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ANTITRUST STANDING: LABOR IS GIVEN A NEW TEST IN *ASSOCIATED GENERAL CONTRACTORS*

INTRODUCTION

The sparse legislative guidance[1] for interpreting section 4 of the Clayton Act[2] has placed the burden of developing a framework for antitrust standing analysis on the courts. The federal courts, searching for a consistent approach to determine whether a party allegedly injured by an antitrust violation has standing to sue,[3] have historically applied four tests: direct injury,[4] target area,[5] zone of interests,[6] and matrix of factors.[7] Previously reluctant to assess the utility of these tests, the Supreme Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*[8] has finally reconciled the various approaches by formulating its own version of a balancing test.

In *Associated General Contractors*, the Court articulated six factors which controlled their balancing test. Three of the factors, intent of the violator, risk of duplicative recovery, and directness of the injury, will provide a cogent framework for future antitrust standing determinations. The other three factors, type of injury, difficulty of damage apportionment, and speculativeness of the claim, however, do not appear to be satisfactory considerations for a standing analysis.

Concluding that the alleged injury was not of a type protected by the antitrust laws, the Court in *Associated General Contractors* denied a labor union standing to sue for treble damages under section 4.[9] The consequences of the *Associated General Contractors* decision are significant for labor organizations in that their ability to bring antitrust actions against alleged antitrust law violators has been substantially diminished.

This comment provides an overview of the legal background of private antitrust standing[10] and an analysis of the *Associated General Contractors* case.

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1. The legislative history of § 4 is sparse and sheds little light on the question of standing. *See* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 811-12 (1977).

2. 15 U.S.C. § 15 (1976 & Supp. V 1981). The original version of § 4 was enacted as § 7 of the Sherman Act, ch. 647, 26 Stat. 210 (1890).

3. The term "standing" in private antitrust actions differs from the meaning of "standing" in constitutional litigation. In antitrust law, standing is used to determine whether the plaintiff is the proper party to maintain the action. A plaintiff must allege an injury in law as well as an injury in fact. Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 103 S. Ct. 897, 907 n.31. *See* Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 ANTITRUST L.J. 5, 6-7 (1966). In constitutional law, standing requires that the plaintiff allege an injury in fact. *See* Warth v. Seldin, 422 U.S. 490, 498-500 (1975).

4. *See infra* text accompanying notes 21-30.

5. *See infra* text accompanying notes 31-35.

6. *See infra* text accompanying notes 36-41.

7. *See infra* text accompanying notes 42-45.

8. 103 S. Ct. 897 (1983).

9. *See infra* text accompanying note 11.

10. The term "antitrust standing" as used in this comment refers only to *private* actions under § 4. Actions brought by the government are beyond the scope of this paper.

Particular reference is made to the positive and negative effects which this newly articulated balancing test can have on a plaintiff's ability to achieve standing in antitrust actions.

I. BACKGROUND OF ANTITRUST STANDING

The Clayton Act's private damages provision, section 4, is a broadly worded remedial statute which provides, in part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court in the United States . . . and shall recover threefold the damages by him sustained . . . .[11]

The Supreme Court has recognized that Congress imposed this multiple measure of damages in order to: 1) provide injured parties with an incentive to bring antitrust actions, 2) deter potential violators, 3) deprive violators of the fruits of their illegality, and 4) adequately compensate victims.[12]

In addition to section 4's remedial purpose, courts have also used this provision to determine whether a plaintiff has a right to maintain an antitrust action. In an effort to consistently evaluate a plaintiff's standing to sue for treble damages, the district and circuit courts have previously used four tests: direct injury, target area, zone of interests, and matrix of factors. The courts, however, have had great difficulty in applying any of these tests consistently to antitrust standing cases. In addition, until *Associated General Contractors*, the Supreme Court had not taken the opportunity to assess the merits of the various approaches set forth above.[13]

Despite its reticence in evaluating the various standing doctrines, the Supreme Court has denied standing under section 4 to a particular group of plaintiffs on two previous occasions.[14] In *Hawaii v. Standard Oil Co.*[15] the Court held that a state may not recover damages on behalf of its citizens for antitrust injuries sustained by its "general economy."[16] The Court reasoned that duplicative recovery could result if individual consumers and businesses, as well as a state on behalf of its general economy, were able to maintain actions under section 4.[17] In the second case, *Illinois Brick Co. v. Illinois*,[18] the majority held that only "direct purchasers" in the chain of manufacturing and distribution were injured parties who may maintain a

11. 15 U.S.C. § 15 (1976 & Supp. V 1981).

12. Blue Shield v. McCready, 457 U.S. 465, 472 (1982).

13. *Id.* at 476 n.12 (the Court noted that it had no occasion to "evaluate the relative utility of any of [the] possibly conflicting approaches toward the problem of remote antitrust injury.") For an overview of the different standing doctrines see generally P. AREEDA & D. TURNER, 2 ANTITRUST LAW §§ 333-42 (1978); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 247 (1977).

14. Two scholars have characterized the Supreme Court's approach in these two cases as a categorization approach, which involves drawing analogies to various categories of plaintiffs who in previous cases have been granted or denied standing. *See* Berger & Bernstein, *supra* note 1, at 820-30.

15. 405 U.S. 251 (1972).

16. *Id.* at 265.

17. *Id.* at 264.

18. 431 U.S. 720 (1977).

private antitrust action.[19] The Supreme Court's decisions in both *Hawaii* and *Illinois Brick* reflected strong judicial concern for minimizing the defendant's exposure to potential multiple liability arising from a single antitrust violation.[20]

A. *The Four Doctrines*

1. Direct Injury

In 1910, the Third Circuit's decision in *Loeb v. Eastman Kodak Co.*[21] dismissed an antitrust suit by a shareholder of an injured corporation because the plaintiff did not sustain any *direct injury*[22] from the company's antitrust violation.[23] The court concluded that any injury Loeb might have received as a shareholder was "indirect, remote, and consequential."[24]

The court's decision reflected judicial concern for the risk of duplicative recovery. If shareholders, in addition to the company itself, were allowed to recover treble damages from the antitrust violator, then duplicative damages would be assessed against the defendant for the same unlawful act. The court of appeals concluded that the statute's framers clearly did not envision the violator being assessed sextupled damages for a single anti-competitive act.[25]

The direct injury test, which was the pervasive test used until the target area approach was devised,[26] opened the door to a flurry of court-seeking methods to determine what constituted a direct or proximate injury stemming from an anti-competitive activity. Tapping the resources of contract and tort law, notions of privity[27] and intent[28] arose as a means of evaluation. The requirement of privity of contract between the violator and victim was dismissed, however, because it automatically excluded competitors from maintaining private action suits.[29] Similarly, some courts have held that a defendant's alleged intent to injure a plaintiff is insufficient to support anti-

19. *Id.* at 729.

20. In *McCready* the Supreme Court added another theme to its opinions in *Hawaii* and *Illinois Brick*: "the difficulty and consequences of apportioning damages may, in limited circumstances, be considered in determining who is entitled to prosecute an action brought under section 4." *McCready*, 457 U.S. at 475 n.11.

21. 183 F. 704 (3d Cir. 1910).

22. Although a federal judge had decided a similar case one year earlier in Ames v. American Tel. & Tel. Co., 166 F. 820 (C.C.D. Mass. 1909), the term "direct injury" did not arise until the decision in *Loeb*.

23. 183 F. at 709.

24. *Id.*

25. *See id.*

26. *See infra* text accompanying notes 31-35.

27. *See, e.g.*, Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); Klein v. Lionel Corp., 237 F.2d 13, 15 (3d Cir. 1956).

28. *See, e.g.*, Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955); International Rys. of Cent. America v. United Brands Co., 358 F. Supp. 1363, 1372 (S.D.N.Y. 1973), *aff'd on other grounds*, 532 F.2d 231 (2d Cir. 1976).

29. *E.g.*, South Carolina Council of Milk Producers v. Newton, 360 F.2d 414, 417 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); FLM Collision Parts v. Ford Motor Co., 406 F. Supp. 224, 238 (S.D.N.Y. 1975), *rev'd on other grounds*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

trust standing.[30]

2. Target Area

In 1951, the Ninth Circuit developed the target area test.[31] The target area test requires that a plaintiff demonstrate that his antitrust injury is within the economic area endangered by a breakdown of competitive conditions.[32] If the injury is found to be within the endangered area, then the plaintiff has standing to maintain an antitrust action under section 4.[33]

Due to the broadness of the "endangered area" concept, the courts have sought to define its parameters by applying the doctrine of foreseeability. The foreseeability doctrine requires that the alleged injury is within the economic area foreseeably harmed by an antitrust violation.[34] The foreseeability approach, however, has been rejected by several courts because it allows a party to sue without regard to their relationship to the defendant.[35]

3. Zone of Interests Test

In 1975, the Sixth Circuit case of *Malamud v. Sinclair Oil Corp.*[36] introduced the zone of interests analysis into the field of antitrust standing. In *Malamud*, the court allowed a gasoline retailer to sue for treble damages for alleged lost profits due to a gasoline supplier's failure to provide financial assistance for the retailer's expansion plans.[37] The court reasoned that the availability of financing and the denial thereof by Sinclair arguably came within a zone of interest—combination or conspiracies in restraint of trade

30. *E.g.*, Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 189 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); Midway Enterprises, Inc. v. Petroleum Marketing Corp., 375 F. Supp. 1339, 1342 (D. Md. 1974). For a discussion of the problems of an intent requirement, see generally, Sherman, *Antitrusting Standing: From* Loeb *to* Malamud, 51 N.Y.U. L. REV. 374, 389-91 (1976).

31. Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). The target area test has been adopted in other circuits as well. *See, e.g.*, Commerce Tankers Corp. v. National Maritime Union of America, 553 F.2d 793 (2d Cir. 1977); Donovan Construction Co. v. Florida Tel. Corp., 564 F.2d 1191 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978).

32. 193 F.2d at 54-55.

33. Compared to the direct injury rule, the target area approach shifts the emphasis from the victim-violator relationship to the victim's relationship with the area of the economy allegedly injured by the defendant. *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127-28, *cert. denied*, 414 U.S. 1045 (1973).

34. The foreseeability approach in antitrust standing ensued from language in *Karseal*, 221 F.2d at 358, where the court concluded that the plaintiff "was not only hit, but was aimed at" by the defendant. *Id.* at 365. The court in Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964), stated that the language "was intended to express the view 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. *See also* Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9th Cir. 1967).

35. In Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972), the court rejected the foreseeability notion by stating that, the "foreseeability test . . . would permit anyone to sue, regardless of how distant his interest or relationship . . . since it would be difficult to disprove the fact that remote economic repercussions in the line of distribution result from almost every antitrust violation." *Id.* at 1296 n.2.

36. 521 F.2d 1142 (6th Cir. 1975).

37. *Id.* at 1151-52.

protected by the antitrust laws.[38] The court, articulating the zone of interests test, stated that if a plaintiff's injury arguably comes within the zone of interests protected by the antitrust laws, he could maintain a treble damage action under section 4.[39]

The Sixth Circuit, in *Malamud*, criticized the direct injury and target area methods as prematurely deciding the merits of the antitrust claims "under the guise of assessing" a claimant's standing to sue.[40] Adopting the zone of interests approach from administrative law, the Sixth Circuit concluded that this test was preferable because it did not demand as much from the plaintiff at the pleading stage of the action.[41]

4. Matrix of Factors Analysis

The final method used to determine legal causation allowing a plaintiff standing under section 4 is the balancing test espoused in 1976 by the Third Circuit in *Cromar Co. v. Nuclear Materials and Equipment Corp.*[42] Reasoning that all antitrust standing analyses inherently include a weighing of factors, the Third Circuit adopted a case-by-case balancing approach to antitrust standing evaluations.[43] The court concluded that a matrix of important factors should be analyzed to determine whether the plaintiff "is one whose protection is the fundamental purpose of the antitrust laws."[44] The court listed the following as the controlling factors: the nature of the industry from which the alleged antitrust violation flows, the relationship between the plaintiff and the alleged violator, and the effect of the violation upon the injured party.[45]

II. *ASSOCIATED GENERAL CONTRACTORS*

A. *Facts*

Against this background of a judicial search for a proper standing criteria, the *Associated General Contractors* case was brought before the courts. The case involved a class action suit initiated by two labor unions, the California State Council of Carpenters,[46] and the Carpenters 46 Northern Counties

38. *Id.* at 1152.

39. *Id.* at 1152 (quoting Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)).

40. *Id.* at 1150.

41. 521 F.2d at 1149.

42. 543 F.2d 501 (3d Cir. 1976).

43. *Id.* at 505-08. Other courts as well have followed a case-by-case approach which focused on the factual matrix and the policy considerations for and against standing in the particular case. *See, e.g.,* Mid-West Paper Prod. Co. v. Continental Group, Inc., 596 F.2d 573, 581-87 (3d Cir. 1979); Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90, 99-100 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977).

44. 543 F.2d at 506.

45. *Id.*

46. The California State Council of Carpenters is the collective bargaining agent for carpenters and their affiliated local unions with respect to master collective bargaining agreements governing the California carpentry industry. California State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc., 648 F.2d 527, 529 (9th Cir. 1980).

Conference Board.[47] These two organizations (the Union) represented more than 50,000 individuals employed in carpentry-related industries throughout California.[48]

The defendant was Associated General Contractors of California, Inc. (Associated), a membership corporation comprised of more than 250 construction contractors.[49] For more than twenty-five years, the Union and Associated had entered into collective bargaining agreements governing the terms and conditions of employment in the California construction industry.[50]

The complaint alleged a continuing conspiracy by Associated and its members to weaken and destroy the collective bargaining agreements between the Union and those who employ the Union.[51] Among the acts allegedly committed in furtherance of the conspiracy were Associated's coercion of landowners to hire non-Union subcontractors.[52] The Union pleaded, inter alia, that this alleged conspiracy violated section 1 of the Sherman Act[53] by adversely affecting the trade of certain unionized firms.[54] The Union claimed to have suffered twenty-five million dollars in damages, and sought a trebling of those damages under section 4 of the Clayton Act.

The district court dismissed the complaint in its entirety for failing to state a claim for relief.[55] For the dismissal of the federal antitrust claim, the court reasoned that while collective bargaining agreements may give rise to antitrust violations, normal labor disputes between a union and an employer do not state a cause of action under section 4.[56]

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47. The Carpenters 46 County Conference Board is the collective bargaining agent for carpenters employed in the drywall industry. *Id.*

48. Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 103 S. Ct. 897, 900 (1983).

49. *Id.*

50. *Id.*

51. Paragraph 23 of the complaint alleged:

> Since on or about April 1, 1974, and continuing to date, defendants and each of them have entered into a plan, scheme, agreement and conspiracy, knowingly, willfully and maliciously, whose purpose and ends are to abrogate, destroy, undermine and weaken the collective bargaining relationship between plaintiffs and each of them and defendants and each of them, and between plaintiffs and other parties to the above described collective bargaining agreements; included within the other parties are the California Drywall Contractors Association and all "memorandum contractors" to the above described master collective bargaining agreements.

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52. Paragraph 24(4) alleged that the defendants knowingly:

> advocated, encouraged, induced, *coerced*, aided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs and each of them.

Id. at 18. (emphasis added).

53. 15 U.S.C. § 1 (1976 & Supp. V 1981).

54. The Union further claimed that, through this conspiracy, Associated breached its collective bargaining agreements with the Union, violated California's antitrust statute, and committed the torts of intentional interference with contractual relations and intentional interference with business relationships. *Associated General Contractors*, 103 S. Ct. at 900 n.1.

55. Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 404 F. Supp. 1067 (N.D. Cal. 1975).

56. *Id.* at 1069. The court observed that the allegations "appear typical of disputes a union might have with an employer," which in the normal course are resolved by grievance and arbitration or by the National Labor Relations Board.

The Ninth Circuit reversed the dismissal of the Union's federal antitrust claim.[57] The court, with one member dissenting, used the target area theory and concluded that the Union was within the area of the economy endangered by a breakdown of competitive conditions.[58] The Ninth Circuit court reasoned that the Union's injury was not only a foreseeable consequence of Associated's alleged boycott, but also an intended result.[59] Rejecting the lower court's holding that a labor dispute exemption[60] be applied to this antitrust action,[61] the court of appeals concluded that the Union had standing to sue for treble damages under section 4 of the Clayton Act.[62] Disagreeing with the Ninth Circuit's decision, Associated perfected an appeal to the United States Supreme Court.

B. *The Majority Holding*

The United States Supreme Court reversed the judgment of the Ninth Circuit in an eight to one decision.[63] The broad issue the Court addressed was whether the antitrust claim sufficiently alleged that the Union was injured by reason of a violation of the antitrust laws.[64] The Court held that the Union's complaint was insufficient as a matter of law and denied the Union standing to sue for treble damages under section 4 of the Clayton Act.[65]

The Court began its antitrust standing analysis by reasoning that section 4, although broadly worded, should be narrowly construed. Alternatively stated, every injury incurred "by reason of" an antitrust violation should not be actionable.[66] Justice Stevens, writing for the majority, proceeded by noting the vain attempts federal judges have made to provide a definitive rule which would determine whether a plaintiff is a proper party to bring an antitrust action.[67] Stating that courts should analyze antitrust standing issues through a case-by-case method, the majority settled on a balancing of specific factors.[68]

Although acknowledging the importance of Associated's alleged intent to cause harm to the Union, the majority concluded that the improper mo-

57. California State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc., 648 F.2d 527 (9th Cir. 1980). The court of appeals affirmed the dismissal of all other claims. *Id.* at 529.

58. *Id.* at 538.

59. *Id.*

60. *See infra* text accompanying notes 113-19.

61. *Id.* at 536.

62. The court stated that its holding was consistent with several recent decisions in which employee groups had been allowed to maintain private antitrust actions on the ground that they were within the target area of the defendant's antitrust activities. *Id.* at 539. *See, e.g.*, Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1176-77 (5th Cir. 1976); International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n, 483 F.2d 384, 397-98 (3d Cir. 1973), *modified*, 494 F.2d 1353 (3d Cir. 1974); Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 884-89 (S.D.N.Y. 1975).

63. *Associated General Contractors*, 103 S. Ct. at 897.

64. *Id.* at 899.

65. *Id.* at 913.

66. *Id.* at 904-08.

67. *Id.* at 907-08.

68. *Id.* The Court stated that "courts should analyze each situation in light of the factors set forth in the text." *Id.* at 908 n.33.

tive of the plaintiff does not necessarily serve as the decisive factor for evaluating a plaintiff's standing under section 4.[69] Instead, the decision focused on the nature of the Union's injury. The court sought to determine whether the plaintiff's antitrust injury fell within the purview of congressional concern.[70] Justice Stevens, citing *Blue Shield of Virginia v. McCready*,[71] coined this determination as the *Brunswick* test.[72]

The *Brunswick* test involves a two-step analysis. The first step is to determine whether the injured party is a consumer or a competitor in the market in which trade was allegedly restrained.[73] The test's second step asks whether the injury was of a "type" Congress meant to redress by the antitrust laws.[74] If the plaintiff fails to satisfy either of the *Brunswick* requirements, its private antitrust claim will most likely be dismissed due to the plaintiff's lack of standing to sue.[75]

In *Associated General Contractors*, the Court held: 1) that the Union was neither a consumer nor a competitor in the restrained market;[76] and 2) that due to both the history of labor unions as unique organizations governed by a separate body of labor law, and the long labor-related relationship between Union and Associated, the Union's injury was not of a type Congress meant to redress.[77] Accordingly, the plaintiff failed both parts of the *Brunswick* test.

The Court continued its standing analysis by addressing the directness of the Union's injury. Stating that the individual unionized subcontractors (the Union's members) would be the direct victims of the alleged coercion, and not the Union itself, the majority concluded that the Union's injury was only an indirect result of the alleged violation. An indirect victim, the Court stated, is not guaranteed a right to maintain an action under section 4.[78]

An additional factor the Court applied was whether the Union's alleged injury was tenuous and speculative. Citing *Hawaii v. Standard Oil*,[79] the majority stated that if the alleged harm is remote and obviously speculative, then it may be appropriate to place the claim beyond the reach of section

69. *Id.* at 908.

70. *Id.*

71. 457 U.S. 465, 483-84 (1982).

72. The *Brunswick* test arose from the 1977 Supreme Court decision in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). In *Brunswick*, operators of bowling centers brought an action against a manufacturer of bowling equipment alleging that the manufacturer's acquisition of bowling centers violated antitrust laws. The Court held that the plaintiffs' loss of income, which would have accrued had the failing centers acquired by the defendant gone bankrupt, was not the type of injury the Clayton Act was intended to protect. *Id.* at 487.

73. *Associated General Contractors*, 103 S. Ct. at 909.

74. *Id.* at 910.

75. Although the Court in *Associated General Contractors* set forth a balancing test, the nuances of the majority opinion indicate that because the nature of the plaintiff's injury was not one which the antitrust laws intended to protect, the plaintiff should be denied standing regardless of the additional factors to be weighed. *See id.* at 908-09.

76. *Id.* at 909.

77. *Id.* at 909-10. The Court stated that a Union "will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers. . . ." *Id.* at 910.

78. *Id.* at 910-11.

79. 405 U.S. at 262-63 n.14.

4.[80] Largely due to the Union's lack of alleging specific injury in its complaint, the majority concluded that the Union's claim was "highly speculative".[81]

Making a judicial economy argument, Justice Stevens also noted the Court's policy to deny standing to a plaintiff whose antitrust claim would likely overburden the courts when they have to ascertain damages.[82] Finding that the district court would be exposed to numerous problems of identifying and apportioning the damages between the Union and its members individually, the Court concluded that the Union's claim would overburden the judicial system.[83] Adding this factor to its analysis, the majority held that the factors against allowing the Union standing outweighed those factors in favor of a suit.[84]

C. *The Dissent*

Justice Marshall's lone dissent argued that Congress' use of the words "*any person* who [has been] injured . . . by reason of *anything* forbidden in the antitrust laws" in section 4 manifests a legislative intent to broadly enforce alleged antitrust violations.[85] Noting the broad language of section 4 coupled with the Supreme Court's prior expansive readings of the statute,[86] Justice Marshall reasoned that the Union's antitrust injury did fit comfortably within the framework for standing.[87]

Justice Marshall rejected the majority's use of the direct-indirect injury factor.[88] Analogizing antitrust claims to tort actions, Justice Marshall stated that an inquiry into proximate cause has traditionally been rejected when the defendant *intends* to inflict injury upon the plaintiff. He reasoned that because the Union was the *intended* victim of Associated's coercive efforts to induce construction contractors to refrain from using unionized carpenters, the remoteness of the Union's injury was irrelevant for standing purposes.[89]

Agreeing with the majority that the exact reduction in dues may be a difficult fact-finding procedure, Justice Marshall stated that the plaintiff need only provide a reasonable estimate of the harm.[90] He emphasized the

80. 103 S. Ct. at 911.

81. *Id.* The Court also noted that the indirect nature of the Union's claim influenced its determination that the claim was highly speculative. *Id.*

82. *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720, 737-38, 745 (1977) (massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble damage suits); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 493 (1968) (denying defendants a defense that the plaintiff passed on their injury, the Court noted that any attempt to ascertain damages with precision would involve massive evidence and complicated theories).

83. 103 S. Ct. at 911-12.

84. *Id.* at 913.

85. *Id.* at 913 (Marshall, J., dissenting) (emphasis in original).

86. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (provision is broad enough to allow standing to a consumer who pays a higher price as a result of an antitrust violation); Pfizer Inc. v. India, 434 U.S. 308 (1978) (statutory phrase "any person" is broad enough to include a foreign sovereign).

87. 103 S. Ct. at 913 (Marshall, J., dissenting).

88. *Id.* at 914.

89. *Id.* at 914-15.

90. *Id.* at 916.

Court's policy of placing the burden of any uncertainty of damages upon the wrongdoer, and not upon the victim.[91]

Justice Marshall also stressed that the risk of duplicative recovery, a critical element in prior Supreme Court cases denying a plaintiff standing, was not a factor in the Union's claim.[92] The loss of union dues, the dissent pointed out, was an injury distinct from any possible claim that other injured parties may bring.[93] Recognizing the absence of risk of duplicative recovery, Justice Marshall concluded that the Union's action should not be dismissed solely on the basis of the pleadings.[94]

III. ANALYSIS

A. *The Balancing Test—An Appropriate Standing Doctrine*

Presented with different approaches to guide antitrust standing determinations, the majority in *Associated General Contractors* wisely decided on a compromise by creating its own version of a balancing test. Recognizing the difficulties of formulating a precise test to apply to all standing evaluations, the Court correctly averted adopting either the target area, direct injury, zone of interests, or matrix of factors test for its analysis.[95] Commentators have also expressed the apparent impossibility of applying any of these various tests and obtaining consistent results.[96]

The Supreme Court's decision to weigh certain factors in private antitrust standing determinations will provide a long-lasting framework for future standing cases. This is due to the flexible nature of balancing tests in general.[97] The test proportions the weight of relevant policies as each situation warrants. This flexibility is especially desired in antitrust litigation because of its inherent complexity and the constantly changing economic environment surrounding the antitrust laws.[98]

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91. *Id.* (quoting Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265 (1946)).

92. 103 S. Ct. at 915-16.

93. Justice Marshall reasoned that the loss of individual unionized subcontractor's revenues as a result of the alleged boycott would also decrease the amount of dues paid to the Union because part of the annual payment of dues is based on a percentage of work. *Id.* at 915.

94. *Id.* at 916.

95. The balancing test espoused in *Associated General Contractors* is quite similar, however, to the matrix of factors approach used in *Cromar*. In *Associated General Contractors*, the Court relied on a list of six factors to guide their analysis: intent of the violator, nature of the antitrust injury, directness of the injury, speculativeness of the claim, difficulty of apportioning damages, and the risk of duplicative recovery. 103 S. Ct. at 913. In comparison, the Third Circuit in *Cromar* focused on a set of three factors: the nature of the industry from which the alleged antitrust violation flows, the relationship between the plaintiff and the alleged violator, and the effect of the violation upon the injured party. 543 F.2d at 506.

96. *See* Berger & Bernstein, *supra* note 1, at 835, 843; Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 27-31 (1971); Sherman, *supra* note 30, at 407 (1976) ("it is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision for every case").

97. The balancing test, which is used frequently in modern first amendment jurisprudence, has been noted as "an extremely flexible case-by-case approach." Gunther, *In Search of Judicial Quality of a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1027 (1972); *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 580-84 (1978).

98. It is widely recognized that each anti-competitive activity causes ripples of injury through an entire economy. *E.g., Billy Baxter*, 431 F.2d at 187. Accordingly, any attempt to divide damages in proportion to the amount of antitrust injury sustained by each consumer is a

A countervailing argument can be made, however, to the point that the balancing test may not provide rigid guidance to both the lower courts and the plaintiffs themselves. Exactly how the courts will apply the six factors of the balancing test to future antitrust standing cases remains to be seen. At least now, the antitrust plaintiff knows which standing test and by what criteria their standing status will be evaluated.

B. *The Choice of Factors*

Two of the six factors the Supreme Court used in its balancing test are important factors for antitrust standing determinations, namely, the risk of duplicative recovery and the intent of the violator. The majority, however, used three other factors which appear to be less useful when evaluating antitrust standing cases: the difficulty of apportioning damages, the speculative nature of the claim, and the nature of the injury.

First, the Supreme Court's concern for the risk of multiple recovery is a policy well-founded in precedent. The policy was announced as early as 1910[99] and reinforced in 1982 by the Court in *Blue Shield of Virginia v. McCready*.[100] In addition to case law support, traditional notions of equity demand that a defendant should not be penalized numerous times for the same injury.

Second, an alleged violator's intention to cause injury to a particular class of persons is also a relevant factor to consider in determining a plaintiff's standing to sue. It is well-settled that a defendant's specific intent may be important to the question whether a violation of antitrust law has been alleged.[101] Moreover, because intent is a requirement for certain antitrust violations, it is an important factor to consider in standing analyses.[102]

The Supreme Court used three other factors in their balancing test which are troublesome. First, although it is important to recognize the need

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complex procedure. *See Illinois Brick*, 431 U.S. at 731-32. ("Permitting the use of pass-on theories under section 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery. . . .") Formulating a consistent method to apportion antitrust damages is difficult not only because of the inherent complexity of the subject matter, but also because of the continued growth and volatility in the economic environment.

Since their enactment in 1890, the antitrust laws have developed in economies which are constantly changing. One sector which has served as a catalyst for this change is technology. The amount of technological advancement which has been made within the last century is outstanding. Moreover, the beginning of the computer era and its resultant increase in efficiency and productivity guarantees a continuously changing economic environment. Therefore, adopting a test such as the balancing test, which can more easily adapt to the economic realities surrounding the antitrust laws, appears to be a prudent approach.

99. The sixth factor, directness of the injury, can have both positive and negative effects on future antitrust standing determinations. A conclusion of whether this factor should be included in a standing analysis is not reached by the author. Accordingly, a discussion of this sixth factor is not included in this analysis.

100. 457 U.S. 465, 475 (1982) (consumer of psychological services was allowed to maintain an action under section 4 against a health insurer because the defendant engaged in an unlawful conspiracy and there existed "not the slightest possibility of a duplicative" recovery).

101. *See* United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948).

102. Contracts and conspiracies in restraint of trade, such as group boycotts, are often intentionally inflicted upon the victims. An alleged intent to harm a party is well-exemplified in the subject case *Associated General Contractors* where Associated's alleged anti-competitive activities were directed solely at harming the Union's trade.

to decrease administrative burdens on the courts, dismissing a plaintiff's action before trial because of the potential difficulties of damage apportionment seems to be an unfair procedure to impose on a plaintiff.[103] Moreover, Congress intended section 4 to rigorously promote the private enforcement of antitrust claims, not to impose restraints.[104] The burden of formulating mathematical equations to approximate the amount of antitrust injury sustained by the victim should rest on the legislature and not the plaintiff.[105]

Second, the Supreme Court's use of the tenuous nature of the plaintiff's claim as a factor for standing also warrants criticism. Although the Supreme Court has previously used the "speculative, abstract, or impractical" nature of a claim as a basis for denying standing,[106] a determination of this kind needs more information than the pleadings provide. As Justice Marshall correctly pointed out in his dissent, if facts exist "to support an inference of causation," the substance of a claim should be decided by trial.[107]

The final factor employed by the Court which appears unsatisfactory is the nature of the plaintiff's injury. Specifically, the Court asks whether the alleged injury falls within the type the antitrust laws sought to protect and redress.[108] To maintain an action, a plaintiff should only have to sufficiently *allege* the necessary requirements to state a claim for relief, the plaintiff should not have to *prove* the merits of his claim in the pleadings.[109] A plaintiff should be entitled to present at trial, inter alia, expert testimony explaining the economic ramifications of the defendant's alleged anti-competitive act. Without expert testimony and other fact-finding techniques, the courts

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103. *See Malamud*, 591 F.2d at 1149.

104. The initial House debates reveal that private 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." 51 CONG. REC. 9073 (1914) (remarks of Rep. Webb); *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

105. An example of the misuse of the damage apportionment factor was seen here in *Associated General Contractors*. The Court weighed this factor against the Union because the District Court would "face problems" of identifying damages if the Union was allowed to maintain the action. Judges and juries, however, regularly "face problems" of awarding damages. Therefore, except where serious difficulties of damage apportionment are present, see *Illinois Brick*, 431 U.S. at 737, and *Hanover Shoe*, 392 U.S. at 493, it would appear that an antitrust claim should not be dismissed at the pleading stage, even partly because the courts will "face problems" of damage assessment.

106. *McCready*, 457 U.S. at 475, n.11.

107. *Associated General Contractors*, 103 S. Ct. at 916 (Marshall, J., dissenting) (quoting Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969)). *See* Berger & Bernstein, *supra* note 1, at 854-55:

> To deny standing on grounds of speculative injury is to prejudge the merits of the plaintiff's claim for damages, for speculativeness of injury implies inability to prove that injury exists. But issues of adequacy of proof are ordinarily handled through motions for summary judgment or for directed verdict. An antitrust plaintiff should not be denied an opportunity to present all its evidence on causation and extent of injury before the court rules on whether its allegations are sufficient as a matter of law; indeed, such a denial is contrary to accepted notions of civil procedure.

Id.

108. This analysis is coined the *Brunswick* test. *See supra* notes 70-77 and accompanying text.

109. For a discussion of the problems created by incorporating substantive antitrust law in standing determinations, see Berger & Bernstein, *supra* note 1, at 835-40. *See Malamud*, 521 F.2d at 1149-50; *But see* Warth v. Seldin, 422 U.S. 490, 500 (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.").

are deprived of knowledge which could aid in their evaluation of whether the alleged injury is one the antitrust laws were meant to protect.

C. *Creating a Double Standard*

In *Associated General Contractors*, the Court applied its standing determination factors to the Union's claim that Associated conspired to weaken and destroy the Union. The factor which the Court apparently weighed most heavily in its decision was the nature of the alleged injury.[110] The majority concluded that the Union's injury was not of a type which the antitrust laws intended to redress.[111] This conclusion, however, is inconsistent with prior case law involving the clash between labor unions and the antitrust laws.[112]

1. Labor and the Antitrust Laws

Posed with a dilemma that labor unions, in theory and practice, were conspiracies in restraint of trade, Congress had to harmonize labor policies with policies favoring free competition.[113] Reaching a pro-labor solution, Congress explicitly exempted the collective bargaining activities of labor organizations from the antitrust laws by enacting two provisions of the Clayton Act: section 6[114] and section 20.[115] Section 6 provides that labor unions are not unlawful, and that neither the unions nor their members may be considered illegal combinations or conspiracies in restraint of trade. Section 20 prohibits courts from issuing injunctions against certain specified activities arising from labor disputes. Enacting these pro-labor statutory clauses, Congress has clearly expressed its intention to promote labor organizations within the framework of the antitrust laws.

Although these clauses exempt labor from specified anti-competitive violations, the Supreme Court has held that certain labor union activities are punishable under the antitrust laws.[116] One method used to determine

110. *Associated General Contractors*, 103 S. Ct. at 908.

111. *Id.* at 913.

112. An in-depth discussion of the relationship between labor organizations and the antitrust laws is beyond the scope of this comment. The Court's decision to deny the Union standing, however, is so clearly adverse to previous Supreme Court decisions which allow, under similar circumstances, an employer to maintain an antitrust action against a union, that a brief discussion of the *Associated General Contractors* anti-labor decision is warranted. For additional discussions on the interplay between union activities and the antitrust laws, see generally, P. AREEDA & D. TURNER, 1 ANTITRUST LAW § 229 (1978); L. SULLIVAN, *supra* note 13, at § 237 (1977); Casey & Cazzillio, *Labor-Antitrust: The Problems of* Connell *and A Remedy that Follows Naturally*, 1980 DUKE L.J. 235; Handler & Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459 (1981); Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183 (1980); Scheinholtz & Kettering, *Exemption Under the Antitrust Laws for Joint Employer Activity*, 21 DUQ. L. REV. 347 (1983).

113. *See* Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 254 (1955) ("The purpose and effect of every labor organization is to eliminate competition in the labor market."); Meltzer, *Labor Unions, Collective Bargaining and The Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965); Comment, *Antitrust Law in Colorado: Back on Track*, 60 DEN. L.J. 645, 652 (1983).

114. 15 U.S.C. § 17 (1976 & Supp. V 1981).

115. 15 U.S.C. § 20 (1976 & Supp. V 1981).

116. *See, e.g.*, Connell Constr. Co. v. Plumber & Steamfitters Local Union No. 100, 421 U.S. 616, 621-22, 625-36 (1975); United Mine Workers v. Pennington, 381 U.S. 657, 662-69 (1965); Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 806-11 (1945).

whether the labor activity is exempt from the antitrust laws has been to draw a line between those anti-competitive acts which result from a typical labor dispute[117] and those which occur by reason of a concerted action or agreement outside the normal bargaining arena.[118] If an antitrust injury emerges from a typical "wage, hour or conditions" labor dispute between a union and non-union party, the claim is exempt from the antitrust laws.[119]

2. A Weak Analysis

In *Associated General Contractors* the Court should have addressed the distinction between the two types of circumstances which surround an anticompetitive act involving union and non-union parties. If the majority had properly analyzed the Union's claim,[120] the Court would have recognized that the Union's alleged injury was not a result of a typical labor dispute. A labor-related conspiracy, especially one which involves *coercive* activities,[121] restraining the trade of a particular business is, without doubt, a *concerted action* not exempt from the antitrust laws.[122] Therefore, because 1) the Union alleged that the defendants conspired to restrain the Union's trade,[123] 2) for purposes of standing, all facts alleged are assumed to be provable,[124] and 3) that a concerted anti-competitive act by a labor employer is *not* within the antitrust exemption for labor activities, it appears that the Union did sufficiently allege an injury which falls within the protection of the antitrust laws.

CONCLUSION

Since 1910,[125] the framework used for antitrust standing decisions has branched off in many directions. Until *Associated General Contractors*, there were four different tests[126] applied to section 4 standing cases by the district and circuit courts. Recognizing that these courts were interpreting the same federal statute, it is fair to say that the field of antitrust standing was in a

117. P. AREEDA & D. TURNER, *supra* note 112, at 189 (1978) ("The antitrust laws apply as usual to agreements among employers concerning wages and working conditions *unless* intimately related to genuine collective bargaining with a union embracing the workers of the agreeing employers.") (emphasis added); L. SULLIVAN, *supra* note 13, at 727-28 (1977) ("There are subjects, such as wages, hours and working conditions, which are mandatory subjects of collective bargaining. Where a union and employers in a bargaining relationship agree on these, no antitrust violation occurs. . . .")

118. *See, e.g., Connell*, 421 U.S. at 622 (citing *United Mine Workers*, 381 U.S. at 662).

119. *See supra* note 117.

120. The Supreme Court failed in its analysis to cite any precedent which supported its conclusion that a long labor-related relationship exempted a non-union party from an antitrust violation directed at a labor union. *See Associated General Contractors*, 103 S. Ct. at 910.

121. The Union in *Associated General Contractors* alleged that it suffered injuries as a result of the defendants' coercion of landowners and other third parties. *See supra* note 52.

122. California State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc., 648 F.2d 527, 532-36 (the Union's claim did not fall within either the statutory or non-statutory antitrust exemptions afforded to certain labor activities).

123. *See supra* note 57.

124. *Associated General Contractors*, 103 S. Ct. at 902 "As the case comes to us, we must assume that the Union can prove the facts alleged in its amended complaint."

125. Loeb v. Eastman Kodak, Co., 183 F. 704 (3d Cir. 1910).

126. Direct injury, target area, zone of interests, and matrix of factors. *See supra* text accompanying notes 21-45.

state of disarray. The Supreme Court in *Associated General Contractors*, however, has begun to shape a definitive antitrust standing policy.

Confronted with four standing doctrines currently in use by the circuit courts—direct injury, target area, zone of interests, and matrix of factors—the Court correctly selected a workable approach to antitrust standing determinations by creating their own version of the balancing test. The balancing method is an extremely flexible test.[127] This flexibility is particularly desirable in antitrust litigation because of the subject matter's inherent complexity. The Court's selection of a balancing test, therefore, should provide a cogent framework for antitrust standing analysis.

The Court's balancing test hinged on six different factors. Two of the factors—the possibility of duplicative recovery and intent—are important factors to evaluate to determine whether the plaintiff is a proper party to maintain an action under section 4. Both of these factors have been well-established in case law as important considerations in weighing a plaintiff's antitrust standing status.[128]

Unfortunately, however, three of the factors which the majority articulated as controlling in the standing analysis appear to be unsatisfactory, and thus, are subject to criticism. Two of these three factors—the nature of the injury and the speculative character of the claim—delve into the *merits* of an antitrust claim. It is unwise to place obstacles of substantive law in front of a plaintiff during the pleading stage because of the possibility that these obstacles will deter potential plaintiffs from bringing actions against antitrust violations. Any reduction in the private enforcement mechanism of American antitrust law is an injury to our free enterprise system.

The Court's use of the difficulty of damage apportionment is also an unsatisfactory factor for determining standing. In antitrust cases, the federal courts inevitably face problems of apportioning the amount of antitrust injury sustained by the victim because of the economic complexities involved in anti-competitive acts. A plaintiff should not be denied standing merely because the court envisions difficulty in awarding damages.[129]

The Court's decision in *Associated General Contractors* to deny the Union standing was not only adverse to Congress's explicit attempts to harmonize labor policies with antitrust policy, but also inconsistent with precedent recognizing that certain labor-related antitrust violations are not exempt from the antitrust laws. The majority wrongly concluded that the labor union's injury was not within the type of injury the antitrust laws sought to protect. The alleged injury was a conscious, anti-competitive act by the defendant. Ample precedent can be cited supporting the proposition that, although normal labor disputes involving wage, hour and working conditions do not warrant an antitrust action, concerted anti-competitive acts outside these typical labor dispute areas are violative of the antitrust laws. Reconciling case law with the alleged facts of the claim, the finding in *Associated General Contractors*

127. *See supra* note 97.

128. *See supra* text accompanying notes 99-102.

129. *See supra* text accompanying notes 103-09.

that the Union's alleged injury was not protected by the antitrust laws, was clearly unsupported.

By dismissing the Union's antitrust claim before the Union had its day in court, the Supreme Court has possibly reduced the capacity of labor organizations to maintain treble damage actions against employers who violate the antitrust laws. Whether the *Associated General Contractors* decision will unfold a trend by the Court to dilute pro-labor policies remains to be seen. In the meantime, although *Associated General Contractors* sets forth a much needed skeleton framework for antitrust standing evaluations, the decision to deny a labor union standing to maintain a antitrust suit under section 4 of the Clayton Act will inevitably have some damaging effects on labor organizations when they next collide with the antitrust laws.

Clifford Chanler