many claims with extremely large damages, in which the plaintiff's losses might greatly exceed the defendant's illegal gains.[217] Thus, the suggested alternative to *Birnbaum* would not automatically overburden the defendant with excessive judgments. On the other hand, however, the protective purposes of the 1934 Act will not be carried out to the fullest extent possible if nonpurchasers and nonsellers are not protected to some degree in open market dealings.

ROBERT E. FOX

**Antitrust Law—Application of the *Data Processing* Standing Test in Treble Damage Actions—*Malamud v. Sinclair Oil Corp.***[1]—In 1968, Malco Petroleum, Inc., three real estate investment companies, and Jack and Anne Malamud, the officers, directors, and sole shareholders of the four corporate plaintiffs, instituted an action against Sinclair Oil Corp. in federal district court alleging violations of section 1 of the Sherman Act[2] and section 3 of the Clayton Act[3] arising out of a series of transactions between the parties.[4] Sinclair and Malco had entered into a distribution agreement in 1965.[5] Under the terms of the agreement, Sinclair promised to supply Malco with petroleum products for resale to retail customers. The parties to the agreement also arrived at an oral understanding whereby Sinclair was to supply financial assistance to the three investment companies to aid them in acquiring and developing new service stations.[6] Subsequent to the agreement, Sinclair refused financial assistance in five possible acquisitions proposed by Jack Malamud acting as an officer of the investment companies.[7] After Sinclair had refused to assist in all five of the proposed ventures, Jack Malamud negotiated a new contract with Texaco, Inc. and unsuccessfully sought an early termination of the contract between Malco and Sinclair.[8] Subsequently, the contract ran its course and, upon termination, Malco executed a new distribution agreement with Texaco, Inc. covering those service stations which had previously been supplied by Sinclair.[9]

The gist of plaintiffs' antitrust claim was that the agreement between Sinclair and Malco required Malco to secure its supply of prod-

[217] *See* Note, 16 B.C. IND. & COM. L. REV. 503, 512-13 (1975).

[1] 521 F.2d 1142 (6th Cir. 1975).
[2] 15 U.S.C. § 1 (1970).
[3] 15 U.S.C. § 14 (1970).
[4] *Malamud*, 521 F.2d at 1144-45.
[5] *Id.* at 1144.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

ucts as well as the financing necessary for expansion from Sinclair, restricting Malco's freedom to secure financial assistance from any of Sinclair's competitors. Plaintiffs also claimed that Sinclair's enforcement of the distribution contract, in conjunction with its failure to provide financing, illegally lessened competition and restrained trade in petroleum products by limiting the number of new service stations.[10]

The investment companies' theory of causation—advanced to satisfy the requirement of section 4 of the Clayton Act[11] that the alleged injury has been caused "by reason of" something forbidden in the antitrust laws—was that Sinclair's failure to provide assistance, and its refusal to free Malco to negotiate with other companies by agreeing to an early termination of the contract, prevented the investment companies from acquiring new service stations and, therefore, prevented them from realizing the profits which would have flowed from expansion and sales growth.[12] Malco's theory was that it lost profits from unrealized sales to the prospective service stations.[13] The Malamuds alleged that their financial interests in all of the corporate plaintiffs would have been improved by the expansion which would have taken place but for Sinclair's insistence on adherence to the contract.[14]

On a motion for reconsideration of a denial of its motion for summary judgment, Sinclair challenged the standing of all of the plaintiffs on the ground that they had not been directly injured by any of the alleged antitrust violations.[15] The district court held that all of the plaintiffs had standing.[16] However, the district court also held that in order to sustain a cause of action under section 4, plaintiffs had to "prove an injury . . . which bears a direct and causal relationship to the proven anti-trust violation."[17] The trial court concluded that, as a matter of law, neither the Malamuds nor Malco could estab-

[10] In order to succeed on the merits of their § 1 and § 3 claims, plaintiffs would have to adduce facts to show that the contractual agreement between Malco and Sinclair was a tying arrangement which had the effect of restraining trade in petroleum products. Malco was required under its agreement with Sinclair to buy its needed petroleum products from Sinclair. By virtue of this arrangement, Malco lacked the leverage of a potential purchaser of petroeleum products with respect to other oil companies, thus making it impossible to persuade such companies to finance the construction of new Malco-operated service stations. Therefore, Malco was virtually foreclosed from seeking alternative sources of financing. The requirements agreement between Malco and Sinclair limited Malco's ability to secure comparable financing elsewhere, thus providing Sinclair with "sufficient economic power with respect to the tying product [financing] to appreciably restrain free competition in the market for the tied product [petroleum products]." Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958). Similarly, the failure of Sinclair to finance such construction restrained Malco's sale of petroleum products.

[11] 15 U.S.C. § 15 (1970).

[12] 521 F.2d at 1145.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

lish such a direct injury and Sinclair's motion for summary judgment was granted as to those plaintiffs.[18] With regard to the investment companies, however, the district court found that there was a genuine issue as to a material fact with respect to the directness of their injuries.[19] Therefore, Sinclair's motion for summary judgment as to the investment companies was denied.[20] Subsequently, the district court certified for appeal the question of the investment companies' standing to sue.[21] Thereafter, Sinclair filed an interlocutory appeal from the district court's order partially denying its motion for summary judgment, and challenged the investment companies' standing before the circuit court.[22] The only plaintiffs appearing on appeal were the three investment companies (hereinafter "plaintiffs" or "investment companies").

The United States Court of Appeals for the Sixth Circuit affirmed, on the basis of the standing test in *Association of Data Processing Service Organizations, Inc. v. Camp,*[23] and HELD: An investment company alleging an inability to expand its operations due to the

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[18] *Id.*

[19] *Id.* at 1146 n.7. The district court concluded that an unresolved question of fact remained in the issue of whether the investment companies' injury was caused by Sinclair's refusal to finance, or whether it resulted solely from the investment companies failure to secure alternative financing, as was claimed by Sinclair. *Id.* Also left unresolved was a mixed question of law and fact in the issue of whether Sinclair's refusal to provide financial assistance had the effect of making the Sinclair-Malco contract an illegal requirements contract violative of § 1 of the Sherman Act and § 3 of the Clayton Act. *Id.*

[20] *Id.* at 1146. The district court reached different results with respect to the motions for summary judgment directed against the investment companies and the other two plaintiffs by adding to the standing requirements imposed by the standing test developed in Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970), the requirement of directness of injury as set forth in Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied,* 372 U.S. 907 (1963). 521 F.2d at 1145-46. Although ostensibly separating the question of standing from that of directness of injury, the district court in fact equated the two. By denying Sinclair's motion with respect to the investment companies and granting the motion with respect to the other two plaintiffs, the district court demanded not only that plaintiffs make a showing adequate to satisfy the requirements of *Data Processing* but also that they plead facts sufficient to show a directness of injury. *Id.*

While the circuit court agreed with the district court's finding that the *Data Processing* test was the proper test for determining treble damage standing, it disagreed with the manner in which the district court applied the test. The circuit court rejected the district court's addition of the direct injury requirement by making it clear that *Volasco* was not a case setting forth standing requirements but was one to be relied upon only when determining the merits of a case. *Id.* at 1150. Under the circuit court's view, summary judgment might not have been granted against Malco and the Malamuds. Such a result would flow from the court of appeals' approach since the operative facts constituting the claims of all three original plaintiffs were the same. If a material question of fact remained unresolved as to one plaintiff it would also have remained unresolved as to the other plaintiffs, and summary judgment would have been equally inappropriate to the claims of all three plaintiffs.

[21] 521 F.2d at 1146.

[22] *Id.* at 1143.

[23] 397 U.S. 150 (1970).

defendant's failure to provide promised financial assistance has alleged an injury in fact,[24] and a "denial of [such] financing arguably comes within the zone of interests protected by the Sherman and Clayton Acts."[25] In so holding, the court of appeals adopted the district court's conclusion that the two-pronged standing test developed by the Supreme Court in *Data Processing*[26] was the appropriate test for determining standing in treble damage actions.[27]

The Sixth Circuit rejected the approaches used in the other circuits to determine standing in section 4 actions[28] on the ground that they demanded too much of plaintiffs in the pleading stages of a case.[29] The court reasoned that the *Data Processing* test was more appropriate than the other antitrust standing tests since it could be utilized without enabling a court "to make a determination on the *merits* of a claim under the guise of assessing the *standing* of the *claimant*."[30] The issue of the proper standing test in treble damage cases has yet to receive definitive treatment by the Supreme Court.

This note will examine the appropriateness of the *Data Processing* standing test in private antitrust actions. It will first consider the principles underlying the development of standing tests in antitrust cases. Next, the standing tests which have previously been adopted by the courts to respond to such principles will be examined. Then it will consider whether the *Data Processing* test—developed for use in administrative actions—ought to be controlling in treble damage cases. Finally, the problems in the application of the *Data Processing* test will be examined to determine whether that test is more likely to successfully reflect the principles relevant to the formulation of an antitrust standing test than the tests presently in use.

## I. PRESENT STANDARDS FOR DETERMINING STANDING IN SECTION 4 CASES: THE DIRECT-INJURY TEST AND THE TARGET-AREA TEST

Section 4 of the Clayton Act provides: "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 . . . ."[31] The language of the statute is clear and the class of persons entitled to sue thereunder almost limitless, since any antitrust violation may have some injurious effect on many

[24] 521 F.2d at 1151.
[25] *Id.* at 1152.
[26] 397 U.S. at 152-53.
[27] 521 F.2d at 1151.
[28] See cases cited at notes 48 & 49 *infra*.
[29] 521 F.2d at 1149.
[30] *Id.* at 1150 (emphasis in original).
[31] 15 U.S.C. § 15 (1970).

areas of the economy.[32] A literal interpretation of section 4 would secure a right of recovery not only for the investment companies in *Malamud* but for any person who could allege an injury and a causal connection between that injury and the alleged antitrust violation, no matter how attenuated the causal chain might be.

Judicial awareness of the ramifications—such as spurious claims,[33] windfall judgments,[34] "over-kill,"[35] and multiplicity of suits and duplication of recovery[36]—of such a broad and literal reading of section 4 has resulted in repeated attempts by the courts to limit the scope of the remedy afforded by that section.[37] The federal courts have often resorted to the law of standing to accomplish this purpose.[38] In so doing, the courts have developed a standing doctrine, "peculiar to antitrust,"[39] which attempts to draw a line of demarcation between those plaintiffs who should be allowed to sue under section 4 and those who should not on the basis not only of the

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[32] *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 125 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). *See* Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 Nw. U.L. Rev. 691, 701 (1963).

[33] *See* Comment, 64 Colum. L. Rev. 570 (1964) where the author described the courts' imposition of a limitation on the availability of § 4 relief as a response to "the need to eliminate spurious claims brought for the purpose of coercing settlement or lured by the possibility of a treble damage windfall." *Id.* at 585.

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

[35] *See* Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972), where the court justified the rules of standing which narrowly construe the language of § 4 by stating:

> Furthermore if 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 a 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.

*Id.* at 1295.

[36] *See* Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 733 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910).

[37] *See In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 125 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); Productive Inventions, Inc. v. Trico Prods. Corp., 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956). As one court has noted the antitrust laws "should not be literally construed if unreasonable results would be reached by doing so. Obviously, there must be a limit somewhere." Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312, 317 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

[38] See cases cited at notes 48 & 49 *infra*. Although the courts have consistently attempted to limit the scope of recovery provided by § 4 by resorting to the law of standing, see *Malamud*, 521 F.2d at 1146, it should be noted that another approach to the problem of limitation in other areas of the law is to address the issue by narrowing the scope of the cause of action and not tampering with the requirements of standing. *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 738-48 (1975). However, the *Malamud* court viewed the *Data Processing* test itself as involving a "policy of judicial self-restraint" to be pursued by resort to the law of standing rather than by limiting the scope of the cause of action. 521 F.2d at 1149.

[39] *Malamud*, 521 F.2d at 1148.

jurisdictional concept grounded in Article III but also on the basis of judicial self-restraint conservatively applied in section 4 cases.[40] The reasons commonly given by the courts to justify such a line are the severity of the treble damage remedy provided by the section,[41] the prevention of multiple suits,[42] and the discernment of a congressional intent not to provide a remedy for every injury that might possibly be attributed to an antitrust violation.[43]

These interests however, are not the only factors which must be considered when devising a standing doctrine; the courts must also be responsive to the entire legislative plan for the enforcement of the antitrust laws. By creating the section 4 private action, Congress sought not only to redress an injury to the individual but also to deter parties from engaging in activities prohibited by the antitrust laws through the threat of private treble damages liability.[44] The private litigant was

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[40] *See id.* In general, any standing doctrine has at its base the limitations imposed by the Constitution on the jurisdiction of the federal courts. Article III, § 2 requires a "case" or "controversy" to invoke the power of the federal judiciary. For a claim to be imbued with the features of a "case" or "controversy" it must be capable of being "presented in an adversary context and in a form historically viewed as capable of judicial resolution." Flast v. Cohen, 392 U.S. 83, 101 (1968). In order to assure the necessary adverseness, the Supreme Court has stated that a party seeking to invoke a court's jurisdiction must have a "personal stake in the outcome of the controversy." Baker v. Carr, 369 U.S. 186, 204 (1962). If a personal stake were the only requirement imposed on a litigant, any injury would suffice. But in all areas of law, and certainly in antitrust, not every injury is afforded protection. Many courts in antitrust have looked not only at the "case" or "controversy" language of § 4—"any person *who is injured*" (emphasis added)—but have also required a plaintiff to satisfy the "causation" language of that section as well. *See, e.g., In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 126, 129 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied,* 401 U.S. 923 (1971); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418 (4th Cir.), *cert. denied,* 385 U.S. 934 (1966); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955); Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910). Thus, the "by reason of" language has been seized upon as evidence of a congressional intent to withhold jurisdiction from the federal courts in particular types of cases.

[41] *See* Westor Theatres, Inc. v. Warner Bros. Pictures, Inc., 41 F. Supp. 757 (D.N.J. 1941):

> The right which [the Sherman and Clayton Acts] give to a person to recover threefold the damages he has sustained, is an unusual one, the remedy drastic, and the Acts are to be strictly construed and not to be enlarged by construction.

*Id.* at 762. *Accord,* Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587, 591 (7th Cir. 1957); Image & Sound Serv. Corp. v. Altec Serv. Corp., 148 F. Supp. 237, 239 (D. Mass. 1956).

[42] *See* Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910); Ames v. American Tel. & Tel. Co., 166 F. 820, 823 (D. Mass. 1909).

[43] As the Supreme Court has noted, "[T]he 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." Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 n.14 (1972) (dictum).

[44] *See, e.g.,* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); P.W. Husserl, Inc. v. Simplicity Pattern Co., 191 F. Supp. 55, 60 (S.D.N.Y. 1961), *rev'd on other grounds sub nom.* House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 870 (2d Cir. 1962); United States v. Standard Ultramarine & Color Co.,

conceived of by Congress as an essential component of the overall legislative enforcement scheme.[45]

Recognizing the importance of the private suit, the Supreme Court has cautioned that the courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust laws]."[46] Therefore, any standing doctrine applied in antitrust cases must be analyzed in terms of these two conflicting sets of interests: the judicially felt need for a limitation on the number of private antitrust litigants, and the importance of the private action as a mechanism for antitrust enforcement.

Against this backdrop of considerations relevant in antitrust, the circuit courts have attempted to formulate a standing doctrine, relying primarily on the "by reason of" causation element of section 4.[47] Two standards, the "direct-injury" test[48] and the "target-area" test,[49] have been developed to determine whether a plaintiff's injury was caused "by reason of" anything forbidden in the antitrust laws.

The direct-injury test, which was first expressed by the Third Circuit in *Loeb v. Eastman Kodak Co.*,[50] focuses on the relationship between the plaintiff and the alleged antitrust violator. In *Loeb*, a shareholder brought a treble damage action against Kodak alleging that Kodak's antitrust violations had forced the corporation in which the plaintiff-shareholder owned shares out of business.[51] The court held that the shareholder did not have standing because his injury was "indirect, remote, and consequential," reasoning that the injury caused by defendant's illegal conduct was to the corporation rather than to the individual.[52] Therefore, any loss suffered by the share-

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137 F. Supp. 167, 171 (S.D.N.Y. 1955); Wham, *Antitrust Treble-Damage Suits: The Government's Chief Aid in Enforcement*, 40 A.B.A.J. 1061 (1954).

[45] Lawlor v. National Screen Serv., 349 U.S. 322, 329 (1955); Kinnear-Weed Corp. v. Humble Oil & Refining Co., 214 F.2d 891, 893 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955).

[46] Radovich v. National Football League, 352 U.S. 445, 454 (1957).

[47] *See Malamud*, 521 F.2d at 1148.

[48] *See, e.g.*, Reibert v. Atlantic Richfield Co., 471 F.2d 727, 729, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 732 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299, 302 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957).

[49] *See, e.g., In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679, 689 (8th Cir. 1966); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

[50] 183 F. 704 (3d Cir. 1910). The action in *Loeb* was brought under § 7 of the Sherman Act. *Id.* at 705. Section 7 was superseded in 1914 by § 4 of the Clayton Act which contains substantially the same language as § 7. *Compare* Clayton Act § 4, 15 U.S.C. § 15 (1970) *with* Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890).

[51] 183 F. at 707.

[52] *Id.* at 709.

holder was derivative and, as such, too indirect to serve as the basis for an antitrust action.[53]

The doctrine enunciated in *Loeb* has been construed to mean that a plaintiff separated from the alleged violator by an intermediate party lacks the directness of injury necessary to establish an injury by reason of anything forbidden in the antitrust laws.[54] Thus, the test limits standing to those in privity with the violator.[55] The application of the direct-injury test has resulted in the delineation of classes, such as "shareholders,"[56] "creditors,"[57] and "lessors,"[58] who are unable to sue under section 4 because of the lack of a direct relationship with the wrongdoer. Although resolving a difficult issue with some simplicity and efficiency, the direct-injury test has been criticized as a "mere search for labels"[59] rather than a bona fide "judicial inquiry."[60] Criticism leveled against the test focuses on its obfuscation of the basic

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[53] *Id.* The court also emphasized that the plaintiff could have found a remedy in the traditional shareholder's derivative suit. *Id.*

[54] *See, e.g., In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1302 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972); Beane, *Antitrust: Standing and Passing On,* 26 BAYLOR L. REV. 331, 335 (1974); Comment, 64 COLUM. L. REV. 570, 582 (1964).

[55] *See In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973) and cases cited at notes 56-58 *infra.*

[56] *See, e.g.,* Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 732 (3d Cir. 1970), *cert. denied,* 401 U.S. 974 (1971); Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292, 294 (2d Cir. 1958); Peter v. Western Newspaper Union, 200 F.2d 867, 872 (5th Cir. 1953).

[57] *See, e.g.,* Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299, 302-03, *aff'd per curiam,* 242 F.2d 758 (1st Cir.), *cert. denied,* 355 U.S. 828 (1957); Gerli v. Silk Ass'n of America, Inc., 36 F.2d 959, 960-61 (S.D.N.Y. 1929).

[58] *See, e.g.,* Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518, 519 (3d Cir.) (per curiam), *cert. denied,* 352 U.S. 890 (1956).

[59] *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973).

[60] *Id.* In Perkins v. Standard Oil Co., 395 U.S. 642 (1969), the Supreme Court considered whether sales of gasoline at fixed lower prices, through a distributive chain which began with sales to a wholesaler and ended with sales to a retail competitor of the plaintiff and with the lower prices allegedly passed on at each step in the chain, was violative of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970). 395 U.S. at 644. The Court, in reversing the court of appeals' holding that such "fourth level" injuries were not protected by the Robinson-Patman Act, concluded that "the competitive harm done . . . is certainly no less because of the presence of an additional link in this particular distribution chain . . . ." *Id.* at 648. Rejecting the Ninth Circuit's conclusion that the presence of intermediate parties precluded recovery, the Court stated that such a "limitation is wholly an artificial one and is completely unwarranted by the language or purpose of the Act." *Id.* at 647. Although the Court was applying a different section of the Clayton Act, its reasoning is equally persuasive when applying § 4. By analogy, the harm to a § 4 plaintiff is no less damaging to his competitive position than the competitive harm done by "fourth level" price discrimination because of the presence of an intermediate party. Therefore, any test which bases standing upon the absence of such a link, as does the direct-injury test, appears to impose an artificial limitation of the type criticized by the Supreme Court in *Perkins.*

issue—whether a plaintiff *and his alleged injury* are within the intended protection of section 4.[61]

Furthermore, the direct-injury test imposes substantial burdens on a litigant attempting to pursue a section 4 recovery. For example, under the direct-injury test, the plaintiffs in *Malamud* would not have had standing since they were not in privity with Sinclair, either through contract or property interests. The investment companies' relationship with Sinclair resulted from the contractual privity between Malco and Sinclair rather than from any direct contractual relationship of their own. Therefore, any allegation by them of a diminution or loss of profits attributable to antitrust violations against Malco would not withstand a "direct-injury" standing challenge.[62] Furthermore, a contention that any violation against Malco was also a violation against the investment companies because they had identical shareholders would also fail, since Malco and the investment companies had chosen to operate through different legal entities and, as the Sixth Circuit has previously stated, "they must now abide by the consequences."[63] The identical injury suffered by the investment companies would have attracted judicial attention had the Malamuds had enough foresight to confine all their activities to a single legal entity. However, requiring litigants to consider, when organizing their businesses, the likelihood of injury due to antitrust violations not only results in an unreasonable burden on them should such wrongs actually be suffered, but also acts to undercut the preventative thrust of the antitrust laws.[64]

The second antitrust standing standard, the target-area test, focuses on the plaintiff's relationship to the area of the economy affected by the alleged antitrust violation. The test was initially expressed by the Ninth Circuit in *Conference of Studio Unions v. Loew's, Inc.*[65] In *Studio Unions*, a labor union and its members brought an action under section 4 alleging violations of the antitrust laws.[66] They sought to recover for injuries caused by an alleged conspiracy between

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[61] *See* Beane, *Antitrust: Standing and Passing On*, 26 BAYLOR L. REV. 331, 335 (1974); Comment, 64 COLUM. L. REV. 570, 587 (1964).

[62] *See* Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956): "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 alleged violations of the antitrust laws." *Id.* at 909. *But see* Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587, 590-91, 595 (7th Cir. 1957).

[63] Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 394 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *accord*, Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., 193 F. Supp. 401, 407 (S.D.N.Y. 1961).

[64] It is not the potential victim who should have possible future antitrust problems in mind when involved in corporate organization. Rather, it is the potential wrongdoer who when organizing his business should consider whether a particular corporate structure will subject him to antitrust liability. *Cf.* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951).

[65] 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

[66] *Id.* at 52.

major motion picture studios and another union to drive independent studios out of business.[67] The plaintiffs' theory of causation was that the major studios' acts of restraining the production of motion pictures and driving the independent studios out of business would result in fewer employment opportunities for the members of plaintiff's union.[68] The court, in holding that plaintiffs did not have standing, reasoned that the conspiracy was directed at motion picture production and not employment. Therefore, since the plaintiffs were not engaged in such production their injuries were not direct enough to support a treble damage suit.[69] In closing, the court enunciated the target-area test: to establish standing, a complainant

> must show that he is within that 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.[70]

The Ninth Circuit refined this test in *Karseal Corp. v. Richfield Oil Corp.*,[71] where the court required not only that the plaintiff show that he was "hit" by the antitrust violation but also that he was "aimed at."[72] In *Twentieth Century Fox Film Corp. v. Goldwyn*,[73] the same court construed the requirement added by *Karseal* to mean that it must have been foreseeable that the defendant's conduct would have an adverse effect on the market in which the plaintiff was operating.[74] Both of these decisions further emphasized that the critical factor in drawing the proper line is the economic area affected rather than the status of the plaintiff *vis-a-vis* the wrongdoer.

It would appear that the plaintiffs in *Malamud* would not have been barred under a target-area approach. The alleged illegal conduct by Sinclair was aimed at limiting the number of new retail outlets for petroleum products through a refusal to provide the financial assis-

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[67] *Id.*

[68] *Id.* at 53.

[69] *Id.* at 54.

[70] *Id.* at 54-55.

[71] 221 F.2d 358 (9th Cir. 1955).

[72] *Id.* at 362.

[73] 328 F.2d 190 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964).

[74] *Id.* at 220. The *20th Century* court added the foreseeability requirement to make it clear that the *Karseal* requirement that the defendant must have aimed at the plaintiff did not mean that the defendant must have had an *intent* to injure the particular antitrust plaintiff, but rather 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." *Id.* However, not all the circuits which adhere to the target-area doctrine focus on the foreseeability of the injury. *See, e.g.,* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied,* 401 U.S. 923 (1971). *Compare* Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073, 1076 n.4 (9th Cir. 1970), *cert. denied,* 402 U.S. 923 (1971) *with* Fields Productions, Inc. v. United Artists Corp., 318 F. Supp. 87, 88 (S.D.N.Y. 1969), *aff'd per curiam,* 432 F.2d 1010 (2d Cir. 1970).

tance required for service station construction.[75] Limiting the number of service stations would affect the entire chain of commerce involved in supplying petroleum products for eventual sale to the consumer. Thus, the entire economic community engaged in supplying petroleum products would be endangered by a breakdown of competitive conditions in the station financing market. The plaintiffs were in that area of the economy. The growth of their business—developing and operating new service stations—was directly related to the existence of an economic climate in which the number of new stations was not artifically controlled. Similarly, Sinclair could have foreseen the adverse effects of anti-competitive conditions on the area of the economy in which plaintiffs' operated. Thus, it appears that the plaintiffs in *Malamud* would have had standing under the target-area test.

The target-area test is presently applied in a majority of the circuits.[76] Although the test does attempt to respond to the inadequacies of the direct-injury test by focusing on the economic area affected rather than the status of the victim, its application has been criticized nonetheless as "opera[ting] to prohibit plaintiffs from suing by applying labels, rather than trying to examine the economic relationships of prospective plaintiffs to the antitrust violations"[77] and as "no more capable than the directness doctrine of vindicating public policy."[78] The target-area test has also been viewed as "a conceptual limitation, and at times vague, confusing and inconsistently applied."[79] Notwithstanding the outcome with respect to the *Malamud* plaintiffs, the target-area test, even though more liberal than the direct-injury test, also demands a great deal of a plaintiff. He must allege facts to show an area of the economy was affected,[80] that he carried on business in that area,[81] that the area was aimed at,[82] and that his injury was a foreseeable result of defendant's conduct.[83] In sum, he must show that a violation of the antitrust laws has occurred, in the pleading stage of the litigation prior to an opportunity to engage in discovery.[84] Certainly, these are not the "general allegations" envis-

[75] 521 F.2d at 1151-52.

[76] See cases cited at notes 48 & 49 *supra.*

[77] Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1303 (2d Cir. 1971) (Levet, J., dissenting), *cert. denied,* 406 U.S. 930 (1972).

[78] *Id. See also* Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos., 382 F.2d 925 (10th Cir. 1967) where the Tenth Circuit, in refusing to abandon its adherence to the direct-injury test and adopt the target-area test, stated: "[W]e need not seek new language to express the same doctrine." *Id.* at 928.

[79] Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1303-04 (2d Cir. 1971) (dissenting opinion), *cert. denied,* 406 U.S. 930 (1972).

[80] *See In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973).

[81] *Id.*

[82] Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955).

[83] Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964). See note 74 *supra.*

[84] The problem with the showing required of a plaintiff in a target-area jurisdiction is primarily that of having to make the showing prior to discovery. Particularly in

aged by the Supreme Court[85] nor the general notice type pleading expressed in the federal requirement of a "short and plain statement of the claim."[86] Many of the allegations in such a complaint go to the merits, so that the target-area test requires the court to make an adjudication on the merits in the pleading stages of litigation uniformly containing complex factual issues,[87] a practice criticized by the Supreme Court.[88]

## II. THE *DATA PROCESSING* STANDARD: PROBLEMS IN APPLICATION AND VIABILITY AS A REPLACEMENT

In *Malamud,* the Sixth Circuit rejected both the direct-injury test and the target-area test, and chose instead to apply the two-part test developed by the Supreme Court in *Data Processing.*[89] The issue in *Data Processing* was whether the plaintiffs, an association of data processors and a corporation engaged in data processing, had standing, as "aggrieved" persons under section 702 of the Administrative Procedure Act,[90] to challenge a Comptroller of Currency's ruling which allowed national banks to provide data processing services to other banks and bank customers.[91] The Court, in an opinion written by Justice Douglas, defined the requisites of standing as (1) whether there is an injury in fact as required by the "case or controversy" mandate of Article III, and (2) "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be pro-

circuits where the *20th Century* foreseeability element is not the focus of the test, a plaintiff may be required to show that the defendant possessed an actual purpose or intent to injure him, without the benefit of investigation into information in the hands of the defendant. *Cf.* Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1296 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972). The plaintiff may therefore be required to delve into facts constituting the merits of the case at a time when he may be ill-equipped to do so. Although the focus in the Ninth Circuit on the foreseeability of the injury alleviates this problem in part, a plaintiff is still required to plead that the injury was reasonably foreseeable from the defendant's vantage point. *Cf. In re* Western Liquid Asphalt Cases, 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974). The plaintiff must, therefore, be privy to information evidencing the defendant's vantage point as well as the information which the defendant possessed when he entered upon the allegedly illegal course of conduct.

[85] Radovich v. National Football League, 352 U.S. 445, 453-54 (1957).

[86] FED. R. CIV. P. 8(a).

[87] *Malamud,* 521 F.2d at 1149-50.

[88] In Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962), the Court cautioned that summary judgment "should be used sparingly in complex antitrust litigation where . . . the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Id.* at 473.

[89] 521 F.2d at 1151.

[90] 5 U.S.C. § 702 (1970):

Right of Review.

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

[91] 397 U.S. at 151.

tected or regulated by the statute or constitutional guarantee in question."[92] In holding that the plaintiffs did have standing, the Court concluded that they had suffered injury in fact due to a loss of profits occasioned by the competition of national banks in the business of data processing.[93] Also, section 4 of the Bank Service Corporation Act of 1962[94] was held to be a relevant statute, arguably designed to protect competitors, such as the plaintiffs, of national banks engaged in non-banking activities.[95]

The applicability of the *Data Processing* test in cases not involving challenges to administrative action has been questioned by both the courts[96] and commentators.[97] Questioning of the test's applicability outside of the administrative law field has been concerned primarily with whether a test designed to determine standing in challenges to administrative orders is controlling in cases not involving the right of

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[92] *Id.* at 153.

[93] *Id.* at 152.

[94] 12 U.S.C. § 1864 (1970). Section 4 provides: "No bank service corporation may engage in any activity other than the performance of bank services for banks."

[95] 397 U.S. at 156, 157.

[96] *See* Postal Workers Detroit Local v. Independent Postal Sys. of America, Inc., 481 F.2d 90, 92-93. (6th Cir. 1973), *cert. granted,* 414 U.S. 1110, *cert. dismissed,* 415 U.S. 901 (1974); Solien v. Teamsters Local 610, 440 F.2d 124, 132 (8th Cir.), *cert. denied,* 403 U.S. 905 (1971). There is, however, some precedent for the application of *Data Processing* in non-administrative actions. *See, e.g.,* Crossen v. Breckenridge, 446 F.2d 833, 839 (6th Cir. 1971), *vacated on other grounds,* 410 U.S. 950 (1973); Colligan v. Activities Club, Ltd., 442 F.2d 686, 691 (2d Cir.), *cert. denied,* 404 U.S. 1004 (1971). The Third Circuit applied the *Data Processing* test in a case involving non-administrative governmental action, reasoning that even though *Data Processing* had involved standing to secure judicial review of an agency action, "nonetheless the opinion enunciates a concept which is at least helpful in deciding the present question." *In re* Grand Jury Proceedings, 450 F.2d 199, 210 n.16 (3d Cir.), *aff'd sub nom.* Gelbard v. United States, 408 U.S. 41 (1971).

There have also been instances of the test's application in non-governmental, non-administrative actions. In Letter Carriers v. Independent Postal Sys. of America, 470 F.2d 265 (10th Cir. 1972), the Tenth Circuit affirmed the trial court's determination that plaintiff letter carriers association had standing to enjoin defendant corporation from delivering Christmas cards bearing privately issued postage. *Id.* at 269-71. The district court had concluded that the zone of interest test was applicable since "the Postal Laws *regulate* the employment opportunities and practices of the members of Plaintiff's organization.... But, if not, the Postal Reorganization Act of 1970 ... has recognized and seeks to protect (as well as regulate) the interests and employment opportunities of the Postal employees ...." Letter Carriers v. Independent Postal Sys. of America, 336 F. Supp. 804, 807 (W.D. Okla. 1971). Similarly, the court of appeals relied on the *Data Processing* test in finding that plaintiff had standing as a "would-be" competitor of the defendant and since the statute in question arguably brought competitors within the zone of interests protected. 407 F.2d at 270. Thus, the court implied that due to the regulatory aspects of both agency actions and postal laws the use of a test developed for the former could be justifiably and logically applied to the latter.

An analogy can be drawn between the postal case and the treble damage suit. Although not an explicit purpose of the antitrust laws, they do operate to regulate business and industry by forbidding and punishing certain practices. *See, e.g.,* Breit & Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis,* 86 HARV. L. REV. 693, 706-08 (1973).

[97] *See, e.g.,* Hasl, *Standing Revisited–The Aftermath of Data Processing,* 18 ST. L.U.L.J. 12 (1973).

judicial review of agency actions, and whether "the *attitude* of the Supreme Court in the agency cases reflects a broadening tendency and presages the extension of the 'zone of interests' test . . . to private party litigation."[98] The *Malamud* court responded to the first of these two issues and held that the test was the proper standard for determining treble damage standing.[99]

The test's application in such cases was justified by the Sixth Circuit on two grounds. First, the court discerned a similarity between section 702 of the Administrative Procedure Act and section 4 of the Clayton Act, in that both employ broad language to define the class of persons authorized to sue under each statute and both make reference to other statutes to supply the substantive law.[100] Section 4 defines the class as "any person injured" and makes reference to the antitrust laws[101] while section 702 refers to "a person . . . adversely affected or aggrieved within the meaning of a relevant statute."[102] This analysis by the court, while focusing on the consistency of legislative *format*, fails to reach the basic issue of whether there is enough similarity between the two sections to conclude that the legislative *purpose* behind section 4 will be served by application of the *Data Processing* test.

The second ground proposed in *Malamud* does address itself to this basic issue. Based on an understanding of the nature of antitrust litigation and the policy underlying private antitrust suits, the court concluded that the *Data Processing* test should be utilized because

> a private antitrust action is not the typically private suit which raises no standing issues because the real party in interest is obvious. Because a private action under Section 4 has some considerable enforcement value, it is in the nature of a public suit. As with a suit in the administrative law field, a private antitrust claim seeks both to remedy the alleged injury to the private plaintiff and to "vindicate the important public interest in free competition."[103]

In light of the nature and goals of both treble damage actions and agency cases, this second justification for the application of the *Data Processing* test is somewhat persuasive. By providing for both public[104] and private[105] enforcement of the Sherman and Clayton Acts, Congress evidenced a belief that the interests protected by those Acts are

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[98] Postal Workers Detroit Local v. Independent Postal Sys. of America, Inc., 349 F. Supp. 1297, 1298 (E.D. Mich. 1972), *aff'd*, 481 F.2d 90 (6th Cir. 1973), *cert. granted*, 414 U.S. 1110, *cert. dismissed*, 415 U.S. 901 (1974).

[99] 521 F.2d at 1151.

[100] *Id.*

[101] 15 U.S.C. § 15 (1970). See text at note 31 *supra*.

[102] 5 U.S.C. § 702 (1970). See note 90 *supra*.

[103] 521 F.2d at 1151 (citations omitted).

[104] 15 U.S.C. § 4 (1970).

[105] 15 U.S.C. § 15 (1970).

both public and private in nature.[106] It is clear that those laws were designed to "protect the victims of the forbidden practice,"[107] but it is also apparent that, in providing a private remedy for the victim, a basic *public* interest in free enterprise in the interstate market is being served.[108] Thus, the treble damage provision was also intended to punish[109] and deter certain practices which have "come to be regarded as a special form of public injury,"[110] with the private litigants acting as "an ancillary force of private investigators to supplement the Department of Justice."[111]

Recent decisions similarly indicate the two-fold nature of private challenges under the Administrative Procedure Act to federal agency actions.[112] By legislative mandate most agencies are instructed to administer their programs in the public interest.[113] Therefore, claimants in an administrative action serve not only to vindicate their own interests but those of the public as well[114] and such claimants have repeatedly been afforded the right to sue to enforce the public interest.[115] Thus, the Sixth Circuit's analysis of the similarity between the general goals of the Administrative Procedure Act and the anti-

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[106] *See* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948); United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 171 (S.D.N.Y. 1955).

[107] Radovich v. National Football League, 352 U.S. 445, 454 (1957).

[108] *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969). As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition. *Id.* at 502; *accord,* Radovich v. National Football League, 352 U.S. 445, 453-54 (1957). *See generally* MacIntyre, *The Role of the Private Litigant in Antitrust Enforcement,* 7 ANTITRUST BULL. 113 (1962).

[109] The punitive aspect of the treble damage action was evident in Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955), where the Supreme Court, in holding against the taxpayer in a deficiency suit for his failure to include two-thirds of a treble damage recovery in gross income, stated that "[I]t would be an anomaly that could not be justified . . . to say that recovery for actual damages is taxable but not the additional amount extracted as *punishment* for the same conduct which caused the injury." *Id.* at 431 (emphasis added).

[110] Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940).

[111] Quemos Theatre Co. v. Warner Bros. Pictures, Inc., 35 F. Supp. 949, 950 (D.N.J. 1940); *see* Comment, 49 YALE L.J. 284, 296 (1939).

[112] In Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (D.C. Cir. 1970), *petition for cert. dismissed,* 401 U.S. 950 (1971), the court stated that the "interest being protected is basically the public interest." *Id.* at 1208.

[113] *See, e.g.,* 15 U.S.C. § 79g(a)(2) (1970) (the Commissioner of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935 may prescribe such rules and regulations as are "necessary or appropriate in the public interest"); 16 U.S.C. § 824c(a) (1970) (the Commissioner of the Federal Power Commission may make orders under the section only if he finds that they are "compatible with the public interest").

[114] *See* Jaffe, *Standing Again,* 84 HARV. L. REV. 633, 635 (1971).

[115] *See, e.g.,* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686-88 (1973); Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1096-97 (D.C. Cir. 1970).

trust statutes is defensible.[116] Notwithstanding such an analysis, however, the existence of a similarity of goals is not sufficient, in itself, to insure that the purposes of section 4 will be furthered by the application of the *Data Processing* test.

The critical question in formulating a standing doctrine is whether, within the confines of Article III,[117] it succeeds in carrying congressional intent into effect. This inquiry necessarily raises questions of whether the purpose of the legislation is promoted by allowing certain parties access to the courts *and* whether the standing test so formulated *efficiently* and *precisely* furthers the legislative intent. The fundamental question for antitrust purposes is thus whether the zone of interests test, as applied for the first time in an antitrust case in *Malamud,* responds adequately to the conflict between the need for a line of demarcation and the policy of private enforcement in a manner certain enough to provide a workable, objective standing test.

Taken literally, the injury in fact element of the *Data Processing* test could be construed to require only that the complainant show some pecuniary harm.[118] However, any interpretation of the test for use in antitrust litigation must be made with reference to the wording of section 4. Thus, to establish an injury in fact under section 4 a claimant must allege an injury to his "business or property."[119] Since the "business or property" phrase has consistently been construed to mean "commercial ventures or enterprises,"[120] it appears that a mere allegation of injury to a plaintiff's non-commercial financial status or to the economy in general would be insufficient. However, any injury to a plaintiff's business regardless of how attenuated the causal chain might be would satisfy the requirement of an injury in fact under *Data Processing,* since the injury in fact element requires nothing more of a plaintiff than that which would be required by a literal reading of section 4.[121] Such a result would run counter to the great weight of case authority, however, which requires a more restrictive reading of section 4 in order to limit the number of antitrust plaintiffs.[122] Therefore, the injury in fact element of the *Data Processing* test standing alone would not limit the availability of section 4, and would conse-

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[116] See text at note 103 *supra.*

[117] The strictures of Article III raise the constitutional question of whether there is a "case" or "controversy," providing a safeguard against use of the federal courts as "a forum [for the airing of] generalized grievances." Flast v. Cohen, 392 U.S. 83, 106 (1968).

[118] Some commentators have suggested that injury in fact should be the only requirement for standing. See Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 450, 457, 472 (1970); Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis,* 25 VAND. L. REV. 479, 511-12 (1972). For a discussion of the problems raised by such a suggestion in the antitrust field see text at notes 144-146 *infra.*

[119] 15 U.S.C. § 15 (1970).

[120] *See, e.g.,* Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972); Roseland v. Phister Mfg. Co., 125 F.2d 417, 419 (7th Cir. 1942).

[121] See text at note 32 *supra.*

[122] See cases cited at note 37 *supra.*

quently fail to respond to the need for a line of demarcation.

The second part of the *Data Processing* test, however, has the potential for both limiting and expanding the availability of section recovery. The second prong of the test is the non-constitutional requirement that a claimant show that the interest invaded by the alleged illegal conduct is "arguably within the zone of the interests to be protected."[123] The key to the success of this element as a restrictive factor is the careful delineation of the boundaries of the "zone of interests." The same element of the test also has the potential to liberalize the demands placed upon the plaintiff by requiring only that he allege invasion of interests which are "*arguably*" within the protected zone. Under the *Data Processing* test as applied in *Malamud,* for example, a litigant must exhibit that he is an intended beneficiary of the statutory protection provided by the antitrust laws, thereby displaying interests protected by those laws.[124] However, a plaintiff need only *allege* the existence of such interests, and then only in the most general way; he need not convince the court on a standing challenge that his interests are indeed within the protected zone, but only that they are "arguably" so.[125] That the *Data Processing* test has the potential to be less burdensome while, at the same time, not completely limitless argues favorably for its use. Whether the test will have such an effect in practice, however, depends on how the courts solve the various problems concerning the application of the test.

In application, the *Data Processing* test may not result in decisions reflecting any greater ability to achieve the balance between the two conflicting sets of antitrust principles than the other two tests. A number of commentators have pointed to questions raised by the *Data Processing* doctrine; specifically, which statute a court should look to in determining the zone of interests, how a court should determine the zone of interests once having decided which statute to apply, and how it should interpret the term "arguably."[126] These questions have particular relevance in antitrust litigation.

In the antitrust context, the problem of which statute should be applied is simply whether the "statute in question" is section 4 of the Clayton Act or the other substantive provisions of the Sherman and Clayton Acts describing the forbidden conduct. Resolution of this issue is fundamental to an actual application of the test, since the zone of interests may differ depending on the statute selected. The *Malamud* court stated that plaintiffs' interests were arguably within the "zone of interests protected by the Sherman and Clayton Acts," implying that the "statute in question" is actually the entire body of substan-

[123] 397 U.S. at 153.

[124] *See* 521 F.2d at 1151-52. See text at notes 126-139 *infra.*

[125] *See* 521 F.2d at 1151-52. See text at notes 140-147 *infra.*

[126] *See* Davis, *supra* note 118, at 458-68; Hasl, *supra* note 97, at 31-38; Jaffee, *supra* note 114, at 634; Sedler, *supra* note 118, at 484-88; Comment, 69 MICH. L. REV. 540, 551-60 (1971).

tive antitrust law.[127] It is possible that other courts, however, when applying the *Data Processing* test, may consider that the zone involved encompasses the interest of the private party in being able to recover for losses sustained due to antitrust violations. It might therefore be argued that section 4 alone should be selected as the statute in question, since it provides the private right of recovery.[128] Nevertheless, the history of standing litigation in the antitrust area bears out the proposition that part of the search for an adequate standing doctrine has been based on the need for objective criteria to define the scope of the protection of section 4.[129] To attempt to satisfy that need by applying a test which focuses once again on the definition of the zone of interests *protected by section 4* would be circular and unproductive. Therefore, the relevant statute is not section 4 alone but rather the entire body of substantive antitrust law.

Once a statute has been selected by the court under *Data Processing*, additional and more difficult problems arise. One such problem

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[127] 521 F.2d at 1152. The court initially stated that the plaintiffs' interest had to fall within the protection of § 1 of the Sherman Act or § 3 of the Clayton Act since those were the relevant substantive statutes under which plaintiffs alleged a violation. *Id.* at 1151. However, the court went on to analyze the scope of the protected zone by reference to concepts which apply generally to the antitrust provisions and concluded by stating:

> 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 alleged in the plaintiffs' complaint, this denial of financing arguably comes within the zone of interests protected by the *Sherman and Clayton Acts.*

*Id.* (citations omitted) (emphasis added). Thus, the court apparently based its analysis and, therefore, its conclusion on the interests protected by the entire body of antitrust law.

The court's reference to specific sections does, however, raise the possibility of a different approach to the "statute in question." Perhaps courts will find it necessary to analyze the substantive sections of the Sherman and Clayton Acts separately and determine the protected zone for each section. For example, the interest protected by § 1 of the Sherman Act might be described as the interest in being free from restraints of trade brought about by agreement or combination of competitors. The prohibition against interlocking directorates in § 8 of the Clayton Act might be viewed as protecting the interest in an absence of restrictions on competition arising from a situation where supposedly competing companies are controlled by the same persons. And the interest which § 3 of the Clayton Act might be deemed to protect could be analyzed as the interest in not having trade restrained by the use of exclusive dealing contracts going beyond actual business needs.

[128] Such a choice would be unlikely if the *Malamud* court's justification for applying the *Data Processing* test were followed since the court, in discussing the similarity between § 702 of the APA and § 4, stated: "Both sections accord standing in light of other statutory provisions." 521 F.2d at 1151. The implication is that since those other statutory provisions must be considered, standing should not be granted or denied on the basis of § 4 alone. For an example of where the review provisions themselves have been deemed the statute in question, see Upper Pecos Ass'n v. Stans, 452 F.2d 1233, 1235 (10th Cir. 1971) where the court found that the interests asserted were within the zone protected by the Administrative Procedure Act.

[129] See text at notes 33-43 *supra. See also* Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 Nw. U.L. Rev. 691, 707 (1963).

is determining what interests fall within the "zone of interests to be protected or regulated" by the chosen statute.[130] It is difficult to find a concrete definition of the interests protected by the antitrust laws.[131] The case law abounds with statements that the purpose of the antitrust laws is to foster free competition and to protect an atmosphere conducive to economic growth.[132] One text writer has stated generally: "[T]hroughout the history of these statutes it has constantly been assumed that one of their purposes was to perpetrate and perserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.[133]

The legislative history does not provide any more definitive guidelines.[134] Senator Sherman described the purpose of the Sherman Act as the prevention and control of combinations created "to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer."[135] Senator George envisioned the bill as a protector of "all small men, all small capitalists, all small enterprises" from being crushed by "the present system of production and exchange."[136] While such generalities may have been helpful for the purposes of enacting the legislation they are not very useful in answering the specific question of whether a particular interest asserted in a case is protected by the antitrust statutes.

For example, one possible solution to the scope of the zone of interests might be to require a plaintiff to assert that he suffered an injury to his opportunity to operate his business in an atmosphere

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[130] The administrative cases applying *Data Processing* are of little help in deciding how the problem generally is to be approached. Some courts have failed to state exactly from which statute the zone of interests applied in the case came, or if a statute was identified, the court failed to analyze the statute or its legislative history. *See, e.g.*, Virgin Islands Hotel Ass'n, Inc. v. Virgin Islands Water & Power Auth., 465 F.2d 1272 (3d Cir. 1972); Tucker v. Hardin, 430 F.2d 737 (1st Cir. 1970). On the other hand, there are decisions in the administrative law field which are based on detailed analysis of the statute in question. *See e.g.*, Ballerina Pen Co. v. Kunzig, 433 F.2d 1204, 1209-15 (D.C. Cir. 1970), *petition for cert. dismissed*, 401 U.S. 950 (1971) ("[W]e need merely note that *all* of the legislative history is relevant to a reviewing court's determination of the scope and purpose of legislation under consideration . . . ." *Id.* at 1213.); Allen M. Campbell Co. Gen. Contractors v. Lloyd Wood Const. Co., 446 F.2d 261, 264 (5th Cir. 1971); M.M. Crockin Co. v. Portsmouth Redev. & Housing Auth., 437 F.2d 784, 787-88 (4th Cir. 1971). Nonetheless, there is ample support for the criticism that "[t]he test is cumbersome, inconvenient, and artificial." Davis, *supra* note 118, at 462 (1970), especially in the antitrust field.

[131] The question is posed in terms of the entire body of antitrust law. For a discussion of alternative formulations see note 127 and text at notes 125-129 *supra*.

[132] *See, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969); Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

[133] L.B. Schwartz, Free Enterprise and Economic Organization (Concentration and Restrictive Practices) 8 (3d ed. 1966).

[134] *See generally* 21 Cong. Rec. 2456-60 (1890); H.R. Rep. No. 1707, 51st Cong., 1st Sess. 6 (1890).

[135] 21 Cong. Rec. at 2457.

[136] *Id.* at 2598.

conducive to economic growth. If such were the case, any conduct which injured a plaintiff's business or property could arguably be viewed as also injuring the conduciveness of the business atmosphere to economic growth. Therefore, any allegation of an injury in fact to the plaintiff's business or property would be at the same time an allegation of an invasion of an interest arguably within the zone of interests protected. However, such a result, which would make the injury in fact in a particular case equivalent to the interest protected, would render the second prong of the *Data Processing* test superfluous and of minimal assistance in restricting the scope of section 4.[137] If, in the alternative, the test were narrowed so that a plaintiff would be required to assert an injured interest in that particular section of the economy in which he actually competes, the resulting class of plaintiffs would include the same persons authorized under the target-area approach. There is little, if any, difference between a requirement that the plaintiff operate in the "affected area of the economy"[138] and a requirement that the plaintiff assert an interest in functioning freely in that section of the economy in which he transacts his business.[139] If such a result would flow from the use of the *Data Processing* test, it would be difficult to enunciate any valid reason for its application. An existing test would be abandoned for a new one only to reach the same conclusions.

Although it may be possible to define the zone of interests protected by the antitrust laws, it must be done with care. When determining the boundaries of the zone of interests, consideration should be given to the possibility that if the zone is defined by reference to extremely general concepts the test may become one-pronged rather than two. Care should also be taken to avoid establishing a zone which would describe a class of plaintiffs identical to the class described under the target-area test.

The Supreme Court's use in *Data Processing* of the elastic term, "arguably," raises further, equally difficult definitional problems. It is unclear precisely how much a plaintiff will be required to show in order to convince a court that his interest is "arguably" within the zone of interests protected. It has been suggested that this qualification was intended to give the lower federal courts broad discretion in applying the *Data Processing* test.[140] Therefore, the courts can, within

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[137] See note 118 and text at notes 118-122 *supra.*

[138] *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973).

[139] Under such an approach to the zone of interests test, for example, the investment companies would have to allege that because of Sinclair's activities their business could not grow and prosper in that certain area of the economy in which they conducted business. Outside that area they would have no business interests which could suffer. Such an area would also be the same and only area of the economy in which the investment companies would suffer an injury due to a "breakdown of competitive conditions." Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952).

[140] *See* Comment, 69 MICH. L. REV. 540, 551 (1971).

the scope of this discretion, construe the test quite liberally. In fact, many courts have done so[141] with the result that standing has been granted under the test more often than it has been denied.[142] Frequently, judicial reliance on the term "arguably" has eliminated careful analysis of the "zone of interests."[143] In the field of antitrust law, such a reliance would result in a loss of the restrictive effect which a careful analysis of the zone could have.[144]

Furthermore, if the application of the test becomes too casual, it is possible that the test will become one-pronged rather than two because "a plaintiff who establishes injury in fact, also will satisfy the zone of interests test in either the private or public action."[145] In antitrust law, dependence on the injury in fact element alone is not readily justifiable since this would render the "by reason of" phrase of section 4 mere surplusage. The language of section 4 requires that a plaintiff be able to allege a nexus between the injury to his business or property and the conduct allegedly in violation of the antitrust laws. A standing test which required only a showing of an injury in fact would not strike a balance between the two conflicting sets of antitrust standing principles; it would merely eliminate consideration of one. Something more than an allegation of injury to the plaintiff's business or property is necessary if the availability of section 4 protection is to be appropriately limited.[146]

In light of the manner in which courts in other areas of law have applied the *Data Processing* test, it is likely that courts hearing section 4 cases will rely heavily on the term "arguably," to determine whether the interests alleged are within the zone of interests protected by the antitrust laws. While emphasis on the term may result in a liberal application of the test,[147] thereby easing the burden on the private litigant, attention must be directed to the possibility that if the test thereby becomes too liberal, the restrictive effect of the "zone of interests" requirement on the number of plaintiffs will be nullified.

## CONCLUSION

The history of litigation over standing in antitrust, unlike that in other areas of law, has been a series of limitations on the availability of the antitrust laws to only those plaintiffs Congress clearly intended to protect. However, any limitation must be imposed with regard for

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[141] *See, e.g.*, Hodgson v. Carpenters Resilient Flooring Local 2212, 457 F.2d 1364, 1369 (3d Cir. 1972); Iacopi v. FCC, 451 F.2d 1142, 1146-47 (9th Cir. 1971); Shannon v. HUD, 436 F.2d 809, 818 (3d Cir. 1970).

[142] *See* Hasl, *supra* note 97, at 35.

[143] *See* Constructors Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183, 1189 (D.C. Cir. 1972); Harry H. Price & Sons, Inc. v. Hardin, 425 F.2d 1137, 1140-41 (5th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971).

[144] See text at notes 129-139 *supra*.

[145] Sedler, *supra* note 118, at 511.

[146] See text at notes 118-122 *supra*.

[147] See text at notes 123-125 *supra*.

the Supreme Court's affirmative position that the private litigant is an essential ingredient in the effective enforcement of the antitrust laws and, therefore, should not be overly burdened in the early stages of litigation. Thus, for an antitrust standing test to be viable, it must be capable of limiting the number of antitrust litigants without limiting them to such an extent that they are no longer of any assistance in enforcement.

The *Data Processing* test has the potential of limiting the number of private antitrust litigants by requiring that they show an injury to interests which were intended to be protected by the antitrust laws. By requiring that the interests allegedly injured need be only "arguably" within the scope of the intended protection, the restriction on the number of litigants will not be so extensive as to minimize their usefulness as part of the antitrust enforcement machinery. The issue thus becomes whether such potential can be realized effectively.

To insure that the *Data Processing* qualifier, "arguably," will not take a meaning so flexible that no limitations are imposed at all, the term cannot take the place of bona fide analysis of the zone of interests protected by the antitrust laws. While expansive application of the term "arguably" eases the pleading burden on the litigant, thereby satisfying one antitrust principle, it is careful analysis of the zone of interests protected that satisfies the corresponding principle of limiting the size of the class of antitrust plaintiffs. If these issues are carefully resolved in a manner responsive to the Supreme Court's admonition that the courts should ask no more of a plaintiff than that which is required by the antitrust statutes themselves,[148] and in a manner which makes the application of the test definite and consistent enough to give business and industry a framework within which to gauge whether their activities are potentially subject to treble damage liability, then the replacement of the old direct-injury and target-area standing tests with the *Data Processing* standard may be justified.

If, on the other hand, these issues are not acknowledged and carefully resolved, and the class of plaintiffs remains the same or becomes more restricted, further application of the *Data Processing* test in section 4 cases may only "compound present confusion and breed even more litigation over standing"[149] without enhancing the courts' ability "to confine the availability of section 4 relief . . . to those individuals whose protection is the fundamental purpose of the antitrust laws."[150]

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[148] *See* Radovich v. National Football League, 352 U.S. 445, 454 (1957).

[149] Barlow v. Collins, 397 U.S. 159, 176 (1970) (Brennan, J., dissenting). This opinion also applies to *Data Processing*. 397 U.S. at 167.

[150] *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 125 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).