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Employee Standing Under Section 4 of the Clayton Act

INTRODUCTION

Section 4 of the Clayton Act provides a treble-damage remedy to “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.”¹ Although private actions filed under this section play a major enforcement role in the federal antitrust laws,² lower courts have diverged widely in answering the threshold question of which parties have standing to maintain a section 4 action.³ Even in the wake of two recent Supreme Court decisions in this area,⁴ the law of antitrust standing remains “something less than a seamless web.”⁵

This Note will focus on the confusion that plagues one category of antitrust standing cases, those in which an employee alleges wrongful discharge for his refusal to participate in a scheme that vio-

1. Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15 (Supp. V 1981)). Section 4 provides:

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

The original version of § 4 superseded § 7 of the Sherman Act, ch. 647, 26 Stat. 209, 210 (1890). Section 7 of the Sherman Act was repealed as redundant in 1955. Act of July 7, 1955, ch. 283, § 3, 69 Stat. 282, 283.

2. In fiscal 1980, 1,475 private antitrust actions were filed, compared to 78 government cases (39 civil and 39 criminal) during the same period. The number of private filings is therefore about 19 times that of government filings. See AD. OFF. OF THE U.S. CTS., 1980 ANNUAL REPORT 63, table 22. For almost two decades, the *total* number of antitrust suits has grown at a rate of about 9% per year. Because the number of cases brought by federal agencies has remained almost constant, however, this growth is almost wholly attributable to the increase in the number of *private* filings. See R. POSNER & F. EASTERBROOK, ANTITRUST 533-34 (2d ed. 1981).

3. See cases cited in note 7 *infra*; see generally Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L. J. 809 (1977); Klingsberg, *Bull's Eyes and Carom Shots: Complications and Conflicts on Standing to Sue and Causation Under Section 4 of the Clayton Act*, 16 ANTITRUST BULL. 351 (1971); Lytle & Purdue, *Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation*, 25 AM. U. L. REV. 795 (1976); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980); Sherman, *Antitrust Standing: From Loeb to Malamod*, 51 N.Y.U. L. REV. 374 (1976); Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964); Comment, *Standing Under Clayton § 4: A Proverbial Mystery*, 77 DICK. L. REV. 73 (1972).

4. *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897 (1983) (denying § 4 standing to labor union); *Blue Shield v. McCreedy*, 457 U.S. 465 (1982) (group health plan subscriber had standing to seek treble damages under § 4).

5. *Warner Management Consultants, Inc. v. Data Gen. Corp.*, 545 F. Supp. 956, 961 (N.D. Ill. 1982) (“In fact, as we have had occasion to observe previously, this area of the law is rife with ‘doctrinal confusion.’”) (citing *In re Uranium Antitrust Litig.*, 473 F. Supp. 393, 401 (N.D. Ill. 1979)).

lates the antitrust laws.⁶ Conflicts among the circuits in their analysis and resolution of these employee standing cases⁷ have not been definitively settled by the Supreme Court's recent pronouncements on the right to seek recovery under section 4. This Note argues that these recent Supreme Court decisions, as well as the policies behind the antitrust laws, weigh in favor of permitting an employee to maintain a section 4 action against his employer if he is discharged for refusing to participate in an operation that violates the antitrust laws. Part I of this Note discusses the general parameters of the right to section 4 recovery, emphasizing the Supreme Court's recent formulation of these parameters. Part II suggests that when these antitrust standing criteria are properly applied to the factual context in which most employee standing cases arise, an employee discharged for refusing to participate in an antitrust scheme has standing to seek treble damages under section 4.

I. GENERAL PARAMETERS OF SECTION 4 RECOVERY

A. *Purposes of and Requirements for Section 4 Recovery: An Overview*

In enacting section 4 of the Clayton Act, Congress created a private antitrust enforcement mechanism that employs two primary approaches. First, the potency of the treble-damage remedy seeks to deter potential antitrust violators from pursuing unlawful schemes.⁸ Second, where deterrence fails, the treble-damage remedy forces vio-

6. This Note will assume throughout that employee discharge or termination encompasses the less frequent situation where an employee is not actually terminated by his employer but is "forced" to resign. See notes 72-74 *infra* and accompanying text.

7. Compare *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded mem.*, 103 S. Ct. 1244 (1983) (former marketing director who alleged forced resignation by employer and blacklisting by employer's co-conspirators because of his refusal to cooperate with conspiracy had standing to seek § 4 recovery), and *Shaw v. Russell Trucking Line, Inc.*, 542 F. Supp. 776 (W.D. Pa. 1982) (truckdriver who alleged termination by employer for his refusal to participate in antitrust conspiracy had § 4 standing), with *Bichan v. Chemetron Corp.*, 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983) (former corporate president who alleged termination by employer and blacklisting by industrial gas industry for his refusal to cooperate with conspiracy had no standing to seek § 4 recovery), *McNulty v. Borden, Inc.*, 542 F. Supp. 655 (E.D. Pa. 1982) (unit sales manager who alleged discharge for refusing to engage in activities that allegedly violated the antitrust laws had no § 4 standing), *Callahan v. Scott Paper Co.*, 541 F. Supp. 550 (E.D. Pa. 1982) (sales managers who alleged discharge for active opposition to employer's allegedly discriminatory pricing policy had no § 4 standing), *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387 (S.D. Ind. 1982) (employee who alleged retaliatory dismissal for refusal to engage in allegedly anticompetitive practices had no § 4 standing), and *Booth v. Radio Shack Div. Tandy Corp.*, 1982-83 Trade Cas. ¶ 65,001 (E.D. Pa. 1982) (employee who alleged termination for refusing to carry out policies that allegedly violated the Robinson-Patman Act had no § 4 standing).

8. See *Blue Shield v. McCready*, 457 U.S. 465, 472 (1982); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968) ("the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws"). See generally, *Berger & Bernstein*, *supra* note 3, at 845-46 (citing supportive legislative history).

lators to disgorge the fruits of their ill-gotten gains, while amply compensating the victims of the antitrust violation.⁹

The Supreme Court has emphasized these two main goals of section 4's private enforcement scheme — deterrence and compensation — in determining who may recover treble damages under that section.¹⁰ In making this threshold determination, the Court has recognized two analytically distinct requirements for the existence of a section 4 private right of action:¹¹ An antitrust plaintiff must allege "antitrust injury" and he must also establish that he has "antitrust standing."¹²

The antitrust "injury" requirement is mandated by the language of section 4 itself. Specifically, an antitrust plaintiff must allege injury to his "business or property" occasioned "by reason of anything

9. See *Blue Shield v. McCready*, 457 U.S. 465, 472 (1982) ("Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations."); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 & n.10 (1976). See generally *Berger & Bernstein*, *supra* note 3, at 845-86 (citing supportive legislative history).

10. See, e.g., *Blue Shield v. McCready*, 457 U.S. 465, 473 (1982) ("[I]n the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, we have applied § 4 in accordance with its plain language and its broad remedial and deterrent objectives."); *American Socy. of Mechanical Engrs., Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 569 (1982) ("In this case, we can honor the statutory purpose [of the antitrust laws] best by interpreting the antitrust private cause of action to be at least as broad as a plaintiff's right to sue for analogous torts, absent indications that the antitrust laws are not intended to reach so far.") (citations omitted); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343-44 (1979) (Because § 4 was primarily conceived as opening the door of justice to individuals and giving ample damages to injured parties, the legislative history supports a holding that "a consumer deprived of money by reason of allegedly anticompetitive conduct is injured in 'property' " within the meaning of that section.); *cf.* *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 905-06 (1983) (although legislative history supports broad construction of § 4, a proper interpretation of this remedial provision cannot "ignore the larger context in which the entire statute was debated"; this larger context reveals the Congressional assumption that various common-law limitations would apply to antitrust damages litigation).

Although the Court did not preface its analysis in *Associated General* with a recitation of the broad remedial purposes of § 4, the Court was nonetheless concerned with upholding that section's private enforcement function. However, where this function could be performed by an "identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement," the Court found little justification for allowing "more remote" parties to assume the same private attorney-general role. 103 S. Ct. at 911. See also *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746-47 (1977).

11. See *Blue Shield v. McCready*, 457 U.S. 465, 473-77 (1982); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 n.7 (1977) ("[T]he question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4.").

12. Although the analytical distinction between the two concepts has been explicitly recognized by the Court, see note 11 *supra*, the Court has not uniformly required discrete inquiries with regard to antitrust standing and antitrust injury. See *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 904-13 (1983) (Court conducted single inquiry as to whether party was "a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act."); *Blue Shield v. McCready*, 457 U.S. 465, 481-84 (1982) (as part of antitrust "standing" analysis, Court incorporated clarified concept of antitrust "injury"; notes 16 & 47-67 *infra* and accompanying text).

forbidden in the antitrust laws.”¹³ The “business or property” language underscores the fact that section 4 provides redress only for *pecuniary* loss,¹⁴ while the words “by reason of” have been construed as a restriction on the *kinds* of pecuniary losses that are cognizable under section 4.¹⁵ The Supreme Court has defined this universe of cognizable antitrust injury to encompass only “injury of the type the antitrust laws were intended to prevent and that flows from *that which makes defendants’ acts unlawful*.”¹⁶ The Court, in clarifying

13. 15 U.S.C. § 15 (Supp. V 1981); see note 1 *supra*. For § 4 purposes, “antitrust laws” include the Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1976)), §§ 73-76 of the Wilson Tariff Act, ch. 349, 28 Stat. 509 (1894), and the Act amending the Wilson Tariff Act, ch. 40, 37 Stat. 667 (1913) (codified as amended at 15 U.S.C. §§ 8-11 (1976)), and the Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12, 13, 14-19, 20, 21, 22-27 and 29 U.S.C. §§ 52-53 (1976 & Supp. V 1981)). Excluded from the meaning of the term “antitrust laws” for § 4 purposes are § 3 of the Robinson-Patman Antidiscrimination Act, ch. 592, § 3, 49 Stat. 1526, 1528 (1936) (codified at 15 U.S.C. § 13(a) (1976)) and § 5 of the Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45 (1976 & Supp. V 1981)). See *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958) (definition of antitrust laws contained at 15 U.S.C. § 12 is exclusive for purposes of 15 U.S.C. §§ 15 & 26, permitting private actions for injuries resulting from practices forbidden by the antitrust laws); cf. *Paul M. Harrod Co. v. A.B. Dick Co.*, 194 F. Supp. 502 (N.D. Ohio 1961) (a judgment or decree entered in connection with an antitrust case filed by the government is not an “antitrust law” within the purview of § 4 and a private party may not recover for violation of such judgment or decree).

14. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1978) (construing injury to “business or property” to encompass monetary injury to consumers arising directly out of retail purchases); cf. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972) (“business or property” refers to “commercial interests or enterprises” and not to “general damages” to state’s economy).

15. See generally *Berger & Bernstein*, *supra* note 3, at 810-13; Page, *supra* note 3, at 497.

16. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis added). In *Brunswick*, respondents, three bowling centers, complained that petitioner’s acquisition of several financially troubled bowling centers violated § 7 of the Clayton Act, 15 U.S.C. § 18 (1976 & Supp. V 1981), by lessening competition or tending to create a monopoly. In seeking treble damages, however, respondents sought to prove that their profits would have increased had petitioners allowed the acquired centers to close, thereby *reducing* competition within the market. Thus, respondents sought to recover treble damages for injury suffered as a result of the *pro*-competitive effects of petitioner’s acquisitions. The Court found that allowing such recovery would have been “inimical to the purposes of [the antitrust] laws.” Respondents could not recover merely by showing that their loss occurred “by reason of” the unlawful acquisitions; they had to show that their loss occurred “by reason of *that which made the acquisitions unlawful*.” 429 U.S. at 488 (emphasis added); cf. *Blue Shield v. McCready*, 457 U.S. 465 (1982) (group health plan subscriber denied reimbursement for certain medical expenses had antitrust standing to challenge anti-competitive effect of refusal to reimburse).

In *McCready*, the Court adopted a two-pronged “test” for antitrust standing: The Court looked to the “physical and economic nexus between the alleged [antitrust] violation and the harm to the plaintiff” and then to the “relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant’s conduct unlawful and in providing a private remedy under § 4.” 457 U.S. at 478. The second prong of the Court’s inquiry is merely an incorporation of the *Brunswick* test for antitrust injury within the framework of antitrust standing analysis. See Case Note, *Right to Sue Under Section 4 of the Clayton Act — The Employee Discharged for Refusal to Participate in Anticompetitive Practices of his Employer*, 1983 B.Y.U. L. REV. 173, 198-99. Prior to *McCready*, *Brunswick* had been interpreted by some courts to require that plaintiffs prove that their injuries resulted from the anticompetitive effect of the alleged violation. See, e.g., *Bichan v. Chemetron Corp.*, 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983). However, the Court announced in

this definition, has interpreted the antitrust injury requirement to stand for the proposition that treble-damage recoveries should be linked both to the pro-competition policy behind the antitrust laws in general¹⁷ and to the private enforcement goals of section 4 in particular.¹⁸ Where redress of the antitrust plaintiff's injury-in-fact would not serve these goals, the Court may refuse to recognize the injury as *antitrust* injury¹⁹ and may therefore deny the plaintiff standing to maintain a section 4 action.²⁰

McCready that *Brunswick* "is not so limiting." 457 U.S. at 482. Instead, the Court found it sufficient that the plaintiff had charged defendants with a "purposefully *anticompetitive* scheme" and had alleged pecuniary loss "as the consequence of [defendants'] attempt to pursue that scheme." 457 U.S. at 483 (emphasis in original) (footnote omitted); cf. Comment, *Employee Standing in Private Antitrust Suits: A New Element in the Balance*, 51 U. CIN. L. REV. 878, 883 n.41 (1982) ("That a *Brunswick* analysis should not be considered a limiting factor in standing cases was recognized explicitly by the Supreme Court in *McCready*.")

Moreover, the fact that *McCready* was not the *intended* victim of the anticompetitive scheme did not prevent her injury from being viewed as antitrust injury. Rather, because she had not yielded to the coercive pressure of Blue Shield's selective reimbursement scheme, *McCready* had borne directly what had been intended for the competitors of the conspirators. As such, her injury "flow[ed] from that which [made] defendants' acts unlawful" within the meaning of *Brunswick*, and [fell] squarely within the area of congressional concern." 457 U.S. at 484 (footnote omitted). *McCready*'s role as a participant *qua* consumer in the relevant economic market — the market for psychotherapeutic services — undoubtedly reinforced the Court's assurance that *McCready*'s injury fell within the core concerns that Congress had in mind in enacting the antitrust laws. Cf. *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897 (1983) (distinguishing *McCready* from case before Court, in which plaintiff-union was neither consumer nor competitor in the relevant market, and had failed to allege any marketwide restraint of trade).

17. *Blue Shield v. McCready*, 457 U.S. 465, 482 (1982); see note 16 *supra*.

18. See, e.g., *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). In *Hawaii*, the Court rejected the state of Hawaii's attempt to sue in its *parens patriae* capacity for harm to its "general economy," caused by a conspiracy among private defendants to restrain trade and commerce in petroleum products. 405 U.S. at 260-66. The Court emphasized that "[e]ven the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State." 405 U.S. at 264.

In *Illinois Brick*, the state of Illinois and 700 local governmental entities brought a treble-damage action for price overcharges paid as a consequence of an alleged price-fixing conspiracy among concrete block manufacturers. The Court held that only the overcharged *direct* purchaser, not a "pass-on" customer, is "injured in his business or property" within the meaning of § 4. 431 U.S. at 728-29; see also *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968); cf. *Blue Shield v. McCready*, 457 U.S. 465, 473-77 (1982) (characterizing the antitrust injury requirement of *Hawaii* and *Illinois Brick* as a "duplicative recovery" limitation analytically distinct from the "remoteness" or antitrust standing limitation on § 4 recovery).

19. In *Illinois Brick*, 431 U.S. 720 (1977), the Court addressed the need for directness of injury, particularly in avoiding apportionment of damages. According to the Court, the legislative purpose in creating a group of private attorneys general to enforce the antitrust laws is better served by "holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." 431 U.S. at 746; cf. *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 910-13 (1983) (same concerns expressed within general analysis of right to seek recovery under § 4).

20. Although plaintiffs who have not suffered injury "by reason of" an antitrust violation necessarily lack *standing* to maintain a § 4 action, the converse is not true: Plaintiffs who have suffered antitrust *injury* do not automatically have antitrust *standing*. See notes 21-24 *infra*

The antitrust *standing* requirement further restricts the availability of a section 4 remedy, denying it to plaintiffs who may have suffered antitrust *injury*, but who are nevertheless deemed "too remote" from the antitrust violation to seek treble damages.²¹ Akin to "proximate cause" in the law of torts, the antitrust standing limitation establishes a point beyond which an antitrust violator is no longer liable in treble damages for the antitrust injuries flowing from a particular violation.²²

Unlike the antitrust injury requirement, the remoteness limitation on section 4 recovery, though derived in attenuated fashion from section 4's "by reason of" language, is not mandated by the statute.²³ Rather, it originates in the lower courts' "virtually unanimous" conclusion that "Congress did not intend the antitrust laws to

and accompanying text. Because a plaintiff cannot maintain a § 4 action if either the antitrust injury or the antitrust standing requirement is not met, the distinction between the two requirements disappears when one examines the effect of a denial of either.

21. In *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897 (1983), the Court observed:

The label "antitrust standing" has traditionally been applied to some of the elements of this inquiry. As commentators have observed, the focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.
103 S. Ct. at 907 n.31.

22. See *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 907 (1983) ("There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause,' and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages.") (footnotes omitted). Because antitrust violations, like tortious acts, may result in "virtually endless repercussions," a sense of fairness and proportionality led courts to impose this limitation on § 4 recovery. See Lytle & Purdue, *supra* note 3, at 796-802. The need for some limitation on antitrust recovery emanates not only from the fact that a single violation "may be expected to cause ripples of harm to flow through the Nation's economy," but also from the potency of the remedy for antitrust injury that Congress fashioned — a trebling of the actual damages incurred by a single antitrust violation. Because "[i]n the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, the courts are . . . forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of 'proximate cause,'" *Blue Shield v. McCreedy*, 457 U.S. 465, 477 (1982) (citations omitted) (footnote omitted), the Court has recently attempted to aid this analysis. See *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 907 n.33 (1983) ("[C]ourts should analyze each situation in light of the factors set forth in the text [of *Associated General*].").

23. See *Berger & Bernstein*, *supra* note 3, at 810-11 (footnote omitted) (emphasis in original):

[C]ourts have created an antitrust standing requirement by interpreting the phrase "by reason of" to imply not only the *fact* of causation but also the presence of *legal* causation. In § 4 case law this legal causation requirement, like the proximate cause requirement in the law of torts, restricts the scope of a defendant's liability and a plaintiff's right to recovery. . . . [I]ts precise definition [however] remains elusive because of the inherent ambiguity of the concept of legal causation.

Because the concept of antitrust standing is ambiguous, and because it derives from the same statutory language as the antitrust injury requirement, notions of injury and standing are easily confused. Basically, the traditional antitrust standing limitation means that courts do

provide a remedy in damages for *all* [antitrust] injuries that might conceivably be traced to an antitrust violation."²⁴ And though consistent with the same pro-competition and private enforcement concerns underlying the Supreme Court's formulation of the antitrust injury requirements,²⁵ the standing limitation is more solidly grounded in the Court's desire to keep the private scheme manageable, thereby preserving its effectiveness.²⁶

Ultimately, the analytical distinction between antitrust injury and antitrust standing becomes blurred, but the difference between the two concepts is not crucial for three reasons. First, the absence of either antitrust injury *or* antitrust standing leads to the same result — the antitrust plaintiff is denied the right to maintain a section 4 action.²⁷ Second, the underlying statutory policy concerns are identical in both inquiries, although the pro-competition goal may be less prominent within the confines of traditional antitrust standing analysis. Third, although the analytical distinction between the two concepts has been recognized by the Supreme Court,²⁸ recent decisions indicate that the Court has turned to a single inquiry that incorporates the two concepts without explicitly differentiating them.²⁹

B. *Delimiting the Right to Section 4 Recovery*

The Supreme Court has recently examined the limitations on section 4 recovery in two very different factual contexts.³⁰ In so doing,

not accept the argument that Congress actually meant "any" person when it wrote the term into § 4.

24. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972) (emphasis added). The Court has recently gone beyond mere acknowledgment of this implied limitation to express approval of the lower courts' attempts to limit § 4 recovery. *See Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 907 (1983); *Blue Shield v. McCready*, 457 U.S. 465, 477-78 (1982).

Standing under § 4 is more carefully scrutinized than standing under § 16 of the Clayton Act, which provides for injunctive relief against "threatened loss or damage by a violation of the antitrust laws" whenever such relief would be granted by courts of equity. 15 U.S.C. § 26 (1976); *see In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 130 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).

25. *See* notes 17-19 *supra* and accompanying text.

26. *See* notes 38 & 63-65 *infra* and accompanying text.

27. *See* note 20 *supra*.

28. *See* note 11 *supra*.

29. *See* note 12 *supra* and Part I-B *infra*. Nevertheless, because the two concepts have developed independently of each other, a separate jurisprudence exists with respect to each. Specifically, the antitrust injury limitation has been shaped largely by the Supreme Court, *see* notes 16-19 *supra* and accompanying text, while the antitrust standing limitation was originally conceived by the lower federal courts, *see* notes 22-24 *supra* and accompanying text, and has only recently become the focus of Supreme Court guidance. Thus, even under the Court's recent unified approval of the right of § 4 recovery, an understanding of the analytical and historical distinction between antitrust injury and antitrust standing is necessary to full comprehension of the Court's recent decisions in this area.

30. *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897 (1983) (labor union sought § 4 recovery against multi-employer association, alleging that

the Court has given the lower courts much needed guidance as to when and how to apply these limitations. Part I-B of this Note will analyze the Court's recent decisions and delineate the standing considerations which these decisions appear to lay down.

1. *The Statutory Policy Considerations Behind the Limitations on the Right to Seek Section 4 Recovery*

In *Blue Shield v. McCready*³¹ the Court held that a consumer of psychotherapeutic services had standing to sue for the injury she sustained as a result of the defendants' conspiracy to restrain competition in the market for such services.³² In *McCready*, the Court "refused to engraft artificial limitations on the [section] 4 remedy,"³³ and indicated that a plaintiff has standing to sue under section 4 unless *statutory policy considerations* suggest that allowing treble recovery would not properly serve the deterrence and compensation goals of the antitrust laws.³⁴

Examining the plaintiff's antitrust claim in *McCready*, the Court identified the statutory policy considerations behind two distinct, judicially imposed limitations on the right to seek section 4 recovery.³⁵

the association had coerced third parties and its own members to do business with nonunion firms, thus adversely affecting the trade of unionized firms, thereby restraining the union's business activities); *Blue Shield v. McCready*, 457 U.S. 465 (1982) (group health plan subscriber sought § 4 recovery against health insurer and organization of psychiatrists, alleging an unlawful conspiracy to exclude psychologists from receiving compensation under health insurer's plans).

31. 457 U.S. 465 (1982).

32. Respondent *McCready* alleged that petitioners *Blue Shield* and a psychiatric society had conspired to exclude clinical psychologists from participating in a prepaid health plan to which she subscribed, in violation of § 1 of the Sherman Act. Section 1 provides, in pertinent part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1976). To further this conspiracy, *Blue Shield* allegedly denied reimbursement for the services of psychologists unless the treatment was supervised by and billed through a physician. When *McCready* was denied reimbursement following unsupervised treatment by a clinical psychologist, she brought a treble damage action challenging the conspiracy. The Supreme Court, in a 5-4 decision, held that she had standing to maintain the § 4 action. 457 U.S. at 484-85.

33. 457 U.S. at 472.

34. The Court found that "in the absence of some *articulable consideration of statutory policy* suggesting a contrary conclusion in a particular factual setting, we have applied § 4 in accordance with its plain language and its broad remedial and deterrent objectives." 457 U.S. at 473 (emphasis added). To illustrate this point, the Court cited *Pfizer Inc. v. India*, 434 U.S. 308 (1978) (giving the statutory phrase "any person" its "naturally broad and inclusive meaning" by holding foreign sovereign to be a "person" for § 4 purposes), and *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) (giving "property" its "naturally broad and inclusive meaning" by extending § 4 remedy to consumers injured by increase in purchase price of goods attributable to price-fixing conspiracy).

35. The two limitations — the duplicative recovery limitation and the remoteness limitation — are judicially imposed rather than statutorily mandated. See notes 18-19 *supra* and accompanying text (duplicative recovery limitation); notes 22-24 *supra* and accompanying text (antitrust standing limitation as a rough equivalent of remoteness limitation).

First, the Court considered the "duplicative recovery" limitation. When more than one injured party along a chain of distribution claims damages arising from a single antitrust violation, there is naturally cause for concern that multiple plaintiffs might together seek damages far in excess of what the statute would normally allow.³⁶ By recognizing as *antitrust* injury only the harm to those plaintiffs who have been the most directly injured, the Court has sought to avoid the potential consequences of allowing multiple section 4 actions.³⁷ These consequences — the necessity of complex damages apportionment and the splintering of treble-damage recoveries — would burden both the courts and potential antitrust plaintiffs and would thereby threaten the viability of the private enforcement scheme.³⁸ Because there was no risk of duplicative recovery in *McCready*, however, the Court found that the private antitrust enforcement concerns behind the duplicative recovery limitation were not implicated and declined to apply that limitation.³⁹

The "remoteness" limitation, the second judicial control discussed in *McCready*,⁴⁰ is analogous to the traditional antitrust standing limitation.⁴¹ The Court emphasized careful application of the

36. See 457 U.S. at 474-75; notes 18-19 *supra*.

37. See notes 18-19 *supra*.

38. See *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 912 (1983) ("[M]assive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits."); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737-38 (1977) (attempts to allocate a passed-on overcharge "would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness"); cf. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 493 (1968) (defendants not permitted to discount damages claims to the extent that overcharges had been passed on to plaintiff's customers because such attempts to fix damages "would often require additional long and complicated proceedings involving massive evidence and complicated theories").

39. 457 U.S. at 475. The Court found that permitting *McCready* to proceed offered "not the slightest possibility of a duplicative exaction from petitioners." Because *McCready* had paid her bills, the Court reasoned, her psychologist could not "link any claim of injury to himself arising from his treatment of *McCready*." 457 U.S. at 475 (emphasis added). Worth noting, however, is the possibility that *McCready*'s psychologist could have linked a more general claim of injury to himself arising from the Blue Shield plan. An action for injunctive relief had in fact been brought by an organization of clinical psychologists and an individual practitioner against the *McCready* petitioners and Blue Shield of Southwestern Virginia. *Virginia Academy of Clinical Psychologists v. Blue Shield*, 469 F. Supp. 552 (E.D. Va. 1979), *revd. in part*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981). The Court of Appeals found no conspiracy between the Blue Shield plans and the neuropsychiatric society, but it did find that the plans *themselves* were "combinations of physicians" capable of conspiring within the meaning of § 1 of the Sherman Act. 624 F.2d at 479-81, 483. This treatment of the Blue Shield plans as combinations rather than distinct entities was apparently accepted by the Supreme Court in *McCready*. See 457 U.S. at 469 n.4.

40. See 457 U.S. at 476 ("Analytically distinct from the [duplicative recovery limitation], there is the conceptually more difficult question 'of which persons have sustained injuries *too remote* [from an antitrust violation] to give them standing to sue for damages under § 4.'") (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 n.7 (1977)) (emphasis in original).

41. See notes 22-24 *supra* and accompanying text.

policies underlying the antitrust laws,⁴² finding it “reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.”⁴³ After focusing first on the “physical and economic” relationship between the alleged violation and the harm to the plaintiff,⁴⁴ and then considering whether the harm to this individual was of the type about which Congress was concerned,⁴⁵ the Court in *McCready* concluded that the plaintiff’s claim satisfied both of these factors.⁴⁶ The

42. 457 U.S. at 477 (Although “neither the statutory language nor the legislative history of § 4 offers any focused guidance on the question of *which* injuries are too remote from the violation and the purposes of the antitrust laws to form the predicate for a suit under § 4[.] . . . the potency of the remedy implies the need for *some* care in its application.”) (emphasis added).

43. 457 U.S. at 476-77 (“An antitrust violation may be expected to cause ripples of harm to flow through the Nation’s economy; but ‘despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.’”) (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting)).

44. 457 U.S. at 478-80. This “physical and economic” nexus requirement is most closely analogous to the “directness of injury” factor of *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897 (1983). See notes 66-67 *infra* and accompanying text.

45. 457 U.S. at 481-84. In general, the core concern of Congress in enacting the antitrust laws was to enhance competition. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (The core principles behind the enactment of § 4, in particular, are deterrence and compensation; the antitrust laws were enacted for “the protection of *competition*, not *competitors*”) (emphasis in original); notes 8-9 *supra* and accompanying text.

Thus, the Court’s concern here is that *standing* to seek treble damages be linked to the pro-competition policy behind the antitrust laws. But this interpretation blurs the analytical distinction between injury and standing because, as the Court recognized in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the very existence of antitrust *injury* turns on whether the injury-in-fact resulting from an antitrust violation reflects the pro-competition policy of the antitrust laws. See note 16 *supra*.

46. Because *McCready* was the direct victim of defendants’ unlawful coercion, and because she suffered pecuniary loss as a result of her refusal to yield to that coercion, the Court found that the requisite physical and economic nexus between the violation and the harm existed. In applying the first prong of its remoteness analysis, the Court treated the physical and economic nexus separately. Examining the physical nexus, the Court focused on two elements. First, the specific intent of the conspirators, to impair psychologists’ competitive position within the psychotherapeutic market, was not dispositive. The availability of a § 4 remedy could not reasonably be restricted to the *intended* victims of the conspiracy, but would extend to the *foreseeable* victims as well. 102 S. Ct. at 2548-49; cf. *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 908 & n.37 (1983) (intent allegation is not of controlling importance where plaintiff’s attempt to show defendant’s specific intent to harm them, or where defendant, as in *McCready*, claims lack of specific intent to harm plaintiff as a defense to plaintiff’s antitrust claims). Second, because the denial of reimbursement to *McCready* was the “very means” by which Blue Shield allegedly sought to achieve its illegal ends, the harm to *McCready* and her class was “clearly foreseeable,” and precisely the type of harm that the underlying conspiracy would be likely to cause. 457 U.S. at 479 (citations omitted).

Looking to the economic nexus, the Court simply stated that *as a consumer* of psychotherapy services and a subscriber to the Blue Shield plan, *McCready* was clearly “‘within that area of the economy . . . endangered by [that] breakdown of competitive conditions’ resulting from Blue Shield’s selective refusal to reimburse.” 457 U.S. at 480-81 (quoting *In re Multidistrict*

Court therefore held that McCready had standing to maintain a section 4 action.

2. *Explicit Identification of Factors Relevant to the Right to Seek Section 4 Recovery*

In *Associated General Contractors of California v. California State Council of Carpenters*,⁴⁷ the Court collapsed the antitrust injury and antitrust standing requirements, explicitly identifying factors that are relevant to a unified judicial inquiry into a plaintiff's right to seek section 4 recovery. At issue was an employee union's standing to bring an antitrust action seeking section 4 recovery.⁴⁸ The Court found that the Union was not "a person injured by reason of a violation of the antitrust laws within the meaning of [section] 4 of the Clayton Act."⁴⁹

In examining the question of standing, *Associated General* modified *McCready* by de-emphasizing the facially broad language of section 4.⁵⁰ The Court focused instead on the circumstances surrounding the enactment of section 4's statutory predecessor, section 7 of the Sherman Act.⁵¹ The Court found the Sherman Act's legisla-

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

As to the second prong of the remoteness analysis, the Court reasoned that because McCready was a consumer of the services that were the target of the alleged conspiracy, her injury was clearly within the core of congressional concern in enacting the antitrust laws. The Court, then, found it sufficient that the plaintiff had charged the defendant with a "purposefully anticompetitive scheme" and had alleged pecuniary loss "as the consequence of [defendant's] attempt to pursue that scheme." 457 U.S. at 483 (emphasis in original) (footnote omitted).

47. 103 S. Ct. 897 (1983).

48. Plaintiff alleged that the multi-employer association with which it had a collective bargaining agreement had coerced certain third parties to give some — but not necessarily all — of their business to nonunion firms. 103 S. Ct. at 903. Only this last allegation was an antitrust allegation. The two classes of coerced persons encompassed by this antitrust claim were: (1) landowners and others who "let" construction contracts; and (2) general contractors. Included in the first class were defendants' customers and potential customers, while the second class consisted of defendants' competitors and defendants themselves. The Union alleged that defendants' coercive conduct weakened and restrained the trade of certain contractors who *refused* to submit to defendants' pressure tactics and at the same time caused certain unionized subcontractors to lose business from the contractors who *did* submit to defendants' coercion. 103 S. Ct. at 903.

The Union claimed that as a result of this alleged restraint on the market for construction contracting and subcontracting, it suffered injury to its "organizational and representational activities." 103 S. Ct. at 902. Yet the Union did not allege any restraint on competition in the market for labor union services. 103 S. Ct. at 903 n.14 (distinguishing cases where union organizational and representational activities were held to constitute a form of business protected by the antitrust laws because those cases involved claims that competition between rival unions had been injured).

49. 103 S. Ct. at 913.

50. See 103 S. Ct. at 904 & n.19; note 34 *supra*.

51. Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890), *repealed by* Act of July 7, 1955, ch. 283, § 3, 69 Stat. 282, 283.

tive history to be filled with "repeated references to the common law[. . . mak[ing] it clear that Congress intended the [Sherman] Act to be construed in the light of its common-law background."⁵² That background encompassed well-accepted rules circumscribing the availability of damages recovery in tort law.⁵³ This common law history thus becomes an "articulable consideration of statutory policy"⁵⁴ to be added to those the Court already enumerated in *McCready* as limiting section 4 recovery. As a result, allegations of consequential harm, even when supported by an allegation of intent to harm the plaintiff, do not end the inquiry into the availability of a section 4 right of recovery.⁵⁵ Instead, courts must consider three additional factors analogous to pertinent common law considerations:⁵⁶ (1) the nature of the plaintiff's alleged injury;⁵⁷ (2) the nature of the damages claim;⁵⁸ and (3) the directness or indirectness of the plaintiff's injury.⁵⁹

In considering the first factor, the nature of the plaintiff's injury, the Court apparently incorporated the antitrust injury requirement within its standing analysis.⁶⁰ Thus, the Court noted that the "central interest" of the Sherman Act was to protect the "economic freedom of participants in the relevant market."⁶¹ Consumers or competitors of the relevant product or service fall most clearly within the ambit of this interest.⁶²

Focusing on the nature of the damages claim, the Court in *Associated General* concerned itself with what *McCready* had labelled the

52. 103 S. Ct. at 905 (Although the legislative history supports a broad construction of § 4's antecedent, "[a] proper interpretation of the section cannot . . . ignore the larger context in which the *entire statute* was debated.") (emphasis added).

53. The Court's examples of these judge-made rules included the doctrines of (1) foreseeability and proximate cause; (2) directness of injury; (3) certainty of damages; and (4) privity of contract. 103 S. Ct. at 905-06. The Court specifically added the second and third of these doctrines to its antitrust framework. See notes 58-67 *infra* and accompanying text.

54. *McCready*, 457 U.S. at 473; see notes 34-35 *supra* and accompanying text.

55. *Associated General*, 103 S. Ct. at 908.

56. 103 S. Ct. at 907 ("[A]s was required in common-law damages litigation in 1890, the question [whether the Union may recover for injury allegedly suffered by reason of the defendants' actions] requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.") (footnote omitted).

57. 103 S. Ct. at 908.

58. 103 S. Ct. at 911.

59. 103 S. Ct. at 910.

60. See notes 16 & 45 *supra* and accompanying text.

61. 103 S. Ct. at 909 (citing *McCready* as precedent for the relevance of this central interest in determining the plaintiff's standing to maintain a § 4 action).

62. 103 S. Ct. at 909. Because the Union in *Associated General* was neither a consumer nor a competitor, and because the Union's longstanding collective bargaining relationship with defendants meant that labor market interests dominated the antitrust implications of defendants' conduct, the Court did not consider the injury to the Union to be an *antitrust* injury. 103 S. Ct. at 909-10.

"duplicative recovery" limitation;⁶³ the Court simply expressed the additional requirement that damages claims not be speculative, thereby raising what was a footnote in *McCready* to textual status.⁶⁴ The "statutory policy concern" here is that the effectiveness of the private enforcement scheme would be crushed under its own weight if the Court were to allow complicated and speculative damage theories to stand.⁶⁵

The Court's inquiry into the third factor, the directness of the injury, also reflects its concern for the effectiveness of private enforcement of the antitrust laws. *Associated General* indicates that standing inquiries ought to concentrate on whether a more directly injured, identifiable class of putative antitrust plaintiffs exists.⁶⁶ If such a class of persons "whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement" does exist, the justification for allowing a more remotely injured party to perform the role of private attorney general is greatly diminished.⁶⁷

Applying all three factors to the facts of *Associated General*, the Court concluded that the Union did not have standing to seek section 4 recovery.⁶⁸ The question remains whether *Associated Gen-*

63. This is basically an antitrust *injury* inquiry.

64. The Court noted in *Associated General* that "nothing but speculation informs the Union's claim of injury by reason of the alleged unlawful coercion. Yet, as we have recently reiterated, it is appropriate for § 4 purposes 'to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm.'" 103 S. Ct. at 911 (quoting *McCready*, 457 U.S. at 475 n.11); see also Case Note, *supra* note 16, at 183-84, 194-95 (treating the feasibility of implementing certain damage theories as a third prong of the *McCready* analysis).

65. The Court emphasized the "strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." 103 S. Ct. at 911 (footnote omitted). This interest underlies "the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." 103 S. Ct. at 912; see notes 18 & 36-38 *supra* and accompanying text.

66. 103 S. Ct. at 911.

67. 103 S. Ct. at 911. This third factor is analogous to traditional antitrust standing analysis, and to the "remoteness" inquiry in *McCready*. See 457 U.S. at 476-84. Where such a directly injured class exists, denying the more remote party a remedy "is not likely to leave a significant antitrust violation undetected or unremedied." *Associated General*, 103 S. Ct. at 911; see also notes 18-19 *supra*.

68. Applying the second and third factors to *Associated General* itself, the Court first found that the Union's injury was merely derivative. The Court noted:

If the Union claims that dues payments were adversely affected because employees had less incentive to join the Union in light of expanding nonunion job opportunities, its damage is more remote than the harm allegedly suffered by unionized subcontractors. The same is true if the Union contends that revenues from dues payments declined because its members lost jobs or wages because their unionized employers lost business. That harm, moreover, is even more indirect than the already indirect injury to its members, yet a number of decisions have denied standing to employees with *merely derivative injuries*.

103 S. Ct. at 910 n.46 (emphasis added) (citations omitted). There was, indeed, "no allegation that the Union's revenues in the form of dues or initiation fees" had decreased. 103 S. Ct. at 911. Rather, any injury to the Union was "only an indirect result" of whatever harm may have been suffered by certain contractors and subcontractors — by those who refused to yield to the

eral's three-factor approach allows a discharged employee to maintain a section 4 cause of action.

II. THE DISCHARGED EMPLOYEE'S STANDING TO SEEK RECOVERY UNDER SECTION 4

Together, *McCready* and *Associated General* demonstrate the Court's desire to go beyond labels in the antitrust context, and to examine instead the policy considerations that affect antitrust standing. After describing the context in which employee standing cases arise, Part II of this Note argues that the factual context and policy concerns peculiar to these cases weigh heavily in favor of granting antitrust standing to discharged employees.

A. Employee Standing: The Factual Context

The very context of employee standing requires explanation, because employees will attempt to maintain section 4 actions in varying capacities. For example, employees may allege derivative injury flowing from a business weakened by an anticompetitive scheme.⁶⁹ They may also allege more direct injury resulting from a concerted refusal to deal aimed directly at them and at the employment market of which they are a part.⁷⁰ Generally, employees are denied antitrust standing in the former case,⁷¹ and granted it in the latter.⁷²

defendants' coercive practices and who thereby lost business to nonunion firms, and by those union firms that lost business when contractors or subcontractors yielded to defendants' coercive practice by diverting contracts to nonunion firms. 103 S. Ct. at 910 & n.46. Because the more immediate victims of the defendants' coercion would be able to maintain a treble damage action against defendants, 103 S. Ct. at 911, and because of the speculative and duplicative nature of the Union's damages claim, the Court concluded that the second and third factors of its analysis, together with the nature of the Union's injury, "weigh[ed] heavily against judicial enforcement of the Union's antitrust claim." 103 S. Ct. at 913.

69. The *primary* injury in these cases is felt by the employer, in the form of lost business resulting from the anticompetitive effects of an antitrust violation. When the employer reacts to this loss by terminating employees, or when employees receive diminished salary or commissions as a result of the employer's weakened market position, these employees suffer *derivative* injury only.

70. The Supreme Court has long permitted those targeted by such a concerted refusal to deal to challenge the larger conspiracy of which the restraint on competition in the labor market is but a part. For example, in *Radovich v. National Football League*, 352 U.S. 445 (1957), the plaintiff football player alleged that pursuant to a conspiracy among the defendants to monopolize professional football in the United States, he had been boycotted and blacklisted for having played for a professional football league that competed with the defendant's league. The Court allowed the plaintiff to challenge the primary conspiracy to monopolize professional football of which the employee boycott was a part.

71. *See, e.g., Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973) (employee lacked antitrust standing to seek recovery for termination resulting from employer's illegal merger); *Mans v. Sunray DX Oil Co.*, 352 F. Supp. 1095 (N.D. Okla. 1971) (same); *Bywater v. Matshushita Elec. Indus. Co.*, 1971 Trade Cas. ¶ 73,759 (S.D.N.Y. 1971) (employees and their union had no standing to seek § 4 recovery where employer was directly affected by Japanese television manufacturers' conspiracy to undersell American competitors).

72. *See, e.g., Radovich v. National Football League*, 352 U.S. 445 (1957) (professional

In the category of employee standing cases with which this Note is concerned, the employee lies somewhere between these two extremes.⁷³ The paradigm of the aggrieved employee with which this Note deals is the whistleblower — the employee who refuses to cooperate with his employer's antitrust violating scheme, often in a not so quiet way, and who therefore suffers the consequence of termination.

The violative schemes in these cases are usually horizontal conspiracies among a group of similarly situated employers to fix prices, rig bids, or allocate markets.⁷⁴ Often, the noncooperating employee occupies an at-will sales or managerial position that renders his active participation in any such horizontal conspiracy essential to its success.⁷⁵ An examination of the elements of standing set forth in *Associated General* indicates that an employee in this situation has standing to seek treble damages under section 4.

B. *Assessing the Statutory Policy Considerations*

1. *The Nature of the Employee's Injury*

Employees who are discharged for refusing to carry out their employer's antitrust violating scheme suffer pecuniary loss⁷⁶ as a direct

football player had standing to challenge blacklisting by defendant league); *Quinonez v. National Assn. of Sec. Dealers* 540 F.2d 824 (5th Cir. 1976) (plaintiff securities sales representative who was the victim of defendant's blackball exclusionary practices had standing to sue); *Nichols v. Spencer Intl. Press, Inc.*, 371 F.2d 332 (7th Cir. 1967) (former employee of defendant had standing to challenge "no switching" agreement entered into between defendant and other firm in industry); *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859 (M.D. Tenn. 1980) (former division managerial employee had standing to sue for loss of employment opportunity, where there was agreement between buyer and seller of corporate division that seller would not rehire former managerial employees who refused employment with buyer); *Drysdale v. Florida Team Tennis, Inc.*, 410 F. Supp. 843 (W.D. Pa. 1976) (tennis player had standing to sue for injuries resulting from defendant's restrictive draft system); *Freeman v. Eastman-Whipstock, Inc.*, 390 F. Supp. 685 (S.D. Tex. 1975) (employee had standing to sue where he alleged that former employers had conspired to prevent his employment in oil well surveying industry and had power to enforce conspiratorial decision).

73. That is, the employee is not alleging mere derivative injury, nor is he necessarily alleging a concerted refusal to deal aimed at restricting competition in the employment market.

74. See cases cited at note 7 *supra*. Horizontal conspiracies violate § 1 of the Sherman Act. See note 25 *supra*.

75. See, e.g., *Bichan v. Chemetron Corp.*, 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983) (corporate president); *Ostrofe v. H.S. Crocker Co.* 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded mem.*, 103 S. Ct. 1244 (1983) (market director); *McNulty v. Borden, Inc.*, 542 F. Supp. 655 (E.D. Pa. 1982) (unit sales manager); *Callahan v. Scott Paper Co.*, 541 F. Supp. 550 (E.D. Pa. 1982) (sales managers). But see *Shaw v. Russell Trucking Line, Inc.*, 542 F. Supp. 776 (W.D. Pa. 1982) (truckdriver). In fact, an employee's mere noncooperation may seem threatening to the employer, for his refusal to participate leaves him with clean hands, and his knowledge of the conspiracy gives him ample weaponry with which to attack the employer if he becomes disgruntled or if he is terminated — whether for antitrust related reasons or for reasons unrelated to the purposes of the antitrust laws.

76. See, e.g., *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176 (5th Cir. 1976) ("There can be little doubt that an employee who is deprived of a work opportunity has been injured in his 'commercial interests or enterprise,' because the selling of one's labor is a com-

consequence of their refusal to cooperate with the unlawful action. Whether this pecuniary loss is cognizable under section 4 depends on the characterization of the employee's role in the relevant market.⁷⁷

Although an employee, like the Union in *Associated General*, is neither a consumer nor a competitor with respect to targeted goods or services, an employee resembles a consumer because he *participates* in the relevant market insofar as his cooperation or noncooperation with an illegal scheme affects that market. By cooperating with such a plan, an employee helps to *effectuate* a restraint on the market for his employer's goods; by refusing to cooperate, however, the same employee can thwart the scheme.⁷⁸ Furthermore, to the extent that the employee alleges a post-discharge boycott of his services among all the employer-conspirators, the boycott affects the market for an employee's *services*.⁷⁹ The shunned employee is a crucial participant in this market and is clearly injured by a boycott.⁸⁰

The central concern of the antitrust laws — protecting the economic freedom of participants in the relevant market — may well extend to protecting the entrepreneurial freedom of some employees. Discharged employees whose jobs involve the exercise of economic discretion and who rely on the ability to compete in an unfettered market suffer a distinct injury of the type contemplated by the Supreme Court. Unlike the Union's interest in *Associated General*,⁸¹ the typical employee's interests are clearly disserved by diminished competition. Because sales and managerial employees often depend on commissions and bonuses to supplement their salaries, and because the size of commissions or bonuses could be reduced by a

mercial interest."); *Nichols v. Spencer Intl. Press, Inc.*, 371 F.2d 332, 334 (7th Cir. 1967) (loss of employment as sales supervisor) ("[W]e readily conclude that one who has been damaged by loss of employment as a result of a violation of the antitrust laws is 'injured in his business or property' and thus entitled to recovery under [§ 4 of Clayton Act] . . . [since] the interest invaded by a wrongful act resulting in loss of employment is so closely akin to the interest invaded by impairment of one's business as to be indistinguishable in this context."); *accord* *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 487 (5th Cir. 1967) (termination of employment as sales supervisor); *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487, 491 (2d Cir. 1948) (loss of employment as advertising solicitor); *Broyer v. B.F. Goodrich Co.*, 415 F. Supp. 193, 196 (E.D. Pa. 1976) (termination of employment as territory sales manager and concomitant loss of commissions and bonuses); *Kinzler v. New York Stock Exch.*, 62 F.R.D. 196, 200 (S.D.N.Y. 1974) (loss of accounts resulting from freeze on employment of failing broker's registered representatives is injury to business or property within meaning of § 4); *Vandervelde v. Put & Call Brokers & Dealers Assn.*, 344 F. Supp. 118, 153 (S.D.N.Y. 1972) (salary or commissions lost as a result of antitrust violations recoverable as damages).

77. See notes 60-62 *supra* and accompanying text.

78. See note 97 *infra* (noncooperative employee serves as prime government source in criminal antitrust prosecution).

79. *Cf. Associated General*, 103 S. Ct. at 903 n.14 (dictum implying that Union might have had § 4 claim if it had alleged direct restraint in the market for labor union services).

80. See notes 70 & 72 *supra*.

81. See *Associated General*, 103 S. Ct. at 909 ("It is not clear whether the Union's interests would be served or disserved by enhanced competition in the market.").

rigged market, these employees have a direct interest in protecting that market's integrity. Moreover, because at-will employees are not covered by a separate body of federal labor law,⁸² the employees' antitrust concerns predominate, and allowing employees to air these concerns in a judicial forum is consistent with the pro-competitive thrust of the antitrust laws.⁸³

2. *The Nature of the Damages Claim*

Neither the "duplicative recovery" nor the "speculative damages" concerns discussed in *Associated General* are warranted in the employee discharge context. First, the duplicative recovery problem does not arise because the employee suffers a discrete injury that is easily distinguishable from any harm suffered by consumers or competitors in the relevant market. Because the claims of consumers, competitors, and employees would not intermingle, there would be no need to apportion damages.⁸⁴

Second, the discharged employee's damages claim is not the least bit speculative.⁸⁵ The employee's injury is direct, its nature precise.

82. See Stieber & Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REF. 319, 319 n.4 (1983) ("The United States stands almost alone among democratic industrialized nations in not providing legal protection against unjust discharge for all wage-earning and salaried employees."). As a result, "[s]ome fifty-nine million private sector employees remain unprotected against arbitrary and possibly unfair disciplinary penalties, including discharge, that may be imposed unilaterally by employers for unacceptable behavior." *Id.* at 322.

At-will employees must usually content themselves with whatever state tort remedies are available. See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (employee who alleged that he was discharged for refusing to participate in an illegal price fixing scheme was allowed to bring a wrongful discharge tort action against his employer). State remedies are, however, inadequate for two reasons. First, most states continue to recognize the employment-at-will doctrine, which holds that an oral contract under which an employee offers only his labor as consideration is terminable at the will of either party. As a result, state remedies generally do not protect employees against arbitrary discharge. See Stieber & Murray, *supra*, at 321-22 & n.23; Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REF. 277, 280 (1983) ("In jurisdictions strictly adhering to the employment-at-will doctrine, the discharged whistleblower has no remedy.") (footnote omitted). Second, "[e]ffective enforcement of federal antitrust laws cannot be made to depend upon the availability of alternate remedies under varying local laws." *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378, 1384 n.12 (9th Cir. 1982), *vacated and remanded mem.*, 103 S. Ct. 1244 (1983). Section 4 demands a more reliable way to deter conspiring employers, as well as a more certain remedy for wrongfully discharged employees.

83. The employee's complaint thus comes within the *Brunswick* test for antitrust injury. See note 16 *supra* and accompanying text.

84. Because employees are not within the same chain of distribution as either the competitors of the conspirators, or the consumers of the targeted goods or services, the duplicative recovery concern is absent in the employee discharge context. See Case Note, *supra* note 16, at 193-94.

85. Cf. *McCready Blue Shield v. McCready*, 457 U.S. 465 (1982):

If there is a subordinate theme to our opinions in *Hawaii* and *Illinois Brick*, it is that the feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4. Where consistent with the broader remedial purposes of the antitrust laws, we have sought to avoid burdening § 4 actions with damages issues giving rise to the

Courts are thoroughly familiar with wrongful termination actions; damages awards are neither difficult to ascertain⁸⁶ nor frighteningly large.⁸⁷ Finally, unlike the situation in *Associated General*, the employee discharge situation does not implicate a competing body of substantive law that could dominate the antitrust concerns raised by the employer's antitrust violating behavior.⁸⁸

need for "massive evidence and complicated theories," where the consequences would be to discourage vigorous enforcement of the antitrust laws by private suits. 457 U.S. at 475 n.11 (quoting *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 493 (1968)).

86. See *Ostrofe v. H.S. Crocker Co.*, 670 F.2d at 1378, 1385 (9th Cir. 1982), *vacated and remanded mem.*, 103 S. Ct. 1244 (1983) ("Suits for damages by persons wrongfully discharged are common; courts are accustomed to assessing such damages; they are neither unduly speculative nor difficult to calculate . . ."). Thus, an employee's claim, "while perhaps not ascertainable to the penny, as was McCready's claim, certainly involve[s] none of the 'massive evidence and complicated theories' required in typical antitrust actions." Case Note, *supra* note 16, at 195 (footnotes omitted) (quoting *Blue Shield v. McCready*, 457 U.S. 465, 475 n.11).

87. Courts are wary of the possible anticompetitive effects of imposing treble-damage liability because extremely high damage awards can severely injure a defendant. See Note, *Class Actions for Punitive Damages*, 81 MICH. L. REV. —, — (1983) (bankruptcy caused by punitive damage awards). Courts will not want to bury an individual defendant with antitrust damages where the loss of that defendant would appreciably lessen competition within the affected market. Yet treble-damage awards to discharged employees are unlikely to produce the level of damages that might be generated in a *McCready* class-action setting. See Case Note, *supra* note 16, at 194 ("Given [the employee's] relatively small potential recovery, lost wages and bonuses trebled, it is unlikely that such a recovery would ruin" the employer or the employer's co-conspirators.). Concern about removing a defendant from the market, thus producing a concomitant reduction of competition in the affected industry, is largely absent in the employee discharge situation.

For an excellent discussion of the policy against overkill liability, see Berger & Bernstein, *supra* note 3, at 851-52, 868. Berger and Bernstein explain that the policy against ruinous recoveries comes into play when "discrete injuries are so numerous that nonduplicative treble damages recoveries for all of them would heavily burden, or perhaps even bankrupt, one or more defendants." *Id.* at 851 (emphasis added). The concern is with the total impact of these discrete awards, and is justified only where it accords with the substantive principles of the antitrust laws. Where no anticompetitive effects are likely, however, "concern over the extent of an antitrust defendant's total liability represents no more than unwarranted solicitude for the alleged antitrust violator." *Id.* at 852. The authors caution that "an overkill defense cannot be permitted to prevail in antitrust standing decisions when great market power causes numerous simultaneous injuries, lest a defendant be effectively shielded from liability because of the outrageous scope of his own misconduct." Such a result, they maintain, would contradict both the deterrent and remedial objectives of the antitrust laws. *Id.* at 868; see also *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-45 (1979) (fear that standing will have potentially ruinous effects on small businesses is not an unimportant consideration, but is one more properly addressed by Congress than by the judiciary).

88. See *Associated Gen. Contractors v. California State Council of Carpenters*, 103 S. Ct. 897, 909-10 (1983). Because of the existence of a broad labor exemption from the antitrust laws and a separate body of labor law specifically designed to protect and promote the "organizational and representational activities of labor unions," the Court in *Associated General* noted that "a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains." 103 S. Ct. at 910 (emphasis added); see also notes 53-54 *supra*. In contrast, most individual employees are not protected by a separate body of law. See note 82 *supra* and accompanying text.

3. *The Directness of the Employee's Injury*

In addition to the nature of the employee's injury, courts must examine the *directness* of that injury. The situation examined in this Note involves direct coercion by an employer attempting to control individual behavior. An employee's refusal to succumb to this coercion usually leads to retaliatory discharge,⁸⁹ and he suffers pecuniary injury as a result.⁹⁰ To be sure, the employee is not the *intended* target of the antitrust conspiracy;⁹¹ he is merely an instrument used to carry out the conspiracy. Only when he declines this assigned role is the employee subjected to whatever economic sanctions his employer may wish to visit upon him.

In all these particulars the employee is akin to the uncooperative contracting and subcontracting firms in *Associated General*. Those firms also refused to yield to the defendants' coercive practices and were therefore subjected to the defendants' retaliatory economic sanctions.⁹² The Court declared in that case that such firms *could* maintain section 4 actions against the defendants, because they were both participants in the relevant market and the direct victims of the defendants' coercive practices.⁹³ The discharged employee appears to fall within this dictum as well.

Behind this rather mechanistic application of *Associated General*, however, lie even stronger reasons to find that employees are directly injured persons within the meaning of that case. First, discharged employees are a directly injured, identifiable class of persons whose self-interest could easily motivate them to vindicate the public interest in antitrust enforcement.⁹⁴ Granting a section 4 right of action to these employees would give them a powerful incentive to refuse participation in unlawful schemes. Knowledge of this incentive, and fear of the treble-damage consequences of terminating recalcitrant employees, might deter employers from even pursuing conspiracies that require the knowledge and participation of several employees.⁹⁵

89. Retaliatory discharge may be preceded by a variety of less drastic coercive measures that are intended to preserve the conspiracy by forcing the employee to capitulate. See, e.g., *Callahan v. Scott Paper Co.*, 541 F. Supp. 550, 553 (E.D. Pa. 1982) (plaintiffs alleged reduced compensation, inability to add new customers, reduction in potential for advancement, diminution of professional reputation and integrity, and ultimate loss of jobs).

90. See note 76 *supra*.

91. Cf. notes 16 & 46 *supra*.

92. See note 58 *supra*.

93. See notes 46 & 68 *supra* and accompanying text.

94. See Case Note, *supra* note 16, at 192; note 97 *infra* and accompanying text; cf. note 67 *supra* and accompanying text.

95. An uncooperative employee leaves the employer with few options. The employer can (1) discharge the employee and run the risk of a § 4 action; (2) allow the employee to interfere with the conspiracy, thus reducing its effectiveness; (3) buy the employee's acquiescence, assuming that the employee has few principles; (4) abandon the illegal practice. See Case Note, *supra* note 16, at 192. Unless the employer has reason to believe that an employee can main-

Second, if the treble-damage remedy failed to deter an employer, the employee *qua* insider would nevertheless be in the best position to blow the whistle on a covert conspiracy *before* it could wreak major competitive damage.⁹⁶ Finally, detection at any stage means that section 4 would be serving its private enforcement purpose. Such private enforcement is especially meaningful in the context of covert horizontal conspiracies, which often require some supervision even after detection and prosecution in order to prevent their reappearance.⁹⁷

tain a § 4 action, his least costly alternative is to discharge the employee. This result eliminates the deterrent effect of choices 2 and 3, both of which increase the costs involved in pursuing the illegal activity.

Of course, because of the risk that an employee might help in a criminal prosecution, *see* note 97 *infra*, the employer might still abandon the conspiracy. In this sense, the mere presence of an uncooperative employee, regardless of his ability to sue, might deter the employer. Thus, one could argue that permitting an employee to seek § 4 recovery will not provide a unique deterrent against employer wrongdoing.

At a minimum, however, allowance of standing would increase deterrence by reducing the risks that an employee must contemplate before refusing to go along with an illegal scheme. Because alternative remedies are limited, *see* note 82 *supra*, an employee will probably be unable to recover damages if he is discharged for interfering with his employer's illegal activities. The financial risks involved might produce acquiescence in an employee who would otherwise help to enforce the law. The availability of remedies gives the objecting employee the security he needs to follow his conscience, and thus encourages greater public detection of activities that violate the antitrust laws. *See* note 97 *infra*. In addition, awareness that employees have nothing to lose by enforcing the law would discourage employer initiation of illegal activities.

96. *See* *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378, 1384-85 (9th Cir. 1982) ("Avoiding injury to the competitive structure itself is particularly important [because] once destroyed, competitive conditions may be difficult to restore.") (citation omitted), *vacated and remanded mem.*, 103 S. Ct. 1244 (1983); Case Note, *supra* note 16, at 197 ("Since conspiracies involving price-fixing and allocation of customers have numerous victims, the number of resulting plaintiffs may well be decreased if the conspiracies are halted at an early stage through employee suits. . . . [T]he extent of harm will [also] be diminished."). Thus, despite judicial assertions that discharged employees are not "efficient enforcers of the antitrust laws," *Bichan v. Chemtron Corp.*, 681 F.2d 514, 520 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983), allowing such plaintiffs to seek § 4 recovery would *improve* efficient enforcement of those laws by preempting the worst anti-competitive effects of a given violation.

97. The detection rate of antitrust violations is admittedly much lower than that of other crimes because antitrust violations are usually concealed and because "there is rarely an identifiable victim *who is aware of the violation*." Berger & Bernstein, *supra* note 3, at 847 n.172 (quoting statement of former Assistant Attorney General Donald Baker before the Tenth New England Antitrust Conference, Nov. 20, 1976) (emphasis added).

The history of the paper label industry serves as one example of the critical role of private detection of antitrust violations. That industry has been the target of several price-fixing indictments beginning in the late 1930s and ending with civil and criminal antitrust actions filed against nine paper label companies by the Department of Justice in March, 1974. *H.S. Crocker Co.* was one of those nine companies. Eight executives of these companies, including Robert J. Rodgers, president of H.S. Crocker Co., pleaded no contest to the criminal charges of price fixing, and were fined and ordered to make speeches before public and business groups. A year later one executive claimed, "Price-fixing in this industry can't ever be truly stopped. . . . I'm not going to do it again, but I'm inclined to believe it will go on. I'm even betting it's going on right now." *Public 'sermons' by accused executives*, BUS. WEEK, June 2, 1975, at 45. This last government investigation of the paper label industry was triggered when a "disgruntled former employee" tipped off a customer. Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L. J. 590, 591 (1977). This disgruntled former employee was Frank J. Ostrofe, plain-

CONCLUSION

In *McCready*, the Court appeared to instruct lower courts to recognize a more expansive section 4 cause of action unless some "articulable consideration of statutory policy" admonishes otherwise. In *Associated General*, the Court retreated a bit, enough to warn the courts that they must not forget the common-law limitations on the section 4 cause of action, and that they must not allow any one statutory policy consideration — particularly, the private antitrust enforcement goal of section 4 — to self-destruct under its own complexity.

The Court's competing concerns can be harmonized in the employee discharge context. First, treble-damage recovery for the discharged employee is consistent with the pro-competitive thrust of the antitrust laws. Second, conferring antitrust standing on the discharged employee furthers the compensation, deterrence, and private antitrust enforcement goals of section 4. No one of these goals is sacrificed to another; and the private antitrust enforcement scheme is not overburdened by speculative, impractical, or complex damages claims. Third, common-law limitations do not limit standing where the employee is the direct victim of the defendant's coercive scheme. In short, the statutory policy considerations weigh heavily in favor of judicial enforcement of the discharged employee's antitrust claim.

tiff in *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded mem.*, 103 S. Ct. 1244 (1983). He became the government's chief witness in their criminal investigation of price fixing in the paper label industry. Employees discharged for refusing to go along with an anti-competitive scheme can therefore be quite important in enforcing the law; they should not be denied the right to seek a remedy for the injuries they receive as a result of their refusal to cooperate. See Case Note, *supra* note 16, at 191-92; note 95 *supra*. But see Malin, *supra* note 82, at 278 ("[A]lthough the law should protect individual acts of whistleblowing once they have occurred, it should not affirmatively encourage whistleblowing.").