Discharged Employees: Should They Ever Have Antitrust Standing under Section 4 of the Clayton Act

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The difficulty in interpreting and applying section 4 of the Clayton Act, which provides for private rights of action for treble damages under the antitrust laws, is well-known. Two cases decided by the Seventh and Ninth Circuits during 1982 indicate that the difficulty persists with regard to the standing of discharged employees to sue for antitrust violations.

Each case involved a defendant who entered into a conspiracy with its competitors to reduce price competition in their industry. To effectuate this aim the conspiracies sought to fix prices, allocate markets, and rig bids. Such acts constitute per se violations of sections 1 and 2 of the Sherman Act. The plaintiff in each case was a key executive directed to assist in implementing the conspiracy. The cooperation of these employees was essential to successfully carry out the price-fixing, market-allocating, and bid-rigging. The executives refused to cooperate and continued to do their jobs in a competitive manner. After receiving pressure from other members of the conspiracies, each defendant company discharged the plaintiff executive.

The plaintiff employees brought suit in federal court, seeking treble damages under section 4. In each case the defendant was granted summary judgment based on the plaintiff's lack of "antitrust standing." Both plaintiffs appealed. The Seventh Circuit, in In re Industrial Gas Antitrust Litigation (Bichan v. Chemetron Corp.), rigidly

1. 15 U.S.C. § 15 (1976 & Supp. V 1981). Section 4 provides, in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee . . ." Id.


3. 15 U.S.C. §§ 1-2 (1976). Per se violations are antitrust violations that are condemned under the "per se doctrine," which provides that "if an activity is blatant in its intent and pernicious in its effect, a court need not inquire into the reasonableness of the same before determining that it is a violation of the antitrust laws." This "implies that certain types of business agreements, such as price-fixing, are considered inherently anti-competitive and injurious to the public without any need to determine if the agreement has actually injured market competition." BLACK'S LAW DICTIONARY 1028 (5th ed. 1979).

4. 681 F.2d 514 (7th Cir. 1982), cert. denied, 103 S. Ct. 1261 (1983). Justice Blackmun voted to grant certiorari, vacate the judgment, and remand the case for further consideration
applied conservative antitrust standing analysis and denied the plaintiff standing to sue under section 4. The Ninth Circuit, however, in Ostrofe v. H.S. Crocker Co.,\(^5\) eschewed such narrow standing analysis and introduced a more flexible approach that gave standing to the discharged employee.\(^6\)

Giving standing to discharged employees poses a serious and important challenge to the antitrust standing doctrine.\(^7\) While such a plaintiff may have great potential for aiding in the enforcement of the antitrust laws, the discharged employee does not fit neatly into the analytic rubrics and patterns of antitrust standing doctrine. This Comment argues that neither the Ostrofe court nor the Bichan court developed a satisfactory approach to the application of that standing doctrine to employee-plaintiffs. The narrow approach of the Seventh Circuit justifies the criticisms of traditional antitrust standing tests made by the Ninth Circuit in Ostrofe. However, the Ninth Circuit's adoption of a new and unworkable test went too far the other way. While the result reached in Ostrofe is desirable, the court largely ignored antitrust standing precedent, set forth essentially a non-test, applied the test unevenly, and failed to consider adequately the concept of "antitrust injury."

This Comment first examines the somewhat confused doctrine of "antitrust standing" as developed by the several circuits. The Comment then discusses the concept of "antitrust injury" as articulated by the Supreme Court. The Comment then analyzes the Ostrofe decision, in contrast with the Bichan case. Finally, the Comment proposes an


\(^7\) The extent of disagreement and uncertainty over the discharged employee as a potential plaintiff is indicated by the situation within the Third Circuit, where two district courts have ruled the opposite way while both claim to follow the same case law. Both courts were confronted with a plaintiff who had been fired for refusing to cooperate in the anticompetitive acts of his employer. See Shaw v. Russell Trucking Line, Inc., 542 F. Supp. 776 (W.D. Pa. 1982) (trucker who refused to drive overweight loads and encouraged others to do likewise was granted standing); McNulty v. Borden, Inc., 542 F. Supp. 655 (E.D. Pa. 1982) (sales manager who refused to engage in price discrimination was denied standing).
approach that applies existing antitrust standing principles in allowing antitrust standing to employees discharged for their refusal to cooperate in the antitrust violations of their employers. The recommended approach makes the per se or non-per se nature of the antitrust violation involved a major factor in determining whether or not the plaintiff has standing to sue under section 4.

**An Overview of the Antitrust Standing Doctrine**

Section 4 of the Clayton Act provides that “[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.” This language could be construed to allow suits for treble damages by any person for any injury causally related to an antitrust violation. The federal courts, however, have realized the implications of such a broad construction and have sought to limit the group of persons allowed to sue for treble damages to include only “those individuals whose protection is the fundamental purpose of the antitrust laws.” This limitation has largely been accomplished through construction of the phrases *business or property* and *by reason of* found in section 4. The latter phrase generally has been narrowly construed and has caused great confusion among the federal courts.

The result of this narrow construction is the confusing doctrine of anti-

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10. *Id.* “[S]tanding is a judicially created doctrine designed to foreclose recovery to some plaintiffs . . . .” *Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 885 (5th Cir. 1982).* This creation has occurred almost exclusively at the circuit court level, as the Supreme Court has declined to act. *See infra* notes 51-69 & accompanying text.

11. Since “property” has such “naturally broad and inclusive meaning” and the statute uses the disjunctive “or,” this phrase is not a significant limitation. The Supreme Court has construed it broadly, while acknowledging that it retains some restrictive significance, such as excluding personal injuries. *See Reiter v. Sonotone Corp., 442 U.S. 330, 338-39 (1979).*

12. “[To have standing to sue under the antitrust laws, plaintiffs must show not only factual causation but also “legal causation,” i.e., that the injury caused was of the type that the antitrust laws were intended to prevent . . . . This judicially-created standing obstacle is based on the phrase ‘by reason of’ in section 4.” *California State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc., 648 F.2d 527, 537 & n.15 (9th Cir. 1980), rev’d, 103 S. Ct. 897 (1983).*

13. *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 126 (9th Cir.), cert. denied sub nom. Morgan v. Automobile Mfr. Ass’n, 414 U.S. 1045 (1973).* “Judicial constructions of standing under section 4 have keyed on the phrases ‘business or property’ and ‘by reason of’ as indicating twin requisites for standing.” *Id.*

14. *Id.* (“by reason of” has consistently eluded efforts at uniform definition or application). *See Note, Standing to Sue in Antitrust: The Application of Data Processing to Private Treble Damages Actions, 11 TULSA L.J. 542, 544 (1976).*
trust standing.\footnote{15}{Antitrust standing should not be confused with the better known judicial doctrine of article III standing that establishes federal “case or controversy” jurisdiction. See generally L. Tribe, American Constitutional Law §§ 3-17 to -29 (1978). Antitrust standing is a unique “concept of proximate causation distinct from the concept of personal stake necessary to establish article III jurisdiction. Our discussion here deals only with the former concept which has been misnamed ‘standing.’” Bogosian v. Gulf Oil Corp., 561 F.2d 434, 447 n.6 (3d Cir. 1977). The distinction between the two, how they relate to antitrust standing analysis, and the problems caused by the misnomer of antitrust standing have been discussed by various commentators. See, e.g., Comment, Antitrust — Malamud v. Sinclair Oil Corp. — The Sixth Circuit Applies the Data Processing “Zone of Interests” Test to Standing Under Section 4 of the Clayton Act, 7 Loy. U. Chi. L.J. 546, 548-56 (1976) [hereinafter cited as Loyola Comment]; Comment, Standing to Sue Under Section 4 of the Clayton Act: Direct Injury, Target Area, or Twilight Zone, 47 Miss. L.J. 502, 503-06 (1976) [hereinafter cited as Mississippi Comment].}

The Direct Injury Test

The seminal case in the antitrust standing area is \textit{Loeb v. Eastman Kodak Co.}\footnote{16}{183 F. 704 (3d Cir. 1910). This is the seminal case despite the fact that no antitrust standing doctrine is explicitly discussed. The \textit{Loeb} case actually antedates the Clayton Act, which was enacted in 1914. The suit in \textit{Loeb} was brought under old § 7 of the Sherman Act, forerunner of the Clayton Act’s § 4, which provided that “[a]ny person who shall be injured in his business or property . . . by reason of anything forbidden or declared to be unlawful by this act, may sue . . . and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney’s fee.” Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890).} The plaintiff, a stockholder and creditor of the victim corporation, was denied the right to sue the violator corporation because he had not “receive[d] any direct injury from the alleged illegal acts of the defendant.”\footnote{17}{Loeb v. Eastman Kodak Co., 183 F. at 709 (emphasis added).} Any injury he did receive was “indirect, remote, and consequential.”\footnote{18}{\textit{Id}. It is important to note that \textit{Loeb} was decided well before MacPherson v. Buick Motors Co., 217 N.Y. 382, 111 N.E. 1050 (1916), which led to the demise of privity in tort law. Therefore, notions of privity were still strong in judicial analysis, even though privity was not an express requirement in antitrust law.} The court reasoned that some barrier was necessary to limit the private antitrust enforcement weapon and to prevent a multiplicity of suits.\footnote{19}{Loeb v. Eastman Kodak Co., 183 F. at 709.}

This “direct injury test” stood for forty years as the primary limitation on antitrust standing. The test basically consists of an analysis of the relationship between the alleged antitrust violator, the plaintiff, and the alleged injury in a particular market. If the relationship is sufficiently “direct,” so that the alleged injury cannot be called “remote or consequential,” then the plaintiff has antitrust standing.\footnote{20}{\textit{Id}.}

The frequent result of applying the test, however, has been that courts focus solely on the relationship between the alleged violator and
the plaintiff. The plaintiff is simply placed in a certain labelled class, such as producers, competitors, suppliers, stockholders, creditors, employees, or lessors. The court then determines whether or not that class has, or has been previously determined to have, the potential for direct injury by an antitrust violation. This application has minimized consideration of both the antitrust violation itself and the alleged injury involved. Such a result is not necessarily mandated by the direct injury test. The test is a very effective barrier to potential plaintiff and, unlike some of its successors, is easy to apply.

The Target Area Test

The first major shift in antitrust standing doctrine occurred in Conference of Studio Unions v. Loew's, Inc. While purporting to follow the rule of Loeb, the Ninth Circuit actually created a new test. The court looked at the antitrust conspiracy before it and conceded that it could have many purposes and objects. A potential plaintiff had to do more than just show that one or more of those objects was an antitrust violation and that an act of the conspiracy had harmed him. The

24. See, e.g., cases cited supra note 22.
25. Most notably, the application of the direct injury test over-emphasizes the prevention of excessive liability and duplicative recoveries and under-emphasizes the enforcement goals of § 4. For an example of this downplaying of the enforcement interest, see S.C.M. Corp. v. Radio Corp. of Am., 407 F.2d 166, 171 (2d Cir. 1969), cert. denied, 395 U.S. 943 (1969).
26. 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952). In this case a group of labor unions brought suit for loss of work due to an alleged conspiracy between several movie studios and a larger union to restrain trade.
27. It is noteworthy that this suit was brought during a period in which the number of private antitrust actions was increasing. See Posner, A Statistical Study of Antitrust Enforcement, 13 J. L. & Econ. 365, 370-72 (1970). The attendant increase in the variety of plaintiffs and theories of suit probably presented a tough challenge to the application of the direct injury test.
plaintiff had to show that "he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." The test of Conference of Studio Unions became known as the "target area test." Its basic application includes two steps. First, the target area of the alleged violation, that is, the area of the economy affected, is defined. Second, the plaintiff is "located" or "placed." If he is located in that defined area, he has standing. If he is not so located, he does not. Like the direct injury test, the target area test appears simple enough, but its consistent application has proven elusive and difficult.

The Ninth Circuit led in the development and refinement of the target area test over the two decades following Conference of Studio Unions. Because the relationship on which the court focused had changed, there was a subtle shift from looking at the directness of the injury to looking at the "aim" taken at the target area. Application of the target area test allowed the court to give greater consideration to the nature of the violation and the injury involved. Also, the court could openly consider the broader social and economic goals of the antitrust laws in its analysis. At the same time, the Ninth Circuit

29. The Ninth Circuit held that such a construction of the "by reason of" phrase of § 4 was "in accordance with the basic and underlying purposes of the anti-trust laws to preserve competition and to protect the consumer." Id. at 55.
30. The actual term "target area" was first used in Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955).
31. But cf. John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 499 (9th Cir. 1977) (the alleged injury must be located or placed). The fully developed target area test is not quite this simple. See infra notes 33-44 & accompanying text.
32. Defining the target area itself can lead to subsidiary "tests." See, e.g., Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295-96 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972) (using direct injury-type analysis to identify the target area).
33. The Ninth Circuit's leadership in the development of antitrust standing doctrine, especially the more liberal developments, has been noted. See, e.g., id. at 1300 (Levet, J., dissenting); Comment, Antitrust — Treble Damages Actions — Private Litigant Whose Injury Was Reasonably Foreseeable Has Standing to Sue, 24 VAND. L. REV. 803, 805 (1971).
34. See supra text accompanying note 29.
35. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955).
36. Id. at 364-65.
37. "Free enterprise is a basic concept of our economy but contained therein is the corollary of free and fair competition. The broad scope of the antitrust laws... thus gave substance to those basic concepts and corollaries." Id. at 365. The Ninth Circuit has not been alone in these considerations. See, e.g., Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90, 99-100 (3d Cir. 1977). It is also noteworthy that the Karseal court, while relying squarely on Conference of Studio Unions, does not repudiate the direct injury test of Loeb,
made it clear that it was not necessarily enough that the plaintiff was simply within the target area of the violator's illegal practices. A stronger causal link was required. To dispel the possible interpretation of this causal link as being "intent," the Ninth Circuit introduced the concept of "reasonable foreseeability" to antitrust standing analysis. It was enough that the plaintiff was "actually in the area which it could reasonably be foreseen would be affected by the conspiracy."

Thus, the target area test would seem to require a third step beyond identifying the target area and placing the plaintiff. In this step the relationship between the violator, the violation, and the plaintiff is analyzed. It is the nature and extent of this analysis that is the major cause of the confusion among the circuits that utilize the target area test. Indeed, the target area test has proven to be almost as malleable in its interpretation and application as the section 4 language itself.

but only the privity notions associated with it. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363-64 (9th Cir. 1955). These privity notions have continued to be a stigma attached to the direct injury test, despite their repudiation by courts applying the direct injury test. See, e.g., Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 967 (7th Cir. 1943).

38. If the plaintiff was "hit" by the violation's effect, was the plaintiff "aimed at" with enough precision to entitle it to maintain a treble damages suit under the Clayton Act? Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955).

39. Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir.), cert. denied, 379 U.S. 880 (1964). See Alioto & Donnici, Standing Requirements for Antitrust Plaintiffs: Judicially Created Exceptions to a Clear Statutory Policy, 4 U.S.F.L. Rev. 205, 212-14 (1970) ("more in line with the intent behind Section 4 and the Supreme Court's liberal construction").


41. See supra notes 30-32 & accompanying text.

42. See Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1233 (6th Cir. 1981) ("That standard... has spawned numerous and often inconsistent opinions attempting to delineate its scope.").

43. See, e.g., Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1 (1st Cir. 1979) (adopting Karseal's "aimed at" language); Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163 (7th Cir. 1978), cert. denied, 440 U.S. 982 (1979) (using the Multidistrict Vehicle Air Pollution formulation of the target area test); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971) (blending direct injury test into the target area test to form a hybrid test); Nationwide Auto Appraiser Serv., Inc. v. Association of Casualty & Sur. Co., 382 F.2d 925 (10th Cir. 1967) (deciding that the direct injury test and the target area test are really the same test); South Carolina Council of Milk Producers, Inc. v.
is less of a barrier than the direct injury test, because some potential plaintiffs who were formerly in a "forbidden class" have a chance of gaining standing.44

Other Tests

Some circuits have found neither the direct injury test nor any of the variations of the target area test satisfying. These courts have introduced different tests, compounding the inconsistency and confusion. The first such test was announced by the Sixth Circuit in Malamud v. Sinclair Oil Corp.45 The court found existing antitrust standing law too restrictive, as it foreclosed claims prematurely. In formulating an alternative, the court borrowed the administrative law doctrine of protected zones.46 Each law has a zone of various interests it is designed to protect. All a plaintiff need show to gain standing, said the court, is an "injury in fact" to an interest "within the zones protected" by the antitrust laws. This test became known as the "zone of interests test."47

Another test was developed in the Third Circuit, where the direct injury test originated. In Cromar Co. v. Nuclear Materials & Equipment Corp.,48 the court sought to integrate the facts of the case with elements of all three of the existing tests. This hybrid became known as the "factual matrix test."49
With the variations of the target area test, there are scarcely two circuits sharing the same antitrust standing test. This is less alarming than it might be, due to the fact that the concerns underlying all of the tests are essentially the same.\textsuperscript{50}

**The Supreme Court, Antitrust Standing, and Antitrust Injury**

Despite the history of conflict among the circuits over antitrust standing doctrine, the Supreme Court has never announced a clear, definitive test of antitrust standing.\textsuperscript{51} The Court has only implicitly approved of the existence of the antitrust standing doctrine, if at all. The Court has generally decided the few antitrust standing cases to come before it on rather narrow grounds, referring only incidentally to the doctrine of antitrust standing.\textsuperscript{52}

**Antitrust Standing: Some Guidelines**

The Supreme Court has made general pronouncements concerning the purpose and goals of section 4 that are highly relevant to standing analysis. The Court has held that section 4 has two purposes: to deter violators by depriving them of the fruits of their violations, and to compensate victims of antitrust violations for their injuries.\textsuperscript{53} Private actions under section 4 are "a bulwark of antitrust enforcement" and

\textsuperscript{50} The differences have been called "largely semantic." Note, *Standing to Sue in Private Antitrust Litigation: Circuits in Conflict*, 10 IND. L. REV. 532 (1977) (setting forth a thorough, though partially dated, summary of the circuits' tests). This inherent similarity has facilitated the switch by a circuit from one test to another. See, e.g., Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1 (1st Cir. 1979); Note, *Recent Decisions—Standing to Sue in the First Circuit Under Section 4 of the Clayton Act*, 15 SUFFOLK U.L. REV. 396 (1981) (pointing out, in reviewing the First Circuit's switch from the direct injury test to the target area test, the small difference between the two tests). Other commentators have found the conflict more disturbing and have argued the need for uniformity. See, e.g., Comment, *supra* note 40, at 83 (raising the possibility of forum-shopping); Mississippi Comment, *supra* note 15, at 502-03.

\textsuperscript{51} The Court recently indicated that it may not even be possible to set forth such a test. See Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 103 S. Ct. 897, 908 (1983) ("the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case").


“will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.”

The Court has indicated that summary judgment motions, in which standing is often challenged, should be granted sparingly in antitrust litigation and that courts should be slow to expand such procedural prohibitions to antitrust suits. They should not “burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws.”

If section 4 is to be a “bulwark,” who are the appropriate plaintiffs? As early as 1948 the Court held that “[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they are perpetrated.” If all such protected victims were truly potential plaintiffs, this would lead to an unrestricted interpretation of section 4. The potency of the treble damages remedy dictated the need for careful application, however, and the Supreme Court later held that there must be some closer causal connection between the antitrust violation and the injury alleged.

The Supreme Court has further limited the pool of potential plaintiffs. For example, the Court has held that the antitrust laws were designed and intended to protect competition, not competitors. The plaintiff must therefore be an efficient enforcer of antitrust policies. The economic costs of allowing the plaintiff to seek and be awarded treble damages must be outweighed by the economic benefit to the competitive structure being protected. To this end, the plaintiff must

61. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). The Court has conceded that persons who are unilaterally injured by a member of a conspiracy can attack the overall conspiracy, if the unilateral action is synonymous with the intent of the conspiracy itself. Radovich v. National Football League, 352 U.S. 445 (1957); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951). The Radovich case is often cited for more expansive positions such as the unqualified standing of employees to sue for treble damages. See, e.g., Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90, 98 n.19 (3d Cir. 1977); Nichols v. Spencer Intl' Press, Inc., 371 F.2d 332, 334 (7th Cir. 1967).
63. See id. The Illinois Brick opinion clearly stated that it was not a standing case, but
not be too remote from the violator or the violation. If plaintiffs who are too remote are allowed to recover, the problem of duplicative recoveries arises. Duplicative recoveries can lead to overdeterrence, which actually harms competition and is the opposite of the result desired.64

Although the Supreme Court has yet to set forth any uniform test of antitrust standing, it seemed to discredit the direct injury test in Perkins v. Standard Oil Co.65 The Perkins Court held that such a “limitation is wholly artificial and is completely unwarranted by the language or purpose of the Act.”66 However, the Court declined to acknowledge that all limitations on antitrust standing are largely artificial. The Court tacitly approved of the general existence of antitrust standing limitations in Hawaii v. Standard Oil Co.,67 noting that the “lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.”68

rather a case of remoteness and duplicative recoveries. Id. at 728 & n.7. This has not prevented circuit courts from using these related principles in the standing context. See, e.g., Bichan v. Chemetron Corp., 681 F.2d 514 (7th Cir. 1982), cert. denied, 103 S. Ct. 1261 (1983); Mid-West Paper Prod. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979).


67. 405 U.S. 251 (1972) (involving a parens patriae suit by the state for damages to its general economy as the result of antitrust violations). Though it makes an oft-quoted reference to the antitrust standing doctrine, Hawaii stands, along with Illinois Brick, for the policy against duplicative recoveries and overdeterrence. See Blue Shield of Va. v. McCready, 457 U.S. 465, 474-75 (1982).

68. Hawaii v. Standard Oil Co., 405 U.S. at 263 n.14. One circuit decision read this statement in conjunction with the Court’s undermining of the direct injury test in Perkins to conclude that the Court favors the target area test. In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 128-29 (9th Cir.), cert. denied sub nom. Morgan Automobile Mfrs. Ass’n, 414 U.S. 1045 (1973). One commentator has suggested that the Ninth Circuit may have stopped too short, and that under the Supreme Court’s analysis the target area test should not delimit “the outermost permissible bounds of treble damage standing.” See
The Court has also recognized that the tests developed by the circuits may conflict, but has declined to act.

The Brunswick Doctrine: Antitrust Injury

The Supreme Court's opinion in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* had a significant impact on antitrust standing doctrine. In *Brunswick*, the plaintiff alleged an illegal vertical merger by a competitor in violation of section 7 of the Clayton Act. The merger intensified price competition that injured plaintiff's business, and the plaintiff sought treble damages. The Supreme Court, in denying relief, recognized the inherent conflict between the prophylactic nature of section 7 and the "remedial" nature of section 4 treble damages. The Court flatly rejected the notion that it is enough to allege an antitrust violation and an injury causally linked to that violation; such a holding would "[divorce] antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so . . . ." To allow recovery in a suit based on *increased* competition would "make Section 4 recovery entirely fortuitous, and would authorize damages for losses which are no concern to the antitrust laws." The Court then introduced the concept of "antitrust injury," which is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."

The full meaning of the concept of antitrust injury and its relationship to antitrust standing analysis is not readily apparent from the Supreme Court's definition. At a minimum, it means that in addition to causing an injury to the plaintiff, the defendant's unlawful acts must

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Note, Antitrust — Standing to Sue Under Section 4 of the Clayton Act, 35 Ohio St. L.J. 723, 733-34 (1974). Probably even more significant than this footnote reference in *Hawaii* is the repeated denial of certiorari by the Court in antitrust standing cases. See, e.g., *supra* notes 6, 9, 22, 23, 25, 26, 32, 39, 40, 43 and the cases cited therein; see also Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term — 1977*, 77 Colum. L. Rev. 979, 994 & n.89 (1977).

69. *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 476 n.12 (1982) ("[w]e have no occasion here to evaluate the relative utility of any of these possibly conflicting approaches").


71. The significance of the decision has been questioned, however, with one writer calling it "old wine in a new bottle." Calvani, *The Mushrooming Brunswick Defense: Injury to Competition, Not to Plaintiff*, 50 Antitrust L. J. 319, 330 (1981). *See also* Page, *supra* note 64, at 467-72.


73. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 479-84.

74. *Id.* at 485.

75. *Id.* at 487.

76. *Id.* (footnote omitted).

77. *Id.* at 489 (citing Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125 (1969)).
also cause injury to competition in the given market area. Problems arise when determining to what extent the two injuries must be connected, or more specifically, if the injury to the plaintiff must flow directly from the injury to competition. The only real assistance offered by the Supreme Court in determining the scope and placement of the antitrust injury concept is that the concept is not limited to section 7 violations and is not relevant solely to standing problems.

Similar problems exist in defining the relationship between antitrust standing and antitrust injury. It is unclear whether antitrust injury adds a step to each of the standing tests, or if it is a separate test to be addressed only if the plaintiff first establishes standing. Circuit courts have decided both ways. The Ninth and Sixth Circuits have ruled that antitrust injury adds a step to their different standing tests. The Third and Fifth Circuits have kept the two concepts separate. The Fourth Circuit has indicated that the antitrust injury doctrine, however viewed, may not even apply to all antitrust violations. This latter holding lends support to the view that the two concepts should be kept separate.

An antitrust plaintiff must prove antitrust injury in order to ultimately prevail. However, to gain standing a plaintiff should only have to make a sufficient allegation of antitrust injury, not prove it. Though antitrust standing and antitrust injury share many underlying principles and serve the common goal of restricting antitrust plaintiffs to those intended to be protected by section 4, they are distinct concepts. They should be kept separate for analytical purposes. This doc-

78. See Lee-Moore Oil Co. v. Union Oil Co., 599 F.2d 1299, 1303 (4th Cir. 1979) (“We think that there is little reason to believe that this unanimous holding of the Court was intended to announce a radical revision of the law of private antitrust damages actions.”).

79. See J. Trueitt Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981). In a case involving price discrimination, a violation of § 2(a) of the Clayton Act, the Court held that its “decision here is virtually governed by our reasoning in Brunswick.” Id. at 562.

80. See Blue Shield of Va. v. McCready, 457 U.S. 465, 476-84 (1982) (utilizing Brunswick in Court’s discussion of “remoteness” doctrine, when it had declined to address standing issue).

81. John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 498-99 (9th Cir. 1977); Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1232 (6th Cir. 1981). But see Bosse v. Crowell Collier & MacMillan, 565 F.2d 602, 607 n.5 (9th Cir. 1977) (indicating that John Lenore & Co. may be limited to § 7 cases).


83. Lee-Moore Oil Co. v. Union Oil Co., 599 F.2d 1299, 1302-04 (4th Cir. 1979) (court distinguishes per se and non-per se violations).

84. In per se violation cases, the injury to competition can be presumed, thus lightening the plaintiff’s initial burden. See supra note 3.

trinal area is confusing enough as it is.86

The Latest Word: Associated General Contractors

A recent Supreme Court decision may have substantial impact on the antitrust standing doctrine. In Associated General Contractors of California, Inc. v. California State Council of Carpenters,87 the Court approached the doctrine, but again declined to resolve the confusion. Instead, the Court offered various "factors" for lower courts to consider in their standing analysis.88 The Court’s decision reversed a Ninth Circuit grant of standing to a group of labor unions.89 The unions alleged injuries due to a boycott by defendant contractors of various other contractors and subcontractors.90 The Court was particularly troubled by the vagueness of the unions’ allegations, as to both violations and damages.91

After acknowledging the broad language of section 4, as well as its own broad interpretations of that language, the Supreme Court engaged in historical analysis aimed at narrowing this interpretation.92 The Court concluded that, “as was required in common-law damages litigation in 1890, the question requires us to evaluate the plaintiff’s harm, the alleged wrongdoing by the defendants, and the relationship between them.”93 This statement could be interpreted to support any of the established antitrust standing tests.94 The Court noted the several major standing tests developed by the circuits and the potential contradictions and inconsistencies among them. The Court, however, did not strike them down. Instead, it urged lower courts to look to

86. See Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 12 n.16 (1st Cir. 1979); Handler, supra note 68, at 994-97; Page, supra note 64, at 497 (“it is useful to keep the concepts separate”). In a recent decision, the Supreme Court appears to take this view. After acknowledging and listing the various antitrust standing tests, the Court stated that it had “no occasion here to evaluate the relative utility of any of these possibly conflicting approaches toward the problem of remote antitrust injury.” Blue Shield of Va. v. McCready, 457 U.S. 465, 476 n.12 (1982).
87. 103 S. Ct. 897 (1983).
88. Id. at 907 n.33.
90. Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 103 S. Ct. at 900-01. The Court was notably uncomfortable with labor unions as antitrust plaintiffs, in view of the historically tenuous relationship between labor law and antitrust law. Id. at 909-11.
91. Id. at 902-04. The Court agreed with the dissenting judge on the Ninth Circuit that the allegations had more of the sound of a labor dispute.
92. Id. at 904-07. The Court looked at both the legislative history and related common law concepts.
93. Id. at 907.
94. It is noteworthy that the only circuit standing case cited in the text by the Court, and with approval, was Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910).
precedent and to use the Court’s “factors” in their analysis — implying that these factors be incorporated into the existing tests.95

The Court’s suggested “factors” were varied, and some were by no means new. They included the causal connection between the antitrust violation and the harm of the plaintiff, the nature of the injury, and the presence or absence of intent of the defendant to cause injury to the plaintiff.96 Courts were instructed to remember “the central interest in protecting the economic freedom of participants in the relevant market.”97 Other factors mentioned included the identity of the plaintiff (in this case a union), the directness or indirectness of the injury (this was too remote), the nature of the damages (they were too speculative), and the judicial system’s interest in preventing duplicative recoveries and controlling complex litigation.98 After analyzing these factors, the Associated General Contractors Court concluded that the unions were not the “direct victims” of the alleged boycott and, hence, lacked standing.99

The scope of the Associated General Contractors decision is uncertain.100 It appears to signal a deceleration of the expansion of antitrust standing, as well as a new emphasis on a more balancing-type analysis. The decision’s message is important in considering the potential standing of the discharged employee.

Antitrust Standing and Employee-Plaintiffs

The case law dealing with the standing of employees to sue their employers or other antitrust law violators101 for treble damages under section 4 is not extensive. One reason is that employees are considered to be one of the “forbidden classes” under the direct injury test.102 This notion appears to have carried over into the target area test, so that employees are seldom within the target area of an antitrust violation.103

96. Id. at 908-09.
97. Id. at 909.
98. Id. at 909-12.
99. Id. at 913. The conclusion was based as much on the pervasive vagueness of the allegations and the tension between labor law and antitrust law as on the “factors” discussed.
100. “We therefore need not decide whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market.” Id. at 910 n.44.
101. The distinction is important because suing “other” violators raises the spectre of duplicative recoveries, i.e., by the victim firm and by its employees. Cf. Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90, 96 n.7, 98-99 (3d Cir. 1977).
103. The most prominent exception to this general statement is the situation where the
The Fifth Circuit, in *Dailey v. Quality School Plan, Inc.*, was the first circuit court to clearly allow an employee standing under modern antitrust standing analysis. The plaintiff, a commissioned salesman, was allowed to sue his employer for income lost as a result of a reduction of his sales territory due to his employer's violation of section 7 of the Clayton Act. The court borrowed the Seventh Circuit's analysis of the *business and property* phrase of section 4 and the Fourth Circuit's analysis of the *by reason of* phrase. The court found that the plaintiff had alleged sufficient injury to his business by reason of his employer's antitrust violation to gain standing under the "reasonable foreseeability" target area test.

Faced with a factual situation similar to that in *Dailey*, the Tenth Circuit reached an opposite result in *Reibert v. Atlantic Richfield Co.* The plaintiff, a salaried employee, was terminated when his job was eliminated during a reorganization that followed an illegal merger. The court made the rather tenuous distinction that the plaintiffs in other cases were "quasi-businessmen" who had carved out a part of the competitive market affected by the antitrust violations, whereas the plaintiff here was only a regular employee. Despite an extended discussion of causal connection and proximate cause, the case was decided on the basis of this distinction and by the court's application of the direct injury test. The discharge was too indirect an injury, and it would have occurred whether the merger was legal or illegal, making it


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104. 380 F.2d 484 (5th Cir. 1967).
106. Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332 (7th Cir. 1967); Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942). *Roseland* was a rare pre-target area test case involving an employee-plaintiff. The Seventh Circuit did not actually discuss standing as it is discussed today, since it focused on the "business or property" phrase of § 4. The court held that the plaintiff salesman had lost sales commissions because of the alleged violation, and thus had standing because those lost commissions fit within the "business or property" definition. In *Nichols*, the Seventh Circuit followed *Roseland* fairly closely, despite the "by reason of" prevalence that had developed in the intervening 25 years. Again, standing was granted to the plaintiff without discussing antitrust standing doctrine as such. Most "business or property" analysis has now been minimized by the Supreme Court's holding in Reiter v. Sonotone, 442 U.S. 330 (1979). *See supra* note 11.
109. 471 F.2d 727 (10th Cir. 1973).
110. The court discussed *Roseland*, *Nichols*, and *Dailey* in the course of its analysis.
112. *Id.* at 730-33 ("the 'directness rule' appears to be a practical application of the Clayton Act"). While the Tenth Circuit reaffirmed its adherence to the direct injury test, it is useful to note the frequent use of "target area language," which is not uncommon in standing cases.
a mere "outgrowth of the alleged unlawful act." Therefore, the plaintiff lacked standing to sue.113

The Ninth Circuit Prior to Ostrofe

The Ninth Circuit has been generally active in this segment of antitrust standing development. In Conference of Studio Unions v. Loew's, Inc.,114 the Ninth Circuit not only originated the target area test, but also first considered employee antitrust standing. The plaintiff employees115 were denied standing because they were not in the target area protected.116 In Solinger v. A & M Records, Inc.,117 the plaintiff sued in a dual capacity as the prospective purchaser and as an employee of the victim corporation. The Ninth Circuit applied the "reasonably foreseeable" target area test. Only in his capacity as a prospective entrant to the market was the plaintiff foreseeably within the area affected by a section 1 or 2 violation and did he have standing; his loss of salary was "merely incidental,"118 exemplifying the fine lines being drawn in these cases.119

The Ninth Circuit made a notable shift in California State Council of Carpenters v. Associated General Contractors of California, Inc.120 Plaintiff employees, through their union, were permitted to sue under the target area test. On its face, this decision could appear to be an accepted exception because the market area affected and endangered

113. Id. at 732-33. One authority has discussed the decision with strong approval, stating that the "analysis of the Reibert case is instructive." 2 P. AREEDA & D. TURNER, supra note 2, § 338, at 195. The Tenth Circuit was faced with a more difficult question in Farnell v. Albuquerque Publishing Co., 589 F.2d 497 (10th Cir. 1978). The plaintiff there, a newspaper vendor, was a "quasi-businessman," similar to the plaintiffs in Roseland, Nichols, and Dailey. The alleged §§ 1 and 2 violations were directed squarely at the plaintiff and other vendors. The court, however, followed only the causation test set forth in Reibert and denied standing because of the technical reason for the discharge (insubordination). Id. at 500-01.

114. 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952). See supra notes 26-29 & accompanying text.

115. The plaintiffs were actually a group of small unions, but the distinction has not traditionally been significant in antitrust standing analysis. But see supra notes 87-100 & accompanying text.

116. Conference of Studio Unions v. Loew's, Inc., 193 F.2d at 54-55. This position was solidly adhered to in Contreras v. Grower Shipper Vegetable Ass'n, 484 F.2d 1346 (9th Cir. 1973), cert. denied, 415 U.S. 932 (1974), where standing was denied plaintiff farmworkers based on a strict target area analysis.

117. 586 F.2d 1304 (9th Cir. 1978), cert. denied, 441 U.S. 908 (1979).

118. Id. at 1311-12.

119. In Program Eng'g, Inc. v. Triangle Publications, Inc., 634 F.2d 1188 (9th Cir. 1980), the court again "split" the grant of standing. Plaintiff company was allowed standing, while plaintiff company president was denied standing because his loss of salary was "merely incidental," following Solinger. Id. at 1191.

120. 648 F.2d 527 (9th Cir. 1980), rev'd, 103 S. Ct. 897 (1983).
by the violations was determined to be the employment market. However, some language used by the court foreshadowed a shift in the Ninth Circuit's view of antitrust standing towards a policy-oriented approach. Non-foreseeable litigants, such as employees, should be allowed standing if to do so would enhance enforcement of antitrust policies. Despite the decision's eventual reversal, its analysis is significant — and it is important because it set the stage for Ostrofe v. H.S. Crocker Co.

Despite the rather small number of employee-plaintiff cases, certain patterns emerge. Employee-plaintiffs are frequently treated as a labelled class presumed to lack standing. If the market affected by the alleged violations is the employment market, however, they may gain standing. If the plaintiff can assert that he is a quasi-businessman, his chances improve. His chances are also improved if he is an employee of the violator, rather than the victim. Overall, however, minimal attention is given to the nature of the violation or the nature of any relationship besides the bare employer-employee relationship.

The Discharged Employee as an Antitrust Plaintiff: Circuits in Conflict

Ostrofe

The defendant in Ostrofe v. H.S. Crocker Co. was a paper litho-

121. This "exception" has been established since Radovich v. National Football League, 352 U.S. 445 (1957). See supra note 61. At the same time, the factual situation was not very different from Conference of Studio Unions, which the court did not overrule. See supra notes 26-29, 114-16 & accompanying text. The dissent stated that "[w]hen all is said and done, this is a labor case wearing an antitrust costume ...." California State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc., 648 F.2d at 543 (Sneed, J., dissenting). The Supreme Court agreed with this dissent. In reversing, the Court also implicitly disagreed with the Ninth Circuit's characterization of the target area, since it identified the affected area of the economy as the contracting and subcontracting market. See Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 103 S. Ct. 897, 911-12 (1983).

122. California State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc., 648 F.2d at 538 n.18 ("systematic denial of standing on foreseeability grounds may result in the dismissal of actions which would otherwise further both the deterrent and compensation purposes of the Act").

123. 670 F.2d 1378 (9th Cir. 1982), remanded for reconsideration, 103 S. Ct. 1244 (1983).

124. See supra notes 102-03 & accompanying text.

125. See supra notes 61, 121 & accompanying text.

126. See supra notes 104-08 & accompanying text. But see supra notes 109-13 & accompanying text.

127. See supra note 101 & accompanying text.


129. 670 F.2d 1378 (9th Cir. 1982), remanded for reconsideration, 103 S. Ct. 1244 (1983).
graph labels manufacturer. The plaintiff, Frank J. Ostrofe, was the company's marketing director. Crocker allegedly entered into a conspiracy with other unnamed manufacturers of paper lithograph labels, aimed at reducing competition in that industry. The conspiracy contemplated price-fixing, bid-rigging, and customer and territory allocation.130

As marketing director, Ostrofe would necessarily play a key role in putting such a conspiracy into action. He alleged that he was ordered to rig bids, fix prices and allocate markets. When he refused to do so and continued to do his job in a competitive manner, the other conspirators complained to Crocker. Ostrofe was threatened with economic reprisals, including discharge, if he failed to cooperate. He continued to refuse to do so and was forced to resign.131

Ostrofe brought suit against Crocker in federal district court seeking damages under the Sherman Act.132 His initial complaint alleged injuries due to the conspiracy, which was in violation of section 1 of the Act.133 The complaint also mentioned of a boycott agreement by the conspirators not to hire or rehire discharged employees, such as Ostrofe, who did not cooperate in the scheme. Crocker moved to dismiss on the grounds that Ostrofe lacked standing to sue under section 4 of the Clayton Act. The district court agreed, but denied dismissal so that it could hear the boycott issue.134

Crocker then moved for summary judgment, presenting depositions and affidavits supporting the lack of any conspiracy to boycott Ostrofe from the paper labels industry. In response, Ostrofe reasserted the actions that led to his resignation. While Crocker's motion was pending, Ostrofe moved to amend his complaint.135 Ostrofe sought to allege that Crocker had unilaterally refused to deal with him by forcing him to resign, in furtherance of the alleged conspiracy.136 The district

130. Id. at 1380. Most, if not all, of these acts would constitute per se violations of the Sherman Act. See supra note 3.

131. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1380. Other threatened reprisals included denial of promised financial compensation or greater share in management. Id.

132. Id. This statement of fact is disputed. The appellate briefs argued, and the dissent accepts, that Ostrofe resigned voluntarily. See id. at 1391 (Kennedy, J., dissenting).

133. The court does not indicate why Ostrofe chose to sue under the antitrust laws.


135. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1380.

136. Id. There was probably good motivation for this motion to amend. Ostrofe's claim of a boycott was weak, as he had scant evidence that there was one. In addition, Ostrofe never looked for another similar job in the industry. See id. at 1391 (Kennedy, J., dissenting).

137. If Ostrofe were allowed to so plead, he would have been aided in proving the § 1 conspiracy by the earlier government actions against Crocker and other conspirators, which had resulted in nolo pleas and some jail sentences. See Petition for Rehearing Brief for Appellee at 9-10, Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir. 1982); see also United
court viewed such an attempt as an indirect method of complaining of the overall conspiracy, which it had ruled he had no standing to do. Consequently, the motion to amend was denied and the summary judgment was granted.  

Ostrofe appealed to the Ninth Circuit. That court’s stated basis for reversal was that the district court erred in “fragmenting” the two claims by Ostrofe — the industry’s conspiracy to boycott him versus Crocker’s unilateral action against him in furtherance of the overall conspiracy. The court held that such a fragmentation led to “erroneous rulings on the motions to dismiss, to amend the complaint, and for summary judgment.” The majority held that Ostrofe had standing to allege the overall conspiracy in conjunction with the alleged boycott. He also had standing to allege that Crocker unilaterally refused to deal with him as a means of furthering that conspiracy.

**Bichan**

The facts in *Bichan v. Chemetron Corp.* were similar to those in *Ostrofe*. The plaintiff, Robert Bichan, was the president of defendant Chemetron’s Industrial Gas Division. Chemetron allegedly entered into a conspiracy to fix prices and allocate markets with other members of the industrial gas industry. Bichan ignored this agreement and competed successfully for new customers, causing complaints from other conspiracy members. Shortly thereafter, he was fired.

Bichan was unable to find a similar position in the industry. He then brought suit against Chemetron and the other alleged conspirators, seeking treble damages under section 4 for injuries sustained due to the defendants’ violations of the Sherman Act. The district court entered judgment for the defendants, based on Bichan’s lack of antitrust standing and antitrust injury. The Seventh Circuit unanimously affirmed the judgment.


139. Id. at 1381.
140. Id. at 1388-89. The dissent disagreed with both holdings. See id. at 1389-92 (Kennedy, J., dissenting). This Comment deals mainly with the second holding, regarding Crocker’s unilateral refusal to deal. The first holding, regarding the boycott, was rather summarily resolved by the majority, as the boycott itself was a violation of the Sherman Act. Id. at 1381-82. As mentioned, Ostrofe’s proof for this claim was weak. See supra note 136.
141. 681 F.2d 514 (7th Cir. 1982), cert. denied, 103 S. Ct. 1261 (1983).
142. Id. at 515.
143. This is in marked contrast to *Ostrofe*, in which the plaintiff did not look for a similar job in the industry. See supra note 136.
144. Bichan v. Chemetron Corp., 681 F.2d at 515.
145. Id.
146. Id. at 515, 520.
an antitrust injury\textsuperscript{147} and, even if it had been, it was too remote from the antitrust violations to give him standing to sue.\textsuperscript{148} Moreover, Bichan lacked antitrust standing under the Seventh Circuit's conservative target area test.\textsuperscript{149}

**Discussion of the *Ostrofe* Decision: The Ninth Circuit Takes a New Approach**

While acknowledging the established antitrust standing cases and tests, the Ninth Circuit majority actually disregarded precedent\textsuperscript{150} and set forth a new "policy balancing test."\textsuperscript{151} On one side of this test is the interest in effective enforcement of the antitrust laws, with the private action being a "bulwark."\textsuperscript{152} On the other side is the interest in avoiding vexatious litigation and excessive liability: "floodgates" and "overkill."\textsuperscript{153} In *Ostrofe*, the court found that the former outweighed the latter.\textsuperscript{154} What the court failed to acknowledge was that the balancing of these two policies has been the underlying objective of all the antitrust standing tests.\textsuperscript{155} The *Ostrofe* court restricted the use of those

\textsuperscript{147} *Id.* at 516-19. The Seventh Circuit based this holding on a narrow interpretation of *Brunswick*, reasoning that the injury to the plaintiff must be caused by the anti-competitive effect of the violation. See generally supra notes 70-80 & accompanying text.

\textsuperscript{148} Bichan v. Chemetron Corp., 681 F.2d at 519-20. The court here relied mainly on *Illinois Brick*, using the Supreme Court decision for its discussion of both antitrust injury and antitrust standing. See generally supra notes 62-64 & accompanying text.

\textsuperscript{149} Bichan v. Chemetron Corp., 681 F.2d at 518-19. The court applied a narrow target area test based on Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163 (7th Cir. 1978), cert. denied, 440 U.S. 982 (1979). The Seventh Circuit recognized the conflict that its decision created with the Ninth Circuit. The circuit decided not to hear the case en banc. The *Bichan* court directly confronted the *Ostrofe* holding and disagreed, choosing to support Judge Kennedy's dissent. Bichan v. Chemetron Corp., 681 F.2d at 514, 518-19.

\textsuperscript{150} The dissent chastises the majority on this point. See *Ostrofe* v. H.S. Crocker Co., 670 F.2d at 1389-92 (Kennedy, J., dissenting) ("[t]his circuit's line of precedent is sound, yet the majority simply and erroneously ignores it").

\textsuperscript{151} Name given by the author. The *Ostrofe* court disdained "tests" and did not name the one it developed to handle the unilateral act issue, or even admit that it was announcing one. *Ostrofe* v. H.S. Crocker Co., 670 F.2d at 1382-83. The court's balancing test was heavily influenced by a prominent law review article. See Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977). Other commentators have also suggested a balancing test approach to antitrust standing. See, e.g., Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits — The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 30 (1977); Note, *Antitrust — Balancing Analysis to Determine Standing — McCready v. Blue Shield of Virginia*, 1981 ARIZ. ST. L.J. 1105, 1114.

\textsuperscript{152} *Ostrofe* v. H.S. Crocker Co., 670 F.2d at 1383 (quoting Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)).

\textsuperscript{153} *Ostrofe* v. H.S. Crocker Co., 670 F.2d at 1383 (quoting Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295-96 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972)).

\textsuperscript{154} *Ostrofe* v. H.S. Crocker Co., 670 F.2d at 1383-84.

\textsuperscript{155} See supra notes 8-50 & accompanying text. Ten years earlier, one commentator
tests to "resolv[ing] clear cases."  

Furtherance of Effective Antitrust Enforcement

The Ninth Circuit offered several reasons why allowing Ostrofe to sue for treble damages would further effective antitrust enforcement. First, section 1 violations are nearly always covert, so their detection often depends on disclosure by an insider. Since the chance of criminal liability is slight, without the civil treble damages remedy there is little incentive for an insider to betray the conspiracy.  However, the court failed to recognize that the reason section 1 violations are usually covert is because they are per se illegal, and therefore the chance of criminal prosecution is actually higher.

Second, the court believed that the chance for a civil recovery by Ostrofe outside of antitrust treble damages was slim. This reasoning was faulty, since the expansion or contraction of antitrust recoveries should not depend upon the availability of other remedies. The antitrust laws were not intended to be a "panacea for all wrongs." Anti-trust standing analysis should not turn on the availability of another remedy, since enforcement, not compensation, is the primary rationale of antitrust standing. A contrary stance could cause more plaintiffs observed that the federal courts had been attempting to "balance the purpose and worth of the treble damage remedy against the unfairness of permitting windfall damages" for sixty years. Comment, supra note 40, at 76.

156. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1382-83.

157. Id. at 1384.

158. See supra note 3.

159. See generally Posner, supra note 27, at 388-95 (showing, inter alia, that price-fixing is a leading violation in terms of imprisonment for antitrust prosecutions); R. Posner & F. Easterbrook, Antitrust: Cases, Economic Notes, and Other Materials 320-21 (1981) (updating data in 1970 article).

160. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1384. The dissent takes the opposite view of Ostrofe's chances at an alternative civil remedy and argues the opposite way on this point. Judge Kennedy indicates the growth in wrongful discharge recoveries, citing to California cases. Id. at 1392 (Kennedy, J., dissenting). This would not be of much use to a plaintiff in a less progressive state. Further, it is an oversimplification of the problem to label Ostrofe's injury a "wrongful discharge" and summarily conclude that it is not, therefore, an antitrust injury.

161. "It is immaterial that block booking was or was not a breach of contract. Successful maintenance of an antitrust suit does not depend upon the availability or nonavailability of a common-law remedy for that wrong. The antitrust laws are an expression of federal public policy to foster free competition. The treble-damage action was designed to implement that policy . . . . That purpose would be frustrated by remitting to his common-law remedies one who has been injured by such conduct." Mulvey v. Samuel Goldwyn Prod., 433 F.2d 1073, 1075 (9th Cir. 1970), cert. denied, 402 U.S. 923 (1971) (emphasis added).


163. See Mulvey v. Samuel Goldwyn Prod., 433 F.2d 1073, 1075 (9th Cir. 1970), cert. denied, 402 U.S. 923 (1971) ("[t]he treble-damage action was designed to implement that policy by encouraging private suitors to enforce the antitrust laws").
to disguise their non-antitrust claims in antitrust clothing.  

Third, since Ostrofe's discharge was "essential to the success" of the conspiracy, the court reasoned that giving him treble damages would increase Crocker's overall antitrust liability. This assumption that the discharge was essential to the conspiracy's success was an analytical error that ran through the opinion. Ostrofe's cooperation in implementing the conspiracy, not his discharge, was essential to the conspiracy's success. The successful operation of the conspiracy required a cooperative employee in the marketing director position. Crocker could have merely transferred Ostrofe and replaced him with a sympathetic marketing director. That Crocker forced him to resign instead did not make his discharge essential. This may appear to be a rather fine distinction, but it is significant to the issue of antitrust injury. The antitrust injury to Ostrofe was not the discharge. Rather, the injury arose from being put in the position of choosing between committing an illegal act or being fired. Moreover, arguing that adding to Crocker's liability would promote enforcement interests actually lends weight to the excessive liability concern on the other side of the balance.

Finally, the court decided that allowing Ostrofe to sue would stop antitrust violations in their incipient stages and protect other parties from later antitrust injuries — injuries that due to the covert nature of the violations might not even be detected. The discharged employee is also an efficient plaintiff: it is less costly to society and to the defendant employer to pay treble damages to the employee at an early stage of the conspiracy than to pay cumulative damages to competitors and purchasers later on. However, this reasoning ignores the fact that section 4 is generally considered a remedial provision providing an in-

164. See infra notes 174-77 & accompanying text.
165. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1384.
166. See infra notes 186-205 & accompanying text.
167. This distinction is also useful in defining the target area. See infra notes 212-13 & accompanying text.
168. This raises an important question that will undoubtedly arise in future cases should Ostrofe remain good law. What if Crocker had just transferred Ostrofe to a lower position or denied him raises or promotions instead of firing him? What if it had found other "punishing" tactics or reprisals short of the forced resignation? Would there still be treble damages for those injuries, or just for discharge? It is noteworthy that Ostrofe was threatened with just such actions. See supra note 131 & accompanying text.
169. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1384-85. The Supreme Court has found that Congress intended the antitrust laws, specifically § 7 of the Clayton Act, to stop the act "at a time when the trend to a lessening of competition . . . was still in its incipiency." Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962).
170. This argument is not as strong when applied to the Ostrofe facts because the conspiracy had already been uncovered and prosecuted. See supra note 137.
direct deterrent, and not a prophylactic one.\textsuperscript{171}

Based on these considerations, the Ninth Circuit concluded this side of its policy balancing test by finding that Ostrofe would be an effective enforcer of the antitrust laws. He was the ideal victim to bring the suit.\textsuperscript{172} Despite some flaws and one-sidedness in these considerations, on the facts of this case it was a defensible conclusion.

**Avoidance of Vexatious Litigation and Excessive Liability**

The other side of the balance, the interest in avoiding vexatious litigation and excessive liability, was given short treatment by the Ninth Circuit.\textsuperscript{173} First, the court reasoned that employees such as Ostrofe are not so numerous as to pose a threat of a ruinous burden on industries.\textsuperscript{174} This may be true, but the court failed to consider adequately the possibility that the lure of such a recovery could lead to the dressing up of claims as antitrust claims, especially when the damages are treble and come with attorney’s fees. The realities of vexatious litigation, as well as the settlement value of any complex case, cannot be easily ignored.\textsuperscript{175} Allowing any discharged and disgruntled employee to place his former employer in peril of treble damages with allegations alone seems to be opening the floodgates to antitrust suits.\textsuperscript{176} If \textit{per se} illegal acts, involving criminal liability, are involved, however, there may be justification for such an opening.\textsuperscript{177}


\textsuperscript{172} Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385. The \textit{Bichan} court hardly discussed the enforcement interests at all. The court declined to speculate on Bichan’s contention that he had been actively increasing competition in the industry, and would have continued to do so, leading to the conspiracy’s demise. The court found it “irrelevant” to antitrust injury analysis — blurring the distinction between antitrust standing and antitrust injury analysis. Bichan v. Chemetron Corp., 681 F.2d at 518.

\textsuperscript{173} In contrast, the \textit{Bichan} court gave nearly \textit{all} of its attention to these interests, in its discussion of antitrust standing, antitrust injury, and remoteness. See generally Bichan v. Chemetron Corp., 681 F.2d at 515-20.

\textsuperscript{174} Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385.

\textsuperscript{175} See, \textit{e.g.}, Nixon v. Fitzgerald, 102 S. Ct. 2690, 2709 (1982) (Burger, C.J., concurring), where the Chief Justice points to the time and money involved in defending even a frivolous lawsuit. See also Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 478 (1962) (Harlan, J., dissenting) (treble damages “creates a special temptation for the institution of vexatious litigation”).

\textsuperscript{176} The possibility of wrongfully motivated antitrust litigation has been noted in general terms by various commentators. See, \textit{e.g.}, Lyle & Purdue, \textit{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, 800-02 (1976); Note, \textit{supra} note 14, at 552. It is important to remember, however, that allegations alone are not sufficient to recover treble damages. The discharged and disgruntled employee still faces the costly and difficult task of proving the alleged violation.

\textsuperscript{177} \textit{Per se} violations are notorious for their covert nature. See \textit{supra} notes 157-59 & accompanying text.
Next, the court made a series of rather summary conclusions, only the first of which clearly fits within the interest on this side of the balance. The injury to Ostrofe was done to him alone, so there was no danger of duplicative recovery.\textsuperscript{178} Second, treble damages would not be an unfair remedy in this case, as the court belatedly acknowledged that the alleged violations by Crocker were \textit{per se} illegal. The defendant knew or should have known its acts were illegal as it committed them. Overdeterrence is not as great a concern where \textit{per se} violations are involved.\textsuperscript{179} Third, damages could be easily assessed, based on wrongful discharge cases.\textsuperscript{180} Finally, awarding treble damages to Ostrofe would not constitute a windfall,\textsuperscript{181} traditionally one of the most feared results of expanding antitrust standing.\textsuperscript{182}

The Ninth Circuit concluded this side of its policy balancing test by finding that allowing Ostrofe standing to sue would not subject Crocker to vexatious litigation or excessive liability.\textsuperscript{183} Though the court’s reasoning was again somewhat one-sided, this was also a defensible conclusion. The majority then concluded that the interest in avoiding such litigation and liability was outweighed by the enforcement interest, so that Ostrofe was entitled to standing.\textsuperscript{184} Despite the flaws, this was the correct result under the court’s policy balancing test as applied to this factual situation.\textsuperscript{185}

\textsuperscript{178} Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385. In so holding, the Ninth Circuit adopted the minimal view of \textit{Illinois Brick}’s rule, that it stands for prevention of duplicative recoveries. \textit{See supra} notes 62-64 \& accompanying text. The Seventh Circuit adopted the maximal view, that it stands for allowing suits by the most efficient enforcers only. \textit{See Bichan v. Chemetron Corp.,} 681 F.2d at 520.


\textsuperscript{180} Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385. This is an interesting assertion in view of the court’s earlier comments on Ostrofe’s chances at an alternative recovery. It has also been suggested that some system of apportionment of damages could be used to allay fears of excessive liability. \textit{See California State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc.,} 648 F.2d 527, 538-39 n.19 (9th Cir. 1980), \textit{rev’d,} 103 S. Ct. 897 (1983).

\textsuperscript{181} Ostrofe v. H.S. Crocker Co., 670 F.2d at 1386.

\textsuperscript{182} “Unfortunately, lower federal courts have demonstrated at times a tendency to be more concerned with the possibility of a windfall recovery under the treble damages provision than with Congress’ established intention to encourage private treble damage suits as an \textit{enforcement} of the antitrust laws.” Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1301 (2d Cir. 1971) (Levet, J., dissenting), \textit{cert. denied,} 406 U.S. 930 (1972).

\textsuperscript{183} Ostrofe v. H.S. Crocker Co., 670 F.2d at 1385-86.

\textsuperscript{184} \textit{Id.} at 1386.

\textsuperscript{185} It is ironic that the \textit{Bichan} court’s denial of standing was the correct result under the more narrow antitrust standing test that the court applied, although the standing analysis in the Seventh Circuit’s opinion is largely secondary to its antitrust injury analysis. \textit{See generally} Bichan v. Chemetron Corp., 681 F.2d at 515-20.
Brunswick and Antitrust Injury

The Ostrofe court recognized that simply finding antitrust standing may not be enough; there is a need to address the antitrust injury concept of Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. After summarizing the Brunswick decision, the court pointed out the lack of clarity as to its scope — whether or not the antitrust injury concept applies only to non-per se violations and whether or not antitrust injury is distinct from antitrust standing. The court made a distinction between the claim based on “injury from the effect of an alleged antitrust violation upon competition” in Brunswick and Ostrofe’s claim based upon “injury stemming from conduct in furtherance of an antitrust violation.” The court failed to fully explain the ramifications of this important distinction. It also failed to clarify the scope of Brunswick. Instead, it simply found the rationale of Brunswick to be “consistent” with giving Ostrofe standing to sue.

Criticism of the Ostrofe Approach: Disregard of the Per Se Distinction

The Ostrofe court’s resolution of the antitrust injury question is both overbroad and vague. The best distinction between the situation before the Ostrofe and Bichan courts and the situation in Brunswick is that the former cases involved per se violations of the Sherman Act, while the latter involved a section 7 violation. While Brunswick is clearly not limited to section 7 cases, it “may not be as readily applicable” in per se violation cases. It could be argued that either the antitrust injury doctrine does not apply at all to per se cases or that it should be applied less stringently. While the former approach may be

186. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1386. See supra notes 70-80 & accompanying text.
187. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1386. The Bichan court seemed to find no such lack of clarity. It assumed that Brunswick applies to all violations, that it defines antitrust injury as “inextricably related to, and caused by, the alleged anticompetitive conduct,” and that it limits § 4’s protection to “consumers or competitors in a defined market.” Bichan v. Chemetron Corp., 681 F.2d at 515, 519.
188. Ostrofe v. H.S. Crocker Co., 670 F.2d at 1387.
189. Id.
190. This failure is especially relevant in view of the circuit’s earlier holding that antitrust injury adds a step to antitrust standing analysis. See John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495 (9th Cir. 1977).
192. See supra note 79 & accompanying text.
193. Lee-Moore Oil Co. v. Union Oil Co., 599 F.2d 1299, 1303 (4th Cir. 1979). See also Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1 (1st Cir. 1979), where the First Circuit lists four factors distinguishing the situation before it from that in Brunswick: §§ 1 and 2 are involved in this case instead of § 7; actual harm is present; there is proof of anticompetitive conduct in this situation; and diminution of competition was shown. Id. at 13.
easier to apply, the latter seems to be the more analytically sound.\textsuperscript{194}

The courts should be less hesitant to allow antitrust standing when a \textit{per se} violation is involved, since such a violation invariably causes competitive injury.\textsuperscript{195} Indeed, that is why the Supreme Court has condemned these violations.\textsuperscript{196} A \textit{per se} violation, such as an agreement to fix prices, is illegal from its inception. There is no need to evaluate the effect. Therefore, the means that are used to further that agreement will be illegal, and injuries resulting directly from such illegal means should be considered antitrust injuries.\textsuperscript{197} When an employee is asked or told to engage directly in price-fixing activity, both the employer and the employee will \textit{know} it is illegal, and possibly criminal. With a non-\textit{per se} violation, such as a merger later found to be illegal, the employee participating in it may not know it is illegal. Even his employer may not know it is illegal until its effect is determined.\textsuperscript{198} Therefore, when applying the antitrust injury concept to a discharge situation, the analysis should turn upon whether or not the underlying activity was \textit{per se} illegal. Such a bifurcated approach has been effectively utilized in other areas of section 4 analysis.\textsuperscript{199}

The Ostrofe court perceived the "central theme" of Brunswick as being a link between the alleged injury and the "core of Congressional concern" in enacting the antitrust laws—the preservation of competition.\textsuperscript{200} The court then proceeded to expand that core to include outlawing acts in furtherance of the anticompetitive result. Since Congress was concerned not just with the specific forbidden acts but also with penalizing those who committed them, the harm done to one who refused to commit such acts would be a "concern" of the antitrust laws.\textsuperscript{201} It is this rhetorical stretch from forbidden results to forbidden acts that brings the court's argument to its farthest limit.

Instead of offering any justification for this approach, the Ostrofe
court merely reasserted that Ostrofe's discharge was "essential" to the conspiracy's success. It was intimately related to what made Crocker's acts unlawful, thus satisfying Brunswick.202 Once again, it is better to identify Ostrofe's cooperation as the essential ingredient for the success of the conspiracy, not his discharge.203 The conspiracy required a cooperative marketing director to carry out Crocker's nefarious plans. The conspiracy to fix prices, allocate markets, and rig bids was per se illegal. Crocker placed Ostrofe in an impossible position. He could either cooperate in the illegal acts, possibly exposing himself to criminal liability, or be fired.204 The antitrust claim by Ostrofe stemmed directly from this wrongful discharge. Thus, the injury forming the basis of the antitrust suit was "inextricably related to, and caused by, the alleged anticompetitive act."205

Recommendation: Adding the Per Se to Antitrust Standing and Antitrust Injury Analysis

The Ostrofe decision appears to be result oriented.206 Although the result reached was correct, the court failed to consider the long-term consequence of the new test it devised to reach that result. Application of an enlightened target area test, coupled with proper antitrust injury analysis, would have reached the same result. Instead, the Ostrofe court chose to unevenly apply a new balancing test, giving greater attention to one side, and to twist the Brunswick antitrust injury doctrine. By following precedent, interpreting it with flexibility, and narrowing the scope of its holding, the Ninth Circuit could have reached the result it sought and at the same time provided greater guidance for the lower courts.

While the Ostrofe policy balancing test may seem desirable in view of the persistent problems with the traditional standing tests, it really does little to solve the problems that exist in the antitrust stand-

202. Id. at 1388.
203. See supra notes 165-67 & accompanying text.
204. The close causal relationship between the refusal to cooperate and the discharge is paramount. If Ostrofe had decided to cooperate and was injured in a car accident while driving the company car on the way to fix prices, the injuries he might receive would not become antitrust injuries merely because he was acting to further his employer's anticompetitive acts. The contrast may be crude, but it illustrates the difficulty in drawing lines. See supra note 168.
206. The impact of Ostrofe is not yet clear, especially in view of the recent remand by the Supreme Court. 103 S. Ct. 1244 (1983). See infra notes 216-17 & accompanying text. At least two Ninth Circuit decisions have addressed the Ostrofe decision, although neither of them adopts the policy balancing test and both seem to attempt to limit the Ostrofe holding. See Stein v. United Artists Corp., 691 F.2d 885, 897 (9th Cir. 1982) ("we considered in Ostrofe only the policy against remoteness"); Thomsen v. Western Elec. Co., 680 F.2d 1263, 1267 (9th Cir. 1982) (factual distinction made).
ing area. Instead of addressing the weaknesses of the established tests, the court discarded the tests as useless in a tough case and came up with a new test. This new test is not at all clear. In essence, the court took the fundamental considerations underlying all antitrust standing doctrine and melded them into a test in themselves. No easily definable or readily applicable test emerges from this melding.

The absence of an easily applicable test forces district courts to engage in complex antitrust policy balancing in each case that comes before them. A real test containing guidelines and buttressed by precedent is needed. A major purpose of any standing doctrine is to lend predictability to the judicial system, an especially important purpose in the area of complex antitrust litigation. A party should be reasonably sure that it is a proper plaintiff or is properly subject to possible liability before that party gets to court.

A better approach would be not to discard the target area test when a tough case arises, but to increase its flexibility, as the Ninth Circuit has done in the past. The approach taken by the Bichan court, that of rigid, routine application of standing tests, should be avoided at all costs. Instead, there should be increased consideration of the nature of the violation when defining the target area in a particular case. One such consideration should be whether or not the violation alleged is *per se* illegal. If it is, then the target area should be enlarged and the concept of reasonable foreseeability more liberally applied. An employee faced with the choice of either cooperating in violating the antitrust laws or being discharged should be in that target area. Such an employee is a part of the "competitive infrastructure" for

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207. See Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) ("The private action... can only serve as an effective deterrent if the courts are able to administer it with some degree of certainty.").

208. *Id.* See generally supra note 15 and sources cited therein.


210. *See supra* notes 26-40 & accompanying text. *See also* Bosse v. Crowell Collier & MacMillan, 565 F.2d 602, 606 (9th Cir. 1977) ("this court repeatedly has used the 'target area' approach to antitrust standing"). In view of Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 103 S. Ct. 897 (1983), the direct injury test appears to be rejuvenated. The points raised in this recommendation could also be applied to an enlightened direct injury test analysis.

211. See Lytle & Purdue, *supra* note 176, for an excellent discussion of this idea. *See also* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) ("the need to examine the form of violation alleged and the nature of its effect on a plaintiff's own business activities").

212. *See* Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1303 (2d Cir. 1971) (Levet, J., dissenting), *cert. denied*, 406 U.S. 930 (1972) ("the 'target area' should encompass the foreseeable totality of competitive injury").

213. See John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 500 (9th Cir. 1977).
purposes of standing analysis. A strong argument against any expansion of antitrust standing has been the absence of bright lines in antitrust law.\textsuperscript{214} The distinction between \textit{per se} and non-\textit{per se} violations is such a bright line.

This same consideration should also be applied to antitrust injury analysis. When a \textit{per se} violation is alleged, an injury to competition is assumed by definition.\textsuperscript{215} The problem is determining the sufficiency of the relationship between the injury to the plaintiff and the injury to competition. The analysis in cases involving \textit{per se} violations should regard injuries "inextricably related" to the means of effectuating those violations as probable antitrust injuries. The analysis in cases involving non-\textit{per se} violations should only consider as possible antitrust injuries the acts related to the effects of the violations. Though distinct concepts, antitrust standing and antitrust injury are closely related and the analysis of one should be consistent with the analysis of the other.

When the potential standing of the discharged employee is viewed within this narrower, more precise framework it will also withstand scrutiny under the "factors" set forth by the Supreme Court in \textit{Associated General Contractors of California, Inc. v. California State Council of Carpenters}.\textsuperscript{216} The causal connection between the antitrust violation and the harm to the plaintiff approaches proximate causation. There is clear intent on the part of the defendant employer to injure the plaintiff employee. Placing the employee in an impossible position robs him of his freedom as a participant in the relevant market. The plaintiff is a single individual, the injury is direct and the damages are not speculative. Since the injury is unique, there is no danger of duplicative recovery. Allowing the employee who is discharged for refusing to participate in the employer’s \textit{per se} illegal activity to bring his action would encounter few of the "conceptual difficulties that encumber"\textsuperscript{217} a union’s claim to "indirect" damages flowing from the coercion of third parties.

The policy considerations set forth in \textit{Ostrofe} should not be ignored, of course. They should be essential considerations in defining the target area and in identifying an antitrust injury. Greater consideration of enforcement interests is especially needed to counterbalance the vexatious litigation and excessive liability interests that have dominated antitrust standing doctrine in the past. The substitution of both


\textsuperscript{215} See supra note 3.

\textsuperscript{216} 103 S. Ct. 897 (1983). See supra notes 96-98 & accompanying text.

\textsuperscript{217} \textit{Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters}, 103 S. Ct. at 910-11.
these policy considerations, along with the factors set out in \textit{Associated General Contractors}, for the labelling and "talismanic rubrics"\textsuperscript{218} that have plagued this area of the law would lead to a much enlightened target area test.

\section*{Conclusion}

The broad language of section 4 has posed a challenge to the federal courts for seventy years. The courts have responded to that challenge by developing the antitrust standing doctrine. They have devised different standing tests, including the direct injury test and the target area test, to implement the section 4 language. The doctrine and the tests have produced confusion and conflict.\textsuperscript{219} The Supreme Court, however, has not resolved the situation, choosing rather to set forth only general guidelines for section 4 analysis.\textsuperscript{220} The Court has also introduced the antitrust injury doctrine which, because of a similarity of purpose and underlying principles, has further confused the antitrust standing doctrine.\textsuperscript{221}

The employee as a potential plaintiff has usually been denied standing under traditional antitrust standing analysis.\textsuperscript{222} The key employee discharged for refusal to cooperate in a \textit{per se} illegal scheme defies such summary treatment. Such a plaintiff was before the Ninth and Seventh Circuits in \textit{Ostrofe} and \textit{Bichan}.\textsuperscript{223} In \textit{Bichan}, traditional antitrust standing analysis and narrow antitrust injury analysis were applied and standing was denied.\textsuperscript{224} In \textit{Ostrofe}, the court introduced a new policy balancing test, applied it unevenly and twisted the antitrust injury doctrine to allow standing. The new test balanced the interest in antitrust enforcement against the interest in preventing vexatious litigation and excessive liability, the fundamental principles underlying all antitrust standing analysis. This decision raised several of the problems with antitrust standing analysis in its policy considerations, especially with regard to enforcement interests.\textsuperscript{225}

This Comment has traced these developments and problems, focusing on the discharged employee as a potential section 4 plaintiff. The Comment recommends a middle ground between the rigid result in \textit{Bichan} and the wide-open holding in \textit{Ostrofe}. It suggests a more flexible target area test, with closer examination of the particular plain-

\textsuperscript{219} See supra notes 8-50 & accompanying text.
\textsuperscript{220} See supra notes 51-69, 87-100 & accompanying text.
\textsuperscript{221} See supra notes 70-86 & accompanying text.
\textsuperscript{222} See supra notes 101-28 & accompanying text.
\textsuperscript{223} See supra notes 129-44 & accompanying text.
\textsuperscript{224} See supra notes 145-49 & accompanying text.
\textsuperscript{225} See supra notes 150-205 & accompanying text.
tiff and greater consideration of the alleged violation. There will be no quick solutions to the problems within the antitrust standing and antitrust injury doctrines, as both caution and flexibility must be exercised. Introducing the distinction between per se and non-per se violations to the analysis, however, would be a positive step toward a resolution of these problems.

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226. See supra notes 206-18 & accompanying text.

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