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Antitrust - The Ninth Circuit Grants a Section 16 Clayton Act Plaintiff Standing to Sue Even Though as a Section 4 Plaintiff He Is Not on the Firing Line

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ANTITRUST—The Ninth Circuit Grants a Section 16 Clayton Act Plaintiff Standing To Sue Even Though as a Section 4 Plaintiff He Is Not on the Firing Line

The purpose of this comment is to examine the issue of standing to sue under the Clayton Act in the context of the Ninth Circuit decision in IN RE MULTIDISTRICT VEHICLE AIR POLLUTION M.D.L. NO. *31. Focus will be on the legislative history of section 4 and section 16 and also on court decisions dealing with the issue of a proper party plaintiff. Consideration will also be given to the disposition of the district court on remand.*

INTRODUCTION

In late 1969, an antitrust consent decree was approved by the district court in central California.[1] The Justice Department had alleged in a civil suit that General Motors, Ford, Chrysler and American Motors had conspired, in violation of section 1 of the Sherman Act,[2] to suppress the research, development, manufacture and installation of motor vehicle air pollution control devices. By the terms of the decree the defendants agreed to cease the challenged collaborative efforts.[3]

Various individuals, organizations and states sought intervention to block approval of the decree in hopes of compelling the litigation to final judgment. The petitions to intervene were denied as the decree essentially provided all that the Government could have obtained had the case been tried and won.[4] The public interest therefore was judged best served by approval. Not only was much time and money saved, but, as the court noted, there was a real question as to the outcome

1. United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom.* City of New York v. United States, 397 U.S. 248 (1970).
2. Sherman Act § 1, 15 U.S.C. § 1 (1970):
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .
3. Terms of the decree are reported in United States v. Automobile Mfrs. Ass'n, 1969 Trade Cas. ¶ 72,907 (C.D. Cal. 1969).
4. 307 F. Supp. at 621.

if the litigation were brought to trial.[5] Much more, however, was to follow.

Private parties[6] and states filed antitrust actions against the automobile manufacturers alleging the same violations as had the Justice Department. Relief was sought under section 4 and section 16 of the Clayton Act.[7] Consolidation proceedings were held and after some disagreement as to location, an order was entered by the Judicial Panel on Multidistrict Litigation directing the suits to pre-trial proceedings in California.[8]

The defendants moved to dismiss the complaints of fifteen plaintiffs on the grounds, among others, that there was no basis for relief under the antitrust laws. The United States District Court for Central California denied this motion in September 1970[9] holding that the plaintiffs were not too remote from the claimed violation to seek damages and that a possible "peculiar need" for further injunctive relief could be proved. Most of the parties plaintiff[10] would be allowed to go to trial seeking relief under section 4 and section 16 of the Clayton Act.

Meanwhile some eighteen additional states sought the original jurisdiction of the Supreme Court.[11] They alleged similar antitrust violations and requested equitable relief in the form of an order requiring the defendants to accelerate their spending on air pollution control research and to retrofit all motor vehicles manufactured during the conspiracy.[12] The motion for leave to file a bill of complaint was denied. The Court held that the relief sought by way of an injunction must

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5. *Id.*
6. Private plaintiffs included a class of farmers.
7. Clayton Act § 4, 15 U.S.C. § 15 (1970):
> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fees.

Clayton Act § 16, 15 U.S.C. § 26 (1970):
> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . .

8. *In re* Motor Vehicle Air Pollution Control Equipment. No. 31, 311 F. Supp. 1349 (J.P.M.L. 1970). California was chosen for it was at this site that the United States had brought its suit and the grand jury documents, which the plaintiffs sought to use by terms of the approved decree, were impounded. *Id.* at 1351.
9. *In re* Motor Vehicle Air Pollution Control Equipment. M.D.L. No. 31, 52 F.R.D. 398 (C.D. Cal. 1970).
10. Seven plaintiffs were denied class action status. *Id.* at 404.
11. Washington v. General Motors Corp., 406 U.S. 109 (1972).
12. *Id.* at 112.

be considered in the context of localized situations.[13] Some of these states then joined as plaintiffs in the litigation in progress in California.

In June 1973, on certified interlocutory appeal, the Ninth Circuit reversed the district court opinion in part holding that all plaintiffs-appellees had standing to sue for equitable relief but that none, before the court, could seek treble damages.[14] The court stated that the plaintiffs need only allege injury to an interest "cognizable in equity" under section 16 of the Clayton Act.[15] Standing to sue under section 4, however, requires injury to business or property by reason of an antitrust violation. The governments' individual claims, class claims, and *parens patriae* claims did not allege injury to commercial interests and thus failed to meet the first predicate.[16] Those plaintiffs with business or property met the first requirement but not the second. Their injury was not "by reason of" an antitrust violation.[17]

In effect, the Ninth Circuit in *MDL No. 31* had announced a new test for standing under the Clayton Act. Often a section 4 plaintiff had been held "too remote" and therefore unable to sue for damages "by reason of" a violation even though having suffered some injury.[18] Here, the court held that even if the plaintiff were not injured "by reason of" a violation and thus lacked section 4 standing, he could be injured "by" a violation and have standing under section 16 to seek an injunction.

LEGISLATIVE HISTORY—WHO MAY SUE UNDER SECTION 4 AND 16 OF THE CLAYTON ACT

The Clayton Act was passed by the Congress in 1914 to fill in the gaps that it was felt existed in the Sherman Act and to prohibit acts which the Sherman Act could not reach.[19] As originally introduced, it contained some twenty-three sections. The first fourteen were seen as supplemental to the existing laws against restraints and monopolies.[20] Sections 15 to 23 were directed to questions of federal procedure relating to contempts and injunctions.[21] At the time of proposal

13. *Id.* at 116.
14. *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973) [hereinafter cited as *MDL No. 31*].
15. *Id.* at 130-31.
16. *Id.* at 126.
17. *Id.* at 129.
18. *See* notes 61-70 and accompanying text *infra*.
19. 51 CONG. REC. 13848 (1914) (remarks of Senator Culberson), 51 CONG. REC. 16275 (1914) (remarks of Congressmen Alexander and Webb).
20. H.R. REP. No. 627, 63d Cong., 2d Sess. 1 (1914).
21. *Id.* at 21.

there was considerable antagonism toward both the "trusts" and toward the courts which had used injunctions to block the efforts of labor.[22]

Congressional intent was that the treble damage provision of the Act (proposed as section 5) was to be basically a carry-over from the Sherman Act. In its report, the majority of the Judiciary Committee stated:

> Section 5 is supplementary to the existing laws and extends the remedy under section 7 of the Sherman Act to persons injured in their business or property by the wrongful acts of persons or combinations violating any of the antitrust laws and allows the recovery of threefold damages therefore.[23]

The minority members of the committee did not oppose this section. Some felt that the Sherman Act was sufficient and that business should be given the opportunity to adjust to it.[24] Others felt that the remedy should be more vigorous enforcement of existing law rather than the enactment of new legislation.[25]

The floor debates indicate that the private treble damage section was accepted with little opposition[26] and that it was viewed as granting a remedy to a broad class.[27] Together with the proposed section 6,[28] the members saw a means of giving the private individual an incentive to sue when the antitrust laws were violated.[29] The private litigant had a remedy when he or the Government could prove an antitrust violation and the individual could prove injury or damage and its extent.[30]

The leader of the Conference Committee, when presenting the final draft, regarded section 4 as one of the real "teeth" in the legislation.[31] The only requisite for the private action appeared to be proof of

22. See the debates generally. Many opposed to the Clayton Act thought it was a "sham."
23. H.R. REP. No. 627, 63d Cong., 2d Sess. 14 (1914).
24. *Id.* (pt. 2) at 1.
25. *Id.* (pt. 3) at 5.
26. 51 CONG. REC. 9164 (1914) (remarks of Congressman Floyd).
27. "This section opens the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and gives the injured party ample damages for the wrong suffered." 51 CONG. REC. 9073 (1914) (remarks of Congressman Webb).
28. Section 6 of the Clayton Act as introduced and initially passed by the House of Representatives made a final decree obtained by the United States conclusive evidence. 51 CONG. REC. 13659 (1914). Final adoption as § 5 made a final decree prima facie evidence.
29. 51 CONG. REC. 9185 (1914) (remarks of Congressman Helvering).
30. Id. at 9490 (remarks of Congressman Floyd).
31. "Now let a business man somewhere in the United States, or 40 or 50 of them, be damaged by the things that are denounced as unlawful in this section, and let them all bring suit. That . . . will have a more deterrent effect on the men who practice those things than mere criminal penalties, and we all know that the disinclination of juries in some quarters to convict men under the criminal sections has resulted in their acquittal."
51 CONG. REC. 16274 (remarks of Congressman Webb).

damage.[32] The intent was to "liberalize the procedure in the courts in order to give the individual who is damaged the right to get his damages anywhere . . . ."[33] Even many opposed to the Clayton Act favored the remedy of private enforcement and treble damages to those injured.[34]

The purpose of section 16 (proposed as section 14) as stated in the original report to the House of Representatives[35] was to give to the individual, who could seek damages under section 7 of the Sherman Act, an additional remedy not available under the Sherman Act. He could now sue for equitable relief before actual loss to his business or property occurred. The minority members of the committee split over the desirability of injunctive relief. Most felt that the remedy of treble damages was sufficient.[36] One member felt that this new remedy was desirable but that the burden of proof would be too difficult.[37]

The debates in both the House and Senate mirrored the position taken by the majority of the Judiciary Committee. Under this section any person was to be given the right to sue for an injunction when necessary to prevent imminent loss or damage.[38] It was suggested that no longer would the individual have to see his business ruined by antitrust violators before he could bring suit.[39] A power to enjoin, similar to that given the Government under the Sherman Act, was now to be given the individual "standing face to face with destruction."[40]

Opposition to this section on the floor was limited. Some felt that the injunctive provision might lead to the blackmail of businessmen.[41]

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32. *Id.* at 16274.
33. *Id.*
34. *Id.* at 15954, 16046 (remarks of Senator Borah).
35. "Section 14 authorizes a person, firm, or corporation or association to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings. Under section 7 of the act of July 2, 1890, a person injured in his business and property by corporations or combinations acting in violation of the Sherman antitrust law, may recover loss and damage for such wrongful act. There is however, no provision in the existing law authorizing a person, firm, corporation, or association to enjoin threatened loss or damage to his *business or property* by the commission of such unlawful acts, and the purpose of this section is to remedy such defect in the law. This provision is in keeping with the recommendation made by the President in his message to Congress on the subject of trusts and monopolies."
(Emphasis added.) H.R. REP. No. 627, 63d Cong., 2d Sess. 21 (1914).
36. *Id.* (pt. 2) at 9-11.
37. *Id.* (pt. 3) at 7 (remarks of Congressman Nelson).
38. 51 CONG. REC. 9074, 16275 (remarks of Congressman Webb).
39. *Id.* at 9261 (remarks of Congressman McGillicuddy).
40. *Id.* at 9270 (remarks of Congressman Carlin).
41. Mr. Levy: But is there nothing to prevent businessmen from being blackmailed? This bill is all in favor of the complainant.

Senator Nelson felt that the remedy did not go far enough to aid the individual as it was probably limited in scope to those cases where the private party could seek relief under the treble damage provision.[42] In addition, it did not give the individual the same remedies in respect to contempt as were given the Justice Department.[43]

Presentation of the final bill found the leaders suggesting that this provision was designed to protect the rights of the private interested party.[44] The proper person to seek relief was the person threatened with loss or damage "by reason of" the antitrust violation.[45] This party was the same individual who would have a remedy under section 7 of the Sherman Act if he were to wait until the violation was completed.[46]

The virtue in sections 4 and 16 was that the business public was now taken into the confidence of the Congress "as allies of the Government" to enforce the antitrust laws.[47] Under the treble damage provision, the private individual could recover for his injuries sustained.[48] Under the equitable relief provision, one threatened with personal damage by an antitrust violation could sue to enjoin such acts.[49]

THE COURTS AND STANDING UNDER SECTION 4 AND SECTION 16 OF THE CLAYTON ACT

Section 4

The lower courts have held that section 4 standing under the Clayton Act requires an injury to business or property and that such injury must result "by reason of" the antitrust violation. The United States Supreme Court held in *Hawaii v. Standard Oil Co. of California*[50] that a state suing as *parens patriae* and seeking recovery for damages to its general economy could not maintain a section 4 action. The Court

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> Mr. Webb: Before the gentleman gets to his hotel tonight somebody may have him arrested on a charge of murder; but that does not make the gentleman guilty.
> I do not know any way to stop a man from making accusations or bringing a suit, but people soon get tired of bringing blackmailing suits when they are mulcted in costs, and there are not very many such suits brought.

51 CONG. REC. 16275 (1914).

42. *Id.* at 15944 (remarks of Senator Nelson).
43. *Id.* at 14214-5 (remarks of Senators Nelson and Shields).
44. *Id.* at 15943 (remarks of Senator Chilton).
45. *Id.* at 16275 (remarks of Congressman Webb).
46. *Id.* at 16319 (remarks of Congressman Floyd).
47. *Id.*
48. *Id.* at 16342 (remarks of Congressman Webb).
49. *Id.* at 16319 (remarks of Congressman Floyd).
50. 405 U.S. 251 (1972).

held that recovery for injury to commercial interests or enterprises is the *sine qua non* of a treble damage action and that only when injury to such interests is alleged may a state sue under section 4.[51] The Ninth Circuit in *MDL No. 31* followed *Hawaii* and denied all governmental units standing on the basis that they lacked the necessary claim of injury to business or property.

The Supreme Court has never ruled directly on the issue of standing to sue under section 4 "by reason of" an antitrust violation. However, the Court has said that treble damage recovery is available, when the antitrust laws are violated, to all victims of the forbidden practices.[52] Proof of damage is all the section requires once a violation is established,[53] and the Court should not burden the private litigant with requirements beyond what is specifically stated in the law.[54] The purpose of section 4, according to the Court, is to encourage private suits to further the "overriding public policy in favor of competition" and thus it is necessary to insure the private action as an ever present deterrent.[55] All persons are entitled to recover their actual damages whenever injured in their business or property by an antitrust violation.[56]

In *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[57] the Ninth Circuit ordered a directed verdict for the defendants on the grounds that there was insufficient evidence to find that the defendants' acts were the cause of the plaintiff's injury.[58] The United States Supreme Court remanded for a new trial stating that it is necessary only that the evidence of the causal connection be sufficient so that different inferences might reasonably be drawn by a jury.[59] Similarly the Court has said that the causation element and proof of damage are established where the illegality is shown to be a material cause of the injury.[60]

The lower courts have developed two tests to determine if the litiga-

51. *Id.* at 264.
52. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235-36 (1948).
53. Radiant Burners, Inc. v. People's Gas Light and Coke Co., 364 U.S. 656, 660 (1961).
54. Radovich v. National Football League, 352 U.S. 445, 454 (1957).
55. Perma Life Mufflers Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).
56. Hawaii v. Standard Oil Co. of Calif., 405 U.S. 251, 262 (1972). *Contra, id.* at 262 n.14.
57. 289 F.2d 86 (9th Cir. 1961). Continental claimed that defendants attempts to monopolize the ferro-vanadium market caused it to fail in its attempts to enter and maintain itself in the vanadium business.
58. *Id.* at 90.
59. 370 U.S. 690, 700-01 (1962).
60. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969).

tion has been initiated by the proper party plaintiff claiming injury "by reason of" an antitrust violation. Basically the circuits use either the "direct injury" or "target area" approach. The former test focuses on the competitive or contractual relationships between the litigants[61] while the latter focuses on the area of the economy affected by the violation and the plaintiff's relationship to it.[62]

The two tests trace their history from *Loeb v. Eastman Kodak Co.*[63] in which a stockholder-creditor was denied the right to sue for treble damages upon the allegation that the defendants' monopoly had caused the bankruptcy of the stockholder's corporation. The Third Circuit held that the antitrust violation was directed at the corporation and therefore, it was the proper party to sue. Any injury to the plaintiff was indirect, too remote and consequential.[64]

The Ninth Circuit, in *Conference of Studio Unions v. Loew's Inc.*,[65] was the first court to articulate the concept of the "target area" in an antitrust action seeking both section 4 and section 16 Clayton Act relief. Standing to sue was denied union members claiming loss of jobs as a result of the defendants' conspiracy. The court held that the violation was not directed against the plaintiffs and therefore the plaintiffs were not injured "by reason of" anything forbidden in the antitrust laws. The plaintiffs failed to show that they were "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[66]

Subsequently standing has been granted in the Ninth Circuit, where the court has found that the defendant "aimed at" the party injured[67] or where the plaintiffs have shown to the court's satisfaction that they were within the area which the defendants could reasonably foresee would be affected by the violation.[68] The circuits have failed to reach the same results on similar facts[69] and the issue of section 4 standing has thus received considerable attention by commentators.[70]

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61. Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).
62. Contreras v. Grower Shipper Veg. Ass'n of Cent. California, 484 F.2d 1346 (9th Cir. 1973).
63. 183 F. 704 (3d Cir. 1910).
64. *Id.* at 709.
65. 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).
66. *Id.* at 54-55.
67. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955).
68. Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964).
69. *Compare* Mulvey v. Samuel Goldwin Productions, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971) *with* Fields Productions, Inc. v. United Artists Corp., 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971).
70. Calderone Enterprises Corp. v. United Artists Theatre Circuit, 454 F.2d 1292,

The Ninth Circuit stated in *MDL No. 31* that it would continue to follow the "target area" rationale with reference to standing to sue under section 4 of the Clayton Act. As authority for this proposition the court cited *Hawaii v. Standard Oil Co. of California*[71] *and Perkins v. Standard Oil Co. of California.*[72] The court reasoned that these decisions recognized the "target area" approach and that there is a limit on who can seek section 4 relief. The proper focus is on the nature of the competitive harm rather than on the mere commercial relationship between the parties.[73]

The Ninth Circuit denied all plaintiffs in *MDL No. 31* standing to sue for treble damages. The court held that the states lacked the requisite business or property interest and that the "by reason of" qualification eliminated the class action farmer. The court held that the area of the economy in which the alleged violation destroyed competitive conditions was the automobile air pollution control market, and that the commercial interests of the farmer were not within this area.[74]

Section 16

The Ninth Circuit in *MDL No. 31* granted all plaintiffs standing to seek equitable relief even though they were too remote to seek treble damages. The United States Supreme Court has not ruled on such a distinction but has spoken on the issue of equitable relief and the proper party plaintiff under the Clayton Act. While the individual does not as yet have to be injured in fact, the Court has stated that interposition by injunction is justified when there is clearly a dangerous probability that damage will occur.[75] Furthermore, the Court has said that

1298-1308 (2d Cir. 1971) (dissenting opinion), *cert. denied*, 406 U.S. 930 (1972); Alioto and Donnici, *Standing Requirements for Antitrust Plaintiffs: Judically Created Exception to a Clear Statutory Policy*, 4 U. SAN FRAN. L. REV. 205 (1970); Collen, *Procedural Directions In Antitrust Treble Damage Litigation: An Overview of Changing Judicial Attitudes*, 17 ANTITRUST BULL. 997, 1023-56 (1972); Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 24-31 (1971); Klingsberg, *Bull's Eyes and Carom Shots: Complications and Conflicts on Standing to Sue and Causation Under Section 4 of the Clayton Act*, 16 ANTITRUST BULL. 351 (1971); Comment, *Standing Under Clayton § 4: A Proverbial Mystery*, 77 DICK. L. REV. 73 (1972).

71. 405 U.S. 251, 262 (1972). *Contra, id.* at 262 n.14. In the body of the opinion, the Supreme Court stated that Congress chose to permit all injured persons to sue for their actual damage under section 4. However in the footnote, relied upon by the Ninth Circuit, the Supreme Court recognized that the lower courts have unanimously concluded that Congress did not intend to provide a remedy in damages for all conceivable injuries.

72. 395 U.S. 642 (1969). The Supreme Court reversed the Ninth Circuit and allowed a customer to bring an antitrust action against his ultimate supplier.

73. 481 F.2d at 129.

74. *Id.*

75. Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association, 274 U.S. 37, 54 (1927).

the private litigant must show that the threatened loss or injury is of a "sort personal to the plaintiff" to obtain section 16 relief.[76]

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[77] the Supreme Court stated that even if the plaintiff could not recover treble damages because of failure to prove the fact of injury, he could obtain injunctive relief under section 16. The Court stated that as long as the plaintiff demonstrates that a significant threat of damage exists from an impending or contemporary violation of the antitrust laws, equitable relief is justified.[78] Where the acts of those in violation of the law pose a threat to the party bringing suit, the purpose of enforcement of antitrust law is served by invoking equity.[79]

Prior to the decision in *MDL No. 31*, which drew a broader circle for those seeking section 16 relief than for those seeking section 4 relief, the district courts and courts of appeal have agreed that there is a close relationship between the requisites for standing under either the treble damage or injunctive relief provisions of the Clayton Act. Generally the courts have heretofore recognized that one seeking an injunction must be in the same area of the economy as the plaintiff seeking treble damages. If section 4 standing is denied because the plaintiff is too remote, any request for an injunction has been similarly denied.

For example, the district court, in ruling on defendant's counterclaim in *SCM Corp. v. Radio Corp. of America*,[80] noted that neither party had claimed that a different standing test was involved under section 4 and section 16.[81] The court denied relief under both sections on the grounds that any injury or threatened loss was not directed at the defendant. The Second Circuit affirmed noting that "RCA is not foreclosed from seeking treble damages or injunctive relief if it can plead, and establish by proof, the causation required by the statute."[82]

In *Ash v. International Business Machines, Inc.*,[83] a minority stockholder sought an injunction, as an individual and also derivatively, alleging an antitrust violation of the Clayton Act in the form of an illegal merger. Both claims were denied by the district court on the

76. United States v. Borden Co., 347 U.S. 514, 518 (1954).
77. 395 U.S. 100 (1969). Zenith claimed that defendant's conspiracy to exclude them from the market caused injury and sought relief under sections 4 and 16.
78. *Id.* at 130-31.
79. *Id.* at 133.
80. 276 F. Supp. 373 (S.D.N.Y. 1967), *aff'd*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969). RCA alleged that the plaintiff's illegal tie-in policy had created a monopoly and caused RCA to lose license fees.
81. 276 F. Supp. at 376.
82. 407 F.2d at 171.
83. 236 F. Supp. 218 (E.D. Pa. 1964), *aff'd*, 353 F.2d 491 (3d Cir. 1965), *cert. denied*, 384 U.S. 927 (1966).

grounds that the alleged injury or threatened loss was not to the plaintiff as an individual but to the corporation.[84] The Third Circuit affirmed since the plaintiff suing as an individual was too remote to have standing under section 16.[85] The court stated that the plaintiff's section 16 claim was similar to that of the section 4 stockholder in *Loeb*.[86] Standing would be denied under either section when the injury to the plaintiff is indirect.

The Fourth Circuit has also held that under either section 4 or section 16 of the Clayton Act the plaintiff must demonstrate injury or the threat of injury to him by the alleged violation.[87] The plaintiff, by showing some damage to his business as a result of the violation, was entitled to treble damage relief.[88] Injunctive relief was justified since total exclusion from the market by the defendant's tying arrangement constituted threatened as well as past damage by reason of the violation.[89]

The district court in *N.W. Controls, Inc. v. Outboard Marine Corp.*[90] denied both treble damages and injunctive relief to a manufacturer alleging an antitrust violation through an illegal tying arrangement. Treble damages were denied because the plaintiff was not in the particular business in which an alleged restraint took place.[91] Section 16 relief was denied for the same reason. The plaintiff had failed to demonstrate a concrete threat of injury.[92]

N.W. Controls was based in part on the holding of the district court in *Ring v. Spina*,[93] where section 4 and section 16 relief was sought by a producer of a play alleging an antitrust violation by the authors. The court denied treble damages on the grounds that the plaintiff was not injured but granted an injunction stating that an individual is entitled to relief under section 16 when, as one engaging in the commerce being restrained, there is a danger of interference to an interest being enjoyed.[94] The court of appeals affirmed denial of treble damages

84. 236 F. Supp. at 221.
85. 353 F.2d at 493-94.
86. *See* notes 63-64 and accompanying text *supra*.
87. Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969).
88. *Id.* at 63.
89. *Id.*
90. 333 F. Supp. 493 (D. Del. 1971).
91. *Id.* at 506-07.
92. *Id.* at 509-11.
93. 84 F. Supp. 403 (S.D.N.Y. 1949), *modified sub. nom.* Ring v. Authors' League of America, 186 F.2d 637 (2d Cir.), *cert. denied*, 341 U.S. 935 (1951).
94. "Plaintiff is entitled to injunctive relief which would protect him against prospective damage. 15 U.S.C.A. § 26. Such damage arises when there is a danger of interference with rights or privileges he now enjoys, not merely as a member of the general public, but as one engaging in the commerce being restrained."
84 F. Supp. at 406.

and also denied the injunction holding that the plaintiff did not have an existing interest to protect and was unable to demonstrate that the wrong to him would be repeated.[95]

However, contrary to these decisions which granted or denied standing under section 4 and section 16 of the Clayton Act using the same test to focus on the relationship of the plaintiff to the alleged violation, the court in *MDL No. 31* stated that all plaintiffs-appellees had standing to seek equitable relief. The Ninth Circuit relied again primarily on the language of the decision in *Hawaii* in which the Supreme Court noted that the requirements for standing under section 16 are less exacting than under section 4.[96] In addition, the court felt that the *Hawaii* analysis of *Georgia v. Pennsylvania Railroad Co.*[97] bespoke the continuing availability of an action for an injunction to stop injury to the general economy of a state.

The *MDL No. 31* decision held that standing under section 16 does not require injury to business or property but only injury to an interest cognizable in equity. Furthermore a section 4 plaintiff can be denied treble damage standing as too remote and yet be given standing to seek an injunction. Contrary to its previous decision in *Studio Unions*,[98] where the "target area" test was established in an action involving both section 4 *and* section 16 standing, the Ninth Circuit eliminated the "by reason of" requirement in an action for equitable relief.

CONCLUSION

The Ninth Circuit and others have voiced concern over the treble damage remedy provided under section 4. There is a general consensus that the line must be drawn somewhere or windfall and duplicative recoveries will result.[99] If the intent of Congress is to be followed, how-

95. 186 F.2d at 642-43.

96. 405 U.S. at 260-64. The Supreme Court stated that section 4 requires injury to business or property while section 16 does not. The remedies are also in contrast as one injunction against the same defendant for the same violation is as effective as one hundred. Finally the Court noted that if a state could recover damages to its general economy, together with private persons for their own injuries, the door to duplicative recovery would be open.

97. 324 U.S. 439 (1945). Georgia sued as *parens patriae* to enjoin discriminatory rate fixing. A cause of action was established under section 16 on the grounds that coercion through an illegal combination directed at a state can be enjoined. *Id.* at 462. The *Hawaii* Court stated that the complaint in Georgia alleged an antitrust violation that favored shippers in other states to the detriment of Georgia shippers. 405 U.S. at 259. However, the Court did note that a state suing as *parens patriae* could theoretically be denied standing to seek an injunction. *Id.* at 261. This may have been in response to the argument of Standard Oil that Hawaii as *parens patriae* was not the real party in interest. Respondent's Brief at 42.

98. *See* note 65 *supra.*

99. Conference of Studio Union's v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951),

ever, there is little merit in such a limitation based on those reasons, since the remedy of treble damages was given to *all* injured in their business or property by reason of an antitrust violation.[100]

Congress enacted section 4 of the Clayton Act to give a remedy to the injured party. The focus, according to those who wrote the legislation, should be upon that injury. If the plaintiff cannot show that there was a cause and effect relationship, an antitrust violation and a measurable injury as a result, then the remedy should be denied. It must be remembered, however, that a purpose of the treble damage provision was to encourage the injured private litigant and to deter antitrust violations.[101]

The Ninth Circuit held that the plaintiffs seeking equitable relief need not be in the same "target area" as those seeking treble damages. Yet the congressional debates show that the proper party plaintiff under section 16 cannot be more removed or remote than the section 4 plaintiff. Certainly an injunction can be issued without actual injury but the intent of Congress shows that a section 16 plaintiff would be entitled to treble damages if injury were sustained. A holding that allows plaintiff to seek an injunction without looking to more than an injury cognizable in equity, but denies this same party standing under section 4 because he is too remote, will lead to more confusion in the courts than now exists.

On remand, the district court ordered dismissal of all state and class action claims.[102] The court held that the defendants had not conspired to violate the antitrust laws. At most they may have agreed to delay the abatement of a public nuisance—smog—caused by competition in the marketing of automobiles. The court stated that an action to redress a nuisance, not created by a conspiracy in restraint of trade, cannot be brought under the antitrust laws.

The court also focused on the nature of equitable relief. While it was agreed that under section 16 of the Clayton Act injunctive relief is available to protect antitrust litigants from "threatened loss or damage," which includes righting a wrong, the court felt that it must look to the purpose and intent of Congress in enacting this remedy.

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cert. denied, 342 U.S. 919 (1952); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312, 317 (E.D. Pa. 1953), *aff'd*, 211 F.2d 405 (3d Cir. 1954), *cert. denied*, 348 U.S. 828 (1954); Calderone Enterprises Corp. v. United Artists Theatre Circuit, 454 F.2d 1292, 1296 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

100. *See* notes 23-34 and accompanying text *supra*.

101. *See* note 31 *supra*.

102. *In re* Multidistrict Vehicle Air Pollution M.D.L. 31, 1973 Trade Cas. ¶ 74819 (C.D. Cal. 1973).

According to the district court, in effect, equitable power under the antitrust laws is limited to preserving "free and unfettered competition—no more and no less."[103]

The plaintiffs in *MDL No. 31* did in fact allege an antitrust violation, a conspiracy to suppress competition in the development and manufacture of emission control devices, as had the Justice Department in its civil suit. The confusion in the district court is understandable when viewed in the context of the holding of the Ninth Circuit. If section 4 standing is not available to the parties because they are "too remote," it is difficult or impossible to justify the section 16 standing granted. The two remedies are part of a package given the private litigants to insure relief from injury, actual or threatened, by the antitrust violation.[104]

The Ninth Circuit has opened the door for standing to sue under section 16 while limiting the entry of the treble damage plaintiff. The court has said that if the plaintiff can show a violation of an interest that equity will recognize—for example, housing discrimination[105]—he has standing to seek an injunction but not damages. Thus the private litigant is being encouraged to seek equitable relief while the requisites for treble damage standing remain limited.

One commentator has suggested that Congress did not intend the antitrust laws, particularly the treble damage provision, as a vehicle for the general public to act as economic Batmen.[106] Similarly Congress did not intend that the private treble damage provision be denied to a class of persons which the court deem entitled to seek equitable relief. Standing to sue for an injunction is to be granted the individual who would have a treble damage claim if he were to wait for injury to occur.

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103. *Id.* at 95650.
104. *See* notes 47-49 and accompanying text *supra.*
105. 481 F.2d at 130. The Ninth Circuit cited Bratcher v. Akron Area Board of Realtors, 381 F.2d 723 (6th Cir. 1967) in support. In fact that decision dealt with the issue of antitrust jurisdiction and not standing.
106. Pollock, *Standing to Sue, Remoteness of Injury And The Passing-On Doctrine,* 32 A.B.A. ANTITRUST L.J. 5, 38 (1966).