Antitrust - Malamud v. Sinclair Oil Corp. - The Sixth Circuit Applies the Data Processing "Zone of Interests" Test to Standing Under Section 4 of the Clayton Act

Cathy A. Kennedy

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Part of the Antitrust and Trade Regulation Commons

Recommended Citation
Available at: http://lawecommons.luc.edu/luclj/vol7/iss2/13

This Comment is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.
ANTITRUST—Malamud v. Sinclair Oil Corp.—The Sixth Circuit Applies the Data Processing "Zone of Interests" Test to Standing Under Section 4 of the Clayton Act.

Malamud v. Sinclair Oil Corp.\(^1\) constitutes a clean break with tradition in the determination of antitrust standing. Discarding the rationale of a long line of cases adhering to the prevalent direct injury and target area formulations, the Sixth Circuit Court of Appeals opted instead for a "zone of interests" test paralleling that articulated by the United States Supreme Court in a case involving judicial review under the Administrative Procedure Act.\(^2\) In utilizing the criteria set forth in Association of Data Processing Service Organizations, Inc. v. Camp,\(^3\) the Malamud court availed itself of the wealth of theories speaking to the notion of standing as a general concept of justiciability. Malamud marks the first application of this broad standard to the perplexing area of antitrust standing under section 4 of the Clayton Act.\(^4\)

The case arose from relatively commonplace facts. In 1965, plaintiffs Jack and Anne Malamud, the officers of the corporate plaintiff, Malco Petroleum, Inc., executed a distribution agreement by which Sinclair Refining Company agreed to supply gasoline and other petroleum products to Malco for resale over a three-year period. Sinclair also orally agreed to provide financial assistance to three real estate investment firms owned by the plaintiffs in order to assist them in acquiring new service station properties. Although Malamud presented five possible sites to Sinclair for approval in the next few months, Sinclair refused to give any financial support. Upon the expiration of the contract, the plaintiffs entered into a new contract with Texaco, Inc., and filed suit against Sinclair, alleging violations of section 1 of the Sherman Act\(^5\) and section 3 of the Clayton Act.\(^6\) The district court partially denied Sinclair's motion for summary judgment which alleged that plaintiffs lacked standing, dismissing

---

   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . .
only the individual plaintiffs and the distributing company. Because mixed questions of law and fact regarding the directness of the alleged injury to the three real estate investment firms remained, the court deemed summary judgment an inappropriate remedy.

In response to defendant’s appeal, the Sixth Circuit Court of Appeals declared invalid both the “direct injury” and “target area” tests devised by federal courts to limit suits brought under section 4 of the Clayton Act. The court found these tests “demand too much from plaintiffs at the pleading stage,” and confuse determination of a party’s standing with a “decision on the merits of his position.” The proper criteria was expressed in the two-part test announced in Association of Data Processing Service Organizations, Inc. v. Camp: an allegation of injury in fact by plaintiff, and a showing that

the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

The Malamud court held that under this test, the plaintiffs had standing for:

[the interest sought to be protected by the real estate firms is the expansion of their business by the acquisition and development of additional service station sites. . . . The antitrust laws were enacted to preserve competition and thereby to protect the individual plaintiff and the consuming public from the effects of any combinations or conspiracies in restraint of trade. . . . Under the circumstances as alleged in the plaintiffs’ complaint, this denial of financing arguably comes within the zone of interests protected by the Sherman and Clayton Acts. Regardless of what the proof at trial may show, the investment companies have made sufficient allegations to establish their standing to sue under the antitrust laws.

10. Id. at 1149. The court disputed the fact that Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), cert. denied, 372 U.S. 907 (1963), was authority for the position that the Sixth Circuit adhered to the direct injury test.

Simply put, the Court in that case was not concerned with Volunteer’s standing but with its showing of directness on the merits. It is patently clear from the opinion that Volunteer had appealed from the dismissal of its claim following a directed verdict at the conclusion of plaintiff’s proof and not from dismissal because plaintiff was an improper litigant, i.e. a litigant without standing. 308 F.2d at 393.

12. Id. at 153.
This article examines the development of the law of standing, considers the methods heretofore used by the lower federal courts to screen section 4 plaintiffs, and attempts to reconcile the Sixth Circuit's use of a zone of interests test to determine the standing of a private antitrust litigant.

**Standing and Justiciability**

*Generalizations about standing to sue are largely worthless as such.*

The amorphous concept of standing embraces both the constitutional notion of justiciability and the prudential limitations created by the Supreme Court to limit the exercise of federal jurisdiction. The constitutional requirement of a "case or controversy" was described by Chief Justice Hughes:

A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Once the existence of a viable case or controversy has been established, the exercise of judicial discretion serves to determine whether the particular plaintiff is justified in seeking "exercise of the court's remedial powers on his behalf," whether he has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues . . . ."
The determination of whether a litigant has standing to sue has been described as "a practical separation of the meritorious sheep from the capricious goats . . . ."20 In application, whether the requirement of justiciability is met has usually been determined by weighing the appropriateness of the issues for decision against the hardship of denying judicial relief.21

Justiciability also includes the concept that the judiciary refuses to violate the constitutional separation of powers doctrine by intruding into the domain of another governmental branch. As such, justiciability prohibits adjudication of political questions and rendering advisory opinions.

In examining the various aspects of standing, it is important to be cognizant of whether the particular right of action is statutory or nonstatutory. Since statutory standing is generally based on an express congressional grant, the court's determination of the justiciability of a particular claim focuses on the parameters of that legislation. However, when a right of action is not based on a statute which confers standing on a designated class of persons, justiciability requires that the court focus instead on the particular plaintiff and whether he is the proper party to bring the action.22

Standing in private antitrust litigation is something of a hybrid; as with statutory standing, there is an express grant of a right of action for a legal wrong; as with nonstatutory standing, the grant is general, unrelated to the specific violations charged. The Administrative Procedure Act (APA),23 providing judicial review of agency action resulting in legal wrong and remedies for persons aggrieved by such agency action, similarly stands somewhere between statutory and nonstatutory standing. Section 4 plaintiffs occupy a purgatory not unlike APA "persons aggrieved."24 The Malamud court chose to apply the Data Processing test, which was developed to deal with judicial review under the APA, to treble damage actions, and thereby bridged the chasm between administrative and antitrust law.

This ambiguity inherent in the concept of standing in antitrust

22. See generally Scott, Standing in the Supreme Court—A Functional Analysis, 86 HARV. L. REV. 645 (1973); see also Comment, Standing—Supreme Court Limits Taxpayer Standing—United States v. Richardson, 8 CREIGHTON L. REV. 523 (1974) [hereinafter cited as Supreme Court Limits Taxpayer Standing].
cases necessitates a brief survey of the Supreme Court decisions which have shaped the doctrine of standing.

THE DECISIONAL DEVELOPMENT OF THE LAW OF STANDING

The Supreme Court's ruling in *Frothingham v. Mellon* that a federal taxpayer is generally without standing to challenge the constitutionality of a federal statute stood for 45 years as a barrier to suits by private parties in their capacities as taxpayers. The Court held that a taxpayer's interest in treasury moneys was "shared with millions of others" and was therefore so "minute and indeterminate" and so "remote, fluctuating and uncertain" that there was insufficient interest upon which to base a claim. In order to have standing, the plaintiff must be able to show, not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

In *Flast v. Cohen*, the Court dispelled the notion that taxpayer-litigants should be necessarily denied standing for lack of a substantial personal stake in the dispute. The Court set forth new criteria for standing in taxpayer litigation:

First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.

The taxpayer was therefore required to show a violation of a specific constitutional limitation on the specific constitutional grant of the

26. *Id.* at 487.
27. *Id.* at 488.
29. *Id.* at 101. For a time, it was thought that the limitations imposed in *Frothingham* were constitutional in nature and that taxpayer suits were forever barred, since the Court had concluded by stating that the substance of the claim asked the Court to prevent officials of the government from executing an unconstitutional act of Congress, which it refused to do. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess. *Frothingham v. Mellon*, 262 U.S. 447, 488-89 (1923).
30. *Id.* at 102.
taxing and spending power. In Flast, since the plaintiffs had alleged that the challenged expenditure made under article I, section 8 violated the establishment and free exercise clauses of the first amendment, they met the double nexus test. Flast did not overrule Frothingham, but it did relax the requirements for taxpayer standing.

The significance of Hardin v. Kentucky Utilities Co. to the decisional development of nonstatutory standing has become apparent in view of the Court's later reading of the case. The Court held that a private utility had standing to enjoin the Tennessee Valley Authority from supplying power to the towns being primarily supplied by the complainant:

> when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision.

Although the case did not so state, the converse has been read into the decision—that unless a party's interests are protected by a statute, he does not have standing.

Two years later, in Association of Data Processing Service Organizations, Inc. v. Camp, the Court created a two-pronged test for standing to obtain judicial review of administrative action, discarding a large part of the former foundations of standing. Sellers of data processing services had sought to challenge a ruling of the Comptroller of the Currency allowing national banks to provide data processing services to other banks and bank customers. The Court rejected the contention that only "legal interests"—e.g. those arising from contract, property, or statutory rights—are protectible. Such a determination relates to the merits of the case, quite apart from the issue of standing. The new test for standing was whether the plaintiff alleged that the challenged action had caused him "injury in fact, economic or otherwise," and whether his allegations established that the interest he sought to protect arguably fell

31. Id. at 102-03.
34. Id. at 6.
38. Id. at 152.
within the zone of interests protected by the relevant statute.\textsuperscript{39}  

The Court applied this new "zone of interests" test in \textit{Barlow v. Collins},\textsuperscript{40} a companion case to \textit{Data Processing}, in order to grant standing to tenant farmers seeking to challenge a regulation issued by the Secretary of Agriculture permitting assignments of payments to secure rent for farms. The regulation in effect released the tenant farmers from previously imposed restrictions. However, the question of whether the particular interest asserted was sufficient to support the plaintiffs' standing was never reached. Instead, the Court held that:

First, there is no doubt that in the context of this litigation the tenant farmers . . . have the personal stake and interest that impart the concrete adverseness required by Article III.

Second, the tenant farmers are clearly within the zone of interests protected by the Act.\textsuperscript{41}

Was it the particular interest a plaintiff was asserting, or the interests of those of a plaintiff's class in general that was to be within the zone of interests?\textsuperscript{42} Justices Brennan and White, concurring in the result but dissenting from the Court's disposition of the standing issue, stated that injury in fact was properly the only test required to determine standing. Anything beyond that was "wholly unnecessary and inappropriate"\textsuperscript{43} and "a useless and unnecessary exercise . . . which may well deny justice."\textsuperscript{44}

Later cases reinforced the implication that the general interests of the class to which the complainants belong determines whether standing exists in a particular instance.\textsuperscript{45} In \textit{Investment Company Institute v. Camp}\textsuperscript{46} the Court recognized that Congress had evidenced concern about reduction of competition by regulating competition in the investment banking industry. Without resorting to the language of \textit{Data Processing}, the majority granted plaintiffs

\textsuperscript{39} \textit{Id.} at 153.
\textsuperscript{40} 397 U.S. 159 (1970).
\textsuperscript{41} \textit{Id.} at 164 (emphasis added).
\textsuperscript{42} Justices Brennan and White, concurring and dissenting, discuss further the confusion bred by the Court's "zone of interests" test, 397 U.S. 159, 176-77 (1970).
\textsuperscript{43} \textit{Id.} at 169.
\textsuperscript{44} \textit{Id.} at 170.
\textsuperscript{45} The cases discussed are only those decisions which have dealt with the zone of interests aspect of the test for standing. For the decisions which have focused on the injury in fact aspect, see \textit{Sierra Club v. Morton}, 405 U.S. 727 (1972); \textit{Moose Lodge No. 107 v. Irvis}, 407 U.S. 163 (1972); \textit{United States v. Students Challenging Regulatory Agency Procedures}, 412 U.S. 669 (1973).
\textsuperscript{46} 401 U.S. 617 (1971).
standing, since the regulated competition was the basis of the complaint.\textsuperscript{47}

In \textit{Trafficante v. Metropolitan Life Insurance Co.},\textsuperscript{48} the Court sustained the standing of two tenants to maintain an action under section 810(a) of the Civil Rights Act of 1968. The plaintiffs, residents of an apartment complex whose landlord discriminated against nonwhites, alleged that they thereby lost both the social benefits of living in an integrated community and the concomitant business and professional advantages that would have been gained; and that they were otherwise stigmatized as residents of a white ghetto.\textsuperscript{49}

After analyzing the purpose of the Civil Rights Act and the "broad and inclusive" statutory language, the Court noted that the dispute was presented in an adversary context so as to avoid any article III problems.\textsuperscript{50} The Court, giving life to section 810(a), held that the plaintiffs were "persons aggrieved" and had standing to sue.\textsuperscript{51}

\textit{Roe v. Wade}\textsuperscript{52} was an action for declaratory and injunctive relief from prosecution under the Texas criminal abortion statutes. The Court upheld the standing of the pregnant unmarried plaintiff,\textsuperscript{53} citing the existence of

\begin{quote}
the "logical nexus between the status asserted and the claim sought to be adjudicated," Flast v. Cohen, 392 U.S., at 102, and the necessary degree of contentiousness. . . .\textsuperscript{54}
\end{quote}

The Court seemed to signal a retreat from the zone of interests test to the less rigid nexus test originated in \textit{Flast} to evaluate taxpayer standing.

In 1974, in \textit{United States v. Richardson},\textsuperscript{55} the Court clarified its position. Richardson alleged that the provisions of the Central Intelligence Agency Act concerning public reporting of expenditures were

\begin{footnotes}
\item[47] \textit{Id.} at 620-21.
\item[48] 409 U.S. 205 (1972).
\item[49] \textit{Id.} at 208.
\item[50] \textit{Id.} at 209, 211.
\item[51] \textit{Id.} at 212.
\item[52] 410 U.S. 113 (1973).
\item[53] A childless married couple did not have standing because their alleged injury was based on future possibilities. \textit{Id.} at 128. A third plaintiff, a licensed physician with two abortion prosecutions pending against him, was dismissed, since he could assert any federally protected right in his defense to the criminal charge. \textit{Id.} at 125-27.
\item[54] \textit{Id.} at 124. The Court also considered the fact that the case might be moot because Roe was no longer pregnant. Noting the short human gestation period, the Court stated that pregnancy was "a classic justification for a conclusion of nonmootness." \textit{Id.} at 125.
\item[55] 418 U.S. 166 (1974).
\end{footnotes}
in violation of article I, section 9, clause 7 of the Constitution.56 In a 5-4 decision, the Court held that Richardson lacked standing to sue either as a citizen or as a taxpayer. Chief Justice Burger, writing for the majority, based this decision on the plaintiff's failure to demonstrate more than a generalized grievance suffered in common with all other citizens. Further, his failure to establish a sufficient nexus between his status as a taxpayer and the alleged failure of Congress to demand a more detailed report from the CIA militated against a finding that Richardson had standing.57

**Recent Developments**

In its latest statement on standing the Court rejected application of any strict formula, be it a nexus or zone of interests approach. *Warth v. Seldin*58 was a suit brought by various organizations and residents in the Rochester, New York metropolitan area against members of the zoning, planning, and town boards of Penfield, a suburb of Rochester. The complaint alleged that the town's zoning ordinance effectively excluded minority groups by practically eliminating low and moderate income housing "in furtherance of a policy of exclusionary zoning."59 This policy allegedly violated petitioners' first, ninth and fourteenth amendment rights, as well as 42 U.S.C. §§ 1981, 1982 and 1983.60

The plaintiffs included two nonprofit organizations concerned with housing shortages and other similar problems, an association of residential construction firms, several individual Rochester taxpayers, and several minority residents. They alleged, in addition to violation of their constitutional rights, that they were variously pre-

---

56. U.S. Const. art. I, § 9, cl. 7:
   No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

57. United States v. Richardson, 418 U.S. 166, 172, 175 (1974). Justice Powell stated in his concurring opinion that, although taxpayer standing existed in establishment clause cases, *i.e.* in a *Flast* fact situation, the *Flast* double nexus test should be abandoned. *Id.* at 180. Justices Stewart and Marshall, in dissent, thought the taxpayer approach wrong, since an affirmative duty to report expenditures existed in this case. *Id.* at 202-03. Justice Brennan would have upheld standing on plaintiff's good faith allegations of injury in fact and nothing more, *id.* at 235-36; while Justice Douglas would have found standing based on the plaintiff's status as a taxpayer and especially as a citizen. *Id.* at 200-02. For a full discussion of the Court's decision, *see Supreme Court Limits Taxpayer Standing, supra* note 22.

58. 95 S.Ct. 2197 (1975).

59. *Id.* at 2203. Plaintiffs alleged that the town's zoning ordinance lot size, set back and density requirements, land allocation, delaying tactics on proposals, denial of proposals and refusals to grant necessary variances and permits made low and moderate income housing economically unfeasible and "virtually impossible." *Id.*

60. *Id.* at 2202. The facts are taken from the opinion at 2202-04.
vented from moving into or living in Penfield, or from building low and moderate income housing in that suburb. The Rochester taxpayers claimed that Penfield’s exclusionary zoning policies forced the city of Rochester to provide a greater number of such housing units, resulting in a greater tax burden on its residents.

Rather than mechanically applying a Flast or Data Processing test, the Court emphasized the dual nature of the standing issue: the constitutional and the prudential limitations. The threshold question of whether a plaintiff satisfies the article III “case or controversy” requirement goes to the justiciability or constitutional dimension of standing:

As an aspect of justiciability, the standing question is whether the plaintiff has “alleged such a personal stake in the outcome of the controversy” to warrant his invocation of federal court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.61

Once the case or controversy requirement is met, the Court still has the power to decline to hear a case based on certain prudential limitations. A refusal to hear a claim based solely on a generalized grievance suffered in common with a large class of citizens62 or one based on legal rights and interests of third parties is warranted.63

The Court stated that although “standing in no way depends on the merits,” the source of the claim often is of great significance with respect to the prudential rules of standing:

Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.64

The majority acknowledged that persons may have standing to seek relief based on a general public interest or on legal rights of third parties if Congress has provided for a right of action.65 Nevertheless, the Court held that none of the petitioners had alleged facts sufficient to demonstrate that it was “a proper party to invoke judicial resolution of the dispute and the exercise of the court’s remedial powers” and so dismissal for lack of standing was affirmed.66

61. Id. at 2205 (citation omitted).
63. E.g., Tileston v. Ullman, 318 U.S. 44 (1943).
64. Warth v. Seldin, 95 S.Ct. 2197, 2206 (1975).
65. Id.
66. Id. at 2215.
Mr. Justice Douglas strongly dissented from the Court's manipulation of standing principles to deny these plaintiffs access to a forum in which to litigate their grievances. He indicated that the Court's antagonism toward the substance of the claim, "the very sensitive matters, some of which involve race, some class distinctions based on wealth," was the basis for the decision.67

Standing has become a barrier to access to the federal courts, just as "the political question" was in earlier decades. . . . [C]ases such as this one reflect festering sores in our society; and the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed. I would lower the technical barriers and let the courts serve that ancient need.68

**ANTITRUST STANDING**

*We must confess at the outset that we find antitrust standing cases more than a little confusing and certainly beyond our powers of reconciliation.*69

Standing problems in private antitrust litigation stem from the language of section 4 of the Clayton Act.70 The courts have seized the phrase "by reason of" to require the private plaintiff to allege a causal relationship between the purported violation and the injury. Courts draw a line, dismissing those plaintiffs whose relationship with the alleged violator (the direct injury approach) or with the affected area of the economy (the target area approach) is "too tenuous to support recovery."71

The rationale behind the foregoing demarcation is simple, fair and reasonable. It respects the purpose of § 4 of the Clayton Act. . . . [I]f the flood-gates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of the treble recovery . . . would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress.72

However, congressional concern regarding enlargement of the cali-

---

67. *Id.*
68. *Id.* The theme was repeated in the dissent of Justice Brennan, joined by Justices White and Marshall. *Id.* at 2216.
ber of the weapon which it had created is not readily apparent from a survey of the history of this treble damage remedy.

Section 4 of the Clayton Act: Historical Development

In the latter part of the 19th century, the United States was rapidly changing from a largely rural, agrarian economy into an urbanized, industrial one. Unprecedented concentrations of power accompanied the transformation, increasingly arousing public opinion. Public hatred of monopolies ran deep, and nothing less than a law capable of destroying the trusts was demanded. In 1890, Congress responded by enacting the Sherman Act. Congress encouraged private enforcement of the antitrust laws by enacting section 4 of the Clayton Act, thereby providing a treble damage remedy to individual plaintiffs:

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

The legislative history of the statute supplies no indication that Congress intended to limit the class of persons to whom its relief would be available. The private antitrust action was intended not only to serve to compensate victims of antitrust violations, but also to deter business behavior in violation of the Sherman or Clayton Acts and thereby vindicate the important public interest in free

---

75. Section 4 superseded section 7 of the Sherman Act, 26 Stat. 210 (1890), which stated in relevant part:

Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefore . . . and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

It is generally agreed that the purpose of the treble damage remedy remained unchanged. 51 Cong. Rec. 9164 (1914); H.R. Rep. No. 627, 63d Cong., 2d Sess. 14 (1914).
competition. It was believed that private antitrust litigation would be "one of the surest weapons" in the scheme for enforcement of the antitrust laws. The treble damage remedy would stimulate "one . . . private interest to combat transgressions by another." Private litigants would serve as private attorneys general and thereby supply an "ancillary force of private investigators to supplement the Department of Justice" in patrolling the antitrust domain.

In effect it enrolls an additional number of policemen who may be expected to protect their interests assiduously and vigorously demand relief when they have been injured. This consideration is of particular consequence as respects the vast number of less serious violations which occur and which may be beyond the effective reach of government enforcement agencies.

The Supreme Court has commented on the scope of section 4, noting that the remedy is not restricted to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

The Court, however, has only indirectly indicated its position on the threshold requirements for recovery under section 4: a "person . . . injured . . . by reason of . . ." an antitrust violation. Citing


congressional enactments protecting “victims of the forbidden prac-
tices as well as the public” and other policies favoring private
antitrust litigants, the Court stated:

In the face of such a policy this Court should not add requirements
to burden the private litigant beyond what is specifically set forth
by Congress in those laws.  

In Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., the
Court held there was no need to allege injury to the general public
in addition to injury to the particular plaintiff:

Congress having thus prescribed the criteria of the prohibitions,
the courts may not expand them. Therefore, to state a claim upon
which relief can be granted under that section, allegations ade-
quate to show a violation and, in a private treble damage action,
that plaintiff was damaged thereby are all the law requires.

But beyond such generalized statements, the Supreme Court has
never directly dealt with this problem of standing to sue under
section 4 of the Clayton Act.

Although neither the equivocal legislative history nor the incon-
clusive Supreme Court decisions suggest limitations on the availa-
bility of treble damage recoveries, the lower federal courts, in inter-
preting the language of the statute have construed “by reason of”
to create a standing requirement:

Standing to sue was not given by Congress to any and every citizen
who, motivated by public spirit or possibly some baser reason,
would set himself up as a watchdog of business behavior. Congress
properly bestowed the right to sue only on such persons as might
be injured in their business or property by reason of anything for-
bidden in the antitrust laws.  

Courts have always had the power to define the scope and effect
of an injury by means of such notions as proximate cause, foreseea-
bility, duty and the sine qua non principles of tort law. They have
further justified denying a plaintiff standing, limiting liability
traceable to a defendant for policy reasons. The Supreme Court

89. Id.
91. Id. at 660.
92. Pollock, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32
93. SCM Corp. v. Radio Corp. of America, 407 F.2d 166, 171 (2d Cir.), cert. denied, 395
94. Antitrust law has its roots in tort law. See generally Pollock, The “Injury” and “Causa-
95. Among the reasons articulated by the courts are: the drastic nature of the treble
recognized the existence of such judicial construction of the causation language of section 4 in *Hawaii v. Standard Oil Company of California*, noting that:

The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.

This use of a causation requirement to screen section 4 plaintiffs has evolved into two main camps: that which adheres to a direct injury approach, and that which follows a target area approach.

*The Direct Injury Approach*

Early cases involving treble damage actions adopted a restrictive view of which plaintiffs were entitled to maintain suit. *Loeb v. Eastman Kodak Co.*, involved a shareholder and creditor of a corporation allegedly driven into bankruptcy by the defendant’s antitrust violations. The court, finding the plaintiff failed to state a cause of action, noted the traditional rule was that the sole redress for injuries such as those alleged by the plaintiff was an action by the corporate entity. The Sherman Act did not authorize hundreds or thousands of stockholders individually to maintain suits. Additionally, the court held that the plaintiff did not have a right of action since he did not receive any direct injury from the alleged illegal acts of the defendant. No conspiracy or combination against him as a stockholder or creditor is alleged. The injury complained of was directed at the corporation, and not the individual stockholder. Hence, any injury which he, as a stockholder, received was indirect, remote, and consequential.

Following the lead of *Loeb*, other courts have held that plaintiffs asserting secondary or “derivative” losses lacked standing to sue. These progeny often have categorically denied recovery to those...
separated from the alleged antitrust violator by an intermediary who was the object of the violation. 101

Judge Wyzanski, in Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 102 articulated the rationale underlying the direct injury test.

It is well settled that despite its broad language § 4 of the Clayton Act does not give a private cause of action to a person whose losses result only from an interruption or diminution of profitable relationships with the party directly affected by the alleged violations of the anti-trust laws. . . . [If these decisions] had gone the other way, there would as a result of the treble damage provisions of the anti-trust acts have been given in each case . . . what has sometimes been called a "windfall". In effect, businessmen would be subjected to liabilities of indefinable scope for conduct already subject to drastic private remedies. 103

The crux of the direct injury test is an analysis of the relationship between the plaintiff and the allegedly injured party: the "victim" must have some direct business interest in the antitrust violation or must be the


Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1978), cert. denied, 401 U.S. 923 (1971); Nationwide Auto Appraiser Serv. v. Association of Cas. & Sur. Co., 382 F.2d 925 (10th Cir. 1967) (franchisors);

SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), cert. denied, 395 U.S. 943, reh. denied, 396 U.S. 869 (1969); Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955), cert. denied, 350 U.S. 936 (1956) (licensors or patent owners);


103. Id. at 909.

one against whom the conspiracy is directed.\textsuperscript{106} If the necessary direct connection between the antitrust violation and the injury is demonstrated, the plaintiff will be permitted to maintain his suit. However, the use of such terms as “indirect,” “remote,” “incidental” or “consequential” has camouflaged the direct injury test by masking the real factors considered in denying standing.\textsuperscript{108} This circumlocution has led to inconsistent results.\textsuperscript{107}

\textit{The Target Area Approach}

It became apparent that strict adherence to the direct injury test would produce undesirable results, inconsistent with the purpose of the treble damage action; the approach was not flexible enough to allow courts to grant standing to those deserving recovery.\textsuperscript{108} As a result, courts developed the concept of a “target area.” This construction of “by reason of” focuses on the relationship between the injury and the purpose and effect of the alleged violation.

The target area approach also had its origin in the language of \textit{Loeb v. Eastman Kodak Co.}\textsuperscript{109} The Loeb rationale that no conspiracy or combination was directed against the plaintiff\textsuperscript{110} was expanded by the court in \textit{Conference of Studio Unions v. Loew’s, Inc.}.'\textsuperscript{111}

A conspiracy may have many purposes and objects; the conspirators may perform an almost infinite variety of acts in furtherance of the conspiracy; but, in order to state a cause of action under the anti-trust laws a plaintiff must show . . . that he is within that \textit{area of the economy which is endangered by a breakdown of competitive conditions} in a particular industry. Otherwise he is not injured “by reason of” anything forbidden in the anti-trust laws.\textsuperscript{112}

This relaxation of the standing requirements seemed to be short-

\textsuperscript{105} SCM Corp. v. Radio Corp. of America, 407 F.2d 166, 170 (2d Cir.), cert. denied, 395 U.S. 943 (1969).
\textsuperscript{106} See note 95 supra.
\textsuperscript{107} Compare, e.g., Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa. 1953), aff’d, 211 F.2d 405 (3d Cir. 1954), cert. denied, 348 U.S. 828 (1954), and Melrose Realty Co. v. Loew’s, Inc., 234 F.2d 518 (3d Cir.), cert. denied, 332 U.S. 890 (1956)(holding injury to landlord of motion picture theatre entitled to rental based on a percentage of receipts too remote to permit suit for an alleged conspiracy affecting the movies run at his theatre) with Congress Building Corp. v. Loew’s, Inc., 246 F.2d 587 (7th Cir. 1957) (reaching opposite results on almost identical facts).
\textsuperscript{109} 183 F. 704 (1910).
\textsuperscript{110} Id. at 709.
\textsuperscript{111} 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952).
\textsuperscript{112} Id. at 54-55 (emphasis added).
lived when the Ninth Circuit apparently reverted to direct injury jargon. Karseal v. Richfield Oil Corp.,\textsuperscript{113} involved exclusive dealing contracts between Richfield and its service station operators which prohibited Karseal from distributing its car wax to those dealers. The court, reversing a dismissal for failure to state a cause of action, phrased the issue:

[W]as Karseal within the "target area" of Richfield's illegal practices . . . Assuming Karseal was "hit" by the effect of the Richfield antitrust violations, was Karseal "aimed at" with enough precision to entitle it to maintain a treble damage suit under the Clayton Act?\textsuperscript{114}

Although couching its decision in target area terminology, the use of "aimed at" and "hit" seemed to emphasize the victim, rather than the area of the economy, as the target of the violation. The Ninth Circuit clarified its position in Twentieth Century Fox Film Corp. v. Goldwyn:\textsuperscript{115}

But in using the words "aimed at" this court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather, it was intended to express the view that the plaintiff must show that, whether or not then known to the conspirators, plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy.\textsuperscript{116}

By adding the concept of foreseeability, the Ninth Circuit expanded the class of plaintiffs entitled to bring a section 4 action. Standing is determined without regard to any direct contractual relationship between the parties.

However, adoption of a more flexible test has not put an end to the inconsistencies evident under the direct injury test,\textsuperscript{117} nor has it provided any guidance for determining which segment of the economy the court will decide was the target of the combination or conspiracy.\textsuperscript{118} The courts often fall into the semantical trap of alter-

\textsuperscript{113} 221 F.2d 358 (9th Cir. 1955).
\textsuperscript{115} Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir. 1964).
\textsuperscript{116} Id. at 220.
nately referring to a plaintiff as one within the "target area" and one who is the "target" of the alleged illegal activity, i.e. the one against whom it is directed. Whether this error is conceptual or syntactical only adds to the confusion.

Variations On A Theme: New Interpretations Of Old Tests

The development of distinct approaches to antitrust standing has led to conflicting results and division among the circuits. Consequently, the courts have reworked the approaches, often merely fashioning new wrinkles in old analyses. In *Billy Baxter, Inc. v. Coca-Cola Co.*, the plaintiff was a franchisor who sold beverage extracts and recipes, in addition to advertising and promotional services, to carbonated beverage bottlers. The complaint alleged that the defendants had violated the antitrust laws by excluding plaintiff from normal channels of distribution. Noting the policy reasons behind limiting access to the courts by potential antitrust plaintiffs, the court referred to the direct injury and target area tests:

These terms do not provide talismanic guides to decision, but they do indicate the need to examine the form of violation alleged and the nature of its effect on a plaintiff's own business activities.

The court reasoned that the target area of the defendant's alleged violations was the marketing of bottled beverages, and that since plaintiff was not in the business of marketing, manufacturing or distributing bottled beverages, but merely licensed the information, he was outside the economic target area of the offense. The court emphasized the need to show a causal connection between the violation and the injury—some proof that the alleged misconduct was a "material cause" or "substantial factor" of the injury. The Second Circuit apparently compromised both prevalent formulas by broadening the direct injury approach and narrowing the target area test.

120. See notes 107 and 117 supra.
121. For a discussion of the target area and direct injury tests applied by the various circuits, see Comment, Standing Under Clayton § 4: A Proverbial Mystery, 77 Dickinson L. Rev. 73, 85 (1972); Standing and Passing On, supra note 71 at 352.
123. The action was also commenced against Canada Dry Corporation. *Id.* at 185.
124. *Id.* at 185-86.
127. *Id.* at 187.
In *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, the court compounded the confusion by stating that "it is necessary to use a rule of reason in construing the requirements of section 4 of the Clayton Act as to standing . . . ." *South Carolina Council of Milk Producers, Inc. v. Newton* introduced the principle of proximate causation to the target area test.

If a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby, then he has standing to sue under § 4.

In *Johnson v. Ready Mix Concrete Co.*, the court stated that the policy of limiting section 4 standing to those "directly injured by the alleged violation" was known as the "target area" doctrine; discussed the "aimed at" language of *Karseal*; added the proximate cause concept of *South Carolina Council of Milk Producers, Inc. v. Newton*, and the foreseeability notion of *Hoopes v. Union Oil Co.* and found that the plaintiff did have standing. The court in *Kirihara v. Bendix Corp.* variegated the target area theme by injecting a discussion of the relevant market:

In order to have a § 4 cause of action . . . not alone must the claimed injury be directly and proximately caused by the proscribed acquisition, but also the injured must be one of the components of the competitive infra-structure of the relevant market involved in the complaint . . . and the effect of such injury upon that component must validate the reasonable probability that a substantial anti-competitive effect upon the viability of competition in that market will flow from the condemned acquisition.

Courts have expressed their acceptance of both tests and have evidenced an inability to tell the difference. The court in *Wilson*
"v. Ringsby Truck Lines, Inc." expressed doubt that either the direct injury or target area test was the correct interpretation of section 4 of the Clayton Act. In the midst of all this confusion, it was not surprising that the Malamud court felt constrained to find another solution, ingenious or outrageous as the result may have been. Certainly the problem of antitrust standing demanded a fresh approach.

**Antitrust Standing: A New Direction?**

The Malamud court’s resort to the Data Processing zone of interests test was foreshadowed by the attempts of a number of courts to deal with the problem of antitrust standing in terms other than target area or direct injury. The courts have sometimes enunciated a test which sounds surprisingly similar to the zone of interests test. In *Billy Baxter, Inc. v. Coca-Cola Co.*, the court stated:

\[\text{[T]his connection must also link a specific form of illegal act to a plaintiff engaged in the sort of legitimate activities which the prohibition of this type of violation was clearly intended to protect.}\]

In noting that section 4 of the Clayton Act contains no limitations upon standing either in terms of a “direct injury” or “target area” restriction, the court in *Wilson v. Ringsby Truck Lines, Inc.*, stated:

\[\text{It may also be argued that the purpose and language of this legislation are so sweeping that any person injured by the proscribed conduct should be considered within the class which Congress intended to protect.}\]

The court in *Reibert v. Atlantic Richfield Co.* expressed the test in terms of proximate cause: a causal connection must exist between the plaintiff’s injury and the antitrust violation which was a substantial factor in the infliction of injury; and the alleged violation had to be linked to “a plaintiff engaged in activities intended to be protected by the antitrust laws.” The plaintiff, a former employee of Sinclair Oil Corporation, was discharged due to the duplication of jobs resulting from the merger of Sinclair and Atlantic Richfield.

---

925, 928 (10th Cir. 1967).
142. Id. at 702.
143. 431 F.2d 183 (2d Cir. 1970).
144. Id. at 187 (emphasis added).
146. Id. at 702-03 (emphasis added).
148. Id. at 731.
Reibert was denied standing since he was "not within the area of competitive economy protected against unlawful mergers." In *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31,* the target area approach was praised for providing:

a logical and flexible tool for analyzing whether a particular claimant falls within the class of persons slated by Congress for protection under section 4 of the Clayton Act.

*Malamud v. Sinclair Oil Corp.: The Sixth Circuit's Answer*

The court in *Malamud v. Sinclair Oil Corp.,* in announcing a new direction in antitrust standing, abandoned the script of previous cases and followed the lead of *Warth v. Seldin* in discussing standing as an aspect of justiciability. The court perceived section four's requirement that any person must have suffered injury in fact before bringing suit as satisfying the article III criteria. The target area and direct injury tests add a burden to plaintiffs at the pleading stage unwarranted by the concept of justiciability. Both enabled a court "to make a determination on the merits of a claim under the guise of assessing the standing of the claimant." While in agreement with the theory that not every person injured is entitled to bring suit under section 4, the court was also aware of the Supreme Court's admonition in *Poller v. Columbia Broadcasting System, Inc.,* that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles.

In applying the *Data Processing* test, the Sixth Circuit acknowledged that the test was developed to deal with suits challenging actions by administrative agencies, but pointed out that a private antitrust action was in the nature of a public suit, since the plaintiff sought both to remedy the alleged injury to himself and to "vindicate the important public interest in free competition." Although it might be disputed that *Data Processing* can be applied to a non-administrative agency action, such as antitrust litigation, the zone of interests test has been applied by lower federal

---

149. Id. at 732.
150. 481 F.2d 122 (9th Cir.), cert. denied, 414 U.S. 1045 (1973).
151. Id. at 128.
152. 521 F.2d 1142 (6th Cir. 1975).
153. 95 S.Ct. 2197 (1975).
155. Id. at 1150.
158. Id. at 1151.
courts to non-administrative government action\textsuperscript{159} and to nongovernmental action,\textsuperscript{160} as well as to cases involving judicial review of administrative action.\textsuperscript{161} Two cases seemed to indicate that the zone of interests test was an alternative construction of the nexus test.\textsuperscript{162} In neither case did the court justify or rationalize its application of the nexus test to a non-taxpayer suit.

The plaintiffs satisfied the first prong of the test by alleging injury in fact. The investment companies asserted that Sinclair's failure to provide necessary financing effectively prevented them from expanding their operations. This allegation clearly convinced the court that the first element of the test had been satisfied.\textsuperscript{163} As to the second prong, the interest sought to be protected by the real estate firms was the expansion of their business. The antitrust laws were enacted to protect individuals and the public from the effects of combinations and conspiracies in restraint of trade.\textsuperscript{164} Sinclair had refused to provide promised financial assistance and had refused to release the plaintiffs from their distribution agreement.

\begin{quote}
[T]his denial of financing arguably comes within the zone of interests protected by the Sherman and Clayton Acts. Regardless of what the proof at trial may show, the investment companies have made sufficient allegations to establish their standing to sue under the antitrust laws.\textsuperscript{165}
\end{quote}

\section*{Conclusion}

The Supreme Court has on occasion granted standing to plaintiffs it considered deserving of the opportunity to bring suit because of expressed congressional intent or because of the laudatory purpose of the statute upon which the claim rested. Such an occasion, which could be paralleled to the antitrust situation, existed in Trafficante \textit{v. Metropolitan Life Insurance Co.}\textsuperscript{166} The statutory definition of a


\textsuperscript{163} Malamud \textit{v. Sinclair Oil Corp.}, 521 F.2d 1142, 1151 (6th Cir. 1975).

\textsuperscript{164} \textit{Id.} at 1151-52.

\textsuperscript{165} \textit{Id.} at 1152.

\textsuperscript{166} 409 U.S. 205 (1972).
"person aggrieved" was "[a]ny person who claims to have been injured by a discriminatory housing practice;" the section 4 any person "injured . . . by reason of anything forbidden in the antitrust laws" is similarly broad and inclusive. Also, in neither case is the legislative history helpful. Additionally, the Court noted that:

[T]he complainants act not only on their own behalf, but also "as private attorneys general in vindicating a policy that Congress considered to be of the highest priority."

The Court might just as well have been speaking of the section 4 plaintiff, who enforces the antitrust laws "to preserve competition and to protect the consumer."

The Court concluded:

We can give vitality to § 810(a) only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute.

The Court could likewise conclude that to give vitality to section 4 of the Clayton Act, an expansive interpretation granting standing to sue to all who could show injury to an interest sought to be protected by the antitrust laws was in order.

In its latest statement on standing, Warth v. Seldin, the Court indicated a willingness to adhere to a zone of interests type test. The injury alleged often exists by virtue of a statute which creates the legal right violated, and thereby satisfies the article III case or controversy requirement; standing becomes a question of preclusion by prudential limitations. The issue is then:

Whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.

The Malamud court saw section 4 as a broad statutory grant of standing to be accorded in light of other statutory provisions.

Since the plaintiffs alleged violations of section 1 of the Sherman

---

170. Id. at 211 (citations omitted).
171. Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951). See Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955).
173. 95 S.Ct. 2197 (1975). See text accompanying notes 72 through 77 supra.
174. Id. at 2206.
Act and section 3 of the Clayton Act their interests had to fall within the zone of either or both of those statutes. The court treated the first prong of the test, injury in fact, rather summarily, apparently equating injury in fact with any injury to business or property traceable to an antitrust violation. However, once injury in fact has been admitted, it becomes difficult to say that any of the usual antitrust plaintiffs is outside the zone of the antitrust laws. Adoption of the *Data Processing* test would signal an abandonment of the variety of antitrust prudential limitations previously imposed by the courts to prevent a flood of treble damage litigation. But whether this is to be dreaded or welcomed hinges on what is perceived as the function of imposing a standing requirement in antitrust litigation.

The wording of section 4 itself is broad and expansive; the legislative history does not mandate any limitations on interpretation, and the Supreme Court has indicated that the section should not be narrowly construed. If the question of standing is in reality a "threshold" question in the sense of being an analysis determinative of the justiciability of a claim and the propriety of invoking the jurisdiction of a federal court, then perhaps the use of *Data Processing*'s two prongs does not really create a problem. It would preclude a preliminary determination of the merits of a plaintiff's case under the guise of resolving the question of standing. The fact that the defendant's alleged misconduct may not have been the legal cause of the plaintiff's injury should not be the deciding factor in the issue of standing. If the presence or absence of legal interest is the real issue, then the courts should label it as such.

If section 4 was meant to grant a private remedy to parties harmed by antitrust violations, then a relaxation of the threshold requirements is unwarranted. But if section 4 was intended to secure more effective and extensive enforcement of the antitrust laws by "deputizing" private litigants, then expansion of the class of persons entitled to bring suit is desirable. Depending upon one's point of view, *Malamud* represents either an enlightened approach to the puzzle of antitrust standing or an aberration of all case law previously written.

CATHY A. KENNEDY

176. See note 95 *supra*.