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Standing [*Hoopes v. Union Oil Co.*, 374 F.2d 480
(9th Cir. 1967); *Sanitary Milk Producers v. Bergians
Farm Dairy, Inc.*, 368 F.2d 679 (8th Cir. 1966)]

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Recent Decisions

ANTITRUST — PRIVATE TREBLE DAMAGE ACTIONS — STANDING

Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d
679 (8th Cir. 1966); *Hoopes v. Union Oil Co.*, 374 F.2d
480 (9th Cir. 1967).

In any particular case arising under the antitrust laws of the United States¹ broad questions of policy are certain to be somewhat determinative. This is especially true with respect to standing of private antitrust litigants. Section 4 of the Clayton Act authorizes suits by "[a]ny person . . . injured in his business or property by reason of anything forbidden in the antitrust laws."² Treble damages are to be awarded to a successful plaintiff.³ Although private suits have been praised as an effective means of antitrust law enforcement,⁴ the courts have generally been conservative and restrictive in their interpretations of section 4.⁵ In the standing area, however, several recent decisions⁶ have made significant inroads upon this traditional approach. Two of these cases, *Sanitary Milk Producers, Inc. v. Bergjans*⁷ and *Hoopes v. Union Oil Co.*,⁸ will be discussed herein against a background of case law and appropriate policy considerations.⁹

Soon after the enactment of the Clayton Act the courts evi-

¹ Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1964); Clayton Act, 15 U.S.C. §§ 12-27 (1964).

² 15 U.S.C. § 15 (1964).

³ *Id.*

⁴ Loevinger, *Private Action — The Strongest Pillar of Antitrust*, in 1 ANTITRUST LAW AND TECHNIQUES 373 (M. Hoffman & A. Winard eds. 1963).

⁵ See, e.g., *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956).

⁶ E.g., *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966), *rev'g* 241 F. Supp. 259 (E.D.S.C. 1965); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1956).

⁷ 368 F.2d 679 (8th Cir. 1966).

⁸ 374 F.2d 480 (9th Cir. 1967).

⁹ For a discussion of the general subject of standing see generally E. KINTNER, AN ANTITRUST PRIMER (1964); 1 L. SCHWARTZ, FREE ENTERPRISE AND ECONOMIC CONCENTRATION 8-10 (3d ed. 1966); Loevinger, *supra* note 4; Pollock, *Standing To Sue, Remoteness of Injury, and the Passing-on Doctrine*, 32 ABA ANTITRUST L.J. (formerly ANTITRUST SECTION) 5 (1966); Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws*, 30 GEO. WASH. L. REV. 231 (1961); Note, *Standing To Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964).

denced their conservative approach to standing,¹⁰ and demanded that a plaintiff must not only show a pecuniary injury resulting from a violation, but also a causal connection between the violation and the injury.¹¹ Standing was frequently denied on the basis that the injury was "indirect, incidental, consequential, remote, or collateral . . . or [lacked] . . . 'proximate cause.'"¹² In short, the courts, believing that section 4 if extended through liberal interpretations would have no limits — the "ripple" concept — decided that some line must be drawn.¹³

Thus, an early case refused standing to a shareholder-creditor of a corporation which was bankrupt as a result of antitrust violations.¹⁴ Two alternative rationales were employed: first, that the Congress could not have intended to create such a multitude of potential suits when a single suit by the corporation would rectify all wrongs (at least to the shareholders), and second, that the injury flowed to the corporation, not its shareholders and creditors.¹⁵ Although it would seem appropriate to call the first rationale the "derivative" theory, this term has actually been applied to the latter,¹⁶ the reasoning being that only those persons intended to be injured by the defendant-violator are directly injured, while losses incurred by other parties which result from an impairment of a business arrangement with the directly injured party are only indirect or "derivative."¹⁷

Two series of cases to which the above reasoning has been applied are relevant to *Hoopes* and *Bergjans* respectively — those involving lessor-injured lessees and those involving supplier-injured distributors.

Two cases from the Third Circuit have held that nonoperating lessors of movie theatres who have rental agreements with their lessees based on a percentage of gross receipts do not have standing against parties who have conspired to damage the theatres' business¹⁸ even when the lessee was alleged to be a conspirator.¹⁹

¹⁰ See, e.g., *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910).

¹¹ See Pollock, *The "Injury" and "Causation" Elements of a Private Antitrust Action*, 21 ABA ANTITRUST SECTION 341 (1962). See generally authorities cited note 9 *supra*.

¹² Pollock, *supra* note 9, at 9.

¹³ See *id.* at 17-18.

¹⁴ *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910).

¹⁵ *Id.* at 709.

¹⁶ See Pollock, *supra* note 9, at 12-14.

¹⁷ See *id.* at 13.

¹⁸ *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518 (3d Cir. 1956); *Harrison v.*

The Seventh and Ninth Circuits have reached a contrary result.²⁰ The Second Circuit has denied standing in an analogous situation to a patentee whose exclusive licensee suffered the direct injury.²¹ The split in the circuits is clear. The reason for the split may be that, although most courts will today apply the so-called "target area"²² test rather than the "derivative" test, they differ in their interpretation and application of it.²³

The lessor-lessee cases have been cited as authority in the supplier-distributor cases²⁴ presumably because of the economic similarity between the two situations. The leading case denying standing was a district court product.²⁵ The plaintiff-supplier furnished 97 percent of its production to the directly injured distributor for use as ingredients in soft drinks; one person owned 50 percent of the supplier and 100 percent of the distributor through stock holdings. The court, in spite of the common ownership, denied standing for three reasons: (1) to allow the suit would provide a "windfall" for the plaintiff; (2) Congress, by failing to amend section 4, has sanctioned the narrow construction approach of the early cases; and (3) one of the Third Circuit lessor-lessee cases.²⁶ The Sixth Circuit has recently followed this decision in a case where common ownership was not involved.²⁷

The Ninth Circuit, liberal in the lessor-lessee area, seems liberal in this area also as is evidenced by *Karseal Corp. v. Richfield Oil*

Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa.), *aff'd per curiam*, 211 F.2d 405 (3d Cir. 1953).

¹⁹ In the former case one judge dissented from denying a petition for rehearing on the belief that this allegation deserved fuller consideration. *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518, 519 (3d Cir. 1956).

²⁰ *Congress Bldg. Corp. v. Loew's, Inc.*, 246 F.2d 587 (7th Cir. 1957); *Steiner v. 20th Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956).

²¹ *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

²² This test demands only that a plaintiff show himself to be within the "area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

²³ The test is not perfect and is frequently confused with or related to others. See notes 34 & 47 *infra* and accompanying text.

²⁴ For example, *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518 (3d Cir. 1956) was relied upon in *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956).

²⁵ *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956).

²⁶ *Id.* at 909.

²⁷ *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 394 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

*Corp.*²⁸ *Karseal* has been distinguished by the restrictive courts on the ground that there the plaintiff supplied the finished product (petroleum items) rather than ingredients to its distributors. Such a distinction proceeds on the premise that in *Karseal* the plaintiff was more "aimed at" by the antitrust violator than were the plaintiffs in the ingredient cases.²⁹

It may be asserted that this distinction is economically unreal and further confuses the issue by announcing another legal standard that must be applied by the courts — finished products and raw ingredients are but end points in a continuum of possible supplied items — where is the line to be drawn? The "target area" test under this reasoning becomes as fuzzy as the old "derivative, remote, proximate" one.

An example of the confusion in this area is a recent Fourth Circuit determination.³⁰ There the plaintiff, a council of dairy producers, sued defendant grocery stores and others, alleging an illegal restraint in the marketing of milk products affecting its distributors. The district court dismissed, distinguishing *Karseal* on the ground that there plaintiff and defendant had been competitors,³¹ and thus chose to follow the restrictive cases. The appellate court reversed and granted standing.³² The court noted that section 4 speaks of "any person" rather than any "competitor." *Karseal* was followed and the restrictive cases were distinguished on the grounds that milk was a "finished product" and that no problem of dual ownership was present.³³ The court refused to read the restrictive cases beyond their facts. It is felt that although this decision is sound, the court was obviously confused by the conflicting passages in prior opinions and thoroughly mixed the new "target area" test with the old "proximate cause, remoteness" concepts.³⁴

The two most recent judicial statements in the standing area — *Hoopes* and *Bergjans* — add needed, well-reasoned thought to the problems heretofore discussed. *Hoopes* held that a nonoperating owner of a gasoline station had standing on his allegations that the

²⁸ 221 F.2d 358 (9th Cir. 1955).

²⁹ See *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 394 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

³⁰ *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966), *rev'g* 241 F. Supp. 259 (E.D.S.C. 1955).

³¹ 241 F. Supp. at 263-64.

³² 360 F.2d at 420.

³³ *Id.* at 418.

³⁴ For a critical analysis see Pollock, *supra* note 9, at 19 n.63.

defendant, as part of a scheme to monopolize, had coerced and frightened away possible lessees by notifying them that it had a valid requirements contract with the owner, Hoopes, when in fact the contract had been adjudged to be an unenforceable lease-leaseback agreement between Hoopes, Union, and previous lessees.³⁵ What is most significant about the case is not its holding (which may even be reached by applying the rationale of the restrictive cases, since the injury was direct in that it flowed from plaintiff's relations with Union and was not derivative through third parties)³⁶ but rather the dictum intentionally used by the Ninth Circuit. In speaking of the restrictive cases the court said "language in a number of Supreme Court opinions casts doubts upon these and other restrictive 'judicial glosses' upon the broad language of" section 4.³⁷ The continuing validity of the Third Circuit decisions discussed previously³⁸ was thus questioned. In returning to the language of section 4, and in following the trend marked out by recent Supreme Court decisions,³⁹ the Ninth Circuit has made a valuable contribution to the law.

Bergjans, on the other hand, is important for its holding. The Eighth Circuit held that a milk producer which sold all its milk to its wholly owned distributor which was in competition with defendants and allegedly injured by their anticompetitive activities had standing.⁴⁰ Because here both dual ownership and the "finished product" were parts of the factual pattern, the court was relatively free to adopt whichever set of case law as precedent that it desired. It will be remembered, however, that the recent Fourth Circuit decision, on similar facts, distinguished the restrictive cases on the ground that they involved dual ownership.⁴¹ The Eighth Circuit court ignored this problem and responded to plaintiff's argument that the Fourth Circuit finished product rule should control.⁴²

³⁵ 374 F.2d at 485-86.

³⁶ *Id.*

³⁷ *Id.* at 485. The Supreme Court decisions mentioned were *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961) and *Radovich v. National Football League*, 352 U.S. 445, 453 (1957). See also *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-700 (1962).

³⁸ Cases cited notes 18 & 19 *supra* and accompanying text.

³⁹ See cases cited note 37 *supra*.

⁴⁰ 368 F.2d at 688-89.

⁴¹ Text accompanying note 33 *supra*.

⁴² It is interesting to note that the plaintiff also attempted to distinguish the restrictive dual ownership cases by arguing that the "windfall" rationale should not apply since only the supplier, and not the distributor, was suing. Brief for Respondents at 61,

As has been pointed out, however, this distinction is unreal;⁴³ the real explanation of the *Bergjans* decision is that the court, having before it all the cases previously discussed as well as the recent Supreme Court implications,⁴⁴ realized that the choice of whether or not to follow the restrictive line of cases was squarely before it and, instead of refusing to follow them, utilized the time-honored judicial prerogative of distinguishing them on a weak factual basis. Thus, while the court stated its decision to be directly within the holdings of two liberal cases,⁴⁵ its holding actually is a clear rejection of the restrictive view.

The problems — and the confusion — in the standing area seem to have arisen from unthinking judicial extensions of the early case which denied standing to a shareholder-creditor.⁴⁶ While this decision makes eminently good sense as applied to shareholders (who have their remedy available in a suit by the corporation), it is manifestly incorrect to apply it to cases involving lessors or suppliers whose actual pecuniary damage will be totally uncompensated if standing is refused.

The use of "incidental" or "lack of proximate cause" only serves to muddy the waters; if standing is to be denied to parties such as lessors or suppliers the result should be justified by an intelligent interpretation of section 4 in light of the policies of the antitrust laws, and not by blind usage of analogy to traditional tort law where the use of "proximate cause" as a limitation is the result of well-reasoned analyses of the policies of tort law.⁴⁷

Section 4, although it does provide for treble damages, has its primary value as a preventive, not a curative, statute,⁴⁸ and it seems only logical that this is what its framers intended.⁴⁹ The antitrust laws, confused and contradictory as they are, are nevertheless an at-

Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966). The court, however, did not even mention this ground, much less place reliance on it.

⁴³ Text accompanying notes 28-30 *supra*.

⁴⁴ See cases cited note 37 *supra*.

⁴⁵ 368 F.2d at 689.

⁴⁶ See text accompanying notes 14-17 *supra*.

⁴⁷ Even respected authorities in the field use this analogy without expressing any cogent reasons therefor. See Pollock, *supra* note 9, at 9 & n.15, 11 & n.29; Timberlake, *supra* note 9, at 235.

⁴⁸ Cf. 1 L. SCHWARTZ, *supra* note 9, at 8 where the author states "private enforcement . . . is significant not only because of the opportunity to recoup losses . . . but equally because potential liability . . . is one of the most important incentives to 'voluntary' compliance with the law." See generally Loevinger, *supra* note 4.

⁴⁹ The legislative history of section 4 is of little help in determining the scope Congress intended the provision to have. Pollock, *supra* note 9, at 8-9.

tempt to legislate an economic theory; to effectuate this theory it is necessary that the laws be stringently enforced — and private action *can* be the most effective way.⁵⁰

The broadened application of the "target area" test by the recent cases is a commendable attempt to cut through the maze of oratory and reach the basic question — what rule is demanded by the policy of the antitrust laws? *Bergjans* and *Hoopes* are the two latest examples of courts taking a more analytical approach to the problem and arriving at more satisfactory conclusions.

It is to be hoped that eventually the only requirement for standing under section 4 will be, as the Supreme Court has indicated,⁵¹ an allegation that the defendant's violation caused pecuniary damage to the plaintiff. The only legitimate restriction in this writer's view is one that is economically real — that is when some other remedy is available as in the shareholder situation. Surely the evidentiary obstacles that a private plaintiff must overcome,⁵² in addition to the practical economics of such a suit,⁵³ are sufficient protection to defendants. It is only by removing or modifying the old restrictions on standing that the policy of the antitrust laws can truly be effectuated.

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⁵⁰ See Loevinger, *supra* note 4.

⁵¹ See *Radovich v. National Football League*, 352 U.S. 445 (1957), where the Court indicated that all that is required is that the plaintiff's injury be caused by the violation. *Id.* at 453. Note that no adjectives such as "proximate" were employed.

⁵² For example, there exist the problems of proof of the violation, which are obvious, and of proof of specific pecuniary damage, a factor which is explored in Rowley, *Proof of Damages in Antitrust Cases*, 32 ABA ANTITRUST L.J. 75 (1966).

⁵³ See Alioto, *The Economics of a Treble Damage Case*, 32 ABA ANTITRUST L.J. 87 (1966).