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Retailatory Discharge: A Cause of Action under Section 4 of the Clayton Act, 17 J. Marshall L. Rev. 439 (1984)

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RETALIATORY DISCHARGE: A CAUSE OF ACTION UNDER SECTION 4 OF THE CLAYTON ACT?

Section 4 of the Clayton Act provides the statutory basis for private antitrust standing by conferring the right to sue for treble damages on "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[1] Despite the apparent literal expansiveness of this provision, however, the Supreme Court has ruled that Congress did not intend the antitrust laws to remedy all injuries that might conceivably be traced to the illegal conduct.[2]

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1. 15 U.S.C. § 15 (1982). The treble damage provision was originally enacted as § 7 of the Sherman Act, 26 Stat. 210 (1890). Without substantive change, § 7 of the Sherman Act was superseded by § 4 of the Clayton Act. Section 7 was repealed in 1955 by the Act of July 7, 1955, § 3, 69 Stat. 283 (1955).

Section 16 of the Clayton Act provides for private "injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26 (1982). Injunctive relief under this provision is not dependent upon the existence of actual injury or even threatened injury to "business of property" in the sense that is required for obtaining damages under § 4. *See* II P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPALS AND THEIR APPLICATION 135 (1978). The private entitlement to equitable relief from antitrust violations is beyond the scope of this article.

2. Earlier decisions suggest that the provision should be read literally. *See* Radiant Burners v. Peoples Gas, Light & Coke Co., 364 U.S. 656, 660 (1961) ("allegations . . . that plaintiff was damaged . . . are all the law requires"); Radovich v. National Football League, 352 U.S. 445, 454 (1957) (courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress"); Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292, 295 (2d Cir. 1958) (L. Hand, J.) (suggesting literal interpretation of § 4); Vines v. General Outdoor Advertising Co., 171 F.2d 487, 491 (2d Cir. 1948) (L. Hand, J.) (language of § 4 quoted as unambiguous and without limitation). Nevertheless, since the early 1970's the Supreme Court has asserted that Congress did not intend to provide a damage remedy for all injuries causally connected to the violation. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 n.14 (1972) (citing with apparent approval the virtually unanimous lower court policy of imposing limitations to § 4 standing).

Recently, the Court specifically articulated a policy that limits the damage remedies available for antitrust violations. In Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) (5-4 decision), the majority acknowledged two types of limitation: (1) to "particular classes of persons"; and, (2) "for redress of particular forms of injury." *Id.* at 473. The first type of limitation eliminates the possibility of double recovery that may result when both indirect and direct purchasers attempt to recover their portion of damages attributable to the same violation, see Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (indirect purchaser denied standing), or when both a state and its citizens attempt to recover damages, the state asserting its rights in a *parens patriae* capacity to recover for damages to the "general economy."

After recognizing that the substantive context of the antitrust laws derives its meaning from common law principles, the Supreme Court, in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*,[3] clarified its intention to delineate the scope of the private remedy with reference to various common law rules that circumscribe the availability of damages in common law tort and contract litigation. Consequently, the common law doctrines of proximate cause, directness of injury, certainty of damages, and privity of contract are now used to limit the scope of the section 4 remedy.[4]

In addition to these common law damage limitations, the Supreme Court recognizes that only certain types of injuries are remediable under section 4.[5] Although many types of injuries may satisfy the common law damage limitation principles, the legislative purpose of the antitrust laws is used to further limit the availability of a section 4 recovery. Suggested first in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[6] and most recently in *Blue Shield of Virginia v. McCready*,[7] only those plaintiffs suffering "antitrust injuries" have standing to bring a treble damage action against violators of the antitrust laws. Antitrust injuries are those which Congress was likely to have been concerned with in making the particular defendant's conduct unlawful.[8] Using this criteria, the focal point of the standing inquiry must be the policy used by Congress in classifying certain types of conduct as violative of the antitrust laws because it is otherwise impossible to exhaustively enumerate the various types of injuries sufficient to invoke section 4 standing. Standing will only be granted when the injury alleged derives from the *reason* the defendant's conduct is made unlawful under the antitrust laws. Mere causation between the defendant's conduct and the alleged injury is insufficient to establish section 4 stand-

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See Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) (state denied standing). The second limitation precludes recovery by individuals whose injuries are deemed "too remote" from the antitrust violation. *McCready*, 457 U.S. at 476. To overcome this second barrier, a plaintiff must establish a "physical and economic nexus between the alleged violation and the harm to the plaintiff, and, . . . [a] relationship [between] the injury alleged [and] those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4. *Id.* at 478. This article deals primarily with this second type of limitation.

3. 103 S. Ct. 897 (1983).

4. *Id.* at 905-06.

5. Blue Shield of Virginia v. McCready, 457 U.S. 465, 478-84 (1982).

6. 429 U.S. 477, 489 (1977).

7. 457 U.S. 465, 482-84 (1982).

8. *Brunswick*, 429 U.S. at 489. *See infra* notes 52-73 and accompanying text.

ing. Causation only establishes that the defendant is responsible for the plaintiff's injury; what it fails to establish, however, is whether the defendant owes a duty to the particular plaintiff and is therefore liable for the plaintiff's losses.

The concept of antitrust injury expressed in *Brunswick*, like the common law limitation concepts noted above, is correctly classified within the broad class of general antitrust standing limitations. For purposes of understanding and clarity, however, it is unfortunate the Court failed to distinguish the common law concept of legal causation from antitrust injury when it referred to the antitrust injury issue as being a question of "remoteness."[9] As a legal and factual matter, the two concepts are quite distinguishable in their purpose and application.

The concept of legal causation or proximate cause arbitrarily limits the liability of a wrongdoer to prevent the potentially endless liability that would ensue if recovery was granted to all parties arguably injured by the defendant's conduct.[10] Antitrust injury, however, like the common law concept of duty, serves to limit the wrongdoer's liability to those plaintiffs that bear some special relationship to the wrongdoer.[11] Viewing antitrust injury as analogous to the concept of duty, rather than to the concept of remoteness, greatly clarifies any section 4 standing analysis.

As discussed in greater depth below, the general underlying purpose of the antitrust laws is to preserve and promote the efficient use of resources through market competition.[12] Section 4 furthers this purpose by imposing a duty upon all economic actors in a given market to not create market inefficiencies that would injure other economic actors within that same market. The duty under the antitrust laws, however, is only owed to those economic actors within the market potentially injured by the market inefficiencies. It is those actors who are entitled to bring a section 4 action against those acting in conflict with such laws.

Ever since the concept of antitrust injury was first enunciated in *Brunswick*, the combination of a generally confused judi-

9. 11 P. AREEDA & D. TURNER, *supra* note 1, at 161-62.

10. *McCready*, 457 U.S. at 476-77.

11. *Id.* at 478-84. It is clear that the *McCready* Court intended to impose a more profound limitation on § 4 than the limitation of proximate cause which arbitrarily excludes plaintiffs whose injuries are too far removed from the defendant's wrongful act. The Court required that there exist a certain "relationship" between the injury alleged and "those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful. . . ." 457 U.S. at 478.

12. *See infra* note 76.

ciary and a stubborn plaintiff's bar has stifled the growth and understanding of this concept.[13] It is the purpose of this article to clarify this concept and illustrate its necessity to the antitrust law by applying it to a standing situation which is presently unresolved by the federal courts. The first section to follow dissects two conflicting circuit court opinions and their differing views on the reality of the antitrust injury concept as it applies to a particular set of facts. The second section examines the manner in which the concept was applied by the Supreme Court in *Blue Shield of Virginia v. McCready*[14] and the ambiguities which follow that decision. The third and final section applies the antitrust injury concept to the unresolved standing issue discussed in the first section. The article concludes that the antitrust injury concept is an essential element to the section 4 standing inquiry as expressed by the Supreme Court, and that an employee who is discharged for refusing to engage in the illegal antitrust activities of his employer does not suffer an actionable antitrust injury.

THE ANTITRUST INJURY DOCTRINE: FACT OR FICTION?

In two recent decisions, the United States Courts of Appeals for the Seventh[15] and Ninth[16] Circuits addressed the issue of whether an employee who is discharged because of his refusal to participate in the illegally anticompetitive practices of his employer has standing to sue under section 4.[17] Although the facts presented before each circuit were essentially identical, the courts reached opposite conclusions.[18]

In July of 1976, Robert C. Bichan was discharged from his position as president of Chemetron Corporation's Industrial Gas

13. *See* Susman, *Standing in Private Antitrust Cases: Where is the Supreme Court Going?*, 52 ANTITRUST L.J. 465, 465 (1983).

14. 457 U.S. 465 (1982).

15. *In re* Industrial Gas Antitrust Litig., 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983).

16. Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 1244 (1983). Judgment was vacated and the case was remanded to the Ninth Circuit for further consideration in light of Associated General Contractors of California, Inc. v. California State Council of Carpenters, 103 S. Ct. 897 (1983).

17. Petition for Writ of Certiorari at i, Bichan v. Chemetron Corp., *sub nom. In re* Industrial Gas Antitrust Litig., 681 F.2d 514 (7th Cir. 1982).

18. The federal district courts in Pennsylvania have confronted this issue but were unable to reach consistent conclusions. Shaw v. Russell Trucking Line, Inc., 542 F. Supp. 776 (W.D. Pa. 1982) (standing found citing *Ostrofe*); McNulty v. Borden, Inc., 542 F. Supp. 655 (E.D. Pa. 1982) (standing denied refusing to follow *Ostrofe*); Callahan v. Scott Paper Co., 541 F. Supp. 550 (E.D. Pa. 1982) (standing denied distinguishing *Ostrofe* on the facts).

Division.[19] Bichan alleged that Chemetron and six other companies in the business of selling and shipping industrial gas illegally conspired to fix gas prices, impose conditions of sale, and allocate customers.[20] Bichan further maintained that upon his refusal to adhere to these illegal practices, and upon his successful procurement of new customers in derogation of the conspiracy, he was fired by Chemetron and blacklisted by the industry.[21] Bichan argued that he had standing under section 4 of the Clayton Act for lost salary and bonuses[22] directly resulting from Chemetron's violation of section 1 of the Sherman Act.[23]

In *In re Industrial Gas Antitrust Litigation*,[24] the Seventh Circuit affirmed the district court's denial[25] of Bichan's standing. Central to that decision was the Supreme Court's seemingly straight forward requirement, expressed in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[26] that a plaintiff must suffer an "antitrust injury" in order to maintain standing to sue for trebel damages under section 4.[27] Writing for the unanimous majority in

19. Petition for Writ of Certiorari at 3-4, Bichan v. Chemetron *sub nom. In re* Industrial Gas Antitrust Litig., 681 F.2d 514 (7th Cir. 1982).

20. Brief of Appellant at 5, Bichan v. Chemetron *sub nom. In re* Industrial Gas Antitrust Litig., 681 F.2d 514 (7th Cir. 1982).

21. *Id.* at 6.

22. Section 4 will enable an injured party to sue for treble damages if he is "injured in his business or property." 15 U.S.C. § 15 (1976). There is some question, therefore, as to whether the loss of salary and bonuses sustained by Bichan constitutes "business or property" within the meaning of the provision. A number of courts have held that employees discharged as redundant after an allegedly unlawful merger have not been injured in their "business or property." *E.g.*, Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Mans v. Sunray DX Oil Co., 352 F. Supp. 1095 (N.D. Okla. 1971). At the same time, other courts upheld the standing of employees when the defendant violated the antitrust laws by tampering with competition in the employment market of the prospective plaintiffs, *e.g.*, Radovich v. National Football League, 352 U.S. 445 (1957); Nichols v. Spencer Intl. Press, Inc., 371 F.2d 332 (7th Cir. 1967); or by creating a reduction in competition within a product market in which the prospective plaintiffs earned sales commissions, *e.g.*, Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967); Broyer v. B.F. Goodrich Co., 415 F. Supp. 193 (E.D. Pa. 1976).

23. 15 U.S.C. § 1 (1976). Section 1 provides that "[e]very 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." *Id.*

24. 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983).

25. Bichan v. Chemetron Corp., No. 80-C-3349 (N.D. Ill. Aug. 31, 1981) (order granting motion to dismiss). The district court's memorandum opinion is provided in full at Petition for Writ of Certiorari at 13a-32a, Bichan v. Chemetron Corp. *sub nom. In re* Industrial Gas Antitrust Litig., 681 F.2d 514 (7th Cir. 1982).

26. 429 U.S. 477 (1977).

27. *Id.* at 489.

Brunswick, Justice Marshall defined "antitrust injury" as an injury that "reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."[28] Thus, according to the Seventh Circuit, Bichan did not have standing because his injuries "did not derive from the lessening of competition in the industrial gas industry."[29] Although it was contended that Bichan's discharge was essential to the implementation of the anticompetitive scheme,[30] the Seventh Circuit insisted that the antitrust laws are based solely upon congressional concern for the preservation of competition and not for the prevention of employee coercion or discharge.[31]

In the factually similar case of *Ostrofe v. H.S. Crocker Co.*,[32]

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28. *Id.*

29. *Industrial Gas*, 681 F.2d at 518.

30. Bichan claimed that he had been actively increasing competition and that had he not been terminated the anticompetitive scheme could not have continued. Brief of Appellant at 11, Bichan v. Chemetron Corp., *sub nom. In re* Industrial Gas Antitrust Litig., 681 F.2d 514 (7th Cir. 1982).

31. *Industrial Gas*, 681 F.2d at 519 (rejecting *Ostrofe*). The court also rejected Bichan's reliance on cases which involved employees injured by their employers' meddling with competitive forces in the particular plaintiff's employment market. *Id.* at 517. *E.g.*, Radovich v. National Football League, 352 U.S. 445 (1957); Nichols v. Spencer Int'l Press Inc., 371 F.2d 332 (7th Cir. 1967). The court implied that Bichan would have had standing had he alleged that the defendants' conspiracy to blacklist him from the industry was intended to restrict competitive conditions in the labor market and that this restriction of his employment alternatives was directly related to the anticompetitive constraints. *Industrial Gas*, 681 F.2d at 517 (1982). However, since "the conspiracy Bichan charge[d] was aimed at restraining competition in the industrial gas market, causing higher prices for consumers and potential loss of profits for nonconspiring producers", he alleged no antitrust injury. *Id.*

In distinguishing between the conspiracy that was intended to restrict competitive conditions in the product market and the conspiracy to blacklist Bichan from future employment in the industry, the court relied on the "target area" test adopted by the Seventh Circuit for defining the scope of § 4 standing. *Id. See* Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1169 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). The "test" is somewhat misguided insofar as it imparts too much emphasis on the violator's intent and not enough emphasis on the relationship between the nature of the plaintiff's injury to the alleged violation. *See* II P. AREEDA & D. TURNER, *supra* note 1, at 198-201; Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 835 (1977). There is a strong indication that the "target area" test did not survive the Supreme Court's most recent § 4 decision. *See* Blue Shield of Virginia v. McCready, 457 U.S. 465, 479 & n.15 (1982) ("The availability of the § 4 remedy to some person who claims its benefit is not a question of specific intent of the conspirators."); Note, *Blue Shield of Virginia v. McCready: Defining the Scope and Rationale of Consumer Standing to Sue Under Clayton Section 4*, 17 J. MAR. L. REV. 195, 200 n.30 (1983).

32. 670 F.2d 1378 (9th Cir. 1982) *vacated*, 103 S. Ct. 1244 (1983). Plaintiff, Frank J. Ostrofe, marketing director and sales manager of defendant, paper lithograph label manufacturer H.S. Crocker Co., was forced to resign and was boycotted from the industry for refusing to cooperate with defendant's illegal conspiracy to "rig bids, fix prices, and allocate markets." *Id.* at 1380.

the Ninth Circuit found that Congress' concern was not as limited as the Seventh Circuit believed. Conceding that Congress was concerned with market competition,[33] the *Ostrofe* court maintained that Congress was equally concerned with the conduct of individuals acting on behalf of conspirators. The Ninth Circuit reasoned that if Congress did not intend to remedy the injuries of individuals dismissed for refusing to participate in schemes violative of the antitrust laws, it would not have imposed criminal liability upon individuals acting in a representative capacity who do not refuse.[34] In granting standing to the discharged plaintiff, the Ninth Circuit expressed its dissatisfaction with the numerous standing "tests" devised to limit the breadth of the literal coverage of section 4.[35] Following the Third Circuit's approach, the *Ostrofe* court balanced the congressional "interest in effective enforcement of the antitrust laws against the interest in avoiding vexatious litigation and excessive liability."[36] Finding neither of these negative factors present, the court found the enforcement interest of overriding importance.[37] In response to the defendant's claims that there was no actionable antitrust injury present, the *Ostrofe* court recognized the apparent conflict between its construction of section 4 and that of the Supreme Court in *Brunswick*.[38] Nevertheless, the court was able to factually distinguish *Brunswick*.

Brunswick involved a damage suit brought by operators of bowling alleys against the Brunswick Corporation, one of the two largest manufacturers of bowling equipment in the United States.[39] Brunswick sells its equipment to bowling alley operators, mostly on a secured credit basis because an average purchase generally requires a major capital expenditure by the operators. When the bowling industry went into a sharp decline in the early 1960's, Brunswick experienced great difficulty collecting secured sales as they became due. As the percentage of delinquent accounts dramatically increased, so did the repossessions under its chattel mortgages. Brunswick's attempts to sell or lease the repossessed equipment met with only limited success. Consequently, Brunswick began to acquire and operate the defaulting bowling centers when the equipment could

33. *Id.* at 1387.

34. *Id.* at 1387-88.

35. *Id.* at 1382.

36. *Id.* at 1383. *See, e.g.*, Midwest Paper Prods. Co. v. Continental Group, 596 F.2d 573, 581-87 (3d Cir. 1979); Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90, 99 (3d Cir. 1977), *cert. denied*, 434 U.S. 823 (1973); Cromar Co. v. Nuclear Materials and Equip. Corp., 543 F.2d 501, 506 (3d Cir. 1976).

37. *Ostrofe*, 670 F.2d at 1384-85.

38. *Id.* at 1386.

39. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 479 (1977).

not be sold but a positive cash flow could be generated.[40]

Bowling center operators that were competing with the defaulting centers alleged that Brunswick's acquisitions violated § 7 of the Clayton Act.[41] The competing centers contended that "because of its size [Brunswick] had the capacity to lessen competition in the markets it had entered by driving smaller competitors out of business."[42] The plaintiffs' injury claim was based on the theory that if Brunswick had not acquired the defaulting centers, and rather allowed them to go out of business, the plaintiffs would have profited.[43]

In reversing the court of appeals' finding that the plaintiffs had standing, Justice Marshall explained that the injuries which the plaintiffs sought to redress were clearly not the type the antitrust laws were intended to prevent.[44] The plaintiffs' losses were the result of Brunswick's *preservation* of competition among the bowling center operators and not of any impairment of competition.[45] Since the alleged unlawful acquisitions deprived the plaintiffs of the benefits of increased concentration, Marshall asserted that it would be "inimical to the purpose of these laws to award damages for the type of injury claimed here."[46]

It is in light of this factual scenario that Justice Marshall wrote that "[t]he injury should reflect the anticompetitive effect . . . of the violation."[47] Relying on this statement, the Seventh Circuit held, in *Industrial Gas*, that the *only* injuries sufficient to confer section 4 standing are those which reflect the anticompetitive effect of a violation.[48] *Ostrofe* attached a quite different meaning to this phrase by emphasizing the peculiarity of the facts in *Brunswick*. The *Ostrofe* court held that if the injury stems from the effect the violation has on market competition, such injury must derive from its anticompetitive impact rather than its procompetitive impact. If, however, the claim is not

40. *Id.* at 479-80.

41. *Id.* at 480. This section prohibits corporations from acquiring the stock or assets of another or creating a monopoly in any line of commerce. 15 U.S.C. § 18 (1976).

42. *Brunswick*, 429 U.S. at 481.

43. *Id.*

44. *Id.* at 488.

45. *Id.*

46. *Id.* "The antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'" *Id.* (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis by *Brown Shoe* Court)).

47. *Brunswick*, 429 U.S. at 489.

48. "[A] mere relationship with the anticompetitive scheme is insufficient to bring the injured party within the scope of § 4; only where the injury is directly related to the scheme's anti-competitive effect does § 4 apply." *Industrial Gas*, 681 F.2d at 519.

based upon an injury caused by the antitrust violation's effect on competition, *Brunswick* is not controlling.[49] Insofar as *Ostrofe* dealt with an "injury stemming from conduct in furtherance of an antitrust violation," and not an injury stemming from the effect of a violation upon competition, the Ninth Circuit was able to distinguish *Brunswick*.[50]

The *Brunswick* court's attempt to delineate a general rule for determining standing under section 4, however, could not have been more clear. Although the facts of the two cases are distinguishable, the law is not. As stated in *Brunswick*:

> [Plaintiffs] 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 the 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.' "[51]

In view of this language the *Brunswick* court must have intended that standing be granted only when the injury alleged derives from the reason that the defendant's conduct violates the antitrust laws.

Antitrust Injury Reaffirmed: The *McCready* Case

At the same time the Seventh and Ninth Circuits were wrestling with conflicting interpretations of *Brunswick*, the Supreme Court was re-examining the concept of antitrust injury. In *Blue Shield of Virginia v. McCready*,[52] a decision representing the Supreme Court's most extensive analysis of the scope of section 4 standing, the Court reaffirmed its view that only certain forms of injuries are redressable under section 4. The *McCready* decision was clear that *Brunswick* would not be limited to its facts. Relying exclusively on the *Brunswick* test quoted above, the Court, after examining the type of injury alleged, found that the injury reflected the anticompetitive effect of the alleged violation and that it flowed from that which made the violation unlawful.

In *McCready*, a subscriber to a prepaid group health plan purchased by her employer brought an antitrust suit against the

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49. *Ostrofe*, 670 F.2d at 1387.

50. "*Brunswick* dealt with a claim based upon injury from the effect of an alleged antitrust violation upon competition. The Court was simply not concerned with a claim based upon injury stemming from conduct in furtherance of an antitrust violation." *Id.*

51. *Brunswick*, 429 U.S. at 489 (citations omitted; emphasis added).

52. 457 U.S. 465 (1982).

health insurer, Blue Shield of Virginia (Blue Shield) and the Neuropsychiatric Society of Virginia (psychiatrists). The plan explicitly provided reimbursement for costs incurred by subscribers attributable to outpatient treatment for mental and nervous disorders, including psychotherapy. In response to an alleged conspiracy between the defendants to induce subscribers to obtain psychotherapy from *psychiatrists* rather than from *psychologists*, Blue Shield provided reimbursement only for services obtained from the former group of professionals.[53]

Carol McCready, a subscriber who was treated by a clinical psychologist, submitted claims to Blue Shield for reimbursement of costs she incurred for psychotherapeutical services. Blue Shield refused to reimburse her for the services. In response to the refusal, McCready brought a treble damage action alleging that the defendants engaged in an unlawful conspiracy in violation of section 1 of the Sherman Act[54] "to exclude and boycott clinical psychologists from receiving compensation under [the Blue Shield plans]."[55] She contended that Blue Shield's failure to reimburse her had been in furtherance of the conspiracy that had caused her injuries entitling her to treble damages under section 4 of the Clayton Act.[56]

In upholding McCready's standing, the majority held that her injury was of a type that Congress sought to redress in providing a private remedy for antitrust violations.[57] The defendants, relying on *Brunswick*, claimed that because McCready did not pay artificially inflated psychiatrist's fees, she could not establish the requisite antitrust injury.[58] Justice Brennan, writing for the majority, rejected the defendants' argument finding their reading of *Brunswick* too narrow.[59] The Court ruled that an injury attributable to price increases resulting from a lessening of competitive forces in a market is not the only type of injury protected by section 4.[60] The Court held that the "Hobson's choice" imposed upon subscribers between forfeiting reimbursement by obtaining services from a psychologist and receiving reimbursement by foregoing treatment by the practitioner of their choice would result in an antitrust injury regardless of which fate was

53. *Id.* at 469-70.
54. 15 U.S.C. § 1 (1982). *See supra* note 23.
55. *McCready*, 457 U.S. at 470.
56. *Id.*
57. *Id.* at 483. *See supra* note 44.
58. *McCready*, 457 U.S. at 481.
59. *Id.* at 482.
60. *Id.* at 482-83.

preferred.[61]

Had McCready yielded to Blue Shield's coercion she would have suffered an injury indirectly attributable to the suppression of competition in the psychotherapy market.[62] In contrast, the injury she actually suffered, "in the form of an increase in the net cost of her psychologist's services," was directly attributable to suppressed competition.[63] In keeping with *Brunswick*, either type of injury would "reflect the anticompetitive effect . . . of the violation" sufficient to constitute an antitrust injury remediable under section 4.[64]

To illustrate this latter point, McCready's injury can be compared to that suffered by a consumer in a product market anticompetitively affected by a price-fixing conspiracy. When a consumer purchases a product of his choice, which is artificially inflated by a conspiratorial scheme, that consumer suffers an antitrust injury sufficient to attain section 4 standing.[65] Similarly, when McCready was forced to forego reimbursement for obtaining the services of her choice, she too suffered antitrust in-

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61. *Id.* at 483. The dissenters insisted that McCready suffered no antitrust injury. Writing for the dissent, Justice Rehnquist argued that McCready was unable to show any lessening of competition because her injury was sustained as a result of Blue Shield's *failure* to coerce her to patronize psychiatrists. *Id.* at 489 (Rehnquist, J., dissenting). As illustrated by Justice Brennan's majority opinion, the anticompetitive effects of a violation cannot be viewed so narrowly. *See infra* notes 62-66 and accompanying text.

62. *McCready*, 457 U.S. at 483. When competition is suppressed, the consumer typically suffers injury reflecting this anticompetitive effect in one of two ways. The monopolistic pricing that is made possible by the reduction of competition injures those purchasers of the monopolized product who pay its anticompetitively inflated price. Those consumers who choose not to pay the inflated price purchase substitute products to satisfy their demand. Although the substituted product is cheaper than the anticompetitively priced product originally preferred by the consumer, it costs more than the original product did before the anticompetitive effect. *See infra* notes 76 and 77 and accompanying text. McCready would have been included in this latter class of consumers had Blue Shield's coercive efforts successfully caused her to obtain the services of a psychiatrist. While the services of a psychiatrist would not cost her more monetarily (costs would be reimbursed), she would suffer intangibly in having lost the opportunity to choose among professional psychotherapists.

63. *McCready*, 457 U.S. at 483.

64. *Brunswick*, 429 U.S. at 489.

65. II P. AREEDA & D. TURNER, *supra* note 1, at 183, *see* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968). It is inherent in the language of both of these cases that the ultimate consumer of anticompetitively priced goods would sustain injuries sufficient to confer standing if he purchased directly from the defendant. For purposes of illustration it is assumed that no intermediary that may have absorbed the entire loss stands between the defendant, and the plaintiff. It is also assumed that the consumer's injury can be ascertained without undue speculation. *See McCready*, 457 U.S. at 474, 475 n.11.

jury.[66] The "price" differential, due to the anticompetitive scheme, was the cost of not being reimbursed by Blue Shield.

As *Industrial Gas* establishes, the discharged employee does not suffer this type of injury.[67] Bichan's loss of salary is not the result of the deprivation of a consumer product or service choice caused by suppressed competition; nor is it the result of an artificially inflated price of obtaining a product or service, as was the injury suffered by the plaintiffs in *McCready*. Moreover, unlike the Blue Shield subscribers, Bichan would derive no economic benefit by judicial maintenance of competition in a product or service market.

On its face, however, *McCready* can be read to support the case of standing for the wrongfully discharged employee.[68] Without a close examination of the facts, *McCready*'s majority opinion contains ample language strikingly similar to that used in the *Ostrofe* rationale. After rejecting the defendants' reliance on *Brunswick*, Justice Brennan wrote: "while an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress, . . . that is not the only form of injury remediable under § 4."[69] Subsequent courts following the *Ostrofe* view could rely on this language to support the unfounded notion that injuries other than those caused by an antitrust violation's effect on competition may be sufficient to confer section 4 standing.[70] By borrowing further, such courts could justify a grant of standing to a discharged employee by comparing his injuries to those sustained by McCready, both of which were "the consequences of [the defendants'] attempt to pursue [an anticompetitive] scheme."[71]

The *McCready* defendants, however, were clearly erroneous in arguing that the injury to a consumer due to a *price increase* is the only form of injury remediable under section 4. Justice Brennan's rejection of this contention, however, must not be misread to signify the beginning of an open-door antitrust standing policy that allows plaintiffs to obtain standing without trac-

66. *See supra* note 62.

67. *Industrial Gas*, 681 F.2d at 519.

68. *See* Petition for Writ of Certiorari at 8, Bichan v. Chemetron, *sub nom. In re* Industrial Gas Antitrust Litigation, 681 F.2d 514 (7th Cir. 1982).

69. *McCready*, 457 U.S. at 482-83.

70. *See supra* text accompanying notes 49 and 50.

71. *McCready*, 457 U.S. at 483. *See* Comment, *Right to Sue Under Section 4 of the Clayton Act—The Employee Discharged for Refusal to Participate in the Anticompetitive Practices of His Employer: Bichan v. Chemetron Corp. Examined in Light of Blue Shield v. McCready*, 1983 B.Y.U.L. REV. 173, 190 (1983) (author relies on *McCready* language to justify *Ostrofe* result).

ing their injuries to the reason the defendants' acts are alleged to be unlawful. Such a reading of *McCready* would be overly broad, particularly in light of Brennan's illustration of how the anticompetitive effects of the alleged violation inflicted injuries upon Blue Shield's subscribers regardless of whether they forfeited reimbursement or forfeited treatment by the practitioner of their choice.[72] Nevertheless, semantic analogies can be drawn by ignoring the distinction between those plaintiffs who are economic actors in the restrained market and those who are not. Critical of the logical inadequacies of such reasoning, one commentator noted that "[law] grows by analogizing new situations to old, and antitrust may move still further away from a policy of competition simply by realizing the potentialities inherent in the principles it now espouses."[73]

Distinguishing Market Injuries From Personal Injuries

In discussing the types of injuries remediable under section 4, the *McCready* court compared its inquiry to the common law concept of remoteness of injury.[74] The policy of imposing a limitation on section 4 standing, however, is based on a more profound principle than that which prevents the potential endless liability that would ensue if the statute were read literally. More significant is the limitation of standing to only those plaintiffs who have suffered injuries that result from the anticompetitive nature of the substantive violation. Thus, under the guise of remoteness, the Court in *McCready* imposed a further limitation to exclude those plaintiffs whose injuries are insufficiently related to Congress' core concerns about prohibiting the antitrust defendant's course of conduct.[75]

The primary objective of the procompetitive policy of antitrust is to enhance consumer welfare through the efficient use and allocation of scarce resources.[76] Economic inefficiencies oc-

72. *McCready*, 457 U.S. at 483-84.

73. R. Bork, The Antitrust Paradox: A Policy at War With Itself 5 (1978).

74. In limiting the availability of the § 4 remedy for redress of particular forms of injury, *McCready* requires a plaintiff to show that a physical and economic nexus exists between the alleged violation and the harm he sustains. 457 U.S. at 478. The Court imposed this restriction conceding, however, that its application is "no less elusive than that employed traditionally by courts at common law with respect to the matter of 'proximate cause.'" *Id.* at 477. The Court further admitted that the arbitrariness of this principle makes it "hardly a rigorous analytical tool." *Id.* at 477 n.13 (citing Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 351-52, 162 N.E. 99, 103 (Andrews, J., dissenting)).

75. 457 U.S. at 478.

76. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (economic efficiency articulated as the basis for determining legality of ver-

cur when the absence of competition enables sellers to reduce output so as to artificially inflate the price of the product they sell.[77] An increase in the price of the product above its cost (including a provision for reasonable profits) induces consumers to purchase substitute products that cost more to produce.[78] This results in the use of greater amounts of society's scarce resources to satisfy the same consumer demand.[79]

The policy of limiting section 4 standing to those plaintiffs who have been injured by the anticompetitive effect of a violation is essential to prevent recovery for injuries that do not emanate from inefficiencies in the marketplace.[80] Although plaintiffs alleging injuries of this type may still be able to prove that the defendant violated a particular antitrust provision, and that their injuries are causally connected to the defendant's conduct, such plaintiffs, in effect, must assert the injuries of third parties as well (*i.e.*, injuries of those parties intended to be pro-

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tical restraints); II P. AREEDA & D. TURNER, *supra* note 1, at 8-12 (economic efficiency and progressiveness goal generally "paramount" in antitrust case law); R. BORK, *supra* note 73, at 89 (consumer welfare enhancement through economic efficiency is the exclusive goal of antitrust); E. GELLHORN, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 1 (2d ed. 1981) ("It is generally agreed that the primary goal of antitrust is to increase consumer welfare through a maximization of national wealth."); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 4 (1976) (economic efficiency should be the only goal of antitrust; there is no ". . . justification for using the antitrust laws to attain goals unrelated or antithetical to efficiency . . ."); Calvani, *The Mushrooming Brunswick Defense: Injury to Competition, Not to Plaintiff*, 50 ANTITRUST L.J. 319, 338 (1981) (Antitrust is increasingly becoming "the province of consumer welfare and economic efficiency" among the courts and at the Supreme Court in particular.); Page, *Antitrust Damages and Economic Efficiency—An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 467-68 (1980). (There is a present trend at the Supreme Court towards recognizing that the predominant goal of antitrust enforcement is the enhancement of economic efficiency through competition rather than the subsidization of small inefficient businesses). *But see* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 1-10 (1977) (principles of economic efficiency are "subject to stringent theoretical conditions which are never fulfilled in the real world").

77. R. POSNER, *supra* note 76, at 9-10.

78. *Id.* at 10.

79. *Id.*

80. Two prominent authorities in the field have argued that an economic justification exists for limiting § 4 damages so that "over-deterrence" does not occur:

> If treble damage actions are to promote economic efficiency, the size of the award should approximate the social cost or inefficiency caused by the violation discounted by the likelihood that the conduct will be discovered and penalized. Firms will not engage in a practice if their expected gain in doing so is less than their expected (private) cost, including any penalties for violating the antitrust laws. If this expected cost exceeds the social cost, firms will be deterred from pursuing activities that promise greater value than any inefficiency resulting from those activities.

Page, *supra* note 76, at 472. *Accord* R. POSNER, *supra* note 76, at 221-22.

tected by Congress in enacting the antitrust laws). A grant of standing under these circumstances therefore, creates a situation in which the plaintiff's ability to maintain his action is necessarily dependent upon the existence of third party injuries. Absent these third party injuries, there would be no violation of the antitrust laws.

The employee who is discharged because of his refusal to participate in his employer's illegal antitrust activities has not personally suffered an antitrust injury. The injury that he does suffer is not the *result* of any inefficient allocation of resources created by his employer. The injury personally suffered by the employee, and the employer's conduct that created that personal injury, are separate and distinct from the injury to the market and his employer's conduct that created the market injury. At issue are two distinguishable courses of conduct. Although both courses of conduct are admittedly repugnant to public policy, only the latter type of conduct was intended to be discouraged by Congress through the enactment of the antitrust statutes.

Retaliatory discharge involves a public concern distinguishable in purpose from those concerns for market efficiency that underlie the antitrust laws. Its growing recognition as a common law tort is a product of the public's general distaste for the employer's coercive use of a superior bargaining position to either prevent employees from exercising legal rights or induce them to engage in illegal activities.[81] Employer coercion aimed at inducing employee involvement in illegal antitrust activities is only a single category among the vast set of factual situations that constitute tortious retaliatory discharge.[82] Recognition by the federal courts of a private right of action under the antitrust statutes for such employees would represent only a small step in an attempt to correct a more general public policy violation. Until Congress and the federal judiciary are prepared to recognize a private right of action for employees discharged for their

81. *See, e.g.*, Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee discharged for supplying information to local law enforcement authorities that employer might be involved in certain criminal violations); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1979) (employee discharged for asserting claim under state workman's compensation statute); *See generally* Platt, *Rethinking the Right of Employers to Terminate At-Will Employees*, 15 J. MAR. L. REV. 633 (1982).

82. Retaliatory discharge of an employee by reason of his refusal to engage in any federal statutory violation would presumably be recognized as a state tort in those states which have recognized a cause of action for wrongful or retaliatory discharge. For a fairly recent examination of the status of the law on wrongful or retaliatory discharge see Annot., 12 A.L.R. 4th 544 (1982) and Annot., 9 A.L.R. 4th 330 (1982) and accompanying pocket parts.

refusal to violate any federal statute, the abatement of wrongful employee coercion should be left to the states to tackle.

CONCLUSION

The antitrust injury concept established by the Supreme Court in *Brunswick* was just the first step in the Court's attempt to enunciate an understandable approach to the section 4 standing issue. The concept's likeness to the duty issue, and the recent application of common law principles of causation and proximate cause, is an indication of a possible trend in this area toward the establishment of a clear set of *prima facie* pleading elements for private antitrust plaintiffs. The added clarity and certainty of the section 4 standing barriers, through the development of these elements, would be a welcome reversal of the present trend in antitrust standing litigation toward increasing confusion and complexity.

It is clear from reading the Supreme Court's most recent standing analysis that the *Brunswick* test of antitrust injury must be met by all private antitrust plaintiffs and cannot be semantically sidestepped as was done by the Ninth Circuit in *Ostrofe*. The requirement logically links the section 4 analysis to the underlying purpose of the substantive antitrust provisions by limiting antitrust standing to those plaintiffs whose injuries derive from market inefficiencies created by antitrust violators. As exemplified by the *Industrial Gas/Ostrofe* debate, the requirement correctly denies standing to those plaintiffs whose injuries, although causally connected to the defendant's conduct, derive not from market inefficiencies, but rather from tortious interferences that are personal in nature and that were not originally intended to be remedied by the antitrust laws.

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