THE THIRD CIRCUIT'S "FUNCTIONAL ANALYSIS": PATROLLING THE PORTALS TO TREBLE DAMAGE ACTIONS BROUGHT UNDER SECTION 4 OF THE CLAYTON ACT

Although section 4 of the Clayton Act[1] provides that any person injured in his business or property by reason of an antitrust violation can recover treble damages from the antitrust violator, the federal courts have been unwilling to construe section 4 literally. The circuit courts of appeals have limited this broadly worded statute by creating various tests for "antitrust standing."[2] The Supreme Court, although never directly approving standing requirements unique to antitrust, has placed two important limitations on the scope of section 4. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[3] the Court held that only plaintiffs who could prove "antitrust injury. . . . injury of the type the antitrust laws were intended to prevent" could collect damages under section 4.[4] In *Illinois Brick Co. v. Illinois*[5] the Court held that a plaintiff who purchases a product only indirectly from an antitrust violator, i.e. through a middleman, is not permitted to prove that he was injured when the middleman "passed on" the violator's illegal overcharge.[6] Although neither *Brunswick* nor *Illinois Brick* were decided on the grounds of antitrust standing, both decisions are relevant to the efforts of the lower federal courts to create a law of standing which will determine the appropriate set of plaintiffs entitled to bring a treble damage action under section 4.

In *Mid-West Paper Products Co. v. Continental Group*,[7] the Court of Appeals for the Third Circuit attempted to balance traditional antitrust standing concerns, the Supreme Court's definition of "antitrust injury" in *Brunswick*, and the Supreme Court's reasoning in *Illinois Brick*.[8] The individual civil actions

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[1] 15 U.S.C. § 15 (1976). The section provides in full:

> 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.

[2] *See, e.g.*, Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975); *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910). For a summary of the antitrust standing tests used in the circuits, see Note, *Standing to Sue in Private Antitrust Litigation: Circuits in Conflict*, 10 IND. L. REV. 532 (1977). It has been suggested that the term "antitrust standing" is a misnomer. Bogosian v. Gulf Oil Corp., 561 F.2d 434, 447 n.6 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) ("[t]he policy of limiting liability implicit in § 4 which has evolved under the rubric of "standing," however, is a 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.").

[3] 429 U.S. 477 (1977).

[4] *Id.* at 489.

[5] 431 U.S. 720 (1977).

[6] *Id.* at 735, 745-46.

[7] 596 F.2d 573 (3d Cir. 1979).

[8] *Id.* at 582.

consolidated in *Mid-West* arose out of a 1976 criminal indictment charging five paper bag manufacturers with conspiring to fix the prices of consumer bags in violation of section 1 of the Sherman Act.[9] One of the plaintiffs, Murray's of Baederwood, was a delicatessan that alleged that it had purchased consumer bags from a manufacturer in competition with the defendants.[10] The price fixing conspiracy was so effective, Murray's contended, that it raised the market price of consumer bags throughout the industry.[11] Murray's brought a section 4 action alleging injury caused by the defendants' conspiracy and claiming as damages the difference between the competitive market price of consumer bags and the artificially inflated price charged by his supplier as a result of the "umbrella" of high prices created by the defendants.[12] Murray's, however, did not allege that his supplier was part of the conspiracy. The District Court for the Eastern District of Pennyslvania granted summary judgment against all the plaintiffs under the authority of *Illinois Brick*.[13]

A divided panel of the Court of Appeals for the Third Circuit, affirming the district court's decision as to Murray's,[14] indicated that no single test of antitrust standing is controlling in the Third Circuit.[15] The court indicated that traditional antitrust standing tests, the requirement of "antitrust injury" and the Supreme Court's decision in *Illinois Brick* would all be considered in

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[9] *Id.* at 575. Consumer bags are single or multilayered bags used to prepackage products such as coffee, pet foods, chemicals and ice cream. *Id.*

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides:

> 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared 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.

[10] 596 F.2d at 580. There were two additional categories of plaintiffs identified by the Third Circuit Court of Appeals. The first was a group of retail stores which had purchased the defendants' bags indirectly through middlemen. The court affirmed the dismissal of their actions because of the holding in *Illinois Brick*. *Id.* Murray's was also a member of this category of indirect purchasers.

In the second additional category of plaintiffs was Mid-West Paper Products Co., a middleman, which purchased bags directly from a subsidiary of a defendant. Its action was remanded to determine more fully the relationship between the defendant and its subsidiary. *Id.* at 589. All plaintiffs sought both monetary damages under section 4 and injunctive relief under section 16 of the Clayton Act, 15 U.S.C. § 26 (1976). The Third Circuit allowed all the plaintiffs to maintain their actions for injunctive relief, reasoning that because of the different language of section 16, the fact that *Illinois Brick* was particularly concerned with treble damages, and the need for flexibility in equitable relief, the standing requirement for section 16 is less rigorous than for section 4. 596 F.2d at 589-94.

[11] *Id.* at 580.

[12] *Id.* at 580-81.

[13] *Id.* at 576. The order was not accompanied by an opinion. *Id.*

[14] *Id.* at 587.

[15] *Id.* at 582.

making a "functional analysis of the factual context presented in each case" to determine whether a plaintiff has standing to sue under section 4.[16] The *Mid-West* court held that a plaintiff who purchases a product from the *competitor* of price fixing firms, and who maintains that this competitor raised his prices in response to the artificially high market price created by the conspiracy, does not have standing to sue the conspirators under section 4.[17] Judge Higginbotham, dissenting, would have granted Murray's standing to sue.[18]

The Third Circuit's "functional analysis" approach to antitrust standing, although a potentially sound method of analysis, was not effectively employed in *Mid-West*. This Note will briefly consider the antitrust standing tests which have been developed in the circuits, and will discuss the Supreme Court's decisions in *Brunswick* and *Illinois Brick*. The majority and dissenting opinions in *Mid-West* will then be examined. It will be demonstrated that the *Mid-West* court failed to identify and distinguish the different policy considerations which underlie traditional antitrust standing tests, the Supreme Court's definition of "antitrust injury" and the Supreme Court's holding in *Illinois Brick*. An examination of these considerations reveals that the direct purchaser from a competitor of price fixing conspirators should be granted standing to sue under Section 4.

I. Limitations Imposed on Section 4: Policies and Precedent

A. *Traditional Tests of Antitrust Standing: A "Decisional Morass"*

The federal district courts and circuit courts of appeals have been unwilling to grant standing under section 4 of the Clayton Act to literally "any person" alleging injury resulting from an antitrust violation.[19] These courts fear that a literal interpretation of section 4 would impose ruinous liability on antitrust defendants and thus conflict with Congress's goal in passing the antitrust laws—to preserve and encourage free competition.[20] If no restrictions

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[16] *Id.*

[17] *Id.* at 587.

[18] *Id.* at 595.

[19] See note 2 *supra* and *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 25 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). Judge Ely observed:

> Read literally, this statute could afford relief to all persons whose injuries are causally related to an antitrust violation. Recognizing the nearly limitless possibilities of such an interpretation, however, the judiciary quickly brushed aside this construction. *Id.*

But see Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1302 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). Judge Levit, dissenting, stated "If lines of demarcation, limitations or restrictions are to be drawn and imposed on the statute, that is for the legislative branch to do and not for this court." *Id.*

[20] *See* Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 506 (3d Cir. 1976); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). The primary goal of the antitrust laws was stressed during the deliberations on the Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified at 15 U.S.C. §§ 1-1505 (1976)). "The antitrust laws clearly reflect the national policy of en-

were placed on the statute, one court concluded, the "flood-gates" would open and suits would be brought by "every creditor, stockholder, employee, subcontractor, or supplier of goods and services" who might in some way be affected by an antitrust violation.[21] The result of allowing treble damages to all such plaintiffs would be "an over-kill, due to the enlargement of the private weapon to a caliber far exceeding that contemplated by Congress."[22]

The circuit courts have been reluctant to allow recovery to plaintiffs who have not suffered "direct" injuries, but whose injuries are merely derived from those sustained by the initial victims of an antitrust violation.[23] In *Ames v. American Telephone and Telegraph Co.*,[24] for example, the plaintiff owned stock in an independent telephone company which was driven into receivership by the defendant.[25] As a result, the plaintiff's stock became worthless. The court held that a shareholder has no independent cause of action apart from a suit by the corporation itself.[26] The court reasoned that to allow the plaintiff to sue independently would "subject the defendant not merely to treble damages, but to sextuple damages, for the same unlawful act."[27]

Whereas a shareholder's injury simply duplicates the injury suffered by the corporation, some individuals suffer derivative injuries that are distinct from and additional to the injury suffered by the primary antitrust victim. In *Harrison v. Paramount Pictures, Inc.*,[28] for example, the plaintiff leased a movie theatre and received a fixed percentage of his lessee's profits as rent.[29] Due to an illegal conspiracy, the lessee's profits were reduced and, consequently, the rent received by the plaintiff was also reduced.[30] Therefore, both the plaintiff and his lessee suffered distinct injuries. The district court nevertheless held that the plaintiff's loss was beyond the limit of injuries redressable under section 4.[31]

Because of these related concerns of ruinous liablity and recoveries based on derivative injuries, the federal courts have created two primary tests for determining antitrust standing—the direct injury test and the target area

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couraging private parties (whether consumers, businesses, or possible competitors) to help enforce the antitrust laws in order to protect competition through compensation of antitrust victims, through punishment of antitrust violators, and through deterrence of antitrust violations." H.R. REP. NO. 499, 94th Cong., 2d Sess. 19, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2589.

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

[22] *Id.*

[23] *See, e.g.*, Engine Specialties, Inc. v. Bombadier Ltd., 605 F.2d 1 (1st Cir. 1979), *aff'd on rehearing*, 615 F.2d 575 (1980); Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975); Billy Baxter, Inc. v. Coca-Cola Co., 481 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

[24] 166 F. 820 (1st Cir. 1909).

[25] *Id.* at 823.

[26] *Id.*

[27] *Id.*

[28] 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

[29] *Id.* at 316.

[30] *Id.*

[31] *Id.* at 317.

test—which limit the scope of section 4 protection.[32] These tests do not address the traditional concerns of constitutional standing to sue because the antitrust plaintiff usually will have alleged sufficient injury in fact. Rather, the tests concentrate on the *cause* of the plaintiff's harm, the section 4 requirement that the plaintiff's injury be "by reason of" an antitrust violation.[33] If the causality is attenuated, as when the plaintiff has suffered only indirect injuries, standing is often denied.[34]

Federal courts which apply the direct injury test focus primarily on the relationship between the plaintiff and the defendant and deny standing if a third person is interposed between these parties.[35] The test was first enunciated in *Loeb v. Eastman Kodak Co.*[36] where the plaintiff, a stockholder and a creditor of a corporation, brought a private treble damage action alleging that the defendant had driven the corporation out of business.[37] The Court of Appeals for the Third Circuit denied the plaintiff standing to sue becaue he had not suffered any "direct injury."[38] The court stated that the antitrust violation was directed at the corporation, not at the individual stockholder or creditor, and hence the plaintiff's injuries were only "indirect, remote, and consequential."[39] The direct injury test has also been used to deny standing to suppliers,[40] landlords[41] and franchisors[42] when it was the customer, tenant or franchisee who was injured initially by the antitrust violation. Competitors of the antitrust defendant or those in privity with the defendant, however, are usually held to satisfy the direct injury test because of their immediate relationship to the defendant.[43]

The target area test, which is now more widely used than the direct injury test,[44] does not concentrate on the relationship between plaintiff and defen-

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[32] For a more detailed discussion of these two tests and the policies which underlie them, see Berger and Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977) [hereinafter cited as Berger and Bernstein].

[33] Some courts view the test for antitrust standing as simply a test of proximate causation. *See, e.g.*, Bogus v. American Speech and Hearing Assoc., 582 F.2d 277, 284 (3d Cir. 1978); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955).

[34] See text at notes 23-31 *supra*.

[35] *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 127 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). *See* Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U. L. REV. 374, 380 (1976).

[36] 183 F. 704 (3d Cir. 1910).

[37] *Id.* at 707. The case was brought under section 7 of the Sherman Act, 26 Stat. 210 (1890), the predecessor of section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), passed in 1914. 183 F. at 705.

[38] *Id.* at 709.

[39] *Id.*

[40] Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

[41] Asbestos Co. v. Johns-Manville Corp., 30 F. Supp. 389, 390-91 (S.D.N.Y. 1939), *aff'd per curiam*, 113 F.2d 114 (2d Cir. 1940).

[42] Nationwide Auto Appraiser Serv., Inc. v. Ass'n of Cas. & Sur. Cos., 382 F.2d 925, 927-29 (10th Cir. 1967).

[43] *See* P. AREEDA AND D. TURNER, ANTITRUST LAW at 164-65 (1978).

[44] For a summary of the antitrust standing tests used in the circuits, see Note, *Standing to Sue in Private Antitrust Litigation: Circuits in Conflict*, 10 IND. L. REV. 532 (1977).

dant, but on the region of the economy affected by the defendant's illegal acts. To attain standing under this test a plaintiff must allege both injury caused by the illegal activity *and* that he is within the target area of the violation, defined as "that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[45] Courts which apply the target area test emphasize that the test does not foreclose meritorious claims "simply because another antitrust victim interfaces the relationship between the claimant and the alleged violator,"[46] and that therefore the test is more responsive to congressional intent than is the direct injury test.[47] Thus under the target area test some plaintiffs who have suffered derivative injuries are granted standing to sue despite the indirectness of their injuries.[48]

Courts which apply the target area test have not always agreed on the scope of the target area. The most restrictive application of the test requires the defendant to have actually "aimed" his illegal activity at the plaintiff. In *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*,[49] for example, the plaintiff was a non-operating landlord of movie theatres who alleged that his share of his tenants' profits was reduced by the anticompetitive activities of the defendant film distributors.[50] The Court of Appeals for the Second Circuit held that the plaintiff lacked standing to sue under section 4 because he was outside the target area of the violation; "the alleged conspiracy was admittedly not aimed at plaintiff, but at competing distributors and exhibitors."[51]

In comparison, the least restrictive application of the target area test requires only that the plaintiff's harm have been foreseeable by the defendant. A district court in *State of Washington v. American Pipe and Construction Co.*[52] used this form of the test to decide whether a plaintiff who has purchased goods only from a competitor of price fixing conspirators has standing to sue those conspirators under section 4. One group of plaintiffs in *American Pipe* had purchased conduit pipe from non-conspiring competitors of the price-fixing defendants.[53] They alleged that their suppliers raised prices because of the conspiracy. Requiring that the plaintiffs' harm have been foreseeable, the court held that these plaintiffs were within the target area of the violation and thus had standing to sue.[54] The court reasoned that because the conspirators sought to raise prices by ending competitive bidding, they should be liable for damages sustained on all sales affected by the lack of competition.[55]

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[45] Conference of Studio Unions v. Loew's Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

[46] In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 127 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

[47] *Id.* at 128. *See also* Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955); *In re* Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072, 1104 (N.D. Cal. 1979).

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

[49] 454 F.2d 1292, 1302 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

[50] *Id.* at 1294.

[51] *Id.* at 1296.

[52] 280 F. Supp. 802 (W.D. Wash. 1968).

[53] *Id.* at 805.

[54] *Id.* at 807.

[55] *Id.*

It has been suggested that the law of antitrust standing is a "decisional morass" which leads to inconsistent results.[56] One of the primary reasons for the fragmentation and confusion which exists in this area of the law is that the Supreme Court has neither adopted a test for antitrust standing nor made consistent statements about the proper construction of section 4 of the Clayton Act. On different occasions, the Court has stated that the antitrust laws must be vigorously enforced through section 4 actions,[57] that no additional requirements should be imposed on antitrust plaintiffs "beyond what is specifically set forth by Congress in the [antitrust] laws,"[58] and that it looks to the "plain language" of section 4.[59] These statements suggest that no special standing requirements for section 4 actions should exist at all. In *Hawaii v. Standard Oil Co. of California*,[60] however, the Supreme Court indirectly approved of the lower courts' use of antitrust standing tests.

In *Hawaii* the Court refused to permit the state of Hawaii to recover as *parens patriae* for the overcharges paid by its citizens due to a price-fixing conspiracy.[61] The Court was concerned with the risk of duplicative recoveries if both the state and its citizens could recover for the same injury.[62] In support of its holding the Court cited antitrust standing decisions in the First through Tenth Circuits, and stated 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."[63] This statement has been cited by the lower federal courts for the proposition that the Supreme Court, at least implicitly, approves the antitrust standing requirements which limit the scope of section 4.[64]

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[56] Berger and Bernstein, *supra* note 32, at 840. *See also* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 24; Note, *Illinois Brick, The Death Knell of Ultimate Consumer Antitrust Suits*, 52 ST. JOHN'S L. REV. 421, 425 (1978).

[57] Illinois Brick Co. v. Illinois, 431 U.S. 720, 745 (1977).

[58] Radovich v. National Football League, 352 U.S. 445 (1957). The Court was referring to private antitrust litigants in the context of section 5 of the Clayton Act, 15 U.S.C. § 16 (1976).

[59] Reiter v. Sonotone Corp., 99 S. Ct. 2326, 2334 (1979). The issue raised in Reiter v. Sonotone Corp. was standing to sue under section 4, but the precise question was different from that in *Mid-West*. The issue addressed by the Court was whether a consumer who has been injured by an antitrust violation has been injured in his "business or property" as required by section 4. The Court rejected the argument that only commercial interests were protected by section 4 and held that consumers have standing to sue under the section. The Court noted, however, that it was *not* addressing the question of whether a consumer might lack standing because of the "indirect purchaser" rule of *Illinois Brick*. *Id.* at 2330 n.3. See text at notes 87-103, *infra*.

[60] 405 U.S. 251 (1972).

[61] *Id.* at 252-53.

[62] *Id.* at 267 n.14.

[63] *Id.*

[64] *See, e.g .*, *In re* Beef Indus. Antitrust Litigation, 600 F.2d 1148, 1168 (5th Cir. 1979); Cromar Co. v. Nuclear Materials and Equipment Corp., 543 F.2d 501, 505 (3d Cir. 1976); Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1175 (5th Cir. 1976); Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975).

In the absence of more specific guidance by the Supreme Court, the district and circuit court of appeals will undoubtedly continue to go their separate ways in refining the existing standing tests. Even when the labels "direct injury test" or "target area test" are used, antitrust contestants remain unenlightened due to the many variations and inconsistent applications of each test. Indeed, as many as seven different approaches to antitrust standing have been identified as currently in use in the circuits.[65] These varying approaches are all related, however, in that they stem from the same assumption that section 4 cannot be construed literally. As mentioned above, this assumption is founded on the fear of ruinous liability and the unwillingness to allow treble damages for plaintiffs with certain indirect injuries.[66] Thus the issue which the lower federal courts have confronted in continuing to develop antitrust standing law is not *whether* section 4 should be read literally, but how the literal scope of the statute should be reduced.

B. *Limitations on Section 4 Imposed by the Supreme Court*

Although the Supreme Court has never addressed the issue of antitrust standing directly, and has given contradictory signals regarding the appropriate construction of section 4, it has narrowed the literal scope of section 4 by requiring that a plaintiff prove "antitrust injury" and by barring the offen-

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[65] *Compare* Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955), *with* Billy Baxter, Inc. v. Coca-Cola, Co. 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971). *Compare also* Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), *with* Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). The following approaches have been used by one or more circuits: 1) The "direct injury" approach. Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910). Plaintiff was denied standing because he "did not receive any direct injury from the alleged illegal acts of the defendant." *Id.* at 709. 2) The "target area" approach. Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). A plaintiff "must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Id.* at 54-55. 3) The "*Karseal* target area" approach. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955). "Turning now to the cases concerning the 'target area' . . . the rule is that one who is only *incidentally* injured by a violation of the antitrust laws,—the bystander who was hit but not aimed at,—cannot recover against the violator." *Id.* at 363. 4) The "proximate target area" approach. South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966). "If a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he has proximately injured thereby, then he was standing to sue under section 4." *Id.* at 418. 5) The "forseeable target area" approach. Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964). To recover under section 4 "the plaintiff must show that . . . plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy." *Id.* at 220. 6) The "zone of interest" approach. Malamud v. Sinclair Oil Corp., 221 F.2d 1142 (6th Cir. 1975). This standing test requires that the plaintiff have been injured in fact and that he be within the zone of interest to be protected by the statute in question. For a circuit by circuit discussion of these approaches, *see* Note, *Standing to Sue in Private Antitrust Litigation: Circuits in Conflict*, 10 IND. L. REV. 532 (1977).

[66] See text at notes 19-31 *supra*.

sive use of the "pass-on theory." The Court first enunciated the concept of antitrust injury in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[67] Plaintiffs were individual bowling centers which alleged that Brunswick, one of the two largest manufacturers of bowling equipment in the United States, had violated the antimerger provisions contained in section 7 of the Clayton Act[68] by acquiring numerous bowling centers.[69] During a period of rapid expansion in the bowling industry Brunswick sold lanes, pinsetters and ancillary equipment to individual bowling centers on a secured credit basis.[70] When the bowling industry went ito a sharp decline during the 1960's, Brunswick acquired 222 centers which had defaulted, 168 of which it continued to operate.[71] The plaintiffs claimed that if Brunswick had not entered their respective markets, these failing centers would have gone out of business through the forces of natural competition, thereby increasing plaintiffs' profits.[72]

A unanimous Supreme Court concluded that the plaintiffs were not entitled to damages.[73] The Court held:

> [F]or plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."[74]

The antitrust laws were enacted, the Court noted, for " 'the protection of competition, not competitors.' "[75] Hence, plaintiffs who complain about the effects of continued exposure to competition fall outside the protection of the antitrust laws.

In addition to requiring proof of antitrust injury, the Supreme Court has dramatically limited the scope of section 4 protection in cases involving a chain of distribution by prohibiting the use of the "pass-on theory." The pass-on theory is that a middleman, forced to pay an artificially high price because of an antitrust violation committed by his supplier, will attempt to pass-on the illegal overcharge to his customers. Depending upon the elasticity

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[67] 429 U.S. 477 (1977).

[68] 15 U.S.C. § 18 (1976). Section 7 prohibits certain acquisitions of a corporation by another, whether through purchase of stock or assets, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." *Id.*

[69] 429 U.S. at 479-80.

[70] *Id.* at 479.

[71] *Id.* at 480.

[72] *Id.* at 481.

[73] *Id.* at 490.

[74] *Id.* at 489.

[75] *Id.* at 488 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

of the demand for the product,[76] the middleman will be able to pass-on anywhere from part to all of the overcharge. This process of passing-on can continue down the chain of distribution to the ultimate consumer.

Using the pass-on theory defensively, an antitrust defendant faced with a suit by a direct purchaser could claim that the purchaser was not in fact injured by the full amount of the overcharge because he was able to pass-on the higher price to his own customers. The Supreme Court considered the use of this defense in *Hanover Shoe, Inc., v. United Shoe Machinery Corp.*[77] Plaintiff was a shoe manufacturer and the defendant was a manufacturer of shoe machinery.[78] The plaintiff alleged that the defendant had monopolized the shoe machinery industry in violation of section 2 of the Sherman Act[79] by its practice of leasing and refusing to sell its shoe machinery.[80] The defendant denied that the plaintiff had suffered any injury because it had been able to pass-on the extra cost of leasing the machinery to its own customers.[81] The Supreme Court held that the defendant was not permitted to use this pass-on defense.[82]

The Court reasoned that the use of the defense would require "massive evidence and complicated theories" in order to determine the amount of the overcharge that was passed-on.[83] Because of the wide range of factors affecting a firm's pricing policies, the Court concluded that this task would normally prove to be "insurmountable".[84] Furthermore, the Court reasoned, if the pass-on defense were allowed it could be used against any member of the distribution chain except the ultimate consumer.[85] Because the ultimate consumers would have such a small interest in attempting a class action, there would be no one willing to bring a suit against an antitrust violator and the effectiveness of treble damage actions would be greatly reduced.[86] Thus by allowing a plaintiff to collect three times the full amount of an overcharge, the Court both avoided what it concluded would be a fruitless economic analysis and encouraged the enforcement of the antitrust laws through treble damage actions.

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[76] If the demand for a product is relatively "inelastic" it is not greatly affected by an increase or decrease in price. Thus if middlemen raise their prices in response to a price increase by the manufacturer, the sales of the product will not be substantially reduced. *See* P. SAMUELSON, ECONOMICS 381-386 (1976); L. SULLIVAN, ANTITRUST 787 (1977).

[77] 392 U.S. 481 (1968).

[78] *Id.* at 483.

[79] 15 U.S.C. § 2 (1976).

[80] 392 U.S. at 483.

[81] *Id.* at 487-88.

[82] *Id.* at 494. The one exception to the Court's holding was "when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present." *Id.*

[83] *Id.* at 493.

[84] *Id.*

[85] *Id.* at 494.

[86] *Id.*

An indirect purchaser from an antitrust defendant, one who has purchased the defendant's product through one or more middlemen, would use the pass-one theory offensively to prove that he was injured when the illegal overcharge was passed-on to him. In *Illinois Brick Co. v. Illinois*[87] the Supreme Court was required to decide whether this offensive use of the pass-on theory was consistent with its earlier holding in *Hanover Shoe*.[88] The State of Illinois had purchased buildings which incorporated bricks manufacturered by the defendant.[89] Although the state was two levels of distribution removed from the defendant, it claimed that the overcharge on the bricks, created by the defendant's price fixing conspiracy, was passed-on to the state by the general and masonry contractors.[90]

The Court first decided that whatever rule was ultimately adopted regarding the use of the pass-on theory, it must apply equally to plaintiffs and defendants.[91] To allow the offensive but not the defensive use of the theory, the Court observed, would involve a serious risk of multiple liability.[92] Not only would the direct purchaser be able to collect three times the overcharge, but each of the indirect purchasers would be able to collect three times the amount passed on.[93] The Court concluded, therefore, that it had the option of either overruling *Hanover Shoe* or banning the offensive use of the pass-on theory.[94] The Court decided to uphold the *Hanover Shoe* rule and held that the pass-on theory cannot be used by either plaintiffs or defendants.[95]

In support of its holding the Court repeated the logic of *Hanover Shoe*. If offensive use of the pass-on theory were permitted, the same insurmountable task of determining the amount of overcharge passed-on at each level of distribution would result.[96] Furthermore, in virtually every private antitrust action *all* indirect purchasers would have to be joined as "persons needed for a just adjudication."[97] The courts would be required to apportion any damage award among all these interested parties.[98] The Court concluded that "[w]e are no more inclined than we were in *Hanover Shoe* to ignore the burdens that such an attempt would impose on the effective enforcement of the antitrust laws."[99]

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[87] 420 U.S. 720 (1977).
[88] *Id.* at 728.
[89] *Id.* at 726.
[90] *Id.* at 727.
[91] *Id.* at 728.
[92] *Id.* at 730.
[93] *Id.*
[94] *Id.* at 729.
[95] *Id.* at 735, 745-46. The Court carved out the same "cost-plus" exception as that in *Hanover Shoe* for plaintiffs who can demonstrate a pre-existing, fixed quantity, cost-plus contract at each level up to the antitrust violator. *Id.* at 735-36, 745. *See* Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 CORNELL L. REV. 309 (1978).
[96] 420 U.S. at 741-43.
[97] *Id.* at 738.
[98] *Id.* at 740-41.
[99] *Id.* at 741.

In addition to this added complexity, the Court noted, offensive use of the pass-on theory would so dilute any recovery that potential plaintiffs would lack the incentive to sue.[100] The Court concluded that the intent of Congress to create a group of private attorneys general to enforce the antitrust laws is better served by concentrating the entire recovery in the direct purchasers, and thus giving them incentive to sue, than by attempting to apportion the overcharge throughout the chain of distribution.[101] The Court recognized that its holding would deny recovery to those indirect purchasers who are in fact injured by antitrust violations and that section 4 was designed in part as a remedy for such injuries.[102] The offensive use of the pass-on theory was nevertheless disallowed, because in addition to its desire to insure the effective enforcement of the antitrust laws, the Court questioned whether the attempt to allocate damages throughout the chain of distribution actually would serve as an effective remedy or would simply deplete the overall recovery in litigating the pass-on issue.[103]

One consequence of the Supreme Court's holdings in *Brunswick* and *Illinois Brick* is that two major restrictions on the scope of section 4 now exist in addition to the antitrust standing tests developed in the circuits. Although the Supreme Court correctly stated in *Illinois Brick* that "the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4,"[104] the result is the same. A plaintiff who is unable to meet the requirements of the applicable standing test, or who is determined not to have alleged antitrust injury, or who is an indirect purchaser, will be unable to take his treble damage action to trial. The problem which the federal courts face today is how to integrate these three major restrictions on the scope of section 4, each of which has a different purpose and focus, into a coherent analysis of a plaintiff's section 4 action at the pre-trial stage. It was precisely this problem which the Court of Appeals for the Third Circuit faced in *Mid-West Paper Products Co. v. Continental Group.*[105]

II. *Mid-West Paper Co. v. Continental Group*

A. *The Majority's Rationale*

In *Mid-West*, the Court of Appeals for the Third Circuit considered traditional antitrust standing tests, the Supreme Court's requirement of antitrust injury in *Brunswick*, and the Supreme Court's holding in *Illinois Brick* in deciding whether Murray's of Baederwood had standing to sue as the purchaser from a competitor of the antitrust defendants.[106] At the beginning of its analysis, the court noted that no specific test of antitrust standing is control-

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[100] *Id.* at 745.
[101] *Id.* at 746.
[102] *Id.*
[103] *Id.* at 746-47.
[104] *Id.* at 728 n.7.
[105] 596 F.2d 573 (3d Cir. 1979).
[106] *Id.* at 582.

ling in the Third Circuit.[107] Instead, the court stated that it would utilize a "functional analysis of the factual context presented in each case 'so as to preserve the effectiveness of the treble damage remedy without overextending its availability.' "[108] The court noted that this approach was first enunciated in *Cromar Co. v. Nuclear Materials and Equipment Corp.*[109] where the "directness" of the injury and the "plaintiff's position in the area of the economy" threatened by the illegal acts—touchstones of the direct injury and target area tests—were deemed important standing considerations.[110]

The *Mid-West* court indicated that in making standing determinations it would also consider the Supreme Court's definition of antitrust injury and the Court's holding in *Illinois Brick*.[111] The Third Circuit acknowledged that antitrust standing, the definition of antitrust injury and the ban on the use of the pass-on theory were "analytically distinct," but observed that they were related in that they all involve enforcement of the antitrust laws: "Together, they constitute the judicial gloss upon the words of § 4 by which the courts have patrolled the portals to a treble damage action."[112] Finally, the court stated that it would consider the danger of duplicative or ruinous recovery, the complexity of proof that the plaintiff's claim would entail, and what result best served the purposes of the antitrust laws.[113] The dual purposes of the section 4 treble damage action, the court stated, are to provide a remedy to injured parties and to deter violators, while the overriding goal of the antitrust laws is to preserve free competition.[114]

In applying its "functional analysis" approach to Murray's claim, the court assumed *arguendo* that Murray's was injured by the price fixing conspiracy.[115] In addition, the court acknowledged that Murray's, as a purchaser of consumer bags, may have been within that area of the economy threatened by the illegal activity.[116] Thus in the court's view Murray's met the constitutional test for standing—injury in fact—and the target area test. Other factors, however, convinced the court that Murray's was not among those " 'whose protection is the fundamental purpose of the antitrust laws.' "[117]

First, the court noted that Murray's was not in a "direct or immediate relationship to the antitrust violators."[118] It was Murray's supplier, and not the defendants, who was enriched by any overcharge that Murray's may have

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[107] *Id.*

[108] *Id.* (quoting Cromar Co. v. Nuclear Materials and Equipment Corp., 543 F.2d 501, 508 (3d Cir. 1976)).

[109] 543 F.2d 501 (3d Cir. 1976).

[110] 596 F.2d at 582 (quoting Cromar Co. v. Nuclear Materials and Equipment Corp., 543 F.2d at 508).

[111] 596 F.2d at 582.

[112] *Id.*

[113] *Id.* at 583.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* (quoting *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973)).

[118] 596 F.2d at 583.

paid.[119] Furthermore, the court reasoned, the result of any attempt to measure the level of prices had there not been a conspiracy would be "highly conjectural" because of the multitude of factors involved in pricing decisions.[120] Thus it would be unlikely that Murray's could demonstrate that a lower price would have prevailed in the market absent the conspiracy and hence prove actual damage.[121] The *Mid-West* court observed that the competitors might have charged the same price complained of regardless of the conspiracy.[122]

Not only would it be difficult for Murray's to prove the amount of its damages, the court continued, but any attempt to do so would transform the trial into a complex economic proceeding of the sort that *Illinois Brick* sought to prevent.[123] Moreover, an expansion of standing to include Murray's would not result in an increased antitrust enforcement in view of the complexity involved in determining injury.[124] The *Mid-West* court asserted that *Illinois Brick* stood for the proposition that once the recovery from price fixers is concentrated in the hands of the direct purchasers, the effective and vigorous enforcement of the antitrust law is assured.[125] Because *Illinois Brick* "singled out" direct purchasers as the group whose protection is the fundamental purpose of the antitrust laws, the Mid-West court concluded, there was no reason to "expand" the standing doctrine to include a purchaser from a competitor of the defendants.[126]

A final reason for not expanding the standing doctrine to include Murray's, the court added, is that to allow recovery when there is such tenuous causality between the defendant's actions and the plaintiff's injury could subject antitrust violators to potentially ruinous liablity.[127] If Murray's were allowed to maintain its action, the defendants could be held liable for higher

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[119] *Id.*

[120] *Id.* at 584. The *Mid-West* court, quoting Justice White's opinion in *Hanover Shoe*, noted " '[a] wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different . . . , he would have chosen a different price.' " *Id. See* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. at 492-93. Those factors involved in a company's pricing policy, observed the *Mid-West* court, include a company's production efficiency, its expenses, its marketing strategy, and the elasticity of demand for its product. 596 F.2d at 584. The *Mid-West* court determined that, to some degree, a company's pricing decisions are unaffected by the prices charged by others; "the competitors of the price fixers may well have charged the same price notwithstanding the conspiracy, and purchasers such as Murray would be hard pressed to prove otherwise." *Id.*

[121] *Id.*

[122] *Id.* The court acknowledged, however, that in an oligopolistic market an umbrella can be created under which a competitor can raise its prices without fear of a decrease in the demand for its product. *Id.* at 584 n.45. On oligopolistic market structures, see generally L. SULLIVAN, ANTITRUST, §§ 115-117 (1977).

[123] 596 F.2d at 585.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* at 586.

prices in the entire industry.[128] The goal of the antitrust laws, to maintain a competitive economy, would be frustrated by allowing huge recoveries that could "cripple" a defendant and might lead to a decrease in competition.[129] The court concluded that these countervailing factors of ruinous, duplicative, or speculative damages, and the desire to avoid unduly complex litigation "were emphasized by the Surpeme Court—though in a slightly different context—in *Illinois Brick*, and we are not free to ignore the thrust of its decision."[130] Whereas the majority found *Illinois Brick* to militate against Murray's standing to sue, Judge Higginbotham in his dissent came to the opposite conclusion.

B. *The Dissent*

Judge Higginbotham, dissenting only from the denial of standing to Murray's, agreed that the balancing approach used by the majority was the best method of analysis.[131] He decided, however, that the "goals of just compensation, vigorous enforcement and free competition" would be served best by granting standing to Murray's and, as such, outweighed the countervailing factors mentioned by the majority.[132] The dissenting judge indicated that Murray's injuries would go uncompensated if standing were denied and that these damages would not be duplicative of any other recovery.[133] An action by Murray's would encourage increased private enforcement and hence deter violations of the antitrust laws.[134] Murray's action would not have the undesirable effect of diluting the recovery of other plaintiffs and thereby lessening their incentive to sue.[135] Whereas the Supreme Court in *Illinois Brick* expressed the fear that direct purchasers might be unwilling to sue their suppliers, the purchaser from a competitor of a price-fixing defendant would not have this unwillingness to sue.[136] Granting standing to plaintiffs such as Murray's, the judge concluded, would be one way to avoid the risk of non-enforcement created when direct purchasers were deemed the only parties injured within the chain of distribution.[137]

Applying one element of the target test area, Judge Higginbotham considered the foreseeability of Murray's injury.[138] The judge stated, "[i]t is

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[128] *Id.*

[129] *Id.* at 586-87.

[130] *Id.* at 587.

[131] *Id.* at 595. Judge Higginbotham also dissented from the application of the holding as regarded Murray's to Mid-West Paper Products Co. in its capacity as a purchaser from a competitor of the defendant. *Id.* He joined with the majority in its other holdings. *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* at 596.

[135] *Id.*

[136] *Id.* The Supreme Court expressed this fear in Illinois Brick Co. v. Illinois, 431 U.S. at 746.

[137] 596 F.2d at 596.

[138] *Id.* at 596-97.

foreseeable if not inevitable that, when those with a substantial share of the market fix prices, their competitors will also raise prices under the anti-competitive umbrella established by price-fixers."[139] Because of this foreseeability, the judge concluded that Murray's injury was proximately caused by the defendant and was within the target area of the violation, both factors, in his view, being relevant to standing determinations in the Third Circuit.[140] He went on to evaluate the seriousness of this violation and stated that because price fixing is "probably the clearest violation of the antitrust laws and the one most obnoxious to the underlying policy of free competition . . . ," broad liability should be imposed on price fixers.[141]

In considering the factors which weighed against granting standing, the judge stressed that the damages claimed by Murray's were not duplicative, derivative, or a "windfall," traditional reasons for denying standing.[142] The judge acknowledged the importance of the majority's concern that the damages collected by plaintiffs such as Murray's might be ruinous to price fixing defendants.[143] He asserted, however, that the ruinous nature of damages should not be a factor "unless there is a very persuasive basis from which to conclude that competition would actually be hurt by the allowance of standing."[144] Judge Higginbotham did not find such a persuasive basis in the action brought by Murray's.[145] Moreover, the judge did not find the complexity of proving damages, or the speculativeness of the amount of the damages, to be convincing factors.[146] He doubted whether the proof of damages by Murray's would in fact be significantly more complex or speculative than in suits brought by direct purchasers.[147] He also noted that the complexity of proof was important in *Illinois Brick* because in suits brought by indirect purchasers such complexity could undermine the enforcement of the antitrust laws;[148] Murray's proof of damages, in contrast, would encourage effective enforcement of those laws.[149] The concern about added complexity, the judge concluded, was therefore greatly diminished.[150]

The *Mid-West* decision merits careful consideration because the approach taken by the Third Circuit in this case represents a bold attempt to bring "analytically distinct" concerns within one analytical framework. The court attempted to integrate the critical concerns both of the lower federal courts in creating antitrust standing tests and of the Supreme Court in its *Brunswick*

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[139] *Id.* at 597.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 597-98.
[143] *Id.* at 598.
[144] *Id.* The dissenting judge reasoned that because only companies with a substantial share of the market could significantly affect the prices charged by competitors, large recoveries would only be levied against large companies or a large collection of smaller companies. *Id.*
[145] *Id.*
[146] *Id.* at 598-99.
[147] *Id.* at 599.
[148] *Id.*
[149] *Id.*
[150] *Id.*

and *Illinois Brick* decisions.[151] Judge Higginbotham, however, raised the intriguing question of whether the majority was sufficiently attuned to the policy considerations of the precedents which it found to be controlling.

III. Evaluation

A. *The Functional Analysis*

The Third Circuit's "functional analysis" is a good approach for determining antitrust standing because it allows a court to consider, distinguish, and balance three limitations on section 4 which could terminate a plaintiff's case at the pre-trial stage. Traditional antitrust standing tests, *Brunswick*, and *Illinois Brick* are best considered together because each limitation, although "analytically distinct," has the basic goal of encouraging competition. The distinction between these limitations lies in their respective rationales. Antitrust standing tests such as the direct injury test and target area test are primarily intended to prevent exposing defendants to such ruinous liability that they would be driven out of business altogether and competition thereby reduced.[152] In contrast, the requirement of proving antitrust injury established in *Brunswick* insures that a company which is acting in a pro-competitive manner not be held liable for the effects of its actions.[153] Finally, the *Illinois Brick* holding attempts to insure that the antitrust laws will be vigorously enforced and competition thereby maintained.[154] Thus *Brunswick* is concerned with the *type* of injury sustained, the traditional antitrust standing tests with the possibility of too *much* enforcement, and the *Illinois Brick* holding with the possibility of too *little* enforcement.

There is an apparent incongruity in the fact that one limitation placed on section 4 attempts to limit enforcement of the antitrust laws while another attempts to increase enforcement. When utilized properly, however, both limitations serve the goal of maintaining competition. The direct injury and target area tests were developed initially in cases where a competitor of the defendant sustained injury.[155] In such cases the competitor is the logical party to sue and has sufficient incentive to bring a section 4 action. If additional individuals with injuries derived from the competitor's injuries are allowed to sue, their recovery would not decrease the recovery of the competitor, but would increase the defendant's exposure. The lower federal courts have attempted to limit the number of these suits by labeling the injuries "indirect," lest the antitrust laws be enforced so vigorously that defendants are driven out of business.

In price fixing cases, however, where prices have been artificially raised, the situation is different. Here the direct purchaser, absent defensive use of

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[151] *Id.* at 583.

[152] See text at notes 19-22 *supra*.

[153] See text at notes 67-75 *supra*.

[154] See text at notes 76-103 *supra*.

[155] *See* Conference of Studio Unions v. Loew's Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910).

the pass-on theory, is both the logical party to sue and has sufficient incentive to bring a section 4 action. In *Illinois Brick* the Supreme Court determined that if indirect purchasers are allowed to sue using the pass-on theory offensively, defensive use of the theory must be allowed and the recovery of the direct purchaser would thereby be reduced.[156] The process of trying to allocate damages through the chain of distribution would result in such complex litigation and the possibility of such a small recovery by an individual plaintiff that no one would have the incentive to sue.[157] Thus, with price fixing violations, the possibility of too many section 4 actions would result in too little enforcement of the antitrust laws with a resulting decrease in competition. Although the *Illinois Brick* holding is superficially an application of the direct injury test in that indirectly injured individuals are not allowed to sue, its rationale of encouraging the enforcement of the antitrust laws is the opposite of the rationale of the direct injury or other traditional tests of antitrust standing which tend to reduce the enforcement of certain violations. Because of these differing rationales, *Illinois Brick* should not be considered authority for denying standing to *all* plaintiffs who do not fall into the "directly injured" category.[158]

The particular advantage of the Third Circuit's functional analysis approach is that it allows a court to break away from the arbitrary categories imposed by traditional antitrust standing tests and decide on a case by case basis what result best serves the goal of encouraging competition. The problem with the *Mid-West* decision is that the court failed to adequately distinguish those factors which it identified as important in the determination of standing or consider the policy behind each of those factors. The court placed an undue emphasis on the indirectness of Murray's injury; it did not inquire into the existence of antitrust injury; and it misread both the holding and rationale of *Illinois Brick*.

B. *Functional Analysis Applied*

The *Mid-West* court, in evaluating Murray's position in the area of the economy affected by the defendants' conspiracy and the directness of the alleged injuries, gave Murray's a passing mark on the target area test and a failing mark on the direct injury test.[159] The court emphasized that although Murray's had suffered injuries and may have been in the affected area of the economy, these injuries were indirect.[160] The defendant did not profit from any injury to Murray's and allowing Murray's to sue might expose the defendant to ruinous liability.[161] Several problems arise from this analysis and from the majority's conclusion that countervailing factors outweighed the fact that Murray's was within the target area of the violation.

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[156] 431 U.S. 720, 736-41.
[157] *Id.* at 745.
[158] *But see* Jones v. Ford Motor Co., 599 F.2d 394, 397 (10th Cir. 1979).
[159] 596 F.2d at 583.
[160] *Id.*
[161] *Id.* at 583, 586.

Under the functional analysis approach, the court should not have denied standing on the basis of indirect injury without explaining why an action by Murray's would frustrate any of the purposes of section 4 or of the antitrust laws. Judge Higginbotham pointed out in his dissent, Murray's injuries were neither duplicative nor derivative, traditional reasons for denying standing. Aside from general speculation, the *Mid-West* court did not demonstrate that permitting Murray's suit would result in ruinous liability and thus decrease competition. Both Congress and the Supreme Court have emphasized that section 4 is primarily a remedial statute.[162] Unless demonstrable reasons exist for denying standing, such as duplicative injuries or a real danger of a marked decrease in competition, an injured party should be entitled to this section 4 remedy. Thus the *Mid-West* court, in analyzing the effect of traditional antitrust standing concerns on Murray's claim, did little more than formalistically apply the direct injury test.

Although the *Mid-West* court identified the presence or absence of antitrust injury to be an important element of its functional analysis approach, nowhere in the *Mid-West* decision did the court discuss whether Murray's had in fact suffered antitrust injury. Instead, the court seemed to equate traditional antitrust standing with antitrust injury. The court quoted on several occasions an observation from a Ninth Circuit Court of Appeals decision, *In re Multidistrict Vehicle Air Pollution*,[163] that the antitrust standing doctrine had been forged to confine the availability of treble damages "to those individuals whose protection is the fundamental purpose of the antitrust laws."[164] The *Mid-West* court did not note, however, that satisfying the criteria of an antitrust standing test does not guarantee that a plaintiff has alleged sufficient antitrust injury, as defined in *Brunswick*, and that for this reason a separate inquiry into antitrust injury must be made.

In *Brunswick*, for example, the plaintiffs were direct competitors with the defendant and thus met the standards of both the direct injury and target area tests. A distinct inquiry by the Supreme Court into the nature of the defendant's alleged antitrust violation, however, revealed that the plaintiffs were injured only by increased competition and therefore had not sustained antitrust injury. A careful inquiry would have revealed that Murray's had sustained antitrust injury. As the district court in *State of Washington v. American Pipe and Construction Co.*[165] pointed out, the purpose of a price fixing conspiracy is to end competitive bidding in an entire industry.[166] Murray's injury, if proved, certainly flowed from the anticompetitive aspects of the defendants' actions and hence Murray sufficiently alleged "antitrust injury . . . injury

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[162] The discussion on the floor of the House of Representatives in connection with the passage of the Clayton Act reveals that private treble damage actions were conceived primarily as "open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered." 51 CONG. REC. 9073 (1914) (remarks of Rep. Webb). *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977).

[163] 481 F.2d 122, 125 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

[164] 596 F.2d at 581, 582, 583, 585, 587.

[165] 280 F. Supp. 802 (W.D. Wash. 1968).

[166] *Id.* at 807.

which the antitrust laws were intended to prevent."[167] Although the inquiry into antitrust injury would not have been dispositive in *Mid-West*, as other tests remained to be satisfied, the court should have addressed this issue initially because in the absence of antitrust injury any further inquiry becomes unnecessary.

The third important factor identified by the *Mid-West* court was the Supreme Court's holding in *Illinois Brick* regarding the use of the pass-on theory. The *Mid-West* court noted that although *Illinois Brick* was not directly controlling, the decision was very important in its standing analysis. The *Mid-West* court misunderstood the rationale of *Illinois Brick*, however, when it stated that "*Illinois Brick* represents in effect the proposition that when defendants have fixed prices above the competitive market price . . . the objectives of the treble damage action are fulfilled when the defendants are required to pay the direct purchasers three times the overcharge."[168] The Supreme Court did not suggest in *Illinois Brick* that the objectives of section 4 would be fulfilled by its holding, or that direct purchasers were to be the exclusive beneficiaries of section 4 actions in price-fixing cases. Rather, the Court made the pragmatic decision that the antitrust laws would be more effectively enforced if direct purchasers, to the exclusion of indirect purchasers in the chain of distribution, were allowed to collect three times the full amount of the overcharge.[169] As Judge Higginbotham pointed out, the primary concern of *Illinois Brick* was not limiting the impact of section 4, but *increasing* its impact and thus encouraging the effective enforcement of the antitrust laws.[170]

The *Mid-West* court emphasized that Murray's proof of damages would be highly conjectural. The court stated that, as it understood the *Illinois Brick* holding, it was "imperative" that the *Mid-West* action not be transformed into a complex economic proceeding.[171] Unlike the situation in *Illinois Brick*, however, Murray's action would not have required the joinder of other parties and thus would not have hampered private enforcement of the antitrust laws. In fact, as Judge Higgenbotham indicated, independent suits by plaintiffs such as Murray's would lead to increased enforcement of the antitrust laws, especially when the direct purchaser from a price-fixing conspirator is unwilling to sue and endanger the source of his supply.[172] In light of the concern expressed in *Illinois Brick* for encouraging private antitrust enforcement, it seems clear that the "thrust" of that decision did not at all preclude suits by plaintiffs such as Murray's.

Conclusion

After *Brunswick* and *Illinois Brick* have been examined in relation to Murray's claim, it is apparent that those decisions, rather than militating against Murray's standing to sue, suggest that Murray's suit should have gone to trial.

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[167] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 489 (1977).
[168] 596 F.2d at 585.
[169] 431 U.S. at 745-46.
[170] 596 F.2d at 596.
[171] *Id.* at 585.
[172] *Id.* at 596.

The only real barricade to Murray's standing was that he was in an indirect relation to the antitrust defendants. The *Mid-West* decision suggests that the jurisdiction which initially developed the direct injury test in *Loeb v. Eastman Kodak Co.*[173] is not entirely ready to abandon the relatively easy answers which that test provides.[174] The Third Circuit's "functional analysis" approach to antitrust standing does hold great promise, however, if courts which apply it are careful to inquire into the policy considerations which inform traditional antitrust standing tests, the *Brunswick* requirement of antitrust injury, and the holding in *Illinois Brick*.

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[173] 183 F. 704 (3d Cir. 1910).

[174] The court was also seriously hampered by its apparently incomplete knowledge of the facts surrounding Murray's suit. Murray's entire claim as the purchaser from a competitor of the defendants arose because one of Murray's officers suggested in a deposition that one of the companies from which Murray's purchased bags "is a paper supplier and it's possible they manufacture. I don't know." 596 F.2d at 576. Although more information would not be necessary for an application of the direct injury test, a "functional analysis of the factual context presented in each case" does require more information concerning the plaintiff's claim and the relevant market. The *Mid-West* court would have been well advised to outline its functional analysis approach and then remand the case so that Murray's could file affidavits stating his supplier's name, whether or not the supplier was in fact a bag manufacturer, what its share of the market was, whether it could offer any explanation of its pricing policies, and the amount of Murray's purchases. If there was no material dispute as to these facts the lower court would have been able to make an informed functional analysis of Murray's claim.