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Standing to Sue in Antitrust: The Application of Data Processing to Private Treble Damage Actions

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STANDING TO SUE IN ANTITRUST: THE APPLICATION OF *DATA PROCESSING* TO PRIVATE TREBLE DAMAGE ACTIONS

I. INTRODUCTION

Recent years have seen an unmistakeable trend toward relaxing the requirements of standing in the federal courts.[1] The thrust of this movement, spearheaded by several Supreme Court decisions,[2] has been to grant standing where it would have been doubtful under prior law. Yet, despite six decades of unresolved controversy, the Supreme Court has failed to give a definitive treatment to the rigid standing requirements under section 4 of the Clayton Act.[3] Much criticism has been leveled at the harshness of these judicially imposed standing rules and

1. *See, e.g.*, Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

2. United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972) (denied standing, but set liberal standing precedent for later environmentalist litigation); Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968); Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968). *Contra* Warth v. Seldin, 422 U.S. 490 (1975).

3. 15 U.S.C. § 15 (1970). The section provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Justice Frankfurter's statement that standing is a "complicated speciality of the federal courts" takes on particular significance in light of the section 4 experience, primarily due to the Supreme Court's repeated denial of certiorari. *See, e.g., In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963); Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); Coast v. Hunt Oil Co., 195 F.2d 870 (5th Cir.), *cert. denied*, 344 U.S. 836 (1952); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957).

the uncertainty surrounding their application.[4] Clear splits have developed among the lower federal courts in their attempts to define the appropriate class of section 4 claimants and no single rationale has emerged from this confusing collection of authority.

Recently, a distinct departure was made from the traditional notions of standing under section 4 of the Clayton Act. In the case of *Malamud v. Sinclair Oil Corp.*,[5] the Sixth Circuit took a major step toward incorporating the "liberalized law of standing" into the private sector of antitrust law. Likening a private antitrust action to a public suit, the court adopted the liberal two-pronged standing test enunciated in *Association of Data Processing Service Organizations, Inc. v. Camp.*[6] This comment concerns the application of *Data Processing* to section 4 of the Clayton Act and whether this new approach affords a sensible accommodation to the troubled law of private treble damage standing.

II. THE CAUSAL CONNECTION CONFUSION

A. THE LIMITING LANGUAGE

Section 4 of the Clayton Act provides that *any* person "injured in his business or property by reason of anything forbidden in the antitrust

4. *See, e.g.*, Beane, *Antitrust: Standing and Passing On*, 26 BAYLOR L. REV. 331 (1974) [hereinafter cited as Beane]; Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 NW. U.L. REV. 691 (1962) [hereinafter cited as Pollock]; Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964) [hereinafter cited as COLUM. L. REV.]; Comment, *Standing under Clayton § 4: A Proverbial Mystery*, 77 DICK. L. REV. 73 (1972) [hereinafter cited as DICK. L. REV.]; Note, *Antitrust—Standing to Sue Under Section 4 of the Clayton Act*, 35 OHIO ST. L.J. 723 (1974) [hereinafter cited as OHIO ST. L.J.].

5. 521 F.2d 1142 (6th Cir. 1975).

6. 397 U.S. 150 (1970). *Data Processing* involved a private challenge of governmental action under section 702 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), which provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The question before the Court was whether sellers of data processing services had standing to challenge a ruling of the Comptroller of the Currency allowing national banks to provide such services, despite the Bank Service Corporation Act's mandate that "[n]o bank service corporation may engage in any activity other than the performance of bank services for banks." 12 U.S.C. § 1864 (1970). The district court and the court of appeals had denied standing to the plaintiff. The Supreme Court reversed, rejecting traditional standing tests because they necessitated an examination of the merits. Accordingly, a new test was fashioned: whether the complainant alleges injury in fact and "whether 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." 397 U.S. at 153. Applying this two-pronged test to the facts, the Court concluded that the plaintiffs had standing, since they alleged economic injury and the relevant statute (section 4 of the Bank Service Corporation Act, 12 U.S.C. § 1864 (1970)) arguably brought banking competitors within its zone of interests.

laws . . . ." may maintain a private action for treble damages.[7] Despite this seemingly broad wording, the lower federal courts have historically restricted the applicability of section 4, fearful of the nearly limitless possibilities that a literal interpretation would afford. As a result the federal courts are in agreement that not every person injured by reason of an antitrust violation is entitled to treble damages.[8] To effectuate this policy narrow judicial interpretations of section 4 standing have focused upon the statutory phrases "business or property" and "by reason of." Thus, the private plaintiff seeking treble damages must establish not only an injury to his "business or property," but also that there is a causal connection of sufficient directness between the two—that he was injured *directly* "by reason of" the antitrust violation.[9]

As it has been interpreted by the lower federal courts, the second requirement has become the most significant restriction of the statute.[10] One writer has observed that "[c]ausal connection is such a haunting and evasive phrase that it will possibly never be understood to any explainable point."[11] This elusive requirement has resulted in a multitude of decisions in the lower federal courts, "sometimes based on policy considerations, sometimes based on categorizing types of plaintiffs, sometimes based on judge-made concepts . . . ."[12] reaching a variety of different results,[13] and creating so much confusion "that no one, other than a direct competitor, can be assured that he has been injured *by*

7. 15 U.S.C. § 15 (1970).

8. Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 n.14 (1972).

9. *See, e.g.*, Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910).

10. *See* Klingsberg, *Bull's Eyes and Carom Shots: Complications and Conflicts on Standing to Sue and Causation Under Section 4 of the Clayton Act*, 16 ANTITRUST BULL. 351, 355 (1971) [hereinafter cited as Klingsberg]. For a discussion of the prerequisite "business or property," see Blackford, *"Business or Property" Entitled to Protection Under Section 4 of the Clayton Act*, 26 MERCER L. REV. 737 (1975).

11. Thomas, *The Sellers of Labor and Corporate Mergers*, 48 NOTRE DAME LAWYER 623, 639 (1973) [hereinafter cited as Thomas].

12. G. REYCRAFT, TREBLE DAMAGE ACTIONS 116 (1970) [hereinafter cited as REYCRAFT].

13. *Compare, e.g.*, Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), *with* Fields Prods., Inc. v. United Artists Corp., 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd per curiam*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971); *and* Congress Building Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957), *with* Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956); *and* Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963), *with* South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

reason of the violation."[14] Consequently, the central issue in section 4 standing cases is not the type of injury that has been suffered, but the directness of that injury. Unfortunately, the courts disagree as to what constitutes a sufficiently direct causal connection and along this line two independent approaches have developed.

B. The Direct Injury Approach and the Target Area Approach

Two analytical techniques, popularly known as the "direct injury" and "target area" tests, represent the competing theories applied by the federal courts in treble damage decisions. The genesis of the direct injury approach is generally considered to be the 1910 case of *Loeb v. Eastman Kodak Co.*[15] There the court denied standing to a stockholder of a photographic supply house which was forced out of business by the illegal conduct of the defendant, Eastman Kodak. The court held that the cause of action could only accrue to the corporation, and not the plaintiff stockholder, since any damage suffered by him was "indirect, remote, and consequential."[16]

Analytically, the direct injury test focuses on the relationship between the antitrust violator and the plaintiff—and "if the victim and the perpetrator are separated by an intermediary party, standing is usually denied . . . ."[17] The simplicity of this test, however, belies the uncertainty which surrounds its application. By reviving notions of privity to aid in distinguishing derivative injuries from those that are direct, this test has tended to establish categories of plaintiffs who may and may not sue under the antitrust laws.[18] Accordingly, this test has

14. Dick. L. Rev., *supra* note 4, at 74 (emphasis added) (footnote omitted).

15. 183 F. 704 (3d Cir. 1910). *See also* Ames v. American Telephone & Telegraph Co., 166 F. 820 (C.C.D. Mass. 1909). Both of these were actions brought by shareholders under section 7 of the Sherman Act, ch. 647, 26 Stat. 210 (1890), repealed by Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283, the forerunner of section 4 of the Clayton Act.

16. 183 F. at 709.

17. Beane, *supra* note 4, at 333.

18. The following categories are representative of plaintiffs whose injuries have become presumptively remote under this analysis:
—*Shareholders of Injured corporations. See, e.g.*, Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292 (2d Cir. 1958); Martens v. Barrett, 245 F.2d 844 (5th Cir. 1957); Peter v. Western Newspaper Union, 200 F.2d 867 (5th Cir. 1953).
—*Officers of Injured corporations. See, e.g.*, Sargent v. National Broadcasting Co., 136 F. Supp. 560 (N.D. Cal. 1955); Westmoreland Asbestos Co. v. Johns-Manville Corp., 30 F. Supp. 389 (S.D.N.Y. 1939), *aff'd per curiam*, 113 F.2d 114 (2d Cir. 1940); Gerli v. Silk Ass'n of America, 36 F.2d 959 (S.D.N.Y. 1929).

been criticized for arbitrarily foreclosing otherwise meritorious claims.[19]

Conversely, the target area approach focuses on the plaintiff's relationship to the area of the economy injured by the antitrust violation. The vanguard decision of this approach was *Conference of Studio Unions v. Loew's, Inc.*[20] In *Loew's* the target area approach was enunciated as follows:

> [I]n order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been

—*Employees of Injured Corporations. See, e.g.*, Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973) (employees terminated as a result of illegal merger); Centanni v. T. Smith & Son, Inc., 216 F. Supp. 330 (E.D. La.), *aff'd per curiam*, 323 F.2d 363 (5th Cir. 1963); Gerli v. Silk Ass'n of America, 36 F.2d 959 (S.D.N.Y. 1929).

—*Suppliers of Injured Manufacturers. See, e.g.*, Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956).

—*Lessors of Injured Tenants. See, e.g.*, Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956); Lieberthal v. North Country Lanes, Inc., 221 F. Supp. 685 (S.D.N.Y. 1963), *aff'd*, 332 F.2d 269 (2d Cir. 1964); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (2d Cir.), *cert. denied*, 348 U.S. 828 (1954).

—*Patentees of Injured Licensees. See, e.g.*, SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969); Productive Inventions, Inc. v. Trico Prods. Corp., 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

—*Creditors. See, e.g.*, Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957); Gerli v. Silk Ass'n of America, 36 F.2d 959 (S.D.N.Y. 1929).

—*Franchisors. See, e.g.*, Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos., 382 F.2d 925 (10th Cir. 1967).

—*Ultimate Consumers. See generally* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

19. *See* Guilfoil, *Private Enforcement of U.S. Antitrust Law*, 10 ANTITRUST BULL. 747 (1965) [hereinafter cited as Guilfoil]. "Distance from an antitrust violation should not dictate judicial disenchantment with a plaintiff's cause; only the absence of provable injury should be permitted such a role." *Id.* at 776.

20. 193 F.2d 51 (9th Cir.), *cert. denied*, 342 U.S. 919 (1952) (no standing for labor union in suit against employers who conspired to hire only nonunion employees). It was not, however, until four years later that that target area analysis was used in a manner to reach results inconsistent with prior decisions of the direct injury approach. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955). In *Karseal* a plaintiff who manufactured automobile polishes alleged that defendant Richfield's exclusive dealing arrangements with independent service stations hindered his ability to make sales to these service stations. The plaintiff, Karseal, had sold its products to independent distributors who, in turn, sold the products to the service stations. The lack of privity between Karseal and the service stations was deemed immaterial. Thus, Richfield's direct injury argument that any cause of action resulting from its sales would accrue only to the distributors of Karseal's products, and not Karseal, was rejected. The court, reasoning that Richfield's sales scheme was aimed at excluding competing products, defined the target area as commerce in petroleum products and automotive accessories. Furthermore, "Karseal was not only hit, but was aimed at, by Richfield." *Id.* at 365. As a result Karseal was granted standing to maintain its treble damage suit.

> committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured "by reason" of anything forbidden in the anti-trust laws.[21]

As applied, the target area approach involves two determinations. First, the target of the defendant's alleged violation must be defined—the sector of the economy at which the violation was "aimed."[22] Second, the plaintiff must establish that his injured commercial activity is within this area of the economy. Theoretically, anyone found within this area of impact is directly injured by reason of his position therein. The bewildering problem is trying to identify this target area. When the target is defined narrowly,[23] or when the target area is used to define the persons at whom the illegal conduct was directed,[24] the test becomes a hybrid of the direct injury test with the same results. However, by incorporating the concept of foreseeability, the target area test can provide a more expansive approach to treble damage standing than the mechanical direct injury approach.[25]

The direct injury and target area theories have been adopted by the circuit courts with varying degrees of consistency. In this respect the law of private antitrust standing is in a very unsatisfactory state, since some courts apply both tests,[26] some courts apply one test, but call it the other,[27] and one court has refused to recognize any distinction between the two.[28] Nevertheless, these two approaches, appearing in one form or another, represent the traditional views of the circuits. In addition to

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21. 193 F.2d at 54-55.

22. The term "aimed at" relates to the area of foreseeable impact affected by the violation. It does not mean that a defendant must have subjectively intended to harm a specific plaintiff. *See* Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964).

23. OHIO ST. L.J., *supra* note 4, at 732.

24. *See* Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

25. One commentator has urged the adoption of the target area analysis as the sole test for section 4 standing, stating that "virtually all federal courts have already accepted the principle, implicitly if not in name." Pollock, *supra* note 4, at 706.

26. *See, e.g.*, Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

27. *See, e.g.*, Standard Oil Co. v. Perkins, 396 F.2d 809 (9th Cir. 1968), *rev'd*, 395 U.S. 642 (1969) (court labeled approach "target area," but employed "direct injury" analysis).

28. *See* Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos., 382 F.2d 925, 928 (10th Cir. 1967).

the specific criticisms already mentioned, there is an ongoing battle over whether these traditional rules governing standing in private antitrust actions should be supplanted with a more liberal standing test.

C. Authority in Favor of a Liberalized Standing Requirement

The Supreme Court has never expressly approved the judicially imposed standing restrictions peculiar to section 4. In fact, the Court has suggested several times that these standing tests may be unduly restrictive.[29] On one occasion it was noted that the "Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws."[30] Although several Supreme Court opinions have severely undercut the direct injury rationale,[31] providing some indication that the Court favors more liberal standing under section 4, it has since denied certiorari in cases where the plaintiff lost on causal connection grounds.[32]

Aside from the fact that the Supreme Court has never accepted the strict standing rules, it should be noted that the Clayton Act does not mention them. The Act, by allowing "any person" to file a suit provided that he is injured in his business or property by reason of an antitrust violation,[33] would appear to necessitate only proof of harm caused by the violation. This statutory language was made intentionally broad, reflecting the purpose of the Clayton Act to ensure a vigorous

29. *See* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961), where the Court said: "[T]o state a claim upon which relief can be granted under [section 1 of the Sherman Act], allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are *all* the law requires." (Emphasis added.) Also *see* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 137-140 (1968); Radovich v. National Football League, 352 U.S. 445, 454 (1957); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265-66 (1946). In light of these opinions, one commentator has suggested that it is doubtful "whether, if presented with the issue, the Court would decree the continuing necessity of demonstrating that plaintiff is within the target area." Klingsberg, *supra* note 11, at 368.

30. Radovich v. National Football League, 352 U.S. 445, 454 (1957).

31. *See, e.g.*, Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969), where the Court said that "artificial limitations" of causal connection are completely unwarranted. "If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury." *Id.* at 648. Although the case did not involve section 4 of the Clayton Act, the Court revealed its general disenchantment with direct-indirect analysis.

32. *See, e.g.*, Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

33. *See* note 3 *supra*.

antitrust enforcement policy through private litigation.[34] Indeed, when the Clayton Act was passed there was strong congressional support for the private antitrust suit[35] and various features of the Act mirror this attitude. Criminal sanctions were deleted to avoid strict construction, thus enhancing the private action as an alternative to government enforcement.[36] Incentives to private action include the treble damages provision, the absence of an "amount in controversy" requirement[37] and an authorization for the recovery of litigation costs.[38] These statutory features, read in light of the legislative history of the Act, appear to be inconsistent with the limiting constructions of section 4 standing. Since it is, after all, the plain language of the statute which Congress approves or disapproves, critics maintain that the courts should not allow that language and its overriding purpose to be significantly undercut by imposing additional burdens on private plaintiffs.[39]

In reality, these judicially developed rules are not standing rules at all—they are rules of proximate cause.[40] In this sense, critics argue that the application of such rules is inappropriate at the standing phase of the litigation, since the court, by arbitrarily resolving the factual issue of proximate cause, is invading the province of the jury.[41] Moreover, the decisions utilizing these concepts are characterized by the use of such cryptic labels as "remote," "indirect," "incidental" and "target area" which offer little in the way of an underlying principle to guide potential claimants and the district courts. One writer has suggested that these terms are "only verbal formulas used by a court to express its *conclusion*

34. Congress was seeking an "army" of private litigants as an additional deterrent to antitrust violations. Senator Borah observed that "[t]here could be no safer guardian for the Sherman Antitrust Law than the hundreds and thousands of people who are injured by these monopolies if the law were made easy of enforcement so far as they are concerned." 51 CONG. REC. 15,986 (1914).

35. Congressman Webb observed: "Thus the offender will begin to open his eyes because you are threatening to take money out of his pocket." 51 CONG. REC. 16,275 (1914). The extraordinary sweep of the Clayton Act has been recognized by numerous authorities. For a more detailed analysis of the legislative history of section 4 see Thomas, *A Challenge to Conglomerates: Private Treble Damages Suits*, 3 LOYOLA U.L.A.L. REV. 292 (1970).

36. The threat of private treble damage suits was considered to be more of a deterrent to antitrust violations than criminal sanctions. 51 CONG. REC. 16,319 (1914) (remarks of Congressman Floyd).

37. Clayton Act § 4, 15 U.S.C. § 15 (1970). The text of this section is given in note 3 *supra*.

38. *Id.*

39. COLUM. L. REV., *supra* note 4, at 588; OHIO ST. L.J., *supra* note 4, at 726.

40. C. HILLS, ANTITRUST ADVISER § 12.27, at 569 (1971) [hereinafter cited as HILLS].

41. *Id.* *See also* Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969).

that . . . the defendant should not be compelled to pay treble damages to the plaintiff."[42] One circuit court has described this avoidance of section 4 merits as "[transforming] judicial inquiry into a mere search for labels."[43]

While some courts use the standing doctrines to completely avoid adjudication of the merits, others utilize these doctrines to intensively examine the merits at the standing phase of the litigation.[44] Traditional notions of standing reject such an approach at this preliminary stage.[45] Presently, the section 4 defendant who raises the standing issue not only gets a preview of the plaintiff's case,[46] but he may also "avoid adjudication on violation and damages, even though there may have been a violation resulting in substantial damage to the plaintiff."[47] Since failure to satisfy these judicially imposed standing requirements results in the early termination of the lawsuit, critics argue that the purpose of the Clayton Act would be better served by a disposition of private antitrust claims on their merits, rather than "clogging the courts with wasteful motions addressed to the sufficiency of complaints . . . ."[48] Moreover, by creating delay in the final disposition of cases, this expensive and time consuming motion practice is said to discourage legitimate claimants from seeking redress through the Clayton Act.[49]

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42. Thomas, *supra* note 11, at 645, *quoting* Pollock, *supra* note 4, at 699 (emphasis in original).

43. *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 127 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973) (in reference to direct injury analysis). Yet in denying standing to a group of farmers allegedly injured by an elimination of competition in the motor vehicle air pollution equipment industry, the court said: "Not only were the crop farmers not targets of the alleged conspiracy, they were not even on the firing range. Accordingly, the farmers lack standing under section 4 of the Clayton Act . . . ." *Id.* at 129 (footnote omitted).

44. *See, e.g.*, Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973) (denying standing to employees terminated as the result of a merger because they failed to show a "lessening of competition"); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) (requiring a comprehensive analysis of the relevant market in the determination of standing).

45. *See* cases cited note 1 *supra*. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." Flast v. Cohen, 392 U.S. 83, 99 (1968).

46. REYCRAFT, *supra* note 12, at 115.

47. *Id.* at 113. "If the issue is raised in a motion to dismiss, it may even avoid discovery." *Id.*

48. Klingsberg, *supra* note 10, at 355.

49. *Id.* at 353. *See generally* Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5 (1959); Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958); Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy*, 3 N.M.L. REV. 286 (1973).

D. Authority Against a Liberalized Standing Requirement

Although the Supreme Court has never definitively treated the standing doctrines judicially imposed on section 4, it has given tacit approval to the policy considerations behind them. Since antitrust violations create foreseeable ripples of injury that often flow to countless parties, the restrictive interpretations are based on what Justice Holmes termed "the endlessness and futility of the effort to follow every transaction to its ultimate result."[50] In *Hawaii v. Standard Oil Co.*[51] the Court observed 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."[52] In that case the state of Hawaii was seeking to recover damages for injury to its general economy. Treble damage relief was denied to the state suing in its *parens patriae* capacity, because of the possibility of duplicative recoveries.[53] Since Hawaii's injury to its general economy was only "a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under § 4."[54] To permit recovery would be to allow individual citizens and the state to recover for identical losses.[55] The avoidance of duplicative recoveries is a frequently given justification for the restrictive standing rules.[56]

Many courts consider the treble damage provision of section 4 to be a severe penalty for the defendant and a possible windfall for the plaintiff.[57] For this reason, "[they] have developed rules designed to

50. Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 534 (1918).
51. 405 U.S. 251 (1972).
52. *Id.* at 262-63 n.14.
53. *Id.* at 264.
54. *Id.*
55. The Court could have employed the traditional standing doctrines by ruling that the injury to the general economy of Hawaii was "remote." Instead, it chose to base the decision on the avoidance of duplicative recoveries. For this reason *Hawaii's* attitude concerning section 4 standing is not as strict as it might appear.
56. *See generally* Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1016-21 (1952).
57. *See, e.g.*, Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 699, 701 (D. Colo. 1970); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956). *See also* Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312, 317 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954); J. BURNS, ANTITRUST DILEMMA: WHY CONGRESS SHOULD MODERNIZE THE ANTITRUST LAWS 229-32 (1969); Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1223 (1969).

limit the classes of plaintiffs which can assert an antitrust violation."[58] The result is a judicial reluctance to permit recovery, demonstrated by the following language:

> In determining the scope of the Act it must be remembered that the treble damage feature is an enforcement provision and superimposes a penalty upon compensation. As such it should not be literally construed if unreasonable results would be reached by so doing. Obviously, there must be a limit somewhere. It is not possible to formulate any general rule by which to determine what injuries are too remote to bring a plaintiff within the scope of the Act . . . .[59]

The rationing of scarce judicial resources is another justification for the strict standing doctrines. "[Private treble damage suits] are notoriously lengthy, some suits covering over ten years in the courts alone."[60] The courts, fearful of an avalanche of such suits brought merely for the purpose of "blackmail" settlement or harassment, utilize the standing rules to "[permit] an early identification of cases in which the plaintiff will never be able to recover because, as demonstrated by undisputed facts or by his own complaint, he will never, as a matter of law, be able to prove injury proximately caused by the defendant."[61] In this manner the judicial process is relieved of lengthy trials and the burden of tracing through a maze of transactions to ascertain if damages have been suffered.[62]

A final, recurrent justification for the narrow standing rules is the failure of Congress to respond to the causal connection interpretations. Since the Clayton Act was passed in 1914, numerous cases have dealt with the often subtle distinctions between those injuries which are too remote to support a private action and those which are sufficiently direct. Yet, "Congress has failed to amend the anti-trust laws on this point in the face of repeated decisions. It seems to have been content for the judiciary to take a position narrower than that often applied in non-statutory tort cases and in cases where plaintiffs are not allowed a multiple recovery."[63] Several courts view this time lapse as significant,

58. Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 699, 701 (D. Colo. 1970).

59. Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312, 317 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

60. Guilfoil, *supra* note 19, at 775-76 (footnote omitted).

61. HILLS, *supra* note 40, at 569.

62. The suits that have excluded stockholders, employees, officers and the like reflect these considerations. *See* cases cited note 18 *supra*.

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

feeling that it would be inappropriate for them to expand their interpretations without further congressional action.[64]

III. THE MALAMUD CASE

Malamud v. Sinclair Oil Corp.[65] involved three real estate investment companies which were allegedly injured by Sinclair's refusal to financially assist them in acquiring additional service station properties. In 1965 Sinclair contracted to supply gasoline and other petroleum products to Malco Petroleum, Inc., a distributorship owned by the Malamuds.[66] At the same time the parties entered into an oral agreement obligating Sinclair to financially assist the three Malamud investment companies[67] in their efforts to acquire and develop additional service station sites. Five acquisitional proposals were submitted to Sinclair over the next few months, but Sinclair declined assistance in all of the ventures. After these disapprovals the Malamuds began negotiations with Texaco, hoping to replace Sinclair as their supplier. In 1966, after signing a distribution agreement with Texaco, the Malamuds unsuccessfully sought an early termination of the Sinclair contract. Because of Sinclair's refusal to terminate, the contract ran its course and upon expiration the Malamuds placed all of their stations under the Texaco agreement. Subsequently, three groups of plaintiffs—Jack and Anne Malamud, the Malco Distributorship and the three real estate investment firms—instituted an action against Sinclair, alleging violations of section 1 of the Sherman Act[68] and section 3 of the Clayton

64. *See, e.g.*, Reibert v. Atlantic Richfield Co., 471 F.2d 727, 733 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos., 382 F.2d 925, 929 (10th Cir. 1967). *See also* Jones v. New York Cent. R.R., 182 F.2d 326, 328 (6th Cir.), *cert. denied*, 340 U.S. 850 (1950); *In re* Wisconsin Co-operative Milk Pool, 119 F.2d 999, 1002 (7th Cir.), *cert. denied*, 314 U.S. 655 (1941).

65. 521 F.2d 1142 (6th Cir. 1975).

66. Jack and Anne Malamud were the officers, directors and sole shareholders of the four corporate plaintiffs (the distributorship and the three real estate investment firms). *Id.* at 1144.

67. Brentwood Corporation, Tobyneil Corporation and Malco Corporation (not to be confused with Malco Petroleum, the distributor).

68. Section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. IV, 1974) states in full:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in section 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intra-

Act.[69] The plaintiffs claimed substantial damage "by reason of" Sinclair's refusal to provide financial assistance to the investment companies and "by reason of" Sinclair's refusal to allow an early contract termination.[70]

At the district court Sinclair argued that all of the plaintiffs lacked standing to sue, since none of them had been directly injured by any alleged antitrust violation. The court, despite its discussion of the test announced by the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp*,[71] relied on a Sixth Circuit decision[72] and dismissed the complaints of the individual plaintiffs and the

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state transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

69. Section 3 of the Clayton Act, 15 U.S.C. § 14 (1970) states in full:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

70. Based on Sinclair's adherence to its contractual rights,

[t]he Malamuds and their corporations each [claimed] substantial damage in that each [had] lost:

1. Profits from unrealized sales growth; and
2. The unrealized increase in going business value. All plaintiffs except Malco also [claimed] damage from unrealized growth in real estate equity ownership.

521 F.2d at 1145. In short, the investment companies were claiming they would have acquired more service stations but for Sinclair's refusal to financially assist them, and the Malamuds were claiming that they would have been free to negotiate with other suppliers but for Sinclair's refusal to terminate. *Id.*

71. 397 U.S. 150 (1970). For a discussion of this case see note 6 *supra*. The district court found that *all* of the plaintiffs had standing as defined in *Data Processing*, but declined to apply that test in view of sixth circuit precedent. 521 F.2d at 1145.

72. Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962),

distributorship, since neither could possibly establish a sufficiently direct injury by reason of any antitrust violation.[73] As to the three investment companies, however, the court found that mixed questions of law and fact remained concerning whether Sinclair's refusal caused the investment companies' injury. Thus, Sinclair's motion for summary judgment was denied.[74]

An appeal to the Sixth Circuit involved only the question of the standing of the three investment firms. The circuit court, after examining the direct injury and target area approaches, concluded that

> as standing doctrines both theories really demand too much from plaintiffs at the pleading stage of a case. . . .
>
> The courts have used one or the other of the two approaches as standing doctrines in order to arrest some antitrust litigation at an early stage. As we see it, however, by using either approach a court is enabled to make a determination on the *merits* of a *claim* under the guise of assessing the *standing* of the *claimant*. Under either theory the entire question of directness is one that must be resolved upon some factual showing, but standing is a preliminary determination ordinarily to be evaluated upon the allegations of the complaint.[75]

For these reasons the court held that the correct test for standing in private treble damage actions was the *Data Processing* test. Although conceding that this test was developed for use in the area of administrative law involving suits challenging governmental action, the court analogized a private antitrust action to a public suit,[76] since the private plaintiff seeks to " 'vindicate the important public interest in free competition.' "[77] Then, *adopting* both prongs of the *Data Processing* test,[78] the court affirmed the district court's conclusion that the three investment companies had standing.[79]

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cert. denied, 372 U.S. 907 (1963). For this case's alliance with the "direct injury" approach see note 87 *infra*.

73. 521 F.2d at 1145.

74. *Id.* at 1145-46.

75. *Id.* at 1149-50 (emphasis in original) (footnote omitted).

76. *Id.* at 1151.

77. *Id., quoting* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969).

78. 521 F.2d at 1152. It is unclear, however, whether the court actually *applied* the second prong of the test. *See* note 90 *infra* and accompanying text.

79. The court was careful to mention that a grant of standing is no assurance of success on the merits: "Regardless of what the proof at trial may show, the investment companies have made sufficient allegations to establish their standing to sue under the antitrust laws." 521 F.2d at 1152. In addition, the court earlier noted that "a party may make sufficient allegations to demonstrate the necessary standing to sue but fail to prove his case on the merits." *Id.* at 1150.

IV. DATA PROCESSING: THE GOLDEN MEAN?

In *Data Processing* the review granting statute was section 702 of the Administrative Procedure Act which provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[80] Under this provision a strong presumption in favor of judicial review of administrative action has developed and nonreviewability is an exception which must be clearly demonstrated.[81] There are similarities between this standing provision and section 4 of the Clayton Act. Each is worded in broad, rather than specific, terms and each contains causal connection language. Section 702 of the Adminstrative Procedure Act grants standing to a person *aggrieved* by agency action; section 4 of the Clayton Act grants standing to a person *injured* in his business or property. Both sections confer standing on persons whose causes of action arise from other statutory provisions.[82]

Although the application of the *Data Processing* test to cases involving other types of private action has been rejected by some courts,[83] the only material difference between public and private suits is that the defendant in the former case is a government officer or an agency, while in the latter he is an individual.[84] The critical question is how much significance should be attached to this difference.[85] Without doubt, the Sixth Circuit accorded little weight to this distinction,[86] and as a result its holding in *Malamud* represents a distinct departure from the traditional notions of section 4 standing. By summarily severing its pre-

80. 5 U.S.C. § 702 (1970).

81. Barlow v. Collins, 397 U.S. 159, 166 (1970).

82. In *Data Processing* section 702 was used to grant standing to review an alleged violation of the Bank Service Corporation Act. In *Malamud*, section 4 was used to grant standing to review alleged violations of the Sherman and Clayton Acts.

83. *See, e.g.*, Solien v. Miscellaneous Drivers Local 610, 440 F.2d 124, 132 (8th Cir.), *cert denied*, 403 U.S. 905 (1971) (NLRB injunction case); Postal Workers, Detroit Local v. Independent Postal Serv. of America, 349 F. Supp. 1297 (E.D. Mich. 1972), *aff'd*, 481 F.2d 90 (6th Cir. 1973) (postal case). *But see* National Ass'n of Letter Carriers v. Independent Postal Sys. of America, Inc., 470 F.2d 265, 270-71 (10th Cir. 1972) (postal case); Trafficante v. Metropolitan Life Ins. Co., 446 F.2d 1158 (9th Cir. 1971), *rev'd*, 409 U.S. 205 (1972) (racial discrimination case); Colligan v. Activities Club, Ltd., 442 F.2d 686, 691-92 (2d Cir. 1971) (Lanham Act case); Herpich v. Wallace, 430 F.2d 792, 805-10 (5th Cir. 1970) (SEC case).

84. The defendant in *Data Processing* was Camp, Comptroller of the Currency. The defendant in *Malamud* was Sinclair, a private corporation.

85. One commentator insists that "[t]o liberalize standing in suits against the government without following the same philosophy in private antitrust suits would be to give the private corporate defendant an advantage not enjoyed by the government." Thomas, *supra* note 11, at 656.

86. *See* 521 F.2d at 1151.

vious ties with the direct injury approach[87] and by declining to adopt the target area approach which could have produced the same result,[88] the court signaled its intention to go beyond the two existing theories and adopt a liberal, more expansive interpretation of section 4 standing. But only future applications can tell whether the Sixth Circuit's "zone of interests" will be broader than the "target area" and whether "injury in fact" will be given a more expansive interpretation than "injury within the target area." In the meantime, however, the *Malamud* decision has created uncertainties of its own.

In *Data Processing* the Supreme Court announced a two-prong test for standing to obtain judicial review of administrative action: whether there is an allegation of *injury in fact* and "whether the interest sought to be protected by the complainant is arguably within the *zone of interests* . . . [of the relevant] statute or constitutional guarantee in question."[89] It is unclear whether the Sixth Circuit in *Malamud* applied both prongs of this test. Judging from its opinion, the two prongs of the *Data Processing* test appear to have been merged into one, due to the court's liberal construction of the zone of interests requirement.[90] If this is true the standing test adopted by the Sixth Circuit is even more liberal than it appears on its face, since the zone of interest requirement would be

87. The court distinguished its earlier decision in Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963) (which had held that the plaintiff was not entitled to recover in a private antitrust action because he was too remote from the violation) on the grounds that there the court was considering the merits, and not the issue of standing. 521 F.2d at 1150-51. The commentators, however, have been virtually unanimous in aligning the Sixth Circuit with the "direct injury" approach on the basis of the *Volasco* decision. *See, e.g.*, HILLS, *supra* note 40, at 570; Beane, *supra* note 4, at 352; COLUM. L. REV., *supra* note 4, at 583; DICK. L. REV., *supra* note 4, at 77.

88. Since the district court had granted standing to the investment companies based on *Volasco*, the circuit court could have simply affirmed on "direct injury" concepts. Or the court could have found standing for the investment companies by the adoption of the target area approach—by defining the target area of the alleged violation as including the commercial interests of the investment companies and declaring the companies' injuries to be within that target area. Instead, the court adopted the *Data Processing* analysis.

89. 397 U.S. 150, 153 (1970) (emphasis added).

90. In *Data Processing* an analysis of the legislative history and underlying policy of the Administrative Procedure Act (the review granting statute) and the Bank Service Corporation Act (the relevant statute) was made to determine the zone of interests. *See id.* at 154-57. However, *Malamud*, after specifying section 1 of the Sherman Act and section 3 of the Clayton Act as the relevant statutes, found the plaintiffs within the zone of interests simply because "[t]he antitrust laws were enacted to preserve competition and thereby to protect the individual plaintiff and the consuming public from the effects of any combinations or conspiracies in restraint of trade." 521 F.2d at 1152. Under this sweeping rationale it seems as though *any* plaintiff who alleged injury because of an antitrust violation would thereby satisfy the zone of interests requirement.

automatically satisfied by the plaintiff who alleges injury in fact.[91] The court seems to have applied the spirit of *Data Porcessing*, without insisting upon substantive compliance with the test.

Assuming, however, that the court meant to apply both prongs of the test, another uncertainty results. One of its reasons for rejecting the direct injury and target area approaches was that their application goes to the merits of the case.[92] The *Data Processing* test was thought to be a better alternative because it was fashioned by the Supreme Court for the very purpose of avoiding examinations of the merits.[93] Yet, the *Data Processing* test has been criticized for the reason that it permits such examinations through the zone of interests inquiry. According to Justice Brennan, who dissented in that case,[94] this inquiry, by requiring

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91. Several commentators have advocated "injury in fact" as the *sole* requisite for standing in the federal courts. *See, e.g.*, Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479 (1972). After discussing recent developments in the law of standing, *Malamud* appeared to be well on its way to expressly adopting a single-prong "injury in fact" test for section 4:

> Although the statute is broadly worded and reflects a similarly expansive congressional enforcement policy, by its very terms it does not grant access to the courts to persons interested merely as members of the public in enforcing the various antitrust laws. The statute defines the real party in interest as being any person *who has been injured.* This definition would seem also to comport with the minimum requirements of Article III of the Constitution, i.e., injury in fact. . . .
>
> . . . Clearly provided for under Section 4 is the requirement that any person must have suffered injury at the hands of the defendant before he can bring an action. This prerequisite both defines the real party in interest and satisfies the minimum criterion established by Article III.

521 F.2d at 1148-49 (emphasis in original). Despite these observations, the court purported to adopt both prongs of the *Data Processing* test. Its application of the test, however, appears to be in the nature of a single-prong "injury in fact" approach. *See* note 40 *supra.*

92. *See* 521 F.2d at 1150. Actually, it is not uncommon for courts to examine aspects of the merits in determining the standing of the litigant as the Supreme Court recently pointed out in *Warth v. Seldin*, 422 U.S. 490 (1975):

> Although *standing* in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . it *often turns on the nature and source of the claim asserted. . . . Moreover, the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes.*

Id. at 500 (emphasis added) (citations omitted). Because of the function of standing as a rule of judicial self-restraint, as well as its function under article III, a merit free determination of standing seems pretentious. The real criticism of the traditional section 4 standing doctrines lies not in the fact that they allow the merits to be examined, but in that they often permit courts to either completely avoid the merits or to prejudge them. *See* notes 40-46 *supra* and accompanying text.

93. *See* note 6 *supra.*

94. Justice Brennan concurred in the result and dissented in both *Data Processing* and its companion case, *Barlow v. Collins*, 397 U.S. 159 (1970).

an investigation of the relevant statutory materials, allows courts to extensively examine the merits before making a determination of standing.[95] Such an examination, he maintained, is both constitutionally unnecessary and entirely inappropriate to the resolution of standing. For this reason he advocated the adoption of a single-prong injury in fact test for the disposition of standing issues.[96]

Thus, while the *Data Processing* test was initially developed to avoid an examination of the merits in the resolution of standing, the zone of interest inquiry shows a potential for that very abuse. Although this inquiry is assured a liberal interpretation by the Sixth Circuit, that is no assurance that other federal courts utilizing the test will attach the same generous construction. It is entirely possible, for example, for courts presently adhering to the direct injury approach to reach traditional direct injury results with an application of the *Data Processing* test. After an examination of the relevant statutory materials, a court could conclude that Congress simply did not intend to spread section 4 protection so far.[97] Such an implementation of the zone of interest inquiry would merely perpetuate the judicial glosses already characteristic of the existing theories and no real change would be effectuated by the adoption of *Data Processing*.[98] In short, it is not clear how far the

95. The Constitution requires for standing only that the plaintiff allege that actual harm resulted to him from the agency action. Investigation to determine whether the constitutional requirement has been met has nothing in common with the inquiry into statutory language, legislative history, and public policy that must be made to ascertain whether Congress has precluded or limited judicial review. . . . *The Court's approach does too little to guard against the possibility that judges will use standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits.*

Barlow v. Collins, 397 U.S. 159, 178 (1970) (Brennan, J., dissenting and concurring in part) (emphasis added) (footnote omitted).

96. *Id.* at 167-68, 176. Several commentators have agreed with Brennan's views. *See* note 91 *supra*. Other commentators have suggested that the Supreme Court has since retreated from the "zone of interests" inquiry. *See, e.g.*, Hasl, *Standing Revisited—The Aftermath of Data Processing*, 18 ST. L.U.L.J. 12, 21 (1973) [hereinafter cited as Hasl]. Yet, despite these views, the zone of interests inquiry appears to remain part of the current standing test, as recently indicated by the Supreme Court in Warth v. Seldin, 422 U.S. 490 (1975). After recognizing that standing may exist solely by virtue of specific statutes, the Court said: "Essentially, the standing question . . . is whether *the constitutional or statutory provision on which the claim rests* properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* at 500 (emphasis added) (footnote omitted). This language is strikingly similar to the zone of interests inquiry in *Data Processing*.

97. Although such a conclusion would have dubious validity in light of the legislative history of the Clayton Act (*see* notes 34-38 *supra* and accompanying text), this result would not be surprising in view of the often encountered judicial bias concerning section 4 liability. *See* text accompanying notes 42-43 & 57-59 *supra*.

98. Future applications of this test by other courts will most likely turn on the emphasis given to the word *arguably* in the "zone of interests" inquiry. *See* Hasl, *supra* note 96, at 33.

Malamud trend will carry, or what sort of standing requirement will remain when it has run its course.

There is, however, much to be said for the position of the court in *Malamud*. While its application of *Data Processing* will not satisfy the demands of those who would reject all but the single-pronged injury in fact test,[99] it may nevertheless help to avoid some of the confusion which has characterized private antitrust standing. First, the court's holding identifies the Sixth Circuit as one in which plaintiffs are assured a liberal construction of section 4 standing. In light of the generous venue provisions afforded by the Clayton Act,[100] this holding becomes increasingly significant. Since chances of success may vary from district to district depending on the various causal connection interpretations, it might be advisable for plaintiffs to take their case to the Sixth Circuit if there is any question about standing.[101] Although the *Malamud* holding gives no assurance of success on the merits,[102] the Sixth Circuit has warranted that it will not arbitrarily halt antitrust litigation at an early stage, but will examine all the facts on the merits before deciding the issue of proximate cause. Under the traditional approaches standing often depends on whether the alleged injury was proximately caused by the violation; therefore, standing to sue and causation are frequently treated interchangeably. The *Malamud* decision represents an attempt to separate these two issues, assuring section 4 claimants an opportunity to prove their charges.[103]

More importantly, the adoption of the *Data Processing* test has the effect of shifting the section 4 standing focus from proximate causation to statutory purpose. The test, by requiring an examination of the relevant statutory materials, inevitably places the legislative purpose of the Clayton Act—as an additional deterrent to antitrust violations—at

99. *See* views of Justice Brennan, notes 94-96 *supra* and accompanying text, and of commentators cited note 91 *supra*.

100. 15 U.S.C. § 15 (1970) states in pertinent part: "Any person who shall be injured in his business or property . . . may sue therefore *in any district court* of the United States *in the district in which the defendant resides or is found or has an agent* . . . ." (Emphasis added.)

101. Currently, there is a powerful incentive for the defendant to raise the directness issue. Free to argue the assorted multitude of lower federal court decisions, experience has shown that the defendant may be able to secure the most favorable ruling possible: the avoidance of a trial. The Malamud holding avoids the risks accompanying the uncertainties of the traditional approaches.

102. *See* note 79 *supra*.

103. The court has not removed the causal connection requirement, but rather has indicated that it will no longer deny standing on this basis. *See* text accompanying note 75 *supra*.

the forefront of section 4 standing inquiries. Both the direct injury and target area tests fail in this respect.[104] By postponing a determination of proximate cause, the *Malamud* court is admittedly placing a greater burden on judicial resources. Yet, a remedy which was designed to play an integral role in the enforcement of the antitrust laws should not be foreclosed prematurely merely to lighten the load of the federal courts.[105]

The *Malamud* application of *Data Processing* actually creates a presumption in favor of the right of action,[106] assuring a penetrating search for possible antitrust violations. It is only in this manner that private antitrust suits, as an alternative to government action, can help ensure a vigorous enforcement policy in this important area of the law. This is not to say that courts should abandon standards which preclude spurious claims and avoid the possibility of duplicative recoveries against antitrust violators. But these competing considerations can be satisfied without vitiating the effectiveness of the statute.[107] The *Data Processing* test offers the *potential* for striking the appropriate balance between the rival section 4 goals of enforcement and prudent limitation.[108]

Yet, if the *Malamud* application of the *Data Processing* test is to truly effect a sensible accommodation in this troubled area of the law, the decision could best aid in alleviating the causal connection confusion by prompting Supreme Court treatment of the problem. Section 4 of the Clayton Act, like the other antitrust provisions, is characterized by

104. The previous tests have concentrated more on causation and less on section 4. The zone of interests inquiry (requiring an examination of statutory purpose) is a much needed addition to section 4 standing considerations, since the uncertainty surrounding the two traditional approaches possibly has done more to deter legitimate claimants than antitrust violators. *See* Guilfoil, *supra* note 19, at 775; Klingsberg, *supra* note 10, at 353; COLUM. L. REV., *supra* note 4, at 587.

105. COLUM. L. REV., *supra* note 4, at 588. *But see* Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws*, 30 GEO. WASH. L. REV. 231, 249 (1961).

106. *See* text accompanying note 75 *supra*.

107. The *Malamud* court, for example, indicated that although the question of directness would normally entail an adversary hearing, directness could be evaluated upon a motion for summary judgment where the material facts are not in issue. 521 F.2d at 1150 n.13; *see* COLUM. L. REV., *supra* note 4, at 588.

108. The mere presence of the words "allege" and "arguably" in the *Data Processing* test should avoid summary dismissals based on conclusory labels, while at the same time giving no assurance of success on the merits. By requiring only the allegation of injury in fact and interests that fall arguably within the zone of interests protected, other courts applying the test should spend less time with "wasteful motions addressed to the sufficiency of complaints where they might better spend their time disposing of legitimate claims on the merits." Klingsberg, *supra* note 10, at 355.

such an extraordinary sweep that a definitive answer can come only from the Supreme Court, and then only because of its finality in our judicial process.[109] Possibly such treatment will be forthcoming, since *Malamud* has enlarged the causal connection conflict—now there are three circuit tests, instead of two.[110] Neither of the previous tests are satisfactory[111] and the new entrant contains uncertainties of its own.[112] Even the most astute antitrust attorney is unable to understand causal connection to any explainable point, since the answers are not found in logic or the application of a formula.[113] Although "[i]t may . . . be argued that the purpose and language of this legislation are so sweeping that any person injured by the proscribed conduct should be considered within the class which Congress intended to protect[,]"[114] the courts are unlikely to accept this simplistic approach to the problem. And the answer does not lie in total abandonment of the existing approaches. If the *Data Processing* test is to yield definitive standing guidelines for potential plaintiffs and the district courts to follow and is to be applied in a way that it deters antitrust violators, instead of legitimate claimants, Supreme Court endorsement and clarification is essential. Perhaps the *Malamud* decision will aid in provoking this long awaited intervention by the high Court.

Layn R. Phillips

109. The Supreme Court has been among the most liberal interpreters of the antitrust laws. *See, e.g.*, Simpson v. Union Oil Co., 377 U.S. 13 (1964); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931).

110. This conflict is further compounded by the various hybrids of these tests. *See* notes 23-28 *supra* and accompanying text.

111. *See* notes 18-49 *supra* and accompanying text.

112. *See* notes 89-98 *supra* and accompanying text.

113. Thomas, *supra* note 11, at 645.

114. Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 699, 702-03 (D. Colo. 1970).