage provisions.

On its face, Section 4 of the Clayton Act would seem to provide relief for any party who could show an injury resulting from an antitrust violation. However, the broad language of the statute has been narrowed by judicial construction, and a plaintiff must meet specific requirements to qualify for relief. A mere violation of the antitrust statutes does not support a private action; there must be a resulting injury to some party for damages to be awarded under this section. The cause of action must be personal to the plaintiff, and not an injury suffered by the public generally. A showing that there was also injury to the public was once considered essential for recovery, but more

1. 15 U.S.C. § 15 (1965) provides:
   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.


5. Tobman v. Cottage Woodcraft Shop, 194 F. Supp. 83 (S.D. Cal. 1961). See Riggall v. Washington County Medical Society, 249 F.2d 266, 268 (8th Cir. 1957), cert. denied, 355 U.S. 954 (1957), where the complaint was held defective since it had not charged an economic burden on the public by reason of the defendant’s acts.
recent decisions indicate that such a showing is no longer required once a violation has been shown.⁶

Although the statute requires the plaintiff to be injured in his "business or property," the plaintiff need not be engaged in a going business to recover. Where the plaintiff was prepared and intended to enter business but was prevented from engaging in business because of the defendant's actions, recovery has been allowed,⁸ but a mere expectation or hope of entering a future business is insufficient. In Broadcasters, Inc. v. Morristown Broadcasting Corporation,⁹ the plaintiff had applied to the Communications Commission for a radio station license and alleged that an unlawful conspiracy by the defendants had caused a delay in the processing of the application. The court ruled that there was no business or property interest of the plaintiff's involved, but merely an expectation.¹⁰ Waldron v. British Petroleum Co.¹¹ presents an extensive discussion of the meaning of business or property under Section 4. In Waldron, the plaintiff had contracted to import and sell Iranian oil. Suit was brought under Section 4, the plaintiff alleging that the defendant's conspiracy prevented resale by causing the contract deadline to expire. The court ruled that the plaintiff was not engaged in business because he did not have the necessary financial resources to act as a principal in importing and selling oil. As to expected contracts for resale in various stages of negotiation, the plaintiff had a mere expectancy which lacked existing economic control. Plaintiff further argued that he had a right to assign his contracts to an importer and that this right of assignment constituted "business." The court said that since the alleged conspiracy was aimed at the oil industry, the plaintiff as an assignor would be only indirectly injured. However, the court concluded that the contract with the Iranian government was a property right within the meaning of the statute. The plaintiff was thus held to have alleged a cause of action, and de-

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⁸. William Goldman Theatres, Inc. v. Loew's, Inc., 69 F. Supp. 103 (E.D. Pa. 1946), aff'd, 164 F.2d 1021 (3d Cir. 1948), cert. denied, 334 U.S. 811 (1948). The problem in proving damages where there are no business records to show what the profit would have been should be noted. Generally, if damages can be estimated by reasonable inference, such proof will be sufficient even though only an approximation. Pennington v. United Mine Workers of America, 325 F.2d 804 (6th Cir. 1963).
¹⁰. See Peller v. International Boxing Club, 227 F.2d 593 (7th Cir. 1955). Miley v. John Hancock Mutual Life Insurance Co., 148 F. Supp. 299 (D. Mass.), aff'd, 242 F.2d 758 (1st Cir.), cert. denied, 355 U.S. 828 (1957), denied standing to an insurance broker who had only the expectancy of a contract. In Brownlee v. Malco Theatres, 99 F. Supp. 312 (W.D. Ark. 1951), plaintiff was negotiating for the purchase of a theatre and was denied standing because he had no more interest in the theatre than any member of the public who might have wished to purchase the property.
fendant's motion to dismiss was accordingly denied.\textsuperscript{12} The injury to the plaintiff does not have to be of a particular type, nor does it have to be unreasonable; once there has been a violation and injury, "the issue becomes one of causation, not reasonableness."\textsuperscript{13}

The final element required for recovery is that the injury be caused "by reason of" the violation. This requirement has proven to be the most troublesome barrier for many plaintiffs to overcome in their suits for treble damages under Section 4. The district and circuit courts have interpreted the statute to require "conduct which proximately results in injury to the plaintiff."\textsuperscript{14} Essentially this means that even though the plaintiff has unquestionably been injured, he must stand in a close enough relation to the defendant to warrant the award of treble damages. An examination of the cases will show that the term "proximate cause" does not have the meaning commonly associated with it in tort law.\textsuperscript{15}

A narrow view of the treble damage provisions was taken in an early case by the use of a restrictive definition of legal cause in \textit{Ames v. American Telephone and Telegraph Co.}\textsuperscript{16} where the plaintiff held stock in a telephone company in which the defendant purchased a controlling interest. Defendant's management prevented the telephone company from doing a profitable business, and the company was forced into receivership, thereby rendering plaintiff's stock worthless. In a suit for injury to his interest, the court denied the plaintiff standing on the ground that there was no "direct" injury. \textit{Loeb v. Eastman Kodak Co.}\textsuperscript{17} followed shortly after \textit{Ames}. In \textit{Loeb}, the plaintiff was a stockholder and unsecured creditor of a corporation which had been driven into bankruptcy by the defendant. On distribution of the fund realized at the receiver's sale, nothing was left for unsecured creditors

\begin{itemize}
  \item \textbf{12.} The court listed four factors that were important in determining whether a party was in business:
  \begin{enumerate}
    \item The background and experience of the plaintiff in his prospective business;
    \item Affirmative action taken to engage in the business;
    \item Financial ability to engage in the business;
    \item Consummation of contracts by the plaintiff.
  \end{enumerate}
  \textit{Id.} at 81-82.

The same test was applied in \textit{Martin v. Phillips Petroleum Co.}, 365 F.2d 629 (5th Cir. 1966).


14. \textit{Weston Theatres v. Warner Bros. Pictures}, 41 F. Supp. 757, 763 (D.N.J. 1941). There is authority for the position that the defendant's conduct need only be a substantial factor in bringing about the harm in accord with the position of the \textit{RESTATEMENT OF TORTS} § 431 (1934). \textit{Ford Motor Co. v. Websters Auto Sales, Inc.}, 361 F.2d 874 (1st Cir. 1966); \textit{Haverhill Gazette Co. v. Union Leader Corp.}, 333 F.2d 798 (1st Cir.), cert. denied, 379 U.S. 931 (1964). \textit{See also} \textit{McWhirter v. Monroe Calculating Machine Co.}, 76 F. Supp. 456 (W.D. Mo. 1948) requiring almost a certainty that the defendant's actions were the sole cause of the harm.

15. "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." \textit{Snow Crest Beverages v. Recipe Foods, Inc.}, 147 F. Supp. 907, 909 (D. Mass. 1956).


17. 183 F. 704 (3d Cir. 1910).
and stockholders. The court ruled that plaintiff had no standing and that the right of action was in the corporation or its trustee in bankruptcy. The court pointed out that this was the rule at common law and that a failure to adhere to this view would, in effect, mean that the anti-trust laws, by giving an action to thousands of individual stockholders which would be better settled by one suit in the name of the corporation, were intended to permit a multiplicity of suits. Furthermore, the conspiracy was not aimed at the plaintiff as a stockholder or creditor, but rather was aimed at the corporation, and the shareholder-plaintiff was only incidentally and indirectly injured. There is little question that the holdings of the Ames and Loeb cases were consistent with the general law and were not necessarily decided with an intent to establish a narrow definition of legal cause under the treble damage provisions of the antitrust acts. It should be recognized at the outset that the prospect of multiple suits was not the sole reason for the common law rule. It is accepted theory that stockholders lose their identity in the recognition of the corporation as a separate and distinct person. By purchasing shares, the stockholder recognizes the corporation as the controlling entity and, individually, is only entitled to share in the earnings and the distribution of assets on liquidation. Correspondingly, if one shareholder has been derivatively injured by reason of an injury to the corporate entity, every other shareholder has also suffered and must be accorded the same right of redress.

The courts have long required the corporate entity to bring suit, as opposed to the individual shareholder. This allows the damages recovered to be available for the payment of corporate creditors and for other purposes, including distribution to the shareholders as dividends. In spite of this background, which undoubtedly heavily influenced the Ames and Loeb decisions, a fear of multiple suits producing inordinately heavy liability has caused these cases to become the foundation of decisions resulting in classes of plaintiffs, other than shareholders or creditors, being excluded from bringing a treble damage action on the ground that they are only indirectly or derivatively injured.

20. E.g., Waller v. Waller, 187 Md. 185, 49 A.2d 449 (1946); Commonwealth of Massachusetts v. Davis, 140 Tex. 398, 168 S.W.2d 216 (1943).
21. To illustrate the evolution of the present doctrines, Ames was cited in Gerli v. Silk Association of America, 36 F.2d 959 (S.D.N.Y. 1929), where the plaintiff was the president and controlling stockholder of a corporation. He claimed damages by reason of losses through the inability of the corporation to pay indebtedness owing him, impairment of the value of his stock, losses of future salaries and commissions, and injury to his credit and reputation. The court, consistent with prior law before the passage of the antitrust acts, denied relief on the ground that a creditor could not enforce a claim of the corporation and that loss of a corporate office and salary were not his business under the statute but the business of the corporation. Ten years later the Gerli case was construed to require a finding that a lessor could not recover for loss of profits incurred as a result of injury to his tenant on the theory that the lessor was a remote plaintiff under the holding of the Gerli case. Westmoreland Asbestos Co., Inc. v. Johns-Manville Corp., 30 F. Supp. 389 (S.D.N.Y. 1939). In more recent years the latter cases have been cited for the proposition that no person incidentally injured or whose losses result only from a diminution of profitable relationships with
Stockholders, creditors, corporate officers, and employees are generally regarded as remote parties and are denied standing. The recognized exception in the stockholder cases is that a derivative action will be allowed on behalf of the corporation when the corporation refuses or is unable to sue in its own right. However, the action is barred unless the corporation is in existence. These principles have been applied to partnerships; usually a partner is barred from bringing suit for injury to his interest. However, one partner may sue on its behalf where the partnership is unable to sue or where prosecution of the suit is an act appropriate to winding up.

Another major area where a class of plaintiffs has been considered remote when the violation and fact of injury are undisputed is the line of cases in which a landlord is suing for injury to his lessee when he has lost his lease or where the lease is for a percentage of the lessee's profits and those profits have been diminished. Generally, if the plaintiff's lessee is not involved in the defendant's conspiracy, the plaintiff will be regarded as indirectly injured and, being considered merely a creditor, will be denied standing. However, when the lessee, the party "directly" affected by an antitrust violation has a right of action for treble damages. E.g., Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956).

23. E.g., Gerli v. Silk Association of America, 36 F.2d 989 (S.D.N.Y. 1936); Westmoreland Asbestos Co. v. Johns-Manville Corp., 30 F. Supp. 389 (S.D.N.Y. 1939). It has been stated that the policy behind refusing recovery here, other than the fear of a multiplicity of suits, is that it would give him a preference over other creditors, thereby thwarting the policy of the Bankruptcy Act. Congress Building Corp. v. Loew's, Inc., 246 F.2d 587, 591 (7th Cir. 1957).
26. In Rogers v. American Can Co., 305 F.2d 297 (3d Cir. 1962), the corporation was in control of the defendant. The court gave a minority stockholder standing to sue even though the majority had voted not to bring an action. See Fanchon and Davis Inc. v. Paramount Pictures, Inc., 202 F.2d 731 (2d Cir. 1953).
29. In Klebanow v. New York Produce Exchange, 344 F.2d 294 (2d Cir. 1965), the general partners had incapacitated themselves by divesting themselves of power to do any act in behalf of the partnership and had authorized a representative to act for them. The representative was unwilling to sue because of affiliations with the defendant. The court ruled that a limited partner could sue on behalf of the partnership. In D'Ippolito v. Cities Service Oil Co., [1967 Transfer Binder] TRADE REC. REP. ¶ 72,034, at 73, 629 (2d Cir. 1967), the plaintiffs were originally partners who formed New Jersey corporations which subsequently merged into a Delaware corporation. The court ruled that the plaintiffs could sue for damages to the partnership in so far as they were not assigned to the New Jersey corporations to the plaintiffs. Claims for the New Jersey corporations could be sued on by the plaintiffs if reserved to them in the merger.
to further other business interests, has joined with the defendant in his actions, the Seventh Circuit Court of Appeals has held, in accord with other cases, that the lessor is directly injured. This result was justified on the ground that there is no substantial danger of a multiplicity of suits, as in the stockholder cases, or of thwarting other policies, as in the creditor cases. Furthermore, the court argued that if the landlord were not allowed to sue there would be no private remedy against the defendant's actions and stated that the defendant should not be permitted to insulate himself from liability by inducing the lessee to join his scheme. Consistent with this reasoning courts have recognized that an employee may maintain an action against persons who have conspired with his employer thereby causing a loss of sales commissions or preventing him from seeking employment elsewhere. It has also been recognized that a violation may result in injuries to a stockholder which are separate and distinct from the in-

32. Congress Building Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957); Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190 (9th Cir. 1956) (coercion to grant a more favorable lease); Erone Corp. v. Skouras Theatres Corp., 166 F. Supp. 621 (S.D.N.Y. 1957). However, this case has not been accepted in New York. In Lieberthal v. North Country Lanes, Inc., 221 F. Supp. 683 (S.D.N.Y. 1963), aff'd, 332 F.2d 269 (2d Cir. 1964), the district court said: "a landlord may not recover for antitrust violations affecting the business of his tenant, whether the tenant be a party to the violation or not." 221 F. Supp. at 690.


34. The court's statement is based on the theory that the lessee would be the only other possible plaintiff and would be barred from suit because he has participated in the alleged antitrust conduct, thereby being in pari delicto. See Perma Life Mufflers, Inc. v. International Parts Corporation, 376 F.2d 692 (7th Cir. 1967). But where the party participating in the misconduct has been coerced into the improper activity by economic duress, he is not deemed to be in pari delicto and may bring an action. Goldlaw, Inc. v. Shubert, 208 F. Supp. 965 (E.D. Pa. 1967).

35. In Vines v. General Outdoor Advertising Co., 171 F.2d 487 (2d Cir. 1948), the plaintiff was an advertising solicitor employed on a commission basis. His employer withdrew a large account from him in order to give it to a large national advertiser pursuant to an allegedly illegal agreement. The employee was held to have standing even though the withdrawal was in accordance with the employment contract. Although not cited, Vines appears to have been rejected in Robinson v. Stanley Home Products, Inc., 178 F. Supp. 230 (D. Mass.), aff'd, 272 F.2d 601 (1st Cir. 1959), where the employee was a sales representative in the New England area. The plaintiff obtained orders from the defendant, and thereafter the defendant negotiated directly with the plaintiff's employer for large purchases at a reduced price. The employer then terminated plaintiff's services and accepted the offer. The plaintiff alleged that the agreement was in violation of the anti-trust laws and that the reduced price was achieved by eliminating his commission. The court held that the complaint did not show a violation, but that even if it had, plaintiff could not recover since the loss of commission was only a condition precedent to the agreement, not a result of the agreement. See also Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942), where the plaintiff was the exclusive sales agent of the defendant in an eight-state area. Defendant and two other companies selling the same products combined activities for the purpose of suppressing competition. As part of the scheme they divided and allocated sales territory, thereby depriving the plaintiff of the opportunity to sell in certain territories. Plaintiff was granted standing. This case was distinguished in Robinson on the ground that the injury was a result of the wrongful acts and was, therefore, direct. Where the employee has been prevented from obtaining employment in the same industry as a result of his employer's agreements, the employee has been given standing. Radovich v. National Football League, 352 U.S. 445 (1957) (agree-
juries to the corporation and for which he may recover in his own right. The Fifth Circuit has indicated that a shareholder may be directly injured and have a right of action if a wrong in violation of a statute has caused him to part with his shares for less than their actual value. However, the injury must not be derivative and therefore where a depreciation in value takes place as a result of injuries to the corporation, relief will be denied. However, the Second Circuit has denied relief where, pursuant to a conspiracy, a stifling of bids at the plaintiff's auction sale forced him to sell his shares for less than their actual value. The court was of the opinion that the antitrust acts only create liabilities for injuries directly affecting interstate commerce and that the plaintiff was not injured in his "commerce." The court did not rest on this ground alone but went on to cite the prior stockholder cases as establishing the rule that a shareholder may never recover for injuries suffered by him individually but must look to the general municipal law. Those cases should not be cited to support such a rule because, as previously discussed, they merely followed prior law for reasons unrelated to the antitrust acts. Furthermore, the early cases did not necessarily intend to foreclose, nor did they have the effect of foreclosing, a treble recovery to the shareholders. If the corporation sues and recovers treble damages, the shareholders, in theory at least, realize a treble recovery. It is entirely possible that if a case involving special injury to a shareholder had been presented to the Ames and Loeb courts that they would have allowed the action, since they would have recognized that a shareholder could sue individually for this type of injury under the general law.

The last significant type of suit in which standing has generally been denied has been where a supplier, whose injury was a loss of sales to customers whose purchases had been reduced as a result of the alleged anti-trust violations of the defendant, brings an action under

36. United Copper Securities Co. v. Amalgamated Copper Co., 232 F. 574 (2d Cir. 1916). In this case, the complaint stated that the defendants had conspired to destroy the business, financial standing, and credit rating of the plaintiffs. The plaintiffs were in the business of promoting and financing companies dealing in copper. The court held that the plaintiffs had a cause of action and that an allegation of a conspiracy to destroy certain copper companies was properly pleaded for the purpose of showing a conspiracy, even though the plaintiffs were interested in the companies and could not recover for corporate injuries.

37. Peter v. Western Newspapers Union, 200 F.2d 867 (5th Cir. 1953). The plaintiff alleged that as a result of defendant's activities his stock had depreciated and he realized only a fraction of its prior value on sale. The court denied relief solely because the depreciation in value resulted from the corporate injury and not from a separate injury to the plaintiff.


Section 4. In Snow Crest Beverages, Inc. v. Recipe Foods, Inc., the customer was a manufacturer of syrups purchasing ninety percent of its extracts from the plaintiff corporation. As a result of the defendant’s exclusive dealing contracts, the sales of the customer diminished, thereby reducing the sales of the plaintiff. The treasurer of the plaintiff corporation owned all the stock of the customer corporation and fifty percent of the plaintiff’s stock, the other fifty percent being held by his wife. The court ruled that the plaintiff-supplier had no standing since it occupied the same position as the lessor in the landlord cases, its loss “[resulting] only from an interruption or diminution of profitable relationships with the party directly affected.” Recognizing that the plaintiff’s losses were foreseeable, the court pointed out that Congress had failed to amend the antitrust laws even though repeated decisions had viewed the injury requirements narrowly. The court said that the result would be unchanged even if owners of the supplier and its customer were identical and even if the customer were the only entity purchasing from the supplier, since the organizers of the corporations “chose to take the advantages and disadvantages which flow from separate legal personalities.” In Volasco Products Company v. Lloyd A. Fry Roofing Company, the plaintiffs were two corporations with the same officers owned by the same stockholders. One corporation was a supplier of raw materials to the second which produced the finished product. Again, the identity of ownership was held meaningless, and the supplier was found to be remotely injured.  


42. Id. at 909.

43. For an argument in favor of the present injury requirements stressing lack of Congressional action as approval, see E. Timberlake, Federal Treble Damage Antitrust Actions § 4.02 (1965).

44. 147 F. Supp. 907, 909 (D. Mass. 1956). See Montana Power Co. v. Federal Power Commission, 185 F.2d 491 (D.D.C. 1950). In an analogous situation, a labor union caused independent employees to strike, which resulted in the destruction of a coal company. The coal company’s sales agency sued for its resulting loss of commissions and was denied standing. United Mine Workers of America v. Osbourne Mining Co., 279 F.2d 716 (6th Cir. 1960), cert. denied, 364 U.S. 881 (1961). The action was brought under the Labor Management Relations Act, 29 U.S.C. § 187b (1959), the wording of which is identical to Section 4 of the Clayton Act. However, the case was decided on the basis of the anti-trust cases since the statute had not been interpreted.

45. 308 F.2d 383 (6th Cir. 1962), cert. denied, 372 U.S. 907 (1963). But see Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962), where the defendant gained control of plaintiff’s raw material suppliers. It was held error for the court to rule as a matter of law that plaintiff was too remote to have standing.

46. “Corporations are separate entities, having various privileges, immunities, and responsibilities, including the rights to sue and be sued. Individuals who desire to do business through a corporation gain some advantages and probably sacrifice others. [The plaintiffs], for reasons sufficient to them, decided to operate through two corporations and they must now abide by the consequences.” 308 F.2d at 394.
Prior to this past year, the only case to allow recovery to a supplier who had lost sales as a result of an injury to his customer was *Karseal Corporation v. Richfield Oil Corporation.* In *Karseal,* the plaintiff was a manufacturer of automobile polish who sold his product to independent distributors who, in turn, sold to service stations. The defendant producer executed exclusive dealing contracts which restricted the purchase of automotive products by some 2,965 service stations to those produced by the defendant. In holding that the plaintiff manufacturer had standing, the court borrowed language from *Conference of Studio Unions v. Loew's, Inc.*, by stating that the defendant's practices were directed at the manufacturers and distributors of competitive products with the intent to reduce their sales and that therefore both the manufacturers and the distributors had a cause of action. These persons were within the "target area," meaning that they were "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry" and were "not only hit but aimed at...."

This past year, in *Sanitary Milk Producers v. Bergjans Farm Dairy, Incorporated,* the Eighth Circuit Court of Appeals followed *Karseal* on similar facts. In *Sanitary Milk Producers,* six small dairy corporations, which were processors of raw milk, brought suit against Sanitary Milk Producers, a dairy farm cooperative, for violations of the Sherman and Clayton Acts. The defendant was engaged in the business of marketing the raw milk of its members to local milk processors including the plaintiffs. Prices are higher for Class I milk, which is raw milk processed as fluid milk, than for Class II milk, which is raw milk processed into other dairy products. The prices are set by the local Federal Milk Market Administrator per order of the Secretary of Agriculture. Since the milk processors in the area imported milk from other states and therefore were not purchasing the defendant's full supply of raw milk, the percentage of defendant's milk sold at the Class I price was less than it would have been if the local processors had purchased defendant's full supply. As a countermeasure, defendant purchased a local milk processing plant, cut off its supply of raw milk to the plaintiffs, and began producing the finished

47. 221 F.2d 358 (9th Cir. 1955); 104 U. Pa. L. Rev. 543 (1956).
48. 193 F.2d 51 (9th Cir. 1951). In this case the defendant was alleged to have agreed to furnish members of its union to certain movie studios at standard rates and furnish its members to competing minor studios at prohibitively high rates. In order to accomplish this, the defendant restricted its production. As a result, members of the plaintiff union lost wages, and the union itself lost revenues by the withdrawal of certain of its member unions. The court ruled that the plaintiff had no standing since the conspiracy was not aimed at harming the union but was aimed at other motion picture producers; plaintiff was deemed to have been harmed only incidentally:...
49. In order to state a cause of action under the antitrust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and 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. *Id.* at 54-55.
50. 221 F.2d at 365.
51. 368 F.2d 679 (8th Cir. 1966).
52. The facts of the case are reported in *Bergjans Farm Dairy, Inc. v. Sanitary Milk Producers,* 241 F. Supp. 476 (E.D. Mo. 1965).
product. A price war followed, which resulted in the defendant's slowly gaining business at the expense of the plaintiffs.

Bergjans Farm Dairy was a processor selling its entire production to its wholly-owned sales company located in the same building as Bergjans. Because of the defendant's activities, the sales company experienced a decrease in its sales volume which resulted in reduced purchases from Bergjans; however, the sales company did not bring suit. The defendant objected to the lower court's ruling that Bergjans had standing on the ground that Bergjans was not a competitor or customer of Sanitary and was therefore a remote party which had suffered no injury within the meaning of Section 4 of the Clayton Act. The Court of Appeals for the Eighth Circuit ruled that Bergjans did have standing to bring suit. It distinguished the principal case from the Sixth Circuit decision in *Volasco* and the Massachusetts district court decision in *Snow Crest* by pointing out that the plaintiff in the instant case was the manufacturer of a finished product, rather than a raw material supplier, and was therefore in direct competition with the defendant; the court thus reasoned that "any recovery by Bergjans is not in the nature of a windfall . . . Bergjans' injury is something more than remote, is not derivative but direct, and is the proximate result of Sanitary's misdoing." \(^{53}\)

In addition to *Sanitary Milk Producers*, one other recent decision would permit recovery by a plaintiff in this type of case. In *South Carolina Council of Milk Producers v. Newton*, \(^{54}\) which was cited with approval in *Sanitary Milk Producers*, the plaintiff was a nonprofit association of raw milk producers, and the defendant was a processor of milk who also controlled a chain of retail stores. The defendant sold milk to the retail stores at below cost for resale to the public below cost. Although the defendant billed its retailers at the South Carolina Milk Commission minimum price, it rebated to the retailers the amount of its loss. The defendant's intention was to use the milk as a loss leader in order to attract customers to its stores in the hope that they would purchase other products as well. The result was a drop in the retail price of milk forcing plaintiffs to sell their product at cost. The district court granted defendant's motion to dismiss on the grounds that the plaintiff's commodity was raw milk while the defendant's was processed milk and that therefore no direct relationship or mutual competition existed between them. On appeal, the Court of Appeals for the Fourth Circuit distinguished *Volasco* and *Snow Crest* on the ground that the milk producers were not in a supplier-seller relationship, but rather that they and the defendants were selling an essentially equivalent commodity. It found that the prior cases stood for the proposition that a supplier does not gain a cause of action by reason of common ownership of the supplier and the buyer in direct competition with the defendant. The court was careful to note that it was merely drawing a factual distinction between the case under consideration and *Volasco* and *Snow Crest*:

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53. 368 F.2d at 689.
... if either of the cited cases be read as declaring that a supplier who is not in privity or competition with one guilty of anti-trust misconduct, but whose business is proximately affected by such misconduct, can never have a claim for anti-trust damages against the wrongdoer, we could not follow the decisions that far. 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 4.55.55 To the extent that the Volasco and Snow Crest cases stand for the proposition that a supplier may never recover for damages caused by injury to its customer, Sanitary Milk Producers and South Carolina Council of Milk Producers have cast doubt on their validity.56 The decision in Sanitary Milk Producers does not significantly differ from Karseal. In both cases the plaintiffs were manufacturers of a finished product and the courts in granting relief looked past the immediate party standing between the plaintiff and the wrongdoer to the real object of the wrongful acts. Although the original motive of the Sanitary Milk Producers may have been only to gain an advantage in the sale of raw milk and the alleged intent was to monopolize the sale to retailers, a necessary object of the scheme adopted was to affect competition in the sale of processed milk, the stage of production and distribution in which plaintiffs were engaged. South Carolina Council of Milk Producers goes significantly further because the object of the defendant's scheme was to gain an advantage in the retail market, not to monopolize or restrain raw milk production, which under the reasoning of the prior cases would have resulted in a ruling that the plaintiffs were indirectly injured. Unlike Karseal and Sanitary Milk Producers, the plaintiff and defendant were in no way competitors, and the court in holding the plaintiff has standing comes close to saying that it will grant relief to a foreseeable plaintiff. The opinion may indicate that where actions in violation of the anti-trust statutes are designed to gain control over or restrain a segment of an industry, relief will be granted to members of that industry at any stage of production or distribution, who, as a result, suffer a foreseeable injury. Even if this decision is accepted, a later court, faced with a case in which the defendant's purposes are not obviously to injure the plaintiff and in which the prospective liability seems inordinately heavy, might, of course, deny standing by restrictively interpreting the term "sector of the economy" in the Fourth Circuit's formulation of the rule. To support the result in Sanitary Milk Producers and South Carolina Council of Milk Producers, the courts relied on the "target

55. 360 F.2d at 418.
56. The district court opinion in South Carolina Council Of Milk Producers distinguished Karseal on the ground that the supplier was furnishing a finished product while in Snow Crest, even though the supplier's product was a major ingredient, there was no direct competition as in Karseal. The court then pointed out that in the case under consideration the raw milk was only an ingredient — although a major one — in the manufacture of the finished product. At a minimum, it would seem that the Fourth Circuit intends to bar a supplier only if his product is not a major ingredient of the finished product.
area" concept as expressed by the Ninth Circuit in Karseal. Most courts today appear to be confronting these issues in terms of this doctrine. As a result, there has been a gradual repudiation of the earlier requirements of privity or direct competition and a movement away from arbitrary classification of plaintiffs.\(^5\) Attention is now focused on the relationship between the plaintiff's injury and the purpose of the alleged misconduct. A recent decision has defined the target area as the "relevant market."\(^7\) A discussion of the relevant market as defined in anti-trust case law is beyond the scope of this comment, but it may be said that the definitions are so varied that no adequate guide for determining when a plaintiff will be in the protected sector of the economy has been provided as yet.\(^9\) Since there is no standard to determine when a plaintiff is within the sector of the economy endangered by a breakdown in competitive conditions, the target area concept allows a court to grant or deny standing in accordance with its view of the proper balance between the need for private enforcement of the anti-trust laws and the danger of windfall recoveries and disproportionate liability.\(^6\) The doctrine has not, as yet, significantly opened the doors to plaintiffs who were denied standing in the past. The few cases that have sought to extend the recognized area of legal injury usually quote the dicta of Supreme Court decisions as approval for a more lenient stand on injury requirements.\(^6\) However,

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5. See Schulman v. Burlington Industries, Inc., 255 F. Supp. 847, 851 (S.D.N.Y. 1966), holding that even if the plaintiff is not a customer or competitor of the defendant he has standing if he is injured and is "aimed at."

6. In Epstein v. Dennison Mfg. Co., TRADE REG. REP. (1966 Trade Cas.) ¶ 71,953, at 83,377 (S.D.N.Y. Dec. 8, 1966), the plaintiff developed an inventory tag fastening device and alleged that defendant, having obtained the patent by fraud, was using it to dominate the market in tag fastening devices. The court said standing should be allowed to all those in the target area: "Stripped of technicalities, this approach amounts to little more than requiring that there be some meaningful relationship or 'proximate cause' between the damages claimed and the particular anti-competitive impact on the relevant market." Id. at 83,378. The court then denied standing because the plaintiff did not show that he was a competitor, customer or otherwise involved in the market restricted by the defendant's acts.

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the Court has consistently declined to hear those cases where the issue of whether the statute should be construed literally or narrowly could be decided. As a result, its statements on the issue are generally ignored by the lower courts. The Court seems to have contented itself with uttering broad dicta with the hope that the lower courts will work out the difficulties for themselves.

Although there is general agreement that the broad purpose of the anti-trust laws is to promote a competitive economy, there are strong views on both sides of the question of whether the present method of limiting classes of plaintiffs adequately achieves this purpose. The argument favoring the present state of the law stresses that recovery of treble damages is a drastic remedy which requires a narrow construction of the statutes, especially since many unfounded claims are brought in the hope of settlement. Others disagree by pointing to the costs, time, and complexity of anti-trust suits as justification for every possible incentive for the private litigant. Some commentators point to the low plaintiff recovery rate as justification for a literal construction of the statute as well as discretion in the trial requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws. Id. at 453.

Radovich was distinguished in Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395 (6th Cir. 1962). In Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961), in deciding that private plaintiffs did not have to show public injury, the Court said:

Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section [15 U.S.C. § 1] allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires. Id. at 660.


63. See E. Timberlake, Federal Treble Damage Antitrust Actions § 3.02 (1965).


66. Id. See also Wham, supra note 62.

judge to award compensatory or treble damages. These commentators stress that if discretion were given the trial court, it would find for the plaintiff on proof of an injury, thereby increasing the percentage of recovery. The argument for discretion usually points to the problem of the “innocent” defendant who has acted on the advice of counsel, or without such advice, and has inadvertently violated the law, or has had a previously lawful act transformed into an unlawful one by judicial decision. This argument stresses that the unfairness of such a situation calls for a restriction of standing requirements. The reply to the discretionary damage proposal is that courts would rarely award treble damages if they were given the choice. Furthermore, due to the cost, expense, and possible recriminatory actions, a plaintiff must have the treble damage incentive because he is unlikely to bring suit if he must bear the risk of having his recovery limited to actual damages. If the private plaintiff is discouraged from bringing suit and if there is a significant drop in the number of actions brought, these commentators claim a great burden would be placed on the Justice Department. Economists have also been critical of antitrust enforcement on the ground that the effects of various business practices on the economy have never been determined. They argue that the present laws and decisions do not adequately separate the market conditions and business practices that are favorable to the public interest from those that are not and that these factors should be the basis for deciding whether a penalty is in order.

In conclusion, there is a slow and cautious trend toward widening the area of standing for the private plaintiff, with greater emphasis on who is intended to be harmed by the wrongdoer’s action and a lessening concern over the possibility of multiple suits. Plaintiffs, under the rulings of Sanitary Milk Producers and South Carolina Council of Milk Producers, have somewhat greater latitude in establishing legal cause and are no longer barred because their injuries are, in form, derived from an injury to another. The Section 4 plaintiff


69. Johnson, supra note 63, at 30; Note, Standing to Sue for Treble Damages Under Section 4 of the Clayton Act, 64 Colum. L. Rev. 570 (1964).

70. Loevinger, Private Action — The Strongest Pillar of Antitrust, in 1 Antitrust Law and Techniques 384 (M. Hoffman and A. Winard eds. 1963); Wham, supra note 62, at 1062.


73. Wham, supra note 62, at 1062, says that without the private suit the Antitrust Division of the Justice Department would need four times the appropriations to take up the slack.

must now focus on convincing the court that he is sufficiently involved in the threatened sector of the economy to be entitled to relief.

It seems clear that neither the lower courts nor the Supreme Court are prepared to broaden the interpretations of the treble damage provisions to a significant extent in the absence of legislative action. The courts are understandably reluctant to make sophisticated economic judgments on methods of implementing the anti-trust laws. A drastic broadening of the standing requirements substantially increasing the number of successful private actions could have a significant effect on current business practices and the country's economic structure.

Perhaps some of the reluctance to broaden standing arises out of the very nature of anti-trust matters. It can be argued that the courts are not equipped by experience or by skilled assistance to enunciate economic policy, that trial procedures are not geared to presentation of the evidence in a complex case in a clearly understandable manner, and that judicial review is difficult. By the same token, the prospects for legislative action are dim; there is no widespread antagonism against big business as there was in the period when the Sherman Act was passed. Today, big business has become well-accepted and there is a widespread though possibly inaccurate feeling that large industries are operating efficiently and are striving to keep prices down.

No easy answer is at hand in this area where there are numerous divergent views and policy considerations and where sudden change could have far-reaching economic effects. Only after judging or pre-judging these many factors would it be an answer to say that Congress intended the statute to be read literally. Since the statute, on its

75. Justice Frankfurter commented in Standard Oil Co. v. United States, 337 U.S. 293, 310 n.13 (1949): The dual system of enforcement provided for by the Clayton Act must have contemplated standards of proof capable of administration by the courts as well as by the Federal Trade Commission and other designated agencies. (Citations omitted.) Our interpretation of the Act, therefore, should recognize that an appraisal of economic data which might be practicable if only the latter were faced with the task may be quite otherwise for judges unequipped for it either by experience or by the availability of skilled assistance.


78. M. Massel, supra note 59, at 26, states that studies of the relationship between competition and innovation are incomplete, but there are indications that large companies are not the principal innovators.


80. Loevinger states: It should also be understood that antitrust cases are political in the sense that the decisions of the courts in these cases actually make policy as to the character and structure of our society of a degree greater than in any other class of cases, except possibly a few cases in constitutional interpretation. Loevinger, Antitrust, Economics and Politics, 1 Antitrust Bull. 225, 259 (1955).

81. H. Thorelli, supra note 77, at 571, is of the opinion that Congress in enacting the Sherman Act purposely utilized broad phrases: ... to make use of that certain technique of judicial reasoning characteristic of common law courts. Aware that the modes of restraint will vary considerably
face, seemingly imposes absolute liability once damage has been shown, the courts may well be correct in refusing to give it such a reading. From a logical standpoint, it would seem that some exception must be made to the literal language. It is a valid exception to deny standing for a truly derivative injury, as was done in the early stockholder cases. However, the rule of these early cases has been used in factual contexts that may not be appropriate for its application, with a resulting degree of decisional inconsistency among the circuits. In the foreseeable future, absent some new wave of anti-trust sentiment which might move the courts to the literal reading or Congress to legislative action, it appears that there will be no substantial clarification of the present standard. The predictability of a plaintiff's success in establishing standing under Section 4 of the Clayton Act will continue to require a sensitivity to the particular facts present, since legal cause has a no more fixed definition now than it has had in the past.

from one industry and period to another, Congress thus deliberately provided for a certain degree of flexibility in the law. Apparently it has never been clear at any time what effect the antitrust laws are intended to have on the economic structure. In commenting on the enactment of the statutes of 1890, Thorelli states:

It must be assumed that legislators were aware of the disturbing lack of data concerning the nature and growth of industrial combinations in the postwar (civil war) period. A number of state and federal investigations were undertaken, but they served mainly to indicate the magnitude of the problems involved. It is true a considerable body of information was amassed, yet little was attained in the way of system and perspective. Id. at 570.

It seems that the closest thing to a comprehensive study that has been done since the turn of the century was that compiled by the Temporary National Economic Committee which was appointed by Congress in 1938. The Committee took almost three years, heard 552 witnesses and produced an 80 volume report, but with the advent of World War II, the study was forgotten. Loevinger, supra note 80, at 232.