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ANTITRUST: CRIMINAL INTENT IN ANTITRUST PROSECUTIONS, COLLATERAL ESTOPPEL AND SECTION 5(a) OF THE CLAYTON ACT, AND THE RELATIONSHIP OF STANDING AND INJURY IN PRIVATE ANTITRUST SUITS

C. PAUL ROGERS III*

This article will treat in some detail three developing areas of antitrust law: (1) the requirement of proof of criminal intent in antitrust prosecutions; (2) the relationship of collateral estoppel and section 5(a) of the Clayton Act; and, (3) the necessity of establishing antitrust standing and/or antitrust injury to successfully maintain a private action. In each section, recent contributions of the Seventh Circuit will be highlighted.

CRIMINAL INTENT IN ANTITRUST PROSECUTIONS

The Seventh Circuit's decision in *United States v. Brighton Building & Maintenance Co.*[1] was one of the first to consider the impact of the United States Supreme Court's holding in *United States v. United States Gypsum Co.*[2] The *Gypsum* Court had held that proof of criminal intent was a necessary predicate to a conviction under section 1 of the Sherman Act.[3] In *Brighton*, the Seventh Circuit distinguished *Gypsum* on its facts, holding that the criminal intent requirement did not extend to *per se* offenses under the antitrust laws.

Several corporate and individual defendants were convicted by a jury in *Brighton* of rigging bids for the construction of an expressway. The government showed that the defendants had agreed on a bid submission procedure whereby participating firms would be assured of submitting the low or the only bid for a specified project. The trial judge, acting before *Gypsum* was decided, instructed the jury that a finding of specific intent to violate the law was not necessary to convict "for the parties are deemed to have intended the necessary and direct

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1. 598 F.2d 1101 (7th Cir. 1979).
2. 438 U.S. 422 (1978).
3. 15 U.S.C. § 1 (1976).

consequences of their acts."[4]

On appeal, the defendants argued that the excuse of proof of specific intent, together with the development of *per se* rules of illegality, had turned the Sherman Act into a strict liability statute for criminal defendants of *per se* offenses.[5] The defendants further asserted that due process requires the inclusion of *mens rea* in a criminal statute that sweeps as broadly as the Sherman Act because of the frequent lack of notice to a defendant that his conduct is prohibited by the statute.[6] Additionally, the defendants argued that the 1974 congressional upgrading of the Sherman Act offenses from misdemeanors to felonies, with concomitant increases in penalties, underscores the necessity of implying a *mens rea* element into the statute.[7]

Although the *Gypsum* decision was not handed down until after the briefs were filed and oral arguments completed in *Brighton*,[8] the Seventh Circuit considered the implications of *Gypsum* at length.[9] In *Gypsum*, several major gypsum manufacturers, together with various of their corporate executives, were charged with violating section 1 of the Sherman Act by conspiring to fix the price of gypsum board.[10] The allegedly illegal conduct involved a system of price verification among the manufacturers. The government argued that the manufacturers concertedly followed a practice of telephoning competing producers to determine prices on gypsum board currently being charged to specific customers.[11] According to the government, the effect of the price exchange plan was to stabilize prices in the industry.

The trial court charged the jury that the defendants' purpose was essentially irrelevant if the jury found that the effect of price verification "was to raise, fix, maintain or stabilize prices."[12] The jury was advised that "the parties are presumed, as a matter of law, to have in-

4. 598 F.2d at 1104.

5. Brief for Appellants at 30-32, United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101 (7th Cir. 1979) [hereinafter referred to as Brief for Appellants]. Appellants argued that the combination of *per se* offenses and the lack of a requirement of intent left possibly innocent persons solely in the hands of prosecutorial discretion, the implication being that conviction could occur in any case the prosecution decided to bring. *Id.* at 41, 45. *See* Mercurio, *Antitrust Crimes: Time for Legislative Definition*, 51 NOTRE DAME LAW. 437, 442-47 (1976).

6. Brief for Appellants, *supra* note 5, at 34-42. *See* Lambert v. California, 355 U.S. 225 (1957).

7. Brief for Appellants, *supra* note 5, at 29, 43-46.

8. The *Gypsum* decision was handed down on June 29, 1978. The oral arguments in *Brighton* were held on June 13, 1978 and the Seventh Circuit's opinion was issued on May 18, 1979.

9. 598 F.2d at 1105-06.

10. 438 U.S. at 426-28.

11. *Id.* at 429.

12. *Id.* at 429-30.

tended [to fix prices]" if the effect of the price exchanges was to raise, fix, maintain, or stabilize prices.[13] Further, in language almost identical to the jury charge later upheld in *Brighton*, the *Gypsum* trial court informed the jury that "the law presumes that a person intends the necessary and natural consequences of his acts."[14] The jury found each of the corporate and individual defendants guilty.

The United States Court of Appeals for the Third Circuit reversed the convictions[15] and the United States Supreme Court affirmed, finding that the limiting nature of the jury instructions alone constituted reversible error.[16] In so holding, the Court implicitly parted with precedent[17] and held, for the first time, that intent is a necessary element of a criminal Sherman Act violation.

Chief Justice Burger, writing for the majority, expressed the view that proof of *mens rea* is the rule rather than the exception in criminal prosecutions under the Anglo-American common law, even where the statute involved does not specifically require criminal intent.[18] Although noting that strict liability crimes do exist,[19] the Chief Justice thought it inappropriate to impose such sanctions in the antitrust context because of the broad, open-ended nature of the language of the Sherman Act which "does not, in clear and categorical terms, precisely

13. *Id.* at 430.
14. *Id.*
15. 550 F.2d 115 (3d Cir. 1977).
16. 438 U.S. at 459. The Third Circuit had reversed the convictions primarily on the ground that the "meeting competition" exception to the Robinson-Patman Act, 15 U.S.C. §§ 13-13(b), 21 (1976), constituted a defense to the price verification scheme if defendants could establish that their sole purpose in engaging in the practice was to establish a defense to price discrimination charges. 550 F.2d at 126. On this point, the Supreme Court disagreed with the Third Circuit, holding that interseller price verification was not necessary to establish a section 2(b) "meeting competition" defense. 438 U.S. at 453. The Court stated that "a good-faith belief, rather than absolute certainty, that a price concession is being offered by a competitor is sufficient to satisfy the § 2(b) defense." *Id.* The Court concluded that actual price verification by a seller would rarely be needed to meet the good-faith standard. *Id.* at 454. For discussion of this aspect of the *Gypsum* case *see* Handler, *Antitrust 1978*, 78 COLUM. L. REV. 1363, 1407-11 (1978) [hereinafter cited as Handler]; Note, *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 288-95 (1978). For detailed, pre-*Gypsum* discussions of the meeting competition defense *see* Note, *Meeting Competition Under the Robinson-Patman Act*, 90 HARV. L. REV. 1476 (1977) [hereinafter cited as *Meeting Competition*]; Note, *Antitrust Liability for an Exchange of Price Information—What Really Happened to Container Corp.*, 63 VA. L. REV. 639 (1977) [hereinafter cited as *What Really Happened*].
17. *See, e.g.*, United States v. Masonite Corp., 316 U.S. 265 (1942); United States v. Patten, 226 U.S. 525 (1913); *see* text accompanying notes 47-50 *infra*.
18. 438 U.S. at 436, *quoting* Dennis v. United States, 341 U.S. 494, 500 (1951). *Contra*, United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971); United States v. Freed, 401 U.S. 601 (1971); United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Behrman, 258 U.S. 280 (1922); United States v. Balint, 258 U.S. 250 (1922). *See generally* Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107.
19. 438 U.S. at 438.

identify the conduct which it proscribes."[20] The judiciary, in developing flexible and adaptable standards such as the rule of reason, has not interpreted the Sherman Act as if it were primarily a criminal statute, Chief Justice Burger asserted.[21]

The Chief Justice then noted that the type of conduct proscribed by the Sherman Act, with the exception of *per se* offenses with known anticompetitive effects, "is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct."[22] The imposition of liability because of anticompetitive effects, without inquiry into intent, would create, according to the Chief Justice, "the distinct possibility of overdeterrence" and would transform the criminal sanctions of the antitrust laws into a regulatory rather than penal role.[23] The Chief Justice concluded that the criminal offenses proscribed by the Sherman Act must include criminal intent as an element because "the same basic concerns which are manifest in our general requirement of *mens rea* in criminal statutes . . . are at least equally salient in the antitrust context."[24]

In *Brighton*, the Seventh Circuit recognized that *Gypsum* established, as a general proposition, that intent is an element of a Sherman Act criminal offense.[25] However, the Seventh Circuit perceived a significant factual difference in *Gypsum* which it believed distinguished the two cases. Since the price verification plan in *Gypsum*, unlike the bid-rigging scheme in *Brighton*, was not a *per se* offense, the Seventh Circuit reasoned that *Gypsum* was not applicable uniformly to *per se* violations.[26]

The *Brighton* jury had been instructed that, in order to convict, it must find that the defendants knowingly participated in a conspiracy whose purpose was to bring about an unreasonable restraint of trade.

20. *Id.*
21. *Id.* at 439.
22. *Id.* at 441.
23. *Id.* The Chief Justice also viewed the recommendation of the 1955 Attorney General's Committee to Study the Antitrust Laws and the revised Antitrust Division Guidelines that criminal prosecutions under the Sherman Act should be reserved for "egregious" or "willful" conduct as evincing the same concerns as "are manifested in our general requirement of *mens rea* in criminal statutes." *Id.* at 439, 440 n.15. *See* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 349 (1955); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 110 (1967).
24. 438 U.S. at 440.
25. 598 F.2d at 1106.
26. *Id.*. The court did not specifically address appellants' argument that the lack of *mens rea* created strict liability for antitrust defendants for what was now a felonious crime. *See* text accompanying notes 4-6 *supra*.

The jury was further advised that bid-rigging is *per se* an unreasonable restraint of trade.[27]

The Seventh Circuit did not believe that *Gypsum* required an instruction of "intent to restrain trade" once the defendants were found to have intentionally made an agreement which is *per se* unlawful. In the court's view, *per se* rules are substantive rules of law which define illegal conduct.[28] Apparently, the intent requirement is fulfilled in *per se* cases by proof of an intentional agreement or conspiracy the purpose of which is to commit a *per se* violation of the law, without proof that the defendants intended the unlawful result or had knowledge of the probable consequences of their acts.[29]

Two other circuits, in cases decided almost contemporaneously with *Brighton*, independently agreed with the Seventh Circuit's restrictive view of the criminal intent requirement. In *United States v. Foley*,[30] the United States Court of Appeals for the Fourth Circuit held that real estate brokers accused of fixing commission rates on residential sales were not entitled to jury instructions which would require a finding of specific intent to restrain trade.[31] In *Foley*, the Fourth Circuit found sufficient the trial court's charge requiring, for conviction, findings that the "defendants must have known that their agreement, if effectuated, would have an effect on prices; that they knowingly joined a conspiracy whose purpose was to fix prices; and, that in joining they intended to further that purpose."[32] Thus, the Fourth Circuit found, as did the Seventh Circuit, that proof of knowing participation in a conspiracy to fix prices was sufficient evidence to convict in a *per se* case.

The United States Court of Appeals for the Third Circuit, in *United States v. Gillen*,[33] expressed, in unequivocal language, the same view as the Seventh and Fourth Circuits. In affirming a conviction for price-fixing in the anthracite coal industry, the court first concluded that *Gypsum* acknowledged that price-fixing cases are an exception to the criminal intent requirement in antitrust prosecutions.[34] Further, the court asserted that, even if *Gypsum* was applicable, the intent re-

27. 598 F.2d at 1107.
28. *Id.* at 1106.
29. The court found it sufficient that "the jury was instructed that in order to convict it must find that defendants were knowing members of a conspiracy whose purpose was to effect an unreasonable restraint on interstate or foreign commerce and that bid-rigging is regarded as unreasonable *per se*." *Id.* at 1106.
30. 598 F.2d 1323 (4th Cir. 1979).
31. *Id.* at 1335.
32. *Id.* at 1336.
33. 599 F.2d 541 (3d Cir. 1979).
34. *Id.* at 544.

quirements will always be met in a case involving a price-fixing conspiracy. The court went on to note that, "[i]f a defendant intends to fix prices, he necessarily intends to restrain trade."[35] In agreeing with the Seventh and Fourth Circuits, the Third Circuit stated that in price-fixing conspiracies "no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy."[36]

The intent standard articulated by the Supreme Court in *Gypsum* requires proof that defendant undertook the proscribed conduct with *knowledge* of its likely effects or probable consequences.[37] The stricter standard of proof of a "conscious desire" to restrain trade was rejected as "both unnecessarily cumulative and unduly burdensome."[38] Given this moderate *mens rea* standard, a formal requirement of intent to restrain trade may be, as asserted by the Third Circuit, superfluous in *per se* cases. It would seem unlikely that defendants who have engaged in conduct sufficiently predatory as to fall within a *per se* rule could be said not to know the probable effects of their actions.[39]

According to the *Gypsum* Court, the jury in such a situation may draw an inference of knowledge based upon the anticompetitive result of the suspect conduct.[40] In rule of reason situations, where, by definition, the conduct may be found reasonable, the drawing of an inference of knowledge of probable effect is problematical. However, such an inference would almost invariably follow *per se* offenses once the illegal agreement or conspiracy was established. For example, in *Brighton*, once the jury found that the defendants had entered into a conspiracy to rig bids, the inference that the defendants knew that their scheme would probably affect the operation of free competitive bidding

35. *Id.* at 545.

36. *Id.* *See also* United States v. Continental Group, Inc., 456 F. Supp. 704, 716 (E.D. Pa. 1978) (holding that *Gypsum* did *not* change requirement that the government must show that defendants acted knowingly rather than with specific intent).

37. 438 U.S. at 446. The Court pointed out that the type of intent under consideration was "the more traditional intent to effectuate the object of the conspiracy" rather than "the basic intent to agree, which is necessary to establish the existence of the conspiracy." *Id.* at 443 n.20, *citing* W. LAFAVE & A. SCOTT, CRIMINAL LAW 464-65 (1972). *See also* Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624 (1941).

38. 438 U.S. at 446. Apparently, conduct undertaken with the express purpose of producing anticompetitive effects would also support criminal liability, even if the proscribed effects did not actually result. The Court, by limiting its holding to situations where anticompetitive effects have been demonstrated, implicitly suggested that the higher standard of intent may be applicable where no anticompetitive effects result. *Id.* at 444-45 n.21.

39. Justice Stevens, who disagreed about the propriety of a judicial imposition of a *mens rea* standard, recognized the limited practical value of the majority's "knowledge" test for intent. *Id.* at 475-76 (Stevens, J., concurring in part and dissenting in part). *See* Handler, *supra* note 16, at 1399-1400; Comment, *United States v. United States Gypsum Co.: Putting a Lid on Container*, 45 BROOKLYN L. REV. 417, 434-35 (1979) [hereinafter cited as *Putting a Lid*].

40. 438 U.S. at 446.

would seem to be inescapable.[41]

However, even if the refusal of the circuit courts to require proof of criminal intent in *per se* prosecutions has little practical significance, it is still appropriate to question the courts' limitation of *Gypsum* to rule of reason cases. If the Supreme Court intended *mens rea* to be an indispensable element of all antitrust criminal suits, then that burden, even though minimal, should be borne by antitrust prosecutors.

Gypsum did not expressly except *per se* offenses in articulating the scienter criterion. And, at least superficially, *Brighton, Foley*, and *Gillen* appear to contravene the spirit of *Gypsum* by imposing strict criminal antitrust liability in spite of Supreme Court language rejecting, for a variety of policy reasons, such an interpretation of Sherman Act culpability. The tenor of the *Gypsum* decision suggests that *mens rea* should be a required element of all criminal offenses unless recognizable circumstances direct otherwise. Although intent is omitted from the statutory language, the Court in *Gypsum* determined that, "Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor. . . ."[42] Strict liability offenses were characterized as "generally disfavored."[43]

However, closer analysis reveals that the circuit courts' distinction of *Gypsum* is supportable and perhaps inescapable. As noted, the Supreme Court's decision revolved around policy considerations. The Court believed that the fact that the Sherman Act contained broad language resulting in open-ended standards, such as the rule of reason, applicable to an indeterminate range of conduct mandated inclusion of a *mens rea* element. Often, the *Gypsum* Court noted, conduct may be found to violate the statute after the fact; criminal sanctions imposed without inquiry into intent could result in too much deterrence and would serve to regulate corporate behavior rather than punish corporate wrongdoing.[44]

Thus, the Court's reference to the vagaries of rule of reason analysis underscores the policy pronouncements favoring a *mens rea* requirement. Further, in characterizing much of the behavior proscribed by

41. In *Brighton*, even though the court held that proof of knowledge that the intended conduct was unlawful was not required, it was pointed out that the defendants' bids were accompanied by affidavits stating that the bidder had not agreed, colluded, or otherwise restrained free competitive bidding. 598 F.2d at 1105 n.1. Presumably, the signing of such affidavits would have proved the defendants' knowledge of the probable consequences of their acts, had the *Gypsum* standard been followed.

42. 438 U.S. at 437, *citing* Morrissette v. United States, 342 U.S. 246, 263 (1952).

43. 438 U.S. at 438.

44. *Id.* at 442.

the Sherman Act as "often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct," the Court specifically excepted *per se* conduct.[45] The apparent difference to the Court between *per se* and rule of reason conduct for intent purposes is underscored by the effort the Court took to signal that the conduct scrutinized in *Gypsum*, exchanges of price information, was not a *per se* offense.[46]

Much of the criticism of *Gypsum* has thus far centered around the Court's apparent disregard of precedent.[47] An early antitrust decision, *United States v. Patten*,[48] had generally been interpreted, both in a section 1 and section 2 context, as obviating the need to prove specific intent by establishing a presumption that conspirators intend the necessary and direct consequences of their acts.[49] The *Gypsum* opinion, which seems to directly contradict *Patten*, made no mention of *Patten* or subsequent decisions.[50]

The Third Circuit in *Gillen*, cognizant of the Supreme Court precedent negating the requirement of intent in criminal antitrust cases, argued that the Court's citation, in *Gypsum*, of *United States v. Socony-Vacuum Oil Co.*,[51] a price-fixing case following the *Patten* rationale, acknowledged that price-fixing cases are an exception to the *mens rea* rule. The *Gillen* court was not persuaded that *Gypsum* was intended to change the long-established rule of law on price-fixing cases, instead

45. *Id.* at 441.

46. *Id.* at 441 n.16. The Court's statement that exchanges of price information is not a *per se* offense is surprising in view of the uncertainty that has followed the decision in United States v. Container Corp., 393 U.S. 333 (1969). Although Justice Fortas, concurring in *Container*, expressed his view that no *per se* rule for price exchanges had been established by the majority, *id.* at 338-39 (Fortas, J., concurring) others were not so certain. *See Meeting Competition, supra* note 16, at 1490 (*per se* rule established); *What Really Happened, supra* note 16, at 654 (modified *per se* rule established). *Compare* Kefauver, *The Legality of Dissemination of Market Data by Trade Associations: What Does Container Hold?*, 57 CORNELL L. REV. 777, 785-86, 791 (1977) (no *per se* rule); Note, *Antitrust Implications of the Exchange of Price Information Among Competitors: The Container Corporation Case*, 68 MICH. L. REV. 720, 730-31 (1970) (no *per se* rule). The Supreme Court itself prior to *Gypsum*, had indicated that the "dissemination of price information" is not itself a *per se* offense. United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 113 (1975). *See also* Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925); Maple Flooring Ass'n v. United States, 268 U.S. 563 (1925). *Compare* United States v. American Linseed Oil Co., 262 U.S. 371 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

47. *See* Handler, *supra* note 16, at 1399; *Putting a Lid, supra* note 39, at 432-33.

48. 226 U.S. 525 (1913).

49. *See* United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948); United States v. Griffith, 334 U.S. 100, 105 (1948); United States v. Masonite Corp., 316 U.S. 265, 275 (1942); United States v. Champion Int'l Corp., 557 F.2d 1270, 1274 (9th Cir.), *cert. denied*, 434 U.S. 938 (1977); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1002 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960).

50. Justice Stevens, concurring in part and dissenting in part, did recognize the precedent of *Patten*. 438 U.S. at 475-76 n.5 (Stevens, J., concurring in part and dissenting in part).

51. 310 U.S. 150 (1940).

voicing its belief that the "Court's statement in *Gypsum* on intent was born out of a concern for borderline violations and was not meant to modify past precedent on price-fixing conspiracies. . . ."[52]

In contrast, the Seventh Circuit in *Brighton* seemed unaware of the strong precedent supporting its position.[53] The court of appeals distinguished *Gypsum* by reference to factual differences which, it asserted, rendered *Gypsum* inapplicable to *per se* offenses. However, the court's opinion is lacking in policy or case analysis. Arguably, the court reached the correct result but for somewhat obscure reasons. This obscurity is at least partly bred by the uncertain precedent established by the Supreme Court in *Gypsum*.

Irrespective of deficiencies in the *Brighton* opinion, the Seventh Circuit is in the mainstream with other circuits in its restriction of *Gypsum*'s intent requirement to rule of reason prosecutions. The burden of proving intent in *per se* cases is probably minimal; thus, it can be argued that the limitation imposed is unimportant. However, *Brighton* and subsequent decisions assure that the influence of *Gypsum* in criminal antitrust proceedings will be slight since the great majority of all criminal antitrust prosecutions concern *per se* offenses.

COLLATERAL ESTOPPEL AND SECTION 5(a) OF THE CLAYTON ACT

In *Illinois v. General Paving Co.*,[54] the Seventh Circuit reversed an aberrational district court decision which had permitted the use of the doctrine of collateral estoppel against defendants in a private treble damage action because of the defendants' prior conviction in a criminal antitrust proceeding based on the same facts.[55] In reversing, the Seventh Circuit ruled that section 5(a) of the Clayton Act[56] precludes the operation of common law collateral estoppel in the antitrust field.[57]

Section 5(a) of the Clayton Act provides that a prior final judgment in favor of the government in a civil or criminal antitrust proceeding shall be prima facie evidence against the defendants to the original suit in any subsequent private actions.[58] The doctrine of col-

52. 599 F.2d at 544.

53. The court did cite *Socony-Vacuum*, but only for the proposition that a price maintenance agreement is a *per se* violation. 598 F.2d at 1106.

54. 590 F.2d 680 (7th Cir. 1979).

55. Illinois v. Huckaba & Sons Constr. Co., 442 F. Supp. 56 (S.D. Ill. 1977). Huckaba did not appeal from the district court's order and was thus bound by it. 590 F.2d at 681 n.1.

56. 15 U.S.C. § 5(a) (1976).

57. 590 F.2d at 683.

58. Section 5(a) of the Clayton Act provides:

> A final judgment or decree heretofore or hereinafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the

lateral estoppel provides generally that an issue of law or fact litigated and determined by a final judgment is conclusive in a subsequent action between the parties whether based on the same or a different claim.[59] Traditionally, the so-called mutuality rule restricted application of the doctrine to situations in which both parties in the second action were also parties, or in privity with parties, to the prior action.[60] However, the courts have increasingly abandoned the mutuality requirement and have permitted "defensive" collateral estoppel against a plaintiff by a defendant not a party to the prior action[61] and "offensive" collateral estoppel against a defendant by a plaintiff not a party to the prior action.[62]

> effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 4A as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under Section 4A.

15 U.S.C. § 16(a) (1976). Three principal types of antitrust suits are contemplated by the Clayton Act. The United States Attorney General is authorized to enforce the antitrust laws by bringing criminal or equitable proceedings. 15 U.S.C. §§ 4, 9, 25 (1976). Such suits are generally called "government enforcement actions" and must be brought "in the public interest." A "private treble damage action" may be brought by private parties to recover damages caused by a defendant's violation of the antitrust laws. *Id.* § 15. Private injunctive relief is also authorized. *Id.* § 26. The United States is now permitted to bring suit to recover actual damages for injuries suffered to its business or property from antitrust violations. *Id.* § 15(a). However, section 5(a) of the Clayton Act provides that the prima facie presumption is inapplicable to judgments obtained in government damage actions.

59. "Collateral estoppel" is defined in the Second Restatement of Judgments as: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977). Collateral estoppel is an equitable doctrine. Thus, a court will estop a party "unless [he] has had a full and fair opportunity to litigate the issue in the first action or unless other circumstances justify affording him an opportunity to relitigate the issue." *Id.* § 88 (Tent. Draft No. 2, 1975). *See also id.* at 68.1 (Tent. Draft No. 1, 1973). *See generally* Brousseau, *A Reader's Guide to the Proposed Changes in the Preclusion Provisions of the Restatement of Judgments*, 11 TULSA L.J. 305, 322-29 (1976).

60. *See* Triplett v. Lowell, 297 U.S. 638 (1936), *overruled*, 402 U.S. 350 (1971); Buckeye Powder Co. v. E.I. DuPont de Nemours Powder Co., 248 U.S. 55 (1918); Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912).

61. *See* Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971); Bruszewski v. United States, 181 F.2d 419 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950); Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 812, 122 P.2d 892, 895 (1942); Schwartz v. Public Administrator, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 2, 1975) (collecting cases).

62. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Zdanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir. 1964); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967). For discussions of the erosion of the mutuality requirement *see* Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25 (1965); Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957); Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968); Note, *Mutuality of Estoppel and*

Allowing a private antitrust plaintiff to invoke offensive collateral estoppel against a defendant who has unsuccessfully defended a prior government enforcement suit goes beyond the statutory language of section 5(a).[63] In that circumstance, the prior judgment has conclusive effect rather than merely creating a prima facie presumption about issues previously litigated. The defendant is precluded from relitigating issues decided adversely to him in the first suit instead of merely facing a presumption on those issues.[64] Thus, if the doctrine of collateral estoppel is applied instead of the prima facie presumption of section 5(a), a subsequent private antitrust plaintiff can typically obtain summary judgment on the issue of liability, needing then only to show antitrust injury[65] from defendant's offense to recover treble damages.

In this context, a court must decide whether the prima facie language of section 5(a) preempts application of the common law principles of collateral estoppel or permits the giving of conclusive effect to judgments obtained in government enforcement proceedings. Although several commentators have argued that collateral estoppel is not precluded by section 5(a),[66] the decision of the United States District Court for the Southern District of Illinois in *Illinois v. Huckaba & Sons Construction Co.*[67] was apparently the first to apply this interpre-

the Seventh Amendment: The Effect of Parklane Hosiery, 64 CORNELL L. REV. 1002 (1979). Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967); Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974).

63. Section 5(a) deals only with offensive collateral estoppel in an antitrust suit by a third party against a defendant subject to a prior antitrust judgment. Several courts have permitted defensive collateral estoppel against an *antitrust* plaintiff, relying on Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971). *See, e.g.*, Poster Exchange, Inc. v. National Screen Corp., 517 F.2d 117, 122-23 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 844-45 (3d Cir. 1974); Raitport v. Commercial Banks, 391 F. Supp. 584, 587 (S.D.N.Y. 1975). A defendant invoking defensive collateral estoppel would seek to bind a plaintiff to issues of law and fact decided against it in a prior action. Following the rationale of *Blonder-Tongue*, the defendant would not have to have been a party to the prior action to assert the doctrine.

64. The prima facie language of section 5(a) in essence shifts the burden of proof to the defendant on the issues covered by the presumption. *See* Illinois v. General Paving Co., 590 F.2d 680, 681 (7th Cir. 1979). *But see* Note, *Antitrust Enforcement By Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1040 (1952).

65. *See* text accompanying notes 85-102 *infra*.

66. Langsdorf, *United States as Antitrust Damage Plaintiff: Mistreated Stepchild of the Parens Patriae*, 16 ANTITRUST BULL. 187, 202-12 (1971); McWilliams, *Federal Antitrust Decrees: Should They Be Given Conclusive Effect in a Subsequent Private Action?*, 48 MISS. L.J. 1 (1977) [hereinafter cited as McWilliams]; Comment, *The Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial*, 43 U. CHI. L. REV. 338 (1976) [hereinafter cited as *Government Judgments*]; Note, *Section 5(a) of the Clayton Act and the use of Collateral Estoppel by a Private Plaintiff in a Treble Damage Action*, 8 U.S.F.L. REV. 74 (1973); Note, *Closing an Antitrust Loophole: Collateral Effect for Nolo Pleas and Government Settlements*, 55 VA. L. REV. 1334 (1969).

67. 442 F. Supp. 56, 59 (S.D. Ill. 1977). In contrast, a number of courts have refused to give

tation.

In *Huckaba*, the defendants were found guilty by a jury of violating section 1 of the Sherman Act. Subsequently, the State of Illinois filed a treble damage action against the same defendants and moved for partial summary judgment on the issue of liability. The district court decided that Illinois could properly invoke the doctrine of collateral estoppel to prevent the defendants from asserting any defenses, rejecting the defendants' argument that section 5(a) made the earlier judgment only prima facie evidence of liability and prevented the application of collateral estoppel.[68]

In support of its conclusion, the district court referred to the legislative history of section 5(a). In so doing, the court noted that Congress seriously considered making prior judgments conclusive evidence in a subsequent action.[69] Apparently, Congress resisted this temptation because of fears that conclusiveness might run afoul of due process since there would be no mutuality of parties.[70] Thus, the court concluded that Congress intended section 5(a) to provide a minimum standard and that common law rules more favorable to private antitrust plaintiffs could be utilized as they became available. According to the district court, since collateral estoppel has passed constitutional muster, antitrust plaintiffs should have access to it.[71]

The district court was not persuaded that the failure of subsequent congressional attempts to amend the Clayton Act by replacing the prima facie standard with a conclusiveness test indicated a change in congressional intent. The court did not see "how inaction by Congress in the 1950's can shed light on what it did do in 1914."[72] In addition, the court found dicta in two other district court decisions which it be-

conclusive effect to government enforcement actions in subsequent private actions. *See* Purex Corp. v. Procter & Gamble Co., 453 F.2d 288, 290 (9th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972); New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co., 332 F.2d 346, 359 (3d Cir. 1964), *aff'd*, 381 U.S. 311 (1965); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312, 315 (E.D. Pa. 1953), *aff'd*, 211 F.2d 405 (3d Cir. 1954); Deluxe Theatre Corp. v. Balaban & Katz Corp., 95 F. Supp. 983, 986 (N.D. Ill. 1951); Zuckerman v. E.I. DuPont de Nemours & Co., [1953] TRADE REG. REP. (CCH) ¶ 67,468 (S.D.N.Y. 1953).

68. The district court initially reserved the entry of partial summary judgment for sixty days, so that the parties could establish whether the facts were the same as in the prior action. 442 F. Supp. at 59-60. Subsequently, the court granted the plaintiff's motion after concluding that the actions were brought on the same facts. 590 F.2d at 681.

69. 442 F. Supp. at 57.

70. *Id.* at 58.

71. *Id.* at 57-58.

72. *Id.* at 58. The court's reasoning here is enigmatic at best, since Congress did enact a prima facie standard in 1914. It is perplexing to assert that congressional enactment of a prima facie standard together with the failure of Congress to subsequently change the standard evinces a congressional intent that prima facie should only be a minimum test.

lieved supported its interpretation of the legislative history.[73]

In reversing, the Seventh Circuit took sharp exception to the lower court's characterization of the legislative history of section 5(a). The court of appeals did not share the trial court's view that the 1914 Congress intended the prima facie language to establish only a minimum standard, pointing out that Congress, had it so intended, "could easily have provided that enforcement judgments would have *at least* a *prima facie* effect. . . ."[74]

In addition, the Seventh Circuit viewed the refusal of Congress to change the standard in the 1955 amendments to the Clayton Act as dispositive on the question of intent.[75] The amendment to section 5(a) specifically included the United States as a possible damage plaintiff.[76] At the same time, the court noted that Congress rejected a proposal to make the presumption accorded to government enforcement judgments conclusive, instead reenacting the prima facie standard both as applied to subsequent private and subsequent government damage suits.[77] It was observed that later efforts to change the presumption had failed, including a proposal before the 1978 Congress.[78] The court further pointed out that the conclusiveness standard was rejected by Congress in 1955, after the Supreme Court had applied collateral estoppel in favor of the government in a civil injunctive action against defendants previously convicted of Sherman Act violations, thus "further demon-

73. *Id.* at 59. *See* Fleer Corp. v. Topps Chewing Gum, Inc., 415 F. Supp. 176, 185 (E.D. Pa. 1976); McCook v. Standard Oil Co. of California, 393 F. Supp. 256, 259 (C.D. Cal. 1975). *But see* the Seventh Circuit's treatment of these cases at 590 F.2d 680, 682. *Compare* Purex Corp. v. Procter & Gamble Co., 308 F. Supp. 584 (C.D. Cal. 1970), *aff'd on other grounds*, 453 F.2d 288 (9th Cir. 1971), which the *Huckaba* trial court characterized as "bottomed on an unsound foundation." 442 F. Supp. at 59.

74. 590 F.2d at 683 (emphasis in original).

75. *Id.* at 682-83.

76. 15 U.S.C. § 16(a) (1976). In 1955, Congress also enacted section 4A of the Clayton Act which authorizes the government to recover civil damages in an antitrust action. *Id.* § 15(a).

77. 590 F.2d at 682-83. For a detailed analysis of the legislative history of section 5(a), from 1914 forward, *see* Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions*, 85 YALE L.J. 541 (1976) [hereinafter cited as *Offensive Collateral*]. The proposal to give government enforcement judgments conclusive effect was introduced in Congress in 1950 and finally rejected when the 1955 amendments were enacted. *See* 590 F.2d at 683 n.5. Congressional opposition to the conclusive effect proposal was apparently based not on constitutional concerns but rather on a feeling that conclusiveness would be too harsh on antitrust defendants. *Id.* *See Offensive Collateral*, *supra*, at 550-51. Pre-amendment commentators, although disagreeing about the merit of the prima facie standard, generally believed that there was no constitutional obstacle to adopting a conclusiveness standard. *See* Note, *Government Antitrust Judgments as Evidence in Private Actions*, 65 HARV. L. REV. 1400, 1407 (1952) (conclusive presumption would not help plaintiffs more than prima facie standard and would prolong government enforcement litigation); Note, *Clayton Act Section 5: Aid to Treble Damage Suitors*, 61 YALE L.J. 417, 425-26 (1952) (conclusiveness would preclude wasteful litigation, encourage private litigants and lead to more settlements of enforcement suits).

78. 590 F.2d at 683, *citing* H.R. 7647, 95th Cong., 2d Sess. (1978).

strat[ing] that section 5(a) was intended to preempt the common law rule of collateral estoppel."[79]

The *General Paving* decision is the first to confront directly the question of whether section 5(a) permits courts to give conclusive effect to antitrust judgments obtained in government enforcement actions. A number of courts have previously refused to give judgments in government enforcement actions conclusive effect in subsequent private suits by relying on section 5(a),[80] but they have typically assumed, rather than analyzed and concluded, that section 5(a) precludes the use of collateral estoppel in antitrust actions.

In confronting the issue in *General Paving*, the Seventh Circuit eschewed the policy arguments propounded by commentators and rested its decision almost solely on its interpretation of legislative intent.[81] However, the court's decision seems to implicitly reject the argument that allowing a conclusiveness standard would merely advance the original congressional intent to stimulate private suits so as to deter

79. 590 F.2d at 683 n.4. In Local 167, Int'l Bhd. of Teamsters v. United States, 291 U.S. 293 (1934), the Supreme Court held that the government in a civil action for injunctive relief was entitled to assert conclusiveness as to the defendants' participation in a conspiracy, based upon the defendants' prior conviction of Sherman Act violations. The Seventh Circuit in *General Paving* concluded that the 1955 re-enactment of the prima facie standard of section 5(a) preempted the government's judicially-established common law right of estoppel. 590 F.2d at 682-83 n.4. *See also* United States v. Grinnell Corp., 307 F. Supp. 1097, 1098 (S.D.N.Y. 1969); *Offensive Collateral, supra* note 77, at 553.

80. *See* cases cited in note 67 *supra. See also* Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709, 725 (9th Cir. 1959), *cert. denied*, 361 U.S. 961 (1960); Emich Motors Corp. v. General Motors Corp., 181 F.2d 70 (1950); Michigan v. Morton Salt Co., 259 F. Supp. 35, 64-65 (D. Minn. 1966), *aff'd sub nom.*, Hardy Salt Co. v. Illinois, 377 F.2d 768 (8th Cir.), *cert. denied*, 389 U.S. 912 (1967). In United States v. Grinnell Corp., 307 F. Supp. 1097 (S.D.N.Y. 1969), the court held that section 5(a) bars the use of common law collateral estoppel in a government damage suit against a defendant who has had a judgment entered against him in a prior government enforcement suit. The court recognized that under common law principles the defendant would have been estopped from relitigating. However, the court read the 1955 amendments as expressly limiting the use of judgments from government enforcement actions in later government damage suits to the prima facie standard. *Id.* at 1907-98. In *Huckaba*, the district court thought *Grinnell* was distinguishable apparently because the United States was seeking damages under section 4A of the Clayton Act while the State of Illinois was treated as a private party litigant under section 4 of the Clayton Act. 442 F. Supp. at 58. Private plaintiffs are entitled to treble damages while the United States is limited to actual damages by section 4A. However, the relevance of this distinction on the prima facie presumption of section 5(a), which is expressly applicable to both types of plaintiffs, is problematical.

81. *See, e.g.*, articles cited in note 66 *supra. See also* W. HAMILTON & I. TILL, ANTITRUST IN ACTION 83 (TNEC Monograph 16, 1940); Hardy, *The Evisceration of Section 5 of the Clayton Act*, 49 GEO. L.J. 44 (1960); Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 174-75 (1958) [hereinafter cited as Loevinger]; Comment, *Proposed Amendment to Section 5(a) of Clayton Act Would Increase Evidentiary Aid for Subsequent Litigants*, 39 N.Y.U.L. REV. 518, 524-27 (1964); Note, *Clayton Act, Section 5: Aid to Treble Damage Suitors?*, 61 YALE L.J. 417, 425-26 (1952). *But see* Note, *Government Antitrust Judgments as Evidence in Private Actions*, 65 HARV. L. REV. 1400 (1952); Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions*, 85 YALE L.J. 541 (1976).

anticompetitive conduct.[82] It may indeed be ironic, as suggested by one commentator, that contemporary collateral estoppel doctrine would provide greater incentive to private plaintiffs than does the statutory formulation originally enacted to achieve that purpose.[83] However, the Seventh Circuit has elected, particularly in view of the repeated legislative denials of the conclusiveness standard,[84] to allow Congress, rather than the courts, to perform the legislative function.

ANTITRUST INJURY/STANDING

Section 4 of the Clayton Act establishes a private cause of action for treble damages to anyone "injured in his business or property by reason of anything forbidden in the antitrust laws. . . ."[85] Together with section 5(a),[86] section 4 was intended to encourage private enforcement of the antitrust laws and deter anticompetitive conduct.[87] Private litigants were intended to supplement the "public interest" enforcement of the Justice Department and Federal Trade Commission, serving as "private attorneys general."[88]

82. The original purpose of section 5 (now section 5(a)) of the Clayton Act was to aid private plaintiffs in recovering treble damages for violations of the antitrust laws. Prior to 1914, private antitrust actions, because of the cost of litigation and the financial resources of large corporate defendants, were scarce and rarely successful. *See* HEARINGS ON S. 2512 BEFORE THE SUBCOMM. ON ANTITRUST AND MONOPOLY OF THE SENATE COMM. ON THE JUDICIARY, 89th Cong., 2d Sess. at 2, 3 (1966).

83. *See Government Judgments, supra* note 66, at 374. *See also* McWilliams, *supra* note 66, at 17.

84. On the effect of the congressional silence in refusing to repeal a judicially-created antitrust exemption, *see* Rogers, *Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws*, 14 HOUS. L. REV. 611, 622-26 (1977).

85. 15 U.S.C. § 15 (1976). The original treble damage provision was incorporated in section 7 of the Sherman Act, 26 Stat. 210 (1890). Although that provision was superseded by section 4 of the Clayton Act, it is generally agreed that the purpose of the treble damage remedy remains unchanged. *See* notes 88 and 89 and accompanying text *infra*; 51 CONG. REC. 9164 (1914); H.R. REP. NO. 627, 63d Cong., 2d Sess. 14 (1914). *See generally* Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956).

86. 15 U.S.C. § 16(a) (1976). *See* text accompanying notes 54-84 *supra*.

87. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). The effectiveness of section 4 actions to deter and compensate is discussed in Loevinger, *supra* note 81; MacIntrye, *The Role of the Private Litigant in Antitrust Enforcement*, 7 ANTITRUST BULL. 113 (1962); Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319 (1973); Comment, *Antitrust Enforcement by Private Parties: Analysis of Development in the Treble Damage Suit*, 61 YALE L.J. 1010 (1952). *But see* Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy*, 3 N.M.L. REV. 286 (1973); Parker, *Treble Damage Action—A Financial Deterrent to Antitrust Violations?*, 16 ANTITRUST BULL. 483 (1971). For a discussion of the deterrent effect of section 5(a) "coattail suits," *see* Tyler, *Private Antitrust Litigation: The Problem of Standing*, 49 U. COLO. L. REV. 269, 296-97 (1978) [hereinafter cited as Tyler]. The author concludes that the additional deterrent effect of section 5(a) suits facilitates government enforcement activities and thus argues for a liberal antitrust standing law. *Id.*

88. *See, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969); Perma Life Mufflers, Inc. v. International

A literal reading of section 4 would require only some kind of causal connection between an injury to plaintiff's "business or property" and an antitrust violation in order to confer standing to sue.[89] However, most courts have been wary of such a literal interpretation, recognizing that a mere causal connection requirement between injury and infraction "would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress."[90] Accordingly, courts have sought to limit the scope of section 4 by construing its "by reason of" language to require not only factual causation between violation and injury, but also legal causation.[91]

The courts have typically manifested the legal causation requirement for standing by adopting one of two approaches: direct injury or target area. The direct injury test focuses on the relationship between the alleged antitrust violator and the claimant.[92] Typically, if the plain-

Parts Corp., 392 U.S. 134, 147 (1968) (Fortas, J., concurring in result); Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 386 (1958) (Douglas, J., dissenting); Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 329 (1955); *Cf.* Weinberg v. Sinclair Refining Co., 48 F. Supp. 203, 205 (E.D.N.Y. 1942) (private action alleging gasoline price-fixing in violation of Clayton and Robinson-Patman Acts); Quemos Theatre Co., Inc. v. Warner Bros. Pictures, Inc., 35 F. Supp. 949, 950 (D.N.J. 1940) (court ruling on Federal Rule of Civil Procedure 34 motion to produce records for inspection).

89. *See* Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292, 295 (2d Cir. 1958); Vines v. General Outdoor Advertising Co., 171 F.2d 487, 491 (2d Cir. 1948). *See also* Radovich v. National Football League, 352 U.S. 445, 454 (1957), where the Supreme Court stated that courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress. . . ." *Accord*, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948). *See* Tyler, *supra* note 87 (arguing for a literal interpretation of section 4).

90. Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). *See also* SCM Corp. v. Radio Corp. of America, 407 F.2d 166, 171 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969). However, the Supreme Court has noted that Federal Rule of Civil Procedure 23 (class actions) has greatly expanded the significance of the private treble damage action, particularly for consumers. Reiter v. Sonotone Corp., 99 S. Ct. 2326, 2333 n.6, 2334 (1979).

91. In Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), the Supreme Court noted that "[t]he 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." *Id.* at 262-63 n.14 (citations omitted). *See also* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 266-67 (1946) (Frankfurter, J., dissenting); SCM Corp. v. Radio Corp. of America, 407 F.2d 166, 171 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969).

Some courts have focused on the "injury to business or property" language of section 4 in analyzing the standing question, particularly after the Supreme Court's decision in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). This had added to the confusion regarding the standing and antitrust injury questions. *See* text accompanying notes 125-34 *infra*. The Supreme Court, in Reiter v. Sonotone Corp., 99 S. Ct. 2326 (1979), recently focused on the "business or property" language in holding that consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations have sustained an antitrust injury under section 4.

92. *See, e.g.*, Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289, 306 (W.D. Colo. 1969); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956). *See* Beane, *Antitrust: Standing and Passing On*, 26 BAYLOR L. REV. 331, 333 (1974); Comment,

tiff does not have direct business contact with the offender or if an intermediate antitrust victim separates the plaintiff and the defendant, the suit will be dismissed for lack of standing.[93] Although the courts recognize that the claimant's injury may be factually related to the antitrust violation, they typically characterize the purported harm as "indirect," "speculative," "remote," "incidental," or "consequential."[94]

In contrast, the target area test for antitrust standing focuses on the relationship between the injury and the purpose and effect of the alleged violation. Two steps are generally required: identification of the areas of the economy affected by the antitrust offense and ascertainment of whether the claimed injury occurred within that area.[95] Thus, a plaintiff has standing under the target area approach if his claimed losses fall within the area of the economy injured by defendant's anticompetitive conduct.

The target area test was, in part, a response to what some courts

Malamud v. Sinclair Oil Corp., 7 LOY. CHI. L.J. 546, 560-62 (1976) [hereinafter cited as *Malamud* Comment].

93. The direct injury rule for antitrust standing arose from two early private antitrust cases, Loeb v. Eastman Kodak Co., 183 F. 704, (3d Cir. 1910) and Ames v. American Tel. & Tel. Co., 166 F. 820 (2d Cir. 1909). In *Loeb*, the plaintiff alleged that the defendant's illegal monopoly bankrupted a corporation of which the plaintiff was a stockholder. The plaintiff claimed injury from his loss of stock, from claims he held against the bankrupt company which were made worthless, and to his personal credit. The Third Circuit refused to permit recovery for such "indirect, remote and consequential" injury. 183 F. at 709. In *Ames*, a shareholder of a corporation also brought suit for antitrust damages incurred by the corporation. The court refused to confer a right of action upon the stockholder because of possible sextuple damage liability for an unlawful act. 166 F. at 824. *See* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 813-16 (1977) [hereinafter cited as Berger & Bernstein]; Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 ANTITRUST L.J. 5 (1966); Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964).

94. Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910) (indirect, remote, and consequential); Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43, 53 (D. Del. 1974) (speculative, indirect, and remote); Westmoreland Asbestos Co. v. Johns-Manville Corp., 30 F. Supp. 389, 391 (S.D.N.Y. 1939), *aff'd mem.*, 113 F.2d 114 (2d Cir. 1940) (remote). *See also In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). Berger & Bernstein, *supra* note 93, at 816-19.

95. *See* Bosse v. Crowell Collier & Macmillan, 565 F.2d 602, 606 (9th Cir. 1977); Blankenship v. Hearst Corp., 519 F.2d 418, 426 (9th Cir. 1975); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073, 1076 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971); Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9th Cir. 1967); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955); Conference of Studio Unions v. Loew's Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). *See also In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 126 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). *See generally* Areeda, *Antitrust Damage Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1133 n.36 (1976) [hereinafter cited as Areeda]; Lytle & Purdue, *Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation*, 25 AM. U.L. REV. 795, 802-07 (1976); Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U.L. REV. 374, 382-84 (1976) [hereinafter cited as Sherman].

believed as the unjustified arbitrariness of the direct injury approach.[96] Under direct injury, the existence of another antitrust victim dealing more directly with the defendant or operating between the plaintiff and the defendant may foreclose the treble damage remedy to the plaintiff, despite economic harm to the plaintiff resulting from the defendant's conduct.[97] The standard has been criticized as "conclusory"[98] and as "creating a competitors only standing doctrine for antitrust."[99] While there is disagreement about the reach of the target area test,[100] it is generally believed by those courts adopting the approach that it more accurately pinpoints those injured by a defendant's antitrust violations without unnecessarily excluding, because of formalistic criterion, those

96. *See In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127-29 n.6 (9th Cir. 1973), *citing* Perkins v. Standard Oil Co., 395 U.S. 642 (1969) (repudiating the direct injury approach and, at least inferentially, approving the target area approach); Midway Enterprises, Inc. v. Petroleum Marketing Corp., 375 F. Supp. 1339, 1343 (D. Md., 1974). Of course, the distinction between direct injury and target area analysis has often been blurred by the courts. *See, e.g.*, Karseal v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). *See generally* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562, 565-66 (1931).

97. The courts have taken irreconciliable positions in applying direct injury. *Compare* Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957) *with* Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd. per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954) *and* Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967); Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956) *with* Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973). *See* Berger & Bernstein, *supra* note 93, at 819-30; Note, *Standing to Sue in Private Antitrust Litigation: Circuits in Conflict*, 10 IND. L. REV. 532 (1977).

98. *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). The case is noted in Comment, 5 LOY. CHI. L.J. 655 (1974); Note, 35 OHIO ST. L.J. 723 (1974).

99. Cromar Co. v. Nuclear Materials & Equip. Corp., [1975] TRADE REG. REP. (CCH) ¶ 60,373, 66,628 (M.D. Pa. 1975). *See also* Sherman, *supra* note 95, at 380-82.

100. For example, the Ninth Circuit and the Second Circuit have expressly disagreed about the necessity that the plaintiff fall within the area which it could be reasonably foreseen would be affected by the illegal activity. *Compare* Fields Productions, Inc. v. United Artists Corp., 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971) *with* Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971) (adopting foreseeability requirement and disagreeing with conclusion of Second Circuit in *Fields*). However, after *Mulvey*, the Ninth Circuit's position on foreseeability has seemingly wavered. *Compare In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 126-29 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973) *with* Blankenship v. Hearst Corp., 519 F.2d 418, 426 (9th Cir. 1975). The Second Circuit has steadfastly rejected the foreseeability test as too broad. *See* Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1296 n.2 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

Also, interchangeable use of the terms "target" and "target area" has created confusion. For instance, it is unclear if a plaintiff within the target area can sue whether or not he can be identified as a target of the alleged violation. *See* Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); Hoopes v. Union Oil Co., 374 F.2d 480 (9th Cir. 1967); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418-19 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); Kemp Pontiac-Cadillac, Inc. v. Hartford Automotive Dealers' Ass'n, Inc., 380 F. Supp. 1382, 1386-87 (D. Conn. 1974).

deserving recovery.[101]

Standing issues should ideally be determined by the facts of each case. Target area analysis looks to the economic effects of each defendant's conduct and measures the impact of that conduct upon the complaining party. This fact orientation is preferable to direct injury formalism which may exclude a party for reasons contrary to antitrust's purpose of compensating those injured by anticompetitive conduct.[102]

It is unclear whether the Seventh Circuit, which has spoken infrequently on the antitrust standing question, adheres to the direct injury or target area approach.[103] The Ninth Circuit, in reviewing the Seventh Circuit's position, expressed uncertainty but concluded that it was closer to the target area approach.[104] More recently, in *Lupia v. Stella D'Oro Biscuit Co.,*[105] the Seventh Circuit had an opportunity to resolve the uncertainty but declined to do so.

Lupia involved a suit by a former exclusive distributor of the defendant's ethnic bakery products. The plaintiff alleged that the defendant granted a five percent discount to retail chain stores, as opposed to independently-owned stores, and then had charged the distributor-plaintiff for the discount.[106] The plaintiff claimed that the defendant company had engaged in price discrimination in violation of section 2(a) of the Robinson-Patman Act since it had not made the discount available to independent purchasers.[107]

The district court granted the defendant's motion for summary judgment on all counts.[108] In dismissing the plaintiff's price discrimi-

101. *See* notes 99 and 100 *supra*. *See generally* Comment, *Standing Under Clayton § 4: A Proverbial Mystery*, 77 DICK. L. REV. 73 (1972); Comment, *Private Plaintiff's Standing Under Clayton Act Section 4: Clothing the Naked Emperor*, 7 SETON HALL L. REV. 588 (1976).

102. The problems of target area analysis should not be overlooked, however. *See* note 100 *supra*. For criticisms of target analysis, *see* Berger & Bernstein, *supra* note 93, and Tyler, *supra* note 87. A third, yet broader, "zone of interest" approach was articulated in Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975). The court expressly rejected the target area and direct injury tests as too harsh with regard to plaintiffs. However, other courts have not generally followed *Malamud*. *See* note 143 *infra*.

103. *See* Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564, 567 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963); Sandidge v. Rogers, 256 F.2d 269 (7th Cir. 1958); Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957). District court decisions include Amerace Corp. v. USM Corp., [1975] TRADE REG. REP. (CCH) ¶ 60,255 (N.D. Ill. 1975); J.O. Pollock Co. v. L.G. Balfour Co., [1973] TRADE REG. REP. (CCH) ¶ 74,339 (N.D. Ill. 1972).

104. *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127 n.7 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

105. 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

106. 586 F.2d at 1167.

107. *See* 15 U.S.C. § 13(a) (1976). The plaintiff also alleged that defendant had violated section 2(c) of the Robinson-Patman Act, section 1 of the Sherman Act, and section 3 of the Clayton Act. These claims were also disposed of by summary judgment. 586 F.2d at 1163.

108. No. 72 C 738 (N.D. Ill., May 31, 1977) (unpublished opinion).

nation claim, the trial court ruled that the plaintiff, as a distributor, lacked standing to challenge any price discrimination imposed on retailers and that the plaintiff had alleged no injury to himself or his business resulting from the defendant's discriminatory pricing.[109] On the standing question, the trial judge applied the target area test, finding that the proper parties to complain were the retailers who did not receive a discount. Plaintiff had not alleged an antitrust injury, the court held, because he failed to show that he could have sold to chain stores if the discount had not been granted them.[110]

The Seventh Circuit affirmed, finding it unnecessary to choose either the direct injury or target area approaches to standing.[111] The court specifically eschewed following the target area approach of the trial court, instead ruling that the "plaintiff could not prevail under any of [the various section 4 standing and injury doctrines]."[112] The court then illustrated its holding by pointing out that, had the target area test been appropriated, the plaintiff would fail because the independent retailers who were discriminated against "solely occupied the 'target area.' "[113]

The Seventh Circuit believed that the procedural posture of the case justified its generalized holding. Because a motion for summary judgment was involved, the Seventh Circuit was not confined to threshold issues such as standing but could "invoke any reason why a claim or defense must succeed or fail."[114] Rather, the issue for decision, according to the court, was "whether plaintiff has alleged any facts demonstrating a violation that 'fits' within the requirements for an antitrust recovery, a question of law that can be answered by the court."[115] The court assumed that all facts stated by the plaintiff were true and determined that the plaintiff was unable to raise factual issues that could

109. *Id.* at 5-10.

110. *Id.* at 7.

111. 586 F.2d 1163 (7th Cir. 1978). The defendants had argued that the plaintiff should be excluded under both the direct injury and target area tests. Brief for Appellee at 24-25, Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163 (7th Cir. 1978).

112. *Id.* at 1169. The district court was thought to have adopted the target area approach. *Id.* at 1168.

113. *Id.* at 1169. The traditional detrimental effect of secondary line price discrimination (supplier discriminating against different purchasers) is upon the disfavored purchaser. *See* notes 152-55 and accompanying text *infra*. *See generally* Barber, *Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 GEO. WASH. L. REV. 181 (1961).

114. 586 F.2d at 1169.

115. *Id.* at 1166. Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted if "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." *See* Rogers, *Summary Judgments in Antitrust Conspiracy Litigation*, 10 LOY. CHI. L.J. 667 (1979).

support a grant of standing or a claim of antitrust injury.[116]

The defendant's motion for summary judgment, then, enabled the court to avoid giving definitive content to the circuit's antitrust standing requirements, since the plaintiff was unable to buttress his complaint with facts which would have met *any* standing approach. Paradoxically, the Seventh Circuit provided a substantial review of antitrust standing and injury doctrine, recognizing that a good deal of confusion and uncertainty about the relationship of the two exists.[117] However, because of the procedural stance of the case and the plaintiff's insufficient pleadings, the Seventh Circuit declined to address that problem as well.

The requirement that a private antitrust claimant prove an antitrust injury is also embedded in the section 4 language granting recovery for injuries caused "by reason of anything forbidden in the antitrust laws. . . ."[118] Recently, in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[119] the Supreme Court clarified the concept by defining an antitrust injury as an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[120] The Court in *Brunswick* further explained that "[t]he injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."[121]

In *Brunswick*, the defendant, a large bowling equipment manufacturer, had acquired and begun operating several bowling alleys that had defaulted on equipment purchased on credit from the defendant.[122] Competitors of some of the acquired alleys brought suit claiming a violation of section 7 of the Clayton Act. The plaintiffs alleged that the entry of a "giant" company like Brunswick with a "deep pock-

116. 586 F.2d at 1169. "[M]ere recitation of antitrust claims in a complaint does not render that complaint immune from summary disposition, if uncontradicted facts show otherwise." *Id.* at 1167.

117. *Id.* at 1168-69.

118. 15 U.S.C. § 15 (1976).

119. 429 U.S. 477 (1977).

120. *Id.* at 489. *See also* GAF Corp. v. Circle Floor Co., 463 F.2d 752 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973), *cited* in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 426 U.S. 477, 489 n.14 (1977). *See* notes 122-28 and accompanying text *infra*.

121. 429 U.S. at 489.

122. When the bowling industry declined in the early 1960's, Brunswick experienced difficulty in collecting on its credit sales made in more prosperous times. By the end of 1964, more than one quarter of Brunswick's accounts were more than ninety days delinquent. Although repossessions increased substantially, Brunswick had difficulty selling or leasing the repossessed equipment. As a result, Brunswick was itself in serious financial difficulty; it had borrowed almost $250,000,000 to finance its credit sales. Thus, Brunswick began acquiring and operating the defaulting bowling alleys when their equipment could not be resold and a profit could be made from operating the centers. *Id.* at 479-80.

et" from its manufacturing business into a market of "pygmy" bowling alley operators might lessen horizontal retail competition.[123] The plaintiffs' injury allegedly derived from a loss of profits occasioned by the acquisitions. The plaintiffs' theory was that, but for the defendant's take-overs, the acquired alleys would have gone out of business, thus permitting the plaintiffs to acquire a greater share of the market.[124]

Even assuming a direct causal relationship between the acquisitions and the plaintiffs' loss in *Brunswick*, the Court found that the plaintiffs' injury theory was impermissible under the antitrust laws.[125] The Court pointed out that every acquisition could cause economic change, but only acquisitions which are likely to produce anticompetitive effects violate section 7.[126] The Court noted that if Brunswick's acquisitions were unlawful, it was because a deep pocket had entered a market predominated by small competitors. However, the plaintiffs' injury—loss of income—bore no relationship to the size of the competitors or the entering company. The plaintiffs would have suffered the same loss had the bowling centers been acquired by small parent firms.[127] The acquisitions only deprived the plaintiffs of the fruits of increased concentration. Consequently, the injury was not the kind of harm the antitrust laws were intended to prevent, nor did it flow from that which made the acquisitions unlawful.[128]

123. *Id.* at 482. Prior to the suit, Brunswick had acquired 222 bowling alleys, 54 of which it either sold or closed. As a result, Brunswick was by far the largest operator of bowling centers, with over five times as many centers as the next largest competitor. *Id.* at 480.

Section 7 of the Clayton Act, 15 U.S.C. § 18 (1976), renders a merger unlawful where it may substantially lessen competition or tend to create a monopoly. Thus, section 7 prohibits mergers where "there is a reasonable probability that the acquisition is likely to result in the condemned restraints." United States v. E.I. DuPont de Nemours & Co., 353 U.S. 586, 592 (1957). It is designed to arrest restraints of trade through merger in their "incipiency." *Id.* at 589. *See also* FTC v. Procter & Gamble Co., 386 U.S. 568, 577-79 (1967); United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966); United States v. Penn-Olin Chemical Co., 378 U.S. 158, 170-71 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362-63 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962). *See generally* A.B.A. ANTITRUST SECTION, MERGERS AND THE PRIVATE ANTITRUST SUIT: THE PRIVATE ENFORCEMENT OF SECTION 7 OF THE CLAYTON ACT—POLICY AND LAW (MONOGRAPH NO. 1, 1977) [hereinafter referred to as A.B.A. ANTITRUST SECTION]. Comment, *Treble Damage Actions for Violations of Section 7 of the Clayton Act*, 38 U. CHI. L. REV. 404 (1971).

124. 429 U.S. at 481.

125. The lower court had held that the acquisition was unlawful under section 7 and that the plaintiffs were entitled to compensation for any loss causally linked to the mere presence of an illegal entrant in the market. NBO Industries Treadway Co. v. Brunswick Corp., 523 F.2d 262 (3d Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977). The Third Circuit's opinion is criticized in Areeda, *supra* note 95, at 1130-36 (prior to the Supreme Court's reversal).

126. 429 U.S. at 487. *See also* Carlson Co. v. Sperry & Hutchinson Co., 507 F.2d 959, 962 (8th Cir. 1974).

127. 429 U.S. at 487.

128. *Id.* at 487-88. It is arguable that the *Brunswick* "antitrust injury" should be limited to section 7 cases, particularly because that statute deals with potential or probable anticompetitive

The *Brunswick* decision has created confusion about the relationship of antitrust injury to antitrust standing doctrine. Several courts have seemingly treated the concepts as equivalent. In *GAF Corp. v. Circle Floor Co.*,[129] a case cited with approval in *Brunswick*,[130] the Second Circuit held that the plaintiff's complaint failed to state a claim upon which relief could be granted under either the standing or antitrust injury doctrines.[131] Subsequently, the Ninth Circuit in *John Lenore & Co. v. Olympia Brewing Co.*,[132] a case decided after *Brunswick*, analyzed the standing and injury concepts as one. In granting summary judgment against a plaintiff who claimed to have lost a distributorship because of an illegal acquisition by the defendant, the Ninth Circuit held that standing could not be conferred where "plaintiff just prove[s] some injury and show[s] that this injury is within the affected area of the economy."[133] The *Lenore* court, relying heavily upon the *Brunswick* injury analysis, denied the plaintiff standing, concluding that "[e]ven though Lenore's injury may have . . . occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisitions unlawful."[134]

A review of antitrust standing and antitrust injury cases suggests that the procedural posture of a case often determines which doctrine will be applied by the court. In pre-trial adjudications, a challenge to a party's right to bring a section 4 suit typically evokes a standing analysis.[135] In contrast, damage or injury issues are normally raised after the plaintiff has had the opportunity to prove his harm from the alleged

effects. *See* note 123 *supra*. In that context, the awarding of treble damages may raise particular problems. *See* 429 U.S. at 487. Some courts initially looked askance at awarding damages for section 7 violations because only anticipated restraints of trade were involved. Highland Supply Corp. v. Reynolds Metals Co., 245 F. Supp. 510, 513 (E.D. Mo. 1965); Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705, 717 (D. Hawaii 1964). More recently, however, parties showing appropriate injury have been permitted to recover damages. *See* cases cited in A.B.A. ANTITRUST SECTION, *supra* note 123, at 8-9 n.25. *See also* Handler, *supra* note 16, at 992-94.

129. 463 F.2d 752 (2d Cir. 1972), *cert. denied*, 413 U.S. 901 (1973).

130. 429 U.S. at 489 n.14.

131. 463 F.2d at 759.

132. 550 F.2d 495 (9th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

133. 550 F.2d at 499.

134. *Id.* at 500. The court focused on the lack of causation between the challenged acquisitions by the defendant and the plaintiff's injury. *See* notes 143-48 and accompanying text *infra*, for a discussion of causation in the standing context. Since the terminations of the plaintiff's distributorships "were not directly and proximately caused by the challenged acquisition," the plaintiff lacked standing to sue. 550 F.2d at 499-500. Other recent cases relying on *Brunswick* in determining a standing issue include Solinger v. A & M Records, Inc., 586 F.2d 1304 (9th Cir. 1978); Bosse v. Crowell, Collier & MacMillan, 565 F.2d 602 (9th Cir. 1977); Juneau Square Corp. v. First Wisconsin Nat'l Bank, 445 F. Supp. 965 (E.D. Wis. 1978). *See also* Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313 (5th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); Kirihara v. Bendix Corp., 306 F. Supp. 72 (D. Hawaii 1969).

135. *See* cases cited in Sherman, *supra* note 95, at 377 nn.17-20.

anticompetitive practices.[136]

These procedural differences illustrate, to some extent, the different nature of the two doctrines. Antitrust standing is perceived generally as a threshold question of law which the court must decide.[137] Damage questions, on the other hand, are questions of fact for decision by a jury.[138] Standing analysis should determine which plaintiffs are proper parties for bringing suit.[139] Injury analysis should determine whether those proper parties have incurred any injury compensable by the antitrust laws. Thus, standing should be doctrinally broader; that is, a party may have standing to sue without having sustained an antitrust injury.[140]

As recent cases have demonstrated, however, the two doctrines have a close kinship.[141] Both evolved from section 4 of the Clayton Act and both implicitly limit treble damage liability.[142] Further, antitrust standing, unlike standing in general, which is jurisdictional in nature

136. For example, in *Brunswick*, the defendant appealed an adverse jury verdict of $2,358,030. 429 U.S. at 481. The antitrust injury question also arose after a jury verdict in another recent Seventh Circuit decision, Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979). It is interesting to note that the court in Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979), considered the injury question in the context of a pretrial motion for summary judgment, ruling that the flexibility of summary judgment permitted consideration of "any reason why a claim or defense must succeed or fail." 586 F.2d at 1169. In *Ohio-Sealy*, the defendant licensed its trademark to the plaintiff, which manufactured and sold "Sealy" brand mattresses in territories for which it was "primarily responsible." The plaintiff alleged that the defendant was effectively maintaining illegal exclusive territories, thus eliminating intrabrand competition by creating barriers which made it very difficult for licensees to compete effectively outside its primary area. 585 F.2d at 828-29. The defendant also had in its license agreements a right of first refusal before a licensee sold its business. The right of refusal was exercised five times against the plaintiff company, which was seeking to expand, although the right had never been exercised against any other licensee. *Id.* at 829. The court found that the jury could have legitimately concluded that the exercise of the right of first refusal was part of a scheme of market allocation, done to keep the plaintiff from expanding and engaging in intrabrand competition with other licensees. *Id.* at 832. Thus, the *Sealy* court concluded that "the profits lost thereby do reflect injury of a type the antitrust laws were intended to prevent and do flow directly from the anticompetitive scheme that made Sealy's acquisitions illegal." *Id.* at 833. A more blatant system of licensing exclusive manufacturing and sales territories had earlier been invalidated in United States v. Sealy, Inc., 388 U.S. 350 (1967).

137. *See, e.g.*, Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1169 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979); John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 498 (9th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

138. Solinger v. A & M Records, Inc., 586 F.2d 1304, 1309 (9th Cir. 1978). *See also* Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 832 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

139. *See* Berger & Bernstein, *supra* note 93, at 836.

140. *See* text accompanying notes 143-48 *infra*.

141. *See* notes 129-34 and accompanying text *supra*. One commentator has suggested that the Supreme Court may consider the two "different sides of the same coin." Handler, *supra* note 16, at 995. *See also* Reiter v. Sonotone Corp., 99 S. Ct. 2326 (1979).

142. *Compare* Calderone Enterprises, Inc. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295-96 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) *with* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486-89 (1977).

and derives from the constitutional requirement of "case or controversy,"[143] involves elements of proximate causation.[144] Thus, antitrust standing necessarily encompasses the element of injury since the relationship of the plaintiff to the defendant's illegal acts is paramount.[145] That is, the plaintiff must allege facts, which if proved, will establish a causal connection between the alleged violation and his injury.[146] This causal connection differs, however, from proof of the actual "antitrust injury."[147] Standing analysis, under the target area approach, serves to identify parties as potential antitrust victims. Whether those parties can prove that their actual injury is of "the type that the statute was intended to forestall"[148] is a separate question.

Brunswick is illustrative. The plaintiffs, as existing competitors, were within the target area of the defendant's deep pocket acquisitions. The plaintiffs had standing since a deep pocket entrant into a market of pygmies may harm the pygmies' ability to compete, in violation of section 7 of the Clayton Act.[149] However, the plaintiffs failed on the injury question because they were unable to relate their claimed injury to

143. *See* Bogosian v. Gulf Oil Corp., 561 F.2d 434, 447 n.6 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). Typically, the constitutional case or controversy requirement mandates at least a minimal element of personal interest to meet the standing criterion. Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962). *See generally* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973). In Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970), the Supreme Court broadened the standing doctrine by finding standing where "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. Subsequently, in Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975), the Sixth Circuit applied the "zone of interests" test of *Data Processing* to a section 4 private antitrust plaintiff. The court in *Malamud* rejected both the direct injury and target area test because they "demanded too much from plaintiffs at the pleading stage" and confused standing with a "decision on the merits." *Id.* at 1149. *See* Sherman, *supra* note 95; *Malamud* Comment, *supra* note 92; Note, *Standing to Sue in Antitrust: The Application of Data Processing to Private Treble Damage Actions*, 11 TULSA L.J. 542 (1976). The zone of interests test has not generally been followed in subsequent antitrust standing cases. *See* Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1169 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

144. *See, e.g.*, Bogosian v. Gulf Oil Corp., 561 F.2d 434, 447 n.6 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 499 (9th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955); Kirihara v. Bendix Corp., 306 F. Supp. 72, 90 (D. Hawaii 1969). *Cf.* Juneau Square Corp. v. First Wisconsin Nat'l Bank, 445 F. Supp. 965, 969, (E.D. Wis. 1978) (causation is not an element of standing). *See generally* Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 NW. U.L. REV. 691 (1963) [hereinafter cited as Pollock].

145. *See* Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312, 316-17 (E.D. Pa. 1953), *aff'd*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954); Pollock, *supra* note 144, at 693 n.9.

146. *See* Pollock, *supra* note 144, at 692 and cases cited therein.

147. That involves a question of fact for jury determination. *See* note 138 and accompanying text *supra*.

148. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487-88 (1977), *quoting* Wyandotte Co. v. United States, 389 U.S. 191, 202 (1967).

149. 429 U.S at 487.

the anticompetitive consequences of the mergers.[150] Their loss of profits could not have been caused by anything proscribed by the antitrust laws.[151]

Lupia is similarly instructive in a non-merger context. Although the Seventh Circuit, following *GAF*, implied that standing and injury may be synonymous for section 4 purposes, it proceeded to analyze the two separately, concluding that plaintiff had established neither.[152] The plaintiff's lack of standing was grounded on the fact that the plaintiff, as a distributor, would not normally have been affected by the price discrimination of a manufacturer to retailers.[153] The injury requirement was not met because the plaintiff could not show harm from the anticompetitive effects of his required absorption of the five percent rebate. Thus, the plaintiff was not harmed by that which made the rebate unlawful.[154]

Since plaintiff was not within the target area, he had no cognizable antitrust injury. However, even a party within the target area, that is, a disfavored retailer, would not necessarily be the subject of an antitrust injury. Such a party could establish standing by virtue of its paying a supplier a higher price for goods also sold to competitors of the disfavored purchaser. Antitrust injury follows only if the harm to the disfavored party stems from anticompetitive effects proscribed by section 2(a) of the Robinson-Patman Act. The price discrimination must create a competitive disadvantage for the disfavored party by permitting the favored purchaser to resell at a cheaper price. A disfavored pur-

150. *Id.*

151. The plaintiff's loss of profits had nothing to do with the size or "deep pocket" of the acquiring firm but derived solely from the fact that the acquisitions maintained existing competition, a pro-competitive result. *Id.* at 487-88. *See* Areeda, *supra* note 95, at 1133-34 n.36; Handler, *supra* note 16, at 997. An analysis that would deny the plaintiffs standing because their loss of profits did not result from the anticompetitive impact of the defendant's conduct would unnecessarily restrict the target area and confuse the legal question of standing with the fact question of proof of antitrust damages. The plaintiffs were within the target area of the acquisitions. However, to establish antitrust injury, they would have had to show damages from attempting to compete with a deep pocket market entrant, not losses simply because of the fact of an acquisition in the retail bowling market of which they were a part. This narrowing of the target area is precisely what occurred in John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495 (9th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). The court there held that, "It is not enough to confer standing that plaintiff just prove some injury and show that this injury is within the affected area of the economy." 550 F.2d at 499.

152. 586 F.2d at 1168-69.

153. The court does, at one point, seem to adopt the target area approach. *Id.* at 1169.

154. The court also noted that the "plaintiff was unable to raise an issue of fact that it could have sold to the chains without the rebate." *Id.* Although the court did not so indicate, the preceding statement must have related to a purported resale price maintenance claim, rather than the price discrimination allegation. *See* Greene v. General Foods Corp., 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976) (a resale price maintenance case which the *Lupia* court took pains to distinguish).

chaser's payment of a higher price for a product than his competitor is not in itself sufficient to establish antitrust injury.[155]

Reciprocal use of the doctrines of antitrust standing and injury may often not alter the outcome of particular cases, since one without injury often does not have standing to sue. However, such a practice confuses legal causation with factual causation. Consequently, two problems arise. Since standing questions are generally litigated before trial, the plaintiff may be denied his opportunity to prove antitrust damages before a jury. The fact of damage is then determined by the legal concept of standing. Courts, wary of depriving parties of standing, may inadvertently expand the scope of antitrust injury and create unwarranted liability under section 4.[156]

In *Lupia v. Stella D'Oro Biscuit Co.*,[157] the Seventh Circuit was presented with a plaintiff that could not establish antitrust standing or injury. Although its opinion was ambiguous, the court did, at least indirectly, support the proposition that standing and injury are divisible doctrines that often have distinct meaning to a private antitrust plaintiff. Hopefully, subsequent decisions will continue to recognize this difference.

155. *See* American Oil Co. v. FTC, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 498 (1964); Enterprise Industries, Inc. v. Texas Co., 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957); Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952). A similar analysis is presented in Handler, *supra* note 16, at 992-93, 997.

156. *See, e.g.*, NBO Industries Treadway Co. v. Brunswick Corp., 523 F.2d 262 (3d Cir. 1975), *rev'd sub nom.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 420 U.S. 477 (1977). One pair of commentators states that the courts' failure to properly confine antitrust standing imbues substantive antitrust law into threshold standing questions. *See* Areeda, *supra* note 95; Berger & Bernstein, *supra* note 93, at 835-40.

157. 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).