Gauging the Impact of *Associated General Contractors* on Antitrust Standing Under Section 4 of the Clayton Act

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The United States Supreme Court, in its 1983 decision in Associated General Contractors v. California State Council of Carpenters, *outlined a comprehensive standard for determining standing in private antitrust suits. This Article endorses the Court's approach both for its sensible analysis of antitrust standing and for its contribution to reducing the confusion and conflict that earlier plagued the federal circuits. The Article then demonstrates in the specific setting of bribed agents how a sympathetic court might invoke* Associated General Contractors *to support a more expansive view of standing than most courts have previously allowed. The Article concludes that the Court struck a proper balance between providing the lower courts with adequate guidance and leaving latitude for the further development of antitrust standing doctrine in the light of new experience.*

INTRODUCTION

Private standing to redress antitrust violations has proved not only a formidable weapon of enforcement, but also a fertile source of judicial and scholarly commentary. Few statutory provisions conferring standing can match section 4 of the Clayton Act,[1] which authorizes private

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[1] 15 U.S.C. § 15 (1983). Originally enacted as Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (superseding § 7 of the Sherman Act, ch. 657, 26 Stat. 209, 210 (1890)).

antitrust standing, as inspiration for such a welter of tests, rules, and analyses. Four years ago, the Supreme Court attempted to clear away the thicket of sometimes conflicting and frequently confusing approaches to standing under section 4. In *Associated General Contractors v. California State Council of Carpenters*,[2] the Court provided a more coherent framework for determining the presence or absence of antitrust standing. This Article assesses the extent to which *Associated General Contractors* has unified courts' analyses of section 4.

Part I of this Article briefly reviews the concept of antitrust standing and the principal standards that the various circuits had developed by the time that the Supreme Court confronted *Associated General Contractors*. Part II examines *Associated General Contractors* against the background of three earlier decisions that contributed to the *Associated General Contractors* analysis. Part III argues that *Associated General Contractors* generally has prompted only modification, rather than drastic revision, of previously existing standards. Part IV considers a single issue — section 4 standing of a buyer whose purchasing agent was bribed by a seller in violation of the Robinson-Patman Act — to illustrate how a sympathetic court might invoke *Associated General Contractors* to grant standing when most courts previously would have denied it. The Article concludes that notwithstanding its failure to quell all differences among the circuits, *Associated General Contractors* represents a constructive step in the incomplete evolution of private antitrust standing.

I. The Problem of Line Drawing and the Babel of Circuit Tests

A. *The Nature of Antitrust Standing*

Section 4 of the Clayton Act grants standing, along with treble damages in the event of a successful suit, to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[3] The availability of treble damages suits under section 4 embodies two principal aims: compensating those injured by antitrust violations,[4] and deterring would-be violators[5] by encouraging "an ancil-

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[2] 459 U.S. 519 (1983).

[3] 15 U.S.C. § 15(a) (1983).

[4] *Associated Gen. Contractors*, 459 U.S. at 530; Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977).

[5] Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (private antitrust suits providing "a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations"); Zenith Radio Corp.

lary force of private investigators to supplement the Department of Justice in law enforcement."[6] Underlying both of these aims, of course, is the antitrust laws' fundamental goal of promoting free competition.[7]

On its face, section 4 encompasses a vast array of potential plaintiffs. Indeed, the Supreme Court has cited "the lack of restrictive language" as reflecting Congress' "expansive remedial purpose" in passing the statute.[8] However, the spectre of hordes of antitrust plaintiffs, propelled by the prospect of treble damages, suggests the necessity of qualifying section 4's literal breadth. Accordingly, the Court has inferred 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 property."[9] Rather, courts have taken a series of steps to limit the number of antitrust treble damage plaintiffs.

The bases of judicial circumscription fall roughly into two categories: primary limitations drawn directly from section 4's language, and secondary limitations based on policy considerations. Primary limitations include interpreting the requisite injury to "business or property" as

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v. Hazeltine Research, Inc., 395 U.S. 100, 130 (1969); Perma Life Mufflers, Inc. v. International Parts Corp. 392 U.S. 134, 139 (1968).

[6] Quemos Theatre Co. v. Warner Bros. Pictures, Inc., 35 F. Supp. 949, 950 (D.N.J. 1940).

[7] Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972); *see* American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 572 (1982) (deterrence of "anticompetitive practices" as a principal purpose of the antitrust private cause of action). The Supreme Court has often characterized protecting competition as the paramount goal of the substantive antitrust laws. *E.g.*, *Brunswick*, 429 U.S. at 488 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)); Northern Pac. Ry. v. United States, 356 U.S. 4-5 (1958); Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 809 (1948); Keogh v. Chicago & Northwestern Ry., 260 U.S. 156, 157 (1922); United States v. American Tobacco Co., 221 U.S. 106, 115 (1911).

[8] Blue Shield v. McCready, 457 U.S. 465, 472 (1982) (quoting Pfizer, Inc. v. India, 434 U.S. 308, 313-14 (1908)); Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948); 21 CONG. REC. 2457 (1890) (remark of sponsor of Sherman Act that standing provision should be "construed liberally"); *see* Radovich v. National Football League, 352 U.S. 445, 453-54 (1957).

[9] *McCready*, 457 U.S. at 477; *see Associated Gen. Contractors*, 459 U.S. at 535; Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14 (1972) (noting that the lower courts "have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation"); *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 125 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); Alaska Teamsters Local 959 v. Atlantic Richfield Co., 616 F. Supp. 593, 597 (D. Alaska 1985).

confining recovery to pecuniary losses.[10] More importantly, requiring that the plaintiff's injury be "by reason of" the antitrust violations ensures a significant nexus between the defendant's breach of antitrust laws and the plaintiff's injury. This nexus has given rise to the various tests and standards that this Article addresses. The secondary limitations well-preceded *Associated General Contractors*' explicitly policy-oriented analysis:[11] avoiding multiple liability,[12] maintaining the manageability of antitrust suits,[13] preventing harassment of defendants,[14] averting evidentiary complications,[15] and simply a generalized fear of the "flood-gates"[16] that an overly permissive standing formula would unleash.

In attempting to delineate section 4's boundaries, courts also have grappled with the difficulties of distinguishing antitrust standing from other issues. For example, the Supreme Court has pointed out that a showing of harm sufficient to meet the constitutional injury-in-fact requirement does not alone satisfy the requirement that the plaintiff be a "proper party" to bring a private antitrust suit.[17] Nor does the scope of

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[10] Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); Clark Oil Co. v. Phillip Petroleum Co., 148 F.2d 580, 582 (8th Cir. 1945); Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 967, 970 (7th Cir. 1943) (citing Sidney Morris & Co. v. National Ass'n of Stationers, Office Outfitters & Mfrs., 40 F.2d 620 (7th Cir. 1930)). Treatment of the "business or property" requirement lies outside the scope of this Article.

[11] *See infra* Part II.

[12] *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 730-31 (1977); *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 200 (9th Cir. 1973); Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481, 484 (S.D.N.Y. 1973). *But see* Tyler, *Private Antitrust Litigation: The Problem of Standing*, 49 U. COLO. L. REV. 269, 290 (1978); Note, *Antitrust Law-Private Actions: The Supreme Court Bars Treble-Damage Suits by Indirect Purchaser*, 56 N.C.L. REV. 341, 341, 354-55 (1978) [hereafter Note, *Antitrust*].

[13] *See Illinois Brick*, 431 U.S. at 740-41; Eisen v. Carlisle & Jacquelin, 479 F.2d 1016, 1016-18 (2d Cir. 1973).

[14] *See* Union Carbide and Carbon Corp. v. Nisley, 300 F.2d 561, 570 (10th Cir. 1962) (§ 516 of the Clayton Act prevents multiplicity of suits); 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, 800 (1976).

[15] *See* Blue Shield v. McCready, 457 U.S. 465, 475 n.11 (1982).

[16] Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc. 454 F.2d 1292, 1295 (2d Cir. 1971).

[17] *Associated Gen. Contractors*, 459 U.S. at 535 n.31; *see* Warth v. Seldin, 422 U.S. 490 (1975); Baker v. Carr, 369 U.S. 186, 204 (1962) (constitutional claimant required to hold a "personal stake in the outcome of the controversy" to ensure "concrete adverseness"). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3.17-3.29 (1978).

antitrust standing coincide with other forms of statutory standing, such as those governing challenges to the actions of administrative agencies.[18] Moreover, uncertainty exists as to the extent to which the question of antitrust injury constitutes an inquiry distinct from that of antitrust standing.[19] Finally, courts may confuse the issue of whether a plaintiff may bring her antitrust suit with the ultimate decision on the merits, thereby foreclosing a permissible action.[20]

B. Directness, Target Areas, and Zones of Interest

A year before *Associated General Contractors*, the Supreme Court noted the courts of appeals' "substantial jurisprudence" on antitrust standing, "formulating various 'tests' as aids in analysis."[21] If anything, the Court's observation may have understated the farrago of rules and standards developed by the lower courts. These tests warrant a brief review, since they form the backdrop to *Associated General Contractors* and, to some degree, continue to influence the courts' treatment of standing.

1. The Direct Injury Rule

The origin of the "direct injury" rule is generally traced to the Third Circuit's opinion in *Loeb v. Eastman Kodak.*[22] In *Loeb*, the court refused standing to a shareholder for Sherman Act violations committed against his corporation. The court found that the plaintiff had not received any "direct injury" from the defendant's alleged wrongs. Rather, any injury suffered by the plaintiff in his capacity as a shareholder was "indirect, remote, and consequential [sic]."[23]

While one could regard *Loeb* as a conventional application of the established rule that shareholders may not obtain personal redress for their corporation's injuries,[24] the case sparked a whole jurisprudence of

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[18] *See* Hoffman, *Antitrust Standing: Congress Responds to* Illinois Brick, 1978 WASH. U.L.Q. 529, 542-43.

[19] *See infra* note 98.

[20] *See* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 835-36 (1977); Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645, 669 (1973).

[21] Blue Shield v. McCready, 457 U.S. 465, 476 n.12 (1982).

[22] 183 F. 704 (3d Cir. 1910). Actually, a similar holding that did not employ the "directness" terminology was handed down the previous year. *See* Ames v. American Tel. & Tel. Co., 166 F. 820 (C.C.D. Mass. 1909).

[23] Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910).

[24] Porter v. Sabin, 149 U.S. 473 (1893); Vincel v. White Motor Corp., 521 F.2d 1113 (2d Cir. 1975); Green v. Victor Talking Mach. Co., 24 F.2d 378 (2d Cir. 1928).

"directness" versus "indirectness" or "remoteness" that dominated antitrust standing analysis for decades.[25] The direct injury test focuses on the existence and closeness of a relationship between the plaintiff and defendant, and on the extent to which the defendant intended to injure the plaintiff.[26] Under this test, courts denied standing to various categories of plaintiffs, including lessors,[27] creditors,[28] employees,[29] suppliers,[30] and ultimate consumers.[31] The direct injury test's vagueness and malleability, and its resulting inconsistent application, eventually forced its abandonment.[32]

2. The Target Area Test

In the 1950's and 1960's, courts substituted the "target area" test for the old directness criterion. In its original formulation, the target area test required an antitrust plaintiff to show that she was "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[33] The first case to apply the target area test, *Conference of Studio Unions v. Loew's, Inc.*,[34] dis-

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[25] *See* Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 581-85 (1964).

[26] For a thorough discussion of the direct injury rule, see Berger & Bernstein, *supra* note 20, at 819-35.

[27] Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.) (per curiam), *cert. denied*, 352 U.S. 890 (1956); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

[28] Gerli v. Silk Ass'n, 36 F.2d 959 (S.D.N.Y. 1929).

[29] Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977); Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973).

[30] Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); GAF Corp. v. Circle Floor Co., 463 F.2d 752 (2d Cir. 1972), *aff'g* 329 F. Supp. 823 (S.D.N.Y. 1971), *cert. dismissed*, 413 U.S. 901 (1973).

[31] United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970).

[32] *See In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127 (9th Cir. 1973) (criticizing "conclusory labels" and "talismanic rubrics" invoked in applications of direct injury rule).

[33] Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). *Loew's* did not explicitly use the term "target area"; the term first appeared in Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955). However, later courts regularly employed *Loew's* as a touchstone for determining whether an injury fell within the target area. *See, e.g.*, South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418 (4th Cir. 1966).

[34] 193 F.2d 51 (9th Cir. 1951).

missed a complaint against movie studios brought by unions representing actors. The complaint alleged a conspiracy against the unions and independent studios. The *Loew's* court held that the alleged scheme's suppression of *competition* did not affect the plaintiff unions, because they did not compete with the major studios.[35] Thus, a showing only of injury caused by an antitrust violation would not suffice under the target area test. Rather, the plaintiff must have suffered an injury "to the economic interest that is the immediate subject of protection of the particular antitrust prohibition relied upon."[36] To fall within the prescribed target area, an antitrust plaintiff must be one of those "against whom the conspiracy is aimed."[37]

Although hailed as providing a more "logical and flexible tool,"[38] the target area test failed to achieve the hoped-for precision and uniformity so fatally absent from the direct injury rule. Indeed, the direct injury rule's terminology and trends lingered even after courts adopted the target area test. Some courts cited both tests in denying antitrust standing;[39] others, while relying essentially on the target area test, continued to invoke notions associated with the earlier test, such as remoteness and incidental injury.[40] In addition, the propensity to deny section 4 standing to certain categories of plaintiffs — derided as a "mere search for labels" when conducted under the direct injury test[41] — persisted under the target area concept.[42] The target area test also bred its own confusion, most conspicuously in the tendency of the target image to generate a host of vivid but often analytically dubious marksmanship

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[35] *Loew's*, 193 F.2d at 54.

[36] Lytle & Purdue, *supra* note 14, at 807.

[37] Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 545-48 (5th Cir. 1980); Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 18 (1st Cir. 1979); Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1296 (2d Cir. 1971).

[38] *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 128 (9th Cir. 1973).

[39] *E.g.*, Reibert v. Atlantic Richfield Co., 471 F.2d 727, 732 (10th Cir. 1973); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970); *see* Berger & Bernstein, *supra* note 20, at 820 (clarifying target area approach as form of direct injury test).

[40] *E.g.*, Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1296 (2d Cir. 1971); Fields Prods., Inc. v. United Artists Corp., 318 F. Supp. 87, 88 (S.D.N.Y. 1969).

[41] *In re Multidistrict*, 481 F.2d at 127.

[42] *See* Vandervelde v. Put and Call Brokers & Dealers Ass'n, 344 F. Supp. 118 (S.D.N.Y. 1972) (employee); Minersville Coal Co., Inc. v. Anthracite Export Ass'n, 335 F. Supp. 360 (M.D. Pa. 1971) (lessor); Miley v. John Hancock Mut. Life Ins. Co., 242 F.2d 758 (1st Cir.), *aff'g per curiam* 148 F. Supp. 299 (D. Mass.), *cert. denied*, 355 U.S. 828 (1957) (creditor).

metaphors. Courts have referred to a plaintiff being " 'hit' . . . squarely" and neither "sideswiped nor struck by a carom shot,"[43] to treble damages as such "potent ammunition" that courts must "keep the range of the barrage within the target area,"[44] to complainants "so far removed from the bull's eye that they are 'not even on the firing range,' "[45] and so on.

More seriously, the widespread adoption of the basic target area concept failed to prevent an unsettling diversity in its application. The literature abounds in articles parsing the various differences in the circuits' administration of the test.[46] The most significant determinant of the leniency or stringency with which courts applied the test was the circuits' decision of whether to make foreseeability of the plaintiff's injury a qualification for her presence in the target area. Foreseeability as a test gained standing for a wider group of plaintiffs,[47] while refusal to include foreseeable injuries as such had a more restrictive effect.[48] Because of this and other discrepancies, the target area approach was regarded as "riddled with inconsistencies."[49]

3. The "Zone of Interests" Test: *Malamud*

Prior to *Associated General Contractors*, one other test vied as a major contender for the appropriate standard of divining standing under section 4. In *Malamud v. Sinclair Oil Corp.*,[50] the Sixth Circuit rejected both the direct injury and target area approaches and instead

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[43] Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073, 1076 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

[44] Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 17 (1st Cir. 1979).

[45] Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131-32 (5th Cir. 1975) (quoting *In re Multidistrict*, 481 F.2d at 129).

[46] A small but fair sampling includes Berger & Bernstein, *supra* note 20, at 822-33; Lytle & Purdue, *supra* note 14, at 796, 805-06; Note, *Standing to Sue in Private Antitrust Litigation: Circuits in Conflict*, 10 IND. L. REV. 532, 535-52 (1977); Note, *Antitrust Standing, Antitrust Injury, and the Per Se Standard*, 93 YALE L.J. 1309, 1315-17 (1984).

[47] *See, e.g.*, Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); H.F.& S. Co. v. American Standard, Inc., 336 F. Supp. 110, 116 (D. Kan. 1972).

[48] *See, e.g.*, Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295-96 (2d Cir. 1971) (implicitly rejecting foreseeability of injury as qualification for standing by strictly confining target area to "those against whom the antitrust violation is directed"); 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 341(c), at 220 (1978) (criticizing foreseeability test).

[49] Berger & Bernstein, *supra* note 20, at 830; *see id.* at 830-32.

[50] 521 F.2d 1142 (6th Cir. 1975).

advocated a test drawn from the Supreme Court's standard for administrative standing promulgated in *Association of Data Processing Service Organizations, Inc. v. Camp*.[51] As adopted by the Sixth Circuit, this test required two elements: (1) that the plaintiff allege an injury in fact, and (2) that the interest protected is arguably within the "zone of interests" that the antitrust statutes protect or regulate.[52] This ostensibly liberal[53] test was sharply criticized[54] and was never followed in any other circuit.

II. THE NEW TEST: *Associated General Contractors*

A. *Laying the Groundwork:* Illinois Brick, Brunswick *and* McCready

While the lower courts devised and refined their various tests for antitrust standing, the Supreme Court did not wholly refrain from its own exegesis of section 4. In particular, the half-dozen years preceding *Associated General Contractors* witnessed three major decisions reflecting the Court's developing perception of section 4. Although only one of the decisions rested explicitly on the principle of antitrust standing, the entire trilogy reflects an evolution in standing analysis that culminated in *Associated General Contractors.*

Illinois Brick Co. v. Illinois,[55] decided in 1977, signaled the Court's intent to limit the broadening scope of antitrust liability. In that case, indirect purchasers from a seller who had allegedly overcharged pursuant to a price fixing conspiracy brought a treble damages suit. The purchasers claimed that they were injured by prior purchasers' having passed on the excessive price. The Court held that section 4 does not permit indirect purchasers (with a narrow exception[56]) to sue on a pass-on theory. While relying heavily[57] on *Hanover Shoe, Inc. v.*

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[51] 397 U.S. 150, 151-52 (1970).

[52] *Malamud*, 521 F.2d at 1151-52 (1975).

[53] Malamud's claim — with its tenuous link between Sinclair's conduct and Malamud's injury and its largely contractual character — would probably not have survived either the direct injury or target area test.

[54] *See* Hoffman, *supra* note 18, at 542-43; Sherman, *Antitrust Standing: From* Loeb *to* Malamud, 51 N.Y.U. L. REV. 374 (1976); *see also* Note, *Application of the* Data Processing *Standing Test in Treble Damage Actions* —Malamud v. Sinclair Oil Corp., 17 B.C. IND. & COMM. L. REV. 489, 498-509 (1976) (approving *Malamud* test but noting problems).

[55] 431 U.S. 720 (1977).

[56] *Id.* at 735-36.

[57] *Id.*

United Shoe Machinery Corp.,[58] barring the pass-on theory as a defense,[59] and asserting that the issue presented was "analytically distinct" from the issue of standing,[60] the Court raised a number of policy considerations that have surfaced in standing analysis. The Court noted the risk of multiple liability for defendants,[61] evidentiary complications in identifying affected parties and measuring their damages,[62] and the difficulties of managing large scale and complex suits.[63]

Earlier that term, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[64] also sounded the Court's more restrictive tenor. *Brunswick* involved a treble damages claim brought under section 7 of the Clayton Act following the defendant's acquisition of over 200 failing bowling alleys. Plaintiffs, operators of competing bowling alleys, sued for lost profits attributed to Brunswick's revival of the bowling centers. The Court denied recovery on the ground that whatever injury the plaintiffs suffered through Brunswick's act, the loss was not "by reason of anything forbidden in the antitrust laws."[65] The plaintiffs did not lose profits " 'by reason of' that which made the acquisitions unlawful."[66] Thus, although the acquisitions may have constituted a prima facie violation of section 7 of the Clayton Act, they could not give rise to a section 4 private cause of action unless they adversely affected competition. In this case, Brunswick's actions actually enhanced competition; therefore, the plaintiffs' injury was not related to the illegal nature of the acquisitions.[67]

Like *Illinois Brick*, the *Brunswick* opinion did not formally address

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[58] 392 U.S. 481 (1968).

[59] The Court in *Hanover Shoe* ruled that a direct buyer may sue the seller under § 4 even if the buyer raises her own price. *Id.* at 489. In *Illinois Brick*, the Court reasoned that symmetry with *Hanover Shoe* precludes offensive use of pass-on. *Illinois Brick*, 431 U.S. at 728-29.

[60] *Illinois Brick*, 431 U.S. at 728 n.7.

[61] *Id.* at 730-31.

[62] *Id.* at 732-43.

[63] *Id.* at 737. For an economic justification of *Illinois Brick*'s holding, see Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. CHI. L. REV. 602 (1979). For criticism see generally Note, *Antitrust*, *supra* note 12.

[64] 429 U.S. 477 (1977).

[65] *Id.* at 488 (quoting 15 U.S.C. § 15 (1983)).

[66] *Id.*

[67] *See* Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term — 1977*, 77 COLUM. L. REV. 979 (1977); *see also* Cargill, Inc. v. Monfort of Colo., Inc., 107 S. Ct. 484 (1986) (*Brunswick* antitrust injury requirement applied to bar private plaintiff seeking injunctive relief under § 16 of Clayton Act).

the doctrine of standing. In expounding the concept of antitrust injury, however, the Court reinforced *Illinois Brick*'s proposition that an antitrust violation, coupled with a causal link between the defendant's act and the plaintiff's injury, by themselves would not support a cause of action under Clayton Act section 4. Together, the two decisions presaged *Associated General Contractors*' avowal of interest in more definite foundations for line-drawing than directness, "target area," and "zone of interest."

The third case in the trilogy, *Blue Shield v. McCready*,[68] represents an attempt to lay down an authoritative approach to standing itself. *McCready's* significance lies primarily in its expansive counterbalance to *Illinois Brick* and *Brunswick* as precedent when the Court framed a more comprehensive standing construct in *Associated General Contractors*. In *McCready*, the Court upheld standing for a Blue Shield group policy subscriber who was denied reimbursement for psychotherapy treatment obtained from a psychologist. The policy had conditioned reimbursement of psychologists (but not psychiatrists) on supervision and billing of the therapy by a physician. McCready alleged that Blue Shield and a neuropsychiatrist association had conspired to exclude psychologists in violation of Sherman Act section 1.[69]

The Court, in a 5-4 decision, specifically rejected the petitioners' contention, grounded in the target area test, that McCready's injury was "too 'fortuitous' and too 'incidental' to and 'remote' from the alleged violation" to sue under Clayton Act section 4.[70] Instead, the Court determined that McCready qualified in light of standing's two principal considerations: (1) the "physical and economic nexus between the alleged violation and the harm to the plaintiff," and (2) 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 section 4."[71] Under this standard, aiming the conspiracy at psychologists rather than subscribers was not dispositive; more relevant was that the harm to McCready and other subscribers was "a necessary step in effecting the

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[68] 457 U.S. 465 (1982).

[69] *Id.* at 467-70.

[70] *Id.* at 478. The Court also rejected the *Brunswick* argument that McCready failed to show any anticompetitive injury to herself. *Id.* at 481. Although McCready did not compete with the conspirators, the Court found it sufficient that her injury was "inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Id.* at 483-84.

[71] *Id.* at 478.

ends of the alleged illegal conspiracy."[72]

B. Associated General Contractors' *Multifactor Analysis*

Associated General Contractors represents an attempt to synthesize *McCready*'s generous view of standing with the more restrictive impulses of *Illinois Brick* and *Brunswick*. In a sense, the divergence between some of *Associated General Contractors*' language, lending itself to the more expansive view,[73] and the result — denial of standing — is an index of that attempt. The claim in *Associated General Contractors* was brought by unions (referred to as "the Union") representing California construction workers against an association of employers with whom the Union had collective bargaining agreements. The complaint charged the association and its members with "coercing" some employers into doing business with nonunion contractors and subcontractors.[74]

In assessing the Union's standing to sue, the Court reviewed the common-law background incorporated into section 4's predecessor[75] and concluded that the overarching inquiry of standing analysis is an evaluation of "the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them."[76] In appraising the Union's claim under this broad standard, the Court described several specific factors that a court should consider in making its individualized determination. The principal factors include:

(1) The causal connection between the antitrust violation and harm to the plaintiff, and intent by the defendant to cause that harm. The Court indicated that neither factor by itself nor the presence of both necessarily mandates standing.[77]

(2) Whether the nature of the plaintiff's alleged injury is "of the type that the antitrust laws were intended to forestall."[78] The Court implied that a plaintiff who is not injured in her capacity as a consumer or competitor in the relevant market must overcome a substantial presumption against standing.[79]

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[72] *Id.* at 479.

[73] *See infra* text accompanying notes 111-14.

[74] Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 520, 522-24 (1983).

[75] *Id.* at 531-35.

[76] *Id.* at 535.

[77] *Id.* at 537.

[78] *Id.* at 540.

[79] *Id.* at 538-39.

(3) The directness or indirectness of the associated injury.[80] By this the Court apparently meant the immediacy or attenuation of causation; the Court's discussion did not have the overtones of privity for which critics have attacked the "direct injury" test.[81] The opinion indicated concern that permissive grants of standing for indirect injuries would produce highly speculative claims.[82]

(4) The existence of more direct victims of the alleged antitrust violation. "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general."[83]

(5) The potential for duplicative recovery or complex apportionment of damages. Avoidance of such results implicates the larger interest in "keeping the scope of complex antitrust trials within judicially manageable limits."[84]

In the Court's eyes, the Union's claim foundered on all of these factors except the first. The claim partook more of labor law than of antitrust concerns;[85] the link between the defendants' conduct and the Union was indirect and speculative;[86] unionized contractors and subcontractors and coerced employers were more immediate and obvious candidates for section 4 suits;[87] and authorization of the Union's claim would entail problems of identifying damages and apportioning them among employees, unions, and directly affected victims.[88]

In enumerating these factors and discussing their underpinnings in antitrust policies, the Court thus wove the strands of its earlier cases into a new, more coherent tapestry. The Court's wariness of duplicative recovery and baffling apportionment echoes *Illinois Brick*'s apprehension of "whole new dimensions of complexity"[89] to section 4 suits, while the emphasis on the nature of the harm draws on *Brunswick*'s concept of antitrust injury. Indirectness of injury and the existence of more direct victims are extrapolated from the tacit underlying thread of

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[80] *Id.* at 541.

[81] *See* Solinger v. A & M Records, Inc., 586 F.2d 1304, 1310 n.33 (9th Cir. 1978); *supra* text accompanying note 26.

[82] *Associated Gen. Contractors*, 459 U.S. at 542.

[83] *Id.*

[84] *Id.* at 543-44.

[85] *Id.* at 539-40.

[86] *Id.* at 540-43, 545 n.52.

[87] *Id.* at 541-42.

[88] *Id.* at 545.

[89] *Illinois Brick*, 431 U.S. at 737.

both *Illinois Brick* and *Brunswick* that courts confine section 4 suits to the best available plaintiffs. At the same time, the Court endorsed *McCready*'s affirmation of the "central interest in protecting the economic freedom of participants in the relevant market,"[90] thereby implicitly warning against invoking *Associated General Contractors* for an overly begrudging construction of section 4 standing.

Despite its disparagement of lower court tests,[91] *Associated General Contractors* did not completely depart from them. Many of the concerns and obstacles described in *Associated General Contractors* had already arisen under these earlier "labels": plaintiff's injury as having resulted from reduced competition,[92] a corollary preference for competitors as antitrust plaintiffs,[93] reluctance to credit speculative injuries,[94] avoidance of duplicative recoveries,[95] and reservation of standing to those with the most incentive to sue.[96] *Associated General Contractors*' entire multifactor approach was adumbrated by some circuits' treatment of section 4 standing questions as a balancing test.[97]

Notwithstanding the specific character of the Court's factors and their consonance with familiar standing considerations, *Associated General Contractors* left open questions. Most importantly, the opinion did not assign explicit weights to its factors — individually, collectively, or relatively. Thus, the Court left unclear whether these constitute the exclusive factors for determining standing, or whether others might substantially affect a determination. More problematically, the Court did not address whether each, some, or none of the factors in its negative form could alone defeat section 4 standing. In particular, the Court did not resolve whether the *Brunswick* notion of antitrust injury, apparently embodied in the second factor, remained an indispensable require-

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[90] *Associated Gen. Contractors*, 459 U.S. at 538.

[91] *Id.* at 536 n.33 ("these labels [directness, target area, zone of interests] may lead to contradictory and inconsistent results").

[92] *See* Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir. 1973); Kirihara v. Bendix Corp., 306 F. Supp. 72, 80 (D. Haw. 1969).

[93] *See* Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54 (9th Cir. 1951).

[94] *See* Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971).

[95] *See In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 130 (9th Cir. 1973).

[96] *See Calderone*, 454 F.2d at 1296.

[97] *See* Ostrofe v. H.S. Crocker Co., 670 F.2d 1378, 1383-88 (9th Cir. 1982); Cromar v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 506 (3d Cir. 1976); Comment, *A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions*, 72 CALIF. L. REV. 437, 445-46 (1984) [hereafter Comment, *Farewell to Arms*].

ment or whether the weighty presence of other positive factors could offset its absence.[98] *Associated General Contractors*, then, left a latitude for interpretation that the remainder of this Article explores.

III. After *Associated General Contractors*: Patterns Among the Variations

Any hopes that *Associated General Contractors* would remove all differences among the circuits' approaches to section 4 standing were quickly disappointed. In spite of the decision's apparent supersession of all existing lower court tests, lower courts have found some room in *Associated General Contractors*' interstices to pursue different emphases in their reading of the Court's opinion.[99] While this result arguably supports the contention that *Associated General Contractors* has failed to reduce the confusion in the section 4 standing,[100] a fairer assessment would recognize the number of trends that have arisen in courts' treatment of antitrust standing since *Associated General Contractors*. The presence of growing commonality of approach amidst persistent differences suggests simply that some variation is still inherent at this stage in the development of antitrust standing analysis, rather than that *Associated General Contractors* has failed to make a valuable contribution to that analysis.

At one obvious level, *Associated General Contractors* has brought a measure of uniformity by imposing a definitive standard with which all

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[98] Some scholars argue that courts should maintain a clear distinction between antitrust standing and antitrust injury. *See, e.g.*, Handler, *supra* note 67, at 996-97; Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1484, 1510-11 (1985). Another proposal would make antitrust injury an absolute requisite for "prophylactic offenses" and only a factor in § 4 standing for other antitrust violations. *See* Comment, *Farewell to Arms*, *supra* note 97, at 472-73. *Associated General Contractors*' common interpretation suggests that the debate may be more semantic than real. Courts have not seen *Associated General Contractors* as eliminating or modifying the *Brunswick* antitrust injury requirement. *See* Note, *Private Antitrust Standing: A Survey and Analysis of the Law After* Associated General, 61 Wash. U.L.Q. 1069, 1083 n.94 (1984) [hereafter Note, *Antitrust Standing*]; *see also infra* text accompanying notes 115-25.

[99] For canvasses of appeals courts' varying approaches after *Associated General Contractors*, see Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1495 n.4 (11th Cir. 1985); Note, *More Trouble with Treble: The Effects of* McCready *and* Associated General Contractors *on the Antitrust Standing Opinions of the Federal Courts of Appeals*, 10 J. Corp. L. 463, 480-91 (1985); Note, *Antitrust Standing*, *supra* note 98.

[100] *See* Page, *supra* note 98, at 1449; Note, *Antitrust Standing*, *supra* note 98, at 479-80, 491.

decisions must at least nominally conform. As the Sixth Circuit has acknowledged, results previously reached under its "zone of interests" test are now valid only insofar as they comport with *Associated General Contractors*' criteria, which displaced the earlier test.[101] Thus, courts have systematically applied the factors set forth in *Associated General Contractors* both to grant standing[102] and to deny it.[103] While *Blue Shield v. McCready*[104] continues to receive mention, courts have generally regarded its principles as subsumed within the *Associated General Contractors* inquiry. *McCready* is invoked to buttress results arrived at under the *Associated General Contractors* analysis.[105]

At the same time, however, courts resist the notion that *Associated General Contractors* deprives earlier tests of all utility. Rather, courts regard *Associated General Contractors*' approach as incorporating or accommodating key elements of their previous standards. The Eleventh Circuit, for example, views *Associated General Contractors* (as well as *McCready*) as "provid[ing] policy guidance consistent with that which is the foundation of this circuit's [and the former Fifth Circuit's] target area test."[106] Other courts tacitly endorse that premise by continuing to

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[101] Meyer Goldberg, Inc. v. Goldberg, 717 F.2d 290, 293-94 (6th Cir. 1983); Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1085-86 (6th Cir. 1983). Other courts have similarly acknowledged the primacy of *Associated General Contractors*' standard and the waning of their own. *See, e.g.*, Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290, 293 (2d Cir. 1983); Solinger v. A. & M. Records, Inc., 718 F.2d 298, 299 (9th Cir. 1983) (per curiam); National Bancard Corp. v. VISA U.S.A., Inc., 596 F. Supp. 1231, 1244-45 (S.D. Fla. 1984); Haff v. Jewelmont Corp., 594 F. Supp. 1468, 1473-76 (N.D. Cal. 1984).

[102] *E.g.*, International Television Prods. Ltd. v. Twentieth Century-Fox, 622 F. Supp. 1532, 1537-38 (S.D.N.Y. 1985); Fischer v. CF & I Steel Corp., 614 F. Supp. 450, 453 (S.D.N.Y. 1985); Monfort, Inc. v. Cargill, Inc., 591 F. Supp. 683, 692 (D. Colo. 1983), *aff'd on appeal*, 761 F.2d 570 (10th Cir. 1985), *rev'd and remanded*, 107 S. Ct. 484 (1986) (standing under Clayton Act §§ 7 and 16); USA Petroleum Co. v. Atlantic Richfield Co., 577 F. Supp. 1296, 1301-02 (C.D. Cal. 1983); Province v. Cleveland Press Publishing Co., 571 F. Supp. 855, 864-68 (N.D. Ohio 1983).

[103] *E.g.*, Midwest Communications, Inc. v. Minnesota Twins, Inc., 779 F.2d 444, 450-52 (8th Cir. 1985); Capital Nat'l Bank v. McDonald's Corp., 625 F. Supp. 874, 881-82 (S.D.N.Y. 1986); County of Oakland v. City of Detroit, 620 F. Supp. 1399, 1403-04 (E.D. Mich. 1985); Alaska Teamsters Local 959 v. Atlantic Richfield Co., 616 F. Supp. 593, 601-06 (D. Alaska 1985).

[104] 457 U.S. 465 (1982).

[105] *See, e.g.*, Gregory Marketing Corp. v. Wakefern Food Corp., 787 F.2d 92, 95-96 (3d Cir. 1986); Bhan v. NME Hosps., Inc., 772 F.2d 1467, 1470 (9th Cir. 1985); Atucha v. Commodity Exch., Inc., 608 F. Supp. 510, 514-15 (S.D.N.Y. 1985); Province v. Cleveland Press Publishing Co., 571 F. Supp. 855, 864 (N.D. Ohio 1983).

[106] Amey, Inc. v. Gulf Abstract & Title, Inc. 758 F.2d 1486, 1497 (11th Cir. 1985); Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 762

employ the lexicon of the target area test even as they recognize the authority of *Associated General Contractors*.[107] Likewise, the Third and Ninth Circuits characterize *Associated General Contractors*' test as fundamentally compatible with their own.[108] Consistent with this attitude, several courts have reaffirmed earlier judgments that they were compelled to reexamine in light of *Associated General Contractors*.[109] More generally, courts have adopted *Associated General Contractors*' rubric in applying established principles such as the prohibition against standing for derivative injuries.[110]

In particular — despite the reasonableness of an expectation to the contrary — the factors that courts must consider under *Associated General Contractors* have not provoked any sweeping contraction in the scope of standing. In fact, some courts have construed *Associated General Contractors*' functional approach as approving standing when a formalistic application of traditional rules probably would have blocked it. One individual who was president, sole director, and sole share-

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(11th Cir. 1983); *see* Consolidated Gas Co. v. City Gas Co., 623 F. Supp. 1357, 1365 (S.D. Fla. 1985); *see also* Palazzo v. Gulf Oil Corp., 764 F.2d 1381, 1386-87 (11th Cir. 1985) (using target area test terminology in construing Florida act patterned after Sherman Act).

[107] *See, e.g.*, *Midwest Communications*, 779 F.2d at 449, 453; Argus, Inc. v. Eastman Kodak Co., 612 F. Supp. 904, 911 (S.D.N.Y. 1985); Ficker v. Chesapeake & Potomac Tel. Co., 596 F. Supp. 900, 904 n.9 (D. Md. 1984); Levey v. E. Stewart Mitchell, Inc., 585 F. Supp. 1030, 1034 (D. Md. 1984); Pinney Dock & Transp. Co. v. Penn Cent. Corp., 600 F. Supp. 859, 883 (N.D. Ohio 1983); CIA Petrolera Caribe, Inc. v. Avis Rental Car Corp., 576 F. Supp. 1011, 1017 (D.P.R. 1983); Indium Corp. v. Semi-Alloys, Inc., 566 F. Supp. 1344, 1352 (N.D.N.Y. 1983); Magic Chef, Inc. v. Rockwell Int'l Corp., 561 F. Supp. 732, 737 (N.D. Ill. 1983).

[108] *See* Ostrofe v. H.S. Crocker Co., 740 F.2d 739, 741 (9th Cir. 1984); Parks v. Watson, 716 F.2d 646, 658-59 (9th Cir. 1983); Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 964-65 (3d Cir. 1983); *see also* Comment, Ostrofe v. H.S. Crocker Co.: *Standing* Brunswick *on Its Head Under Section 4 of the Clayton Act*, 3 J. L. & COM. 343, 353-54 (1983). *But see* Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290, 293 (2d Cir. 1983).

[109] Hangards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1295-97 (9th Cir. 1984); *Ostrofe*, 740 F.2d at 741; Walker v. U-Haul Co., 734 F.2d 1068, 1073 (5th Cir. 1984); Stepp v. Ford Motor Credit Co., 623 F. Supp. 583, 589 (E.D. Wis. 1985).

[110] *See* Bubar v. Ampco Foods, Inc., 752 F.2d 445, 452-53 (9th Cir. 1985) (shareholder); Rand v. Anaconda-Ericsson, Inc., 623 F. Supp. 176, 188 (E.D.N.Y. 1985) (shareholder); Province v. Cleveland Press Publishing Co., 605 F. Supp. 945, 960-61, 963 (N.D. Ohio 1985) (employee); Rosenberg v. Cleary, Gottlieb, Steen & Hamilton, 598 F. Supp. 642, 644-45 (S.D.N.Y. 1984) (lessor); Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n, 593 F. Supp. 1184, 1187 (S.D.N.Y. 1984) (president of corporation); Continental Ill. Nat'l Bank & Trust Co. v. Stanley, 585 F. Supp. 1385, 1388 (N.D. Ill. 1984) (shareholder and guarantor of loan).

holder of a corporation was granted standing in his personal capacity when the court recognized the "unity of interest and ownership" prevailing in that instance and the strong possibility that no one else could pursue the antitrust claims at issue.[111] Another plaintiff, who was president and majority shareholder, was similarly permitted to bring an individual suit; the "loss in his business and property" that plaintiff had suffered was found to satisfy section 4.[112] Other cases decided under *Associated General Contractors*' authority have similarly pierced superficial obstacles to identify sufficient grounds for standing.[113] It appears that only rarely do courts view *Associated General Contractors*' mandates as a direct bar to their own more expansive leanings.[114]

Ironically, the single conspicuous restrictive effect of *Associated General Contractors* has been to entrench the antitrust injury requirement of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[115] as an aspect of section 4 standing. While a few courts insist on maintaining the distinction between antitrust injury and antitrust standing,[116] and others prefer to rely squarely on *Brunswick* when rejecting claims as lacking allegation of antitrust injury,[117] apparently most courts see *Associated General Contractors* as including an "effort to explain the concept of antitrust injury."[118] These courts have located *Associated General Contractors*'

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[111] John Peterson Motors, Inc. v. General Motors Corp., 613 F. Supp. 887, 901-02 (D. Minn. 1985).

[112] Stepp v. Ford Motor Credit Co., 623 F. Supp. 583, 589 (E.D. Wis. 1985).

[113] *See* CVD, Inc. v. Raytheon Co., 769 F.2d 842, 857-58 (1st Cir. 1985); Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290, 293-97 (2d Cir. 1983); Pinney Dock & Transp. Co. v. Penn Cent. Corp., 600 F. Supp. 859, 883-84 (N.D. Ohio 1983) (difficulty of ascertaining damages not defeating standing when defendants allegedly attempted to eliminate plaintiff as competitor through boycott); *In re* Wheat Rail Freight Rate Antitrust Litig., 579 F. Supp. 510, 512-15 (N.D. Ill. 1983) (standing granted notwithstanding argument that defendants' alleged conspiracy against plaintiff was part of larger conspiracy).

[114] *See* Solinger v. A. & M. Records, Inc., 718 F.2d 298, 299 (9th Cir. 1983) (per curiam). The Court intimated that it might previously have viewed the plaintiff's theory of standing more sympathetically, but that the theory's "legal basis evaporated" with the Court's analysis in *Associated Gen. Contractors*.

[115] 429 U.S. 477 (1977).

[116] *See* Walker v. U-Haul Co., 747 F.2d 1011, 1014 (5th Cir. 1984) (petitions for rehearing and suggestion for rehearing en banc); Warnick v. Washington Educ. Ass'n, 593 F. Supp. 66, 69 (E.D. Wash. 1984).

[117] *See* Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300, 303-04, (5th Cir. 1984); Garshman v. Universal Resources Holding, Inc., 625 F. Supp. 737, 745-46 (D.N.J. 1986); Bryant Heating & Air Conditioning Corp. v. Carrier Corp., 597 F. Supp. 1045, 1052-53 (S.D. Fla. 1984).

[118] Chelson v. Oregonian Publishing Co., 715 F.2d 1368, 1370 (9th Cir. 1983).

depiction of antitrust injury as an element of antitrust standing in a variety of sources; they have not restricted their authority to *Associated General Contractors*' factor that examines whether the alleged injury is "of the type that the antitrust statute was intended to forestall."[119] Some have cited *Associated General Contractors*' broad charge to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them."[120] Other courts have pointed to *Associated General Contractors*' discussion in footnote forty-four distinguishing the Union's inadequate claim from earlier valid claims in which antitrust injury had existed,[121] and to the Court's exclusion of claims when the causal connection is tenuous.[122] Several courts have read *Associated General Contractors* and *McCready* as together reinforcing the requirement of antitrust injury.[123] Many, however, seem simply to assume that the concept of standing under *Associated General Contractors* now includes a showing of antitrust injury.[124] Indeed, the notion of antitrust standing's embracing antitrust injury has become so pervasive that one court cited *Brunswick* as a barrier to standing.[125]

In the context of antitrust injury, courts have focused particularly on *Associated General Contractors*' observation that the Union was "neither a consumer nor a competitor in the market in which trade was

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[119] Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 540 (1983); *see, e.g.*, Monfort, Inc. v. Cargill, Inc., 591 F. Supp. 683, 694 (D. Colo. 1983), *aff'd on appeal*, 761 F.2d 570 (10th Cir. 1985), *rev'd and remanded*, 107 S. Ct. 484 (1986); Carter Hawley Hale Stores v. Limited, Inc., 587 F. Supp. 246, 249 (C.D. Cal. 1984).

[120] *Associated Gen. Contractors*, 459 U.S. at 535; *see also Chelson*, 715 F.2d at 1370; TCI Cablevision, Inc. v. City of Jefferson, 604 F. Supp. 845, 846 (W.D. Mo. 1984).

[121] *See* McDonald v. Johnson & Johnson, 722 F.2d 1370, 1377 (8th Cir. 1983) (discussing *Associated Gen. Contractors*, 459 U.S. at 540 n.44).

[122] *See* Argus, Inc. v. Eastman Kodak Co., 612 F. Supp. 904, 918-19 (S.D.N.Y. 1985).

[123] *See* Trepel v. Pontiac Osteopathic Hosp., 599 F. Supp. 1484, 1492-93 (E.D. Mich. 1984); Province v. Cleveland Press Publishing Co., 571 F. Supp. 855, 864 (N.D. Ohio 1983).

[124] *See* Midwest Communications, Inc. v. Minnesota Twins, Inc., 779 F.2d 444, 450-53 (8th Cir. 1985); CVD v. Raytheon Co., 769 F.2d 842, 857-58 (1st Cir. 1985); Schaefer/May Motor Sales v. Mid-Atlantic Toyota Distribs., Inc., 583 F. Supp. 940, 942 (D. Md. 1984); Barnosky Oils, Inc. v. Union Oil Co., 582 F. Supp. 1332, 1336 (E.D. Mich. 1984); Sakamoto v. Duty Free Shoppers, Ltd., 613 F. Supp. 381, 390 (D. Guam 1983).

[125] Eastern Auto Distribs., Inc. v. Peugeot Motors, Inc., 573 F. Supp. 943, 947 (E.D. Va. 1983).

restrained."[126] Many courts have elevated that observation into a virtual per se rule against standing for parties that do not fall into either of these categories.[127] As one court paraphrased *Associated General Contractors*, the matter of whether the plaintiff was a consumer or competitor in the relevant market is "the essential consideration" in analyzing the Court's second factor; the plaintiff's failure in that case to show either status proved fatal to obtaining standing.[128] Other courts have similarly slammed the door on plaintiffs who were not participants in the applicable market.[129] Conversely, a plaintiff's ability to persuade the court that it was a direct competitor of the defendant has proved decisive in gaining standing.[130]

Another factor that courts frequently cite is the directness or indirectness of the asserted injury. That factor, however, has served primarily to supply a label for existing concerns about appropriate causal relationships rather than to introduce new barriers to standing. Thus, for example, courts have couched denials of standing due to the derivative character of the asserted injury in the language of directness and remoteness.[131] At most, the Court's discussion of directness has heightened awareness that standing policy prefers minimum links in the chain of causation.[132] The term is sufficiently general that it has sometimes served as a residual catchall shibboleth for rejected theories of

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[126] *Associated Gen. Contractors*, 519 U.S. at 539.

[127] *See* TCI Cablevision, Inc. v. City of Jefferson, 604 F. Supp. 845, 846-47 (W.D. Mo. 1984); *Trepel*, 599 F. Supp. at 1493; Kartell v. Blue Shield, 582 F. Supp. 734, 743 (D. Mass. 1984); *Eastern Auto Distribs.*, 573 F. Supp. at 947.

[128] Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n, Inc., 593 F. Supp. 1184, 1187 (S.D.N.Y. 1984).

[129] *See* Midwest Communications, Inc. v. Minnesota Twins, Inc., 779 F.2d 444, 451 (8th Cir. 1985); Rosenberg v. Cleary, Gottlieb, Steen & Hamilton, 598 F. Supp. 642, 645 (S.D.N.Y. 1984).

[130] *See* Indium Corp. of Am. v. Semi-Alloys, Inc. 591 F. Supp. 608, 613-14 (N.D.N.Y. 1984) (defective complaint cured by adding allegation, *inter alia*, that plaintiff was direct competitor of defendant); USA Petroleum Co. v. Atlantic Richfield Co., 577 F. Supp. 1296, 1301-02 (C.D. Cal. 1983) (plaintiff's adequate grounds for standing distinguished from Union in *Associated Gen. Contractors* on ground that plaintiff was competitor of defendant).

[131] *See* Sealy, Inc. v. Easy Living, Inc. 743 F.2d 1378, 1384 (9th Cir. 1984); Garshman v. Universal Resources Holding, Inc., 625 F. Supp. 737, 745 (D.N.J. 1986); Continental Ill. Nat'l Bank & Trust Co. v. Stanley, 585 F. Supp. 1385, 1388 (N.D. Ill. 1984).

[132] The directness notion has played an important role in such cases as de Atucha v. Commodity Exch., Inc., 608 F. Supp. 510, 514-15 (N.D. Cal. 1983); Eastern Auto Distribs., Inc. v. Peugeot Motors, Inc., 573 F. Supp. 943, 949 (E.D. Va. 1983); Magic Chef, Inc. v. Rockwell Int'l Corp., 561 F. Supp. 732, 737 (N.D. Ill. 1983).

standing that cannot be neatly pigeonholed under any of *Associated General Contractors*' factors.[133]

Confronted with the issue of antitrust standing in the specific context of the Union's claim, the *Associated General Contractors* Court understandably did not resolve all outstanding questions under section 4. Nor could one reasonably expect the Court's factors to point unequivocally to a given result in every instance. Thus, it was inevitable that the circuits would diverge on particular standing issues. Indeed, it is impressive that so far few outright conflicts have emerged. The most noteworthy conflict has involved section 4 standing for employees who are discharged because of their refusal to participate in their employer's scheme to violate antitrust laws.[134] The Ninth Circuit has allowed such standing for employees when no problem of apportionment or duplicative recovery is present.[135] The Tenth Circuit has emphatically rejected that position.[136]

Another area in which some uncertainty (rather than conflict) remains is the role of foreseeability in evaluating the defendant's infliction of the plaintiff's injury. The multifactor formulation of *Associated General Contractors* does not explicitly address the question of whether foreseeability can form an affirmative part of section 4 standing. In the absence of such authority, and notwithstanding respected authority to the contrary,[137] some courts have continued to state or to intimate that foreseeability of injury can contribute significantly to plaintiff's grounds for standing.[138]

The inability of *Associated General Contractors* to remove all doubt and debate from antitrust standing doctrine, however, does not detract from the case's significant contribution: spurring examination of anti-

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[133] *See* Stevens v. Zenith Distrib. Corp., 568 F. Supp. 1200, 1201 (W.D. Mo. 1983) ("If a theoretical label needs to be placed on the rejection of the novel claim, perhaps it should be categorized as too 'indirect' or 'remote' from the offending sales transactions.").

[134] *See* Note, *Antitrust Standing After* Associated General Contractors: *The Issue of Employee Retaliation Discharge*, 63 B.U.L. REV. 983 (1983); Note, *Employee Standing Under Section 4 of the Clayton Act*, 81 MICH. L. REV. 1846 (1983).

[135] Ostrofe v. H.S. Crocker Co., 740 F.2d 739, 747 (9th Cir. 1984).

[136] *See* Winther v. DEC Int'l, Inc., 625 F. Supp. 100, 103 (D. Colo. 1985).

[137] *See* P. AREEDA & D. TURNER, *supra* note 48, at 220.

[138] *See* Parks v. Watson, 716 F.2d 646, 658-59 (9th Cir. 1983). Some courts have referred to the defendant's "intent" or "purpose" in such a manner as to suggest overtones of foreseeability. *See* CVD, Inc. v. Raytheon Co., 769 F.2d 842, 858 (1st Cir. 1985); Pinney Dock & Transp. Co. v. Penn Cent. Corp., 600 F. Supp. 859, 883 (N.D. Ohio 1983); USA Petroleum Co. v. Atlantic Richfield Co., 577 F. Supp. 1296, 1302 (C.D. Cal. 1983).

trust standing issues from the broad perspective of reserving standing for the most appropriate parties. The overriding task of antitrust standing analysis, after all, is to "identify the most efficient plaintiff or plaintiffs from among those who have suffered antitrust injury."[139] And while only the fifth factor — the existence of more direct victims of the defendant's antitrust violation — explicitly pursues this object, all of *Associated General Contractors*' factors have the cumulative aim of attaining this outcome. Lawsuits by parties that are ineffective in enforcement and not most worthy of compensation can be eliminated by excluding claims that allege a tenuous or speculative relationship between violation and injury. Courts should also exclude claims that allow the possibility of duplicative recovery or complex apportionment or, of course, fail to show the type of injury that the antitrust laws were designed to prevent. What remains, hopefully, is that plaintiff who "can bring suit for the lowest direct and indirect costs."[140]

Cases decided since *Associated General Contractors* display an increased consciousness of this ultimate thrust of antitrust standing. As suggested above, courts have not relied solely or even principally on *Associated General Contractors*' delineation of "an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement."[141] Rather, courts' discussion of other factors reflects the principle of identifying the most efficient plaintiff. Dismissal of claims that harbor much potential for duplicative recoveries, for example, has drawn the courts' attention to the antitrust violation's "true victim."[142] In one typical case, a court joined its apprehension of duplicative recoveries with its description of other competitors who were "more appropriate plaintiffs to raise the antitrust claim."[143] Similarly, the courts' exclusion of plaintiffs who are not consumers or competitors, or who are not directly harmed, has naturally

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[139] Page, *supra* note 98, at 1484.

[140] *Id.* at 1455.

[141] *Associated General Contractors*, 459 U.S. at 542. The language, of course, is sometimes cited. *See, e.g.*, Garshman v. Universal Resources Holding, Inc., 625 F. Supp. 737, 745 (D.N.J. 1986); Kartell v. Blue Shield, 582 F. Supp. 734, 443 (D. Mass. 1984).

[142] Capital Nat'l Bank v. McDonald's Corp., 625 F. Supp. 874, 881 (S.D.N.Y. 1986).

[143] Indium Corp. of Am. v. Semi-Alloys, Inc., 566 F. Supp. 1344, 1352 (N.D.N.Y. 1983); *see also* County of Oakland v. City of Detroit, 620 F. Supp. 1399, 1403-04 (potential for duplicative recovery militating against county whose municipalities, citizens, and competitors "might be able to recover for the alleged antitrust violations").

evoked some obligation to identify those who are in such positions.[144]

Conversely, this intensified search for the apposite plaintiff can produce standing when an otherwise disfavored plaintiff is in the best position to react against an antitrust violation. In its controversial decision in *Ostrofe v. H.S. Crocker Co., Inc.*,[145] the Ninth Circuit granted standing to the discharged employee because "it is unlikely that any other victim with knowledge of the conspiracy sustained a kind of injury that would give him equal incentive to bring the antitrust violators to account."[146] In a similar vein, a Minnesota district court waived orthodox doctrine governing standing for shareholders and employees as individuals when it determined that the plaintiff was uniquely capable of raising the antitrust claims.[147]

Obviously, discussions of *Associated General Contractors*' individual factors and of their impact on antitrust standing have overlapped and interwoven. *Associated General Contractors*' failure to produce a rigorous compartmentalization of antitrust standing analysis, however, does not detract from the standard's worth. Rather, it demonstrates antitrust standing's complexity and the concomitant resistance of standing doctrine to bright-line rules and simplistic "tests." The multifactor approach reflects a truer picture of antitrust standing's multidimensional nature. The factors' often mutually reinforcing and confirmatory operation enhances, not undermines, the standing doctrine's stability and clarity.

IV. *Associated General Contractors* AS POTENTIAL AUTHORITY FOR EXPANDED STANDING: THE CASE OF BRIBING BUYERS UNDER ROBINSON-PATMAN SECTION 2(C)

Associated General Contractors has not shackled the lower courts with rigid and categorical antitrust standing rules. Some courts might exploit this latitude by invoking *Associated General Contractors* as im-

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[144] *See generally* Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n, Inc., 593 F. Supp. 1184, 1187 (S.D.N.Y. 1984) (denial of standing to president of horse show accompanied by suggestion that sponsors of, and exhibitors in, horse shows would receive standing upon some allegation of antitrust injury); Eastern Auto Distribs., Inc. v. Peugeot Motors, Inc., 573 F. Supp. 943, 949 (E.D. Va. 1983) (pointing out that "directly injured" parties "possess sufficient self-motivation to efficiently enforce the antitrust laws," and asserting that "[r]eserving standing to the private party with the greatest risk of loss serves to effectuate the policy behind the antitrust laws").

[145] 740 F.2d 739 (9th Cir. 1984).

[146] *Id.* at 747.

[147] John Peterson Motors, Inc. v. General Motors Corp., 613 F. Supp. 887, 902 (D. Minn. 1985).

primatur for standing in certain instances in which the prior weight of authority goes against it. This Part examines one such possible occasion: antitrust standing for a buyer who alleges that a seller has bribed the buyer's agent in order to induce purchase of the seller's product.

A. The Special Context of Robinson-Patman Section 2(c) and Previous Denials of Clayton Section 4 Standing

Bribing purchasing agents has ancient if not honorable antecedents. Numerous laws and strictures attest both to this practice's pervasiveness and to its widespread condemnation.[148] Within the ambit of the antitrust laws, the most relevant provision is section 2(c) of the Robinson-Patman Act,[149] which provides in part:

> It shall be unlawful for any person engaged in commerce . . . to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Actually, the legislative history of section 2(c) shows that the section was designed primarily to prohibit "dummy brokerage" arrangements by which large institutional buyers would exercise their leverage to demand discounts under the guise of brokerage.[150] The Supreme Court endorsed this interpretation in *Federal Trade Commission v. Henry Broch & Co.*[151] However, the Court also asserted that the section's proscription was not confined to dummy brokerage.[152] In a footnote, the Court singled out bribery of a seller's broker by a buyer as another instrument of price discrimination that Congress intended section 2(c)

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[148] *See* 18 U.S.C. § 201(b) (1983), *construed in* United States v. Pommerening, 500 F.2d 92 (10th Cir.), *cert. denied*, 419 U.S. 1088 (1974); 18 U.S.C. § 656 (1983); 18 U.S.C. § 1952 (1983), *construed in* United States v. Perrin, 580 F.2d 730 (5th Cir. 1978), *aff'd*, 444 U.S. 37 (1979); COLO. REV. STAT. § 18-5-401 (1978); LA. REV. STAT. ANN. § 14:73 (West 1984); MASS. GEN. LAWS ANN. ch. 271, § 39 (West Supp. 1983); PA. CONS. STAT. ANN. § 4108 (Purdon 1984); VA. CODE ANN. § 18.2-444 (1982); 4 W. BLACKSTONE, COMMENTARIES §§ 139-140 (1769); 3 E. COKE, INSTITUTES 144, 149 (1628); RESTATEMENT (SECOND) OF AGENCY § 312 (1958); RESTATEMENT (SECOND) OF TORTS § 766 (1979).

[149] 15 U.S.C. § 13(c) (1983).

[150] *See* H.R. REP. NO. 2287, 74th Cong., 2d Sess. 15 (1936).

[151] 363 U.S. 166, 168-69, 170 (1960).

[152] *Id.* at 168-69.

to prohibit.[153] Since then, a majority of courts that have considered the question have concluded that section 2(c) applies to commercial bribery in various forms.[154]

Despite wide acceptance of this construction, buyers seeking treble damages for alleged bribery of their agents have fared poorly. Their lack of success is due chiefly to their inability to meet the standing requirements of Clayton Act section 4. In particular, every court, with one exception, specifically addressing section 4 standing to commercial bribery claims under section 2(c) of the Robinson-Patman Act has affirmed the requirement that the plaintiff's injury must stem not only from the antitrust violation itself, but also from the anticompetitive effect of the violation.[155] Under this view, even though a supplier's bribery of a company's employee to induce a sale may both violate section 2(c) and injure that company, the company still lacks section 4 standing because it has not suffered a " 'competitive injury' within the meaning of the statutory framework. Rather, it is the supplier's *competitors* who

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[153] *Id.* at 169-70 n.6.

[154] *See* Grace v. E.J. Kozin Co., 538 F.2d 170, 173 (7th Cir. 1976); Calnetics Corp. v. Volkswagen of Am., Inc. 532 F.2d 674, 696 (9th Cir. 1976) (per curiam); Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 856-58 (9th Cir. 1965); Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 640 (D. Alaska 1982); Computer Statistics, Inc. v. Blair, 418 F. Supp. 1339, 1347 (S.D. Tex. 1976). *But see* Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 371-72 (3d Cir. 1985) (questioning "whether Congress intended to sweep commercial bribery within the ambit of section 2(c)").

[155] *See, e.g.*, Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266 (5th Cir. 1979) (per curiam) (standing under § 2(c) only for plaintiff competing with defendant); Bunker Ramo Corp. v. Cywan, 511 F. Supp. 531 (N.D. Ill. 1981) (standing only for competitors of § 2(c) violators); Computer Statistics, Inc. v. Blair, 418 F. Supp. 1339, 1347 (S.D. Tex. 1976) ("a plaintiff who cannot show competitive injury lacks standing to complain about payments although they literally fit within the language of the statute"); *see also* Grace v. E.J. Kozin Co., 538 F.2d 170 (7th Cir. 1970) (plaintiff competitor of defendant-payor of illegal commissions); Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 851 (9th Cir. 1965) (§ 2(c) plaintiff competing with defendant); Haff v. Jewelmont Corp., 594 F. Supp. 1468 (N.D. Cal. 1984) (denying standing to noncompetitor of defendant, notwithstanding that plaintiff's injury resulted from a § 2(c) violation); Abernathy v. Bausch & Lomb, Inc., 97 F.R.D. 470, 477 (N.D. Tex. 1983) (clearly standing for competitors of illegal commission recipients); Falstaff Brewing Corp. v. Phillip Morris, Inc., 1979-2 Trade Cases ¶ 62, 814 at 78 n.1 (N.D. Cal. 1979) (commercial bribery supportable basis of a § 2(c) claim "by a competitor of the firm making the payments"). *Contra Municipality of Anchorage*, 547 F. Supp. at 633.

Some cases have involved treble damages recoveries by plaintiff buyers when the courts never contested or considered buyer's standing to recover antitrust damages in reaching their decision. *See* Fitch v. Kentucky-Tennessee Light & Power Co., 136 F.2d 12 (6th Cir. 1943).

have suffered competitive injury as a consequence of the bribe and it is they who have standing to sue under the antitrust scheme."[156] Similarly, a company could not sue a defendant clearly violating section 2(c) by paying other companies' employees to influence their employers to do business with the defendant, because the company was not competing with the defendant.[157]

Significantly, the lone exception to this approach, *Municipality of Anchorage v. Hitachi Cable, Ltd.*,[158] was decided the year before *Associated General Contractors*. Relying largely on evidence in section 2(c)'s history that Congress sought to protect both competition and the fiduciary relationship between brokers and clients,[159] the *Hitachi* court granted section 4 standing to a city in its suit against a company that bribed two city employees. Since then, however, courts dealing with section 2(c) have not seriously considered whether *Associated General Contractors* furnishes additional ground for this more generous view of section 4 standing.[160]

B. *Applying and Elaborating on* Associated General Contractors' *Factors to Open Up Standing for Buyers*

Section 4 standing for buyers whose agents were bribed tests the nature and limits of *Associated General Contractors* in a number of ways. First, it serves as a barometer of the rigidity or flexibility with which courts will apply each of *Associated General Contractors*' factors, especially the nature of the plaintiff's injuries. The issue also presents an opportunity to discern whether courts will consider sometimes pertinent factors other than those discussed in *Associated General Contractors*. As a final index of flexibility, this problem may illuminate whether *Associated General Contractors* permits a variable section 4 standing standard, according to the substantive antitrust law provision on which the plaintiff bases her claim.

Systematically applying *Associated General Contractors*' factors, a complaining buyer whose purchasing agent is bribed by a defendant should have no difficulty framing allegations to satisfy the threshold

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[156] Bunker Ramo Corp. v. Cywan, 511 F. Supp. 531, 533 (N.D. Ill. 1981) (emphasis added).

[157] Computer Statistics, Inc. v. Blair, 418 F. Supp. 1339, 1347 (S.D. Tex. 1976).

[158] 547 F. Supp. 633 (D. Alaska 1982).

[159] *Id.* at 639-40.

[160] *See* Haff v. Jewelmont Corp., 594 F. Supp. 1468, 1477 (N.D. Cal. 1984) (equating plaintiff alleging § 2(c) violation with Union in *Associated Gen. Contractors* as unsuitable candidate for standing).

requirement of causal connection and intent. At one end of the causal relationship, ample authority supports the proposition that commercial bribery violates Robinson-Patman Act section 2(c).[161] At the other end, the bribed buyer should have no difficulty alleging injury to its business or property flowing from the bribery. The bribery may have resulted in the purchaser paying a higher price for the goods than the purchaser would have paid absent bribery.[162] Alternatively (or perhaps additionally), the bribery may have induced the purchase of lesser quality goods than the plaintiff otherwise would have selected.[163] Conceivably, the buyer might allege injury simply from the corruption of the fiduciary relationship between the purchasing agent and the buyer that inevitably resulted from the bribery.

In designating intent as an aspect of the first factor, the *Associated General Contractors* Court appeared only to assure that antitrust plaintiffs allege minimum scienter. The Court sought primarily to sift out merely adventitious injuries, not to resurrect the tools of target area analysis. The bribing seller's specific intent may vary depending upon the particular circumstances that motivate the conduct. For example, in *Rangen v. Sterling Nelson & Sons*,[164] a fish food seller bribed a state purchasing agent to secure substantially all of the state's fish food purchases, to the exclusion of several competitors. The bribery did not result in the purchase of inferior merchandise or in the payment of an inflated purchase price. Rather, the bribery was directed at excluding competing bidders from the state's business. In this situation the purchaser is not clearly an intended victim of the antitrust violation.

When, however, the bribery's purpose is not simply obtaining a sales contract on otherwise competitive terms, the seller's intent may have a different impact on standing analysis. For example, a seller's bribery may constitute nothing more than collusion with a dishonest purchasing agent to share the benefit of an inflated price. The seller may design such a scheme solely to victimize the unwitting buyer, without considering the conduct's effects on the seller's competitors. The Court has declared that specific intent to harm the plaintiff is not dispositive of section 4 standing. However, the intent factor recognized in *Associated General Contractors* would favor standing for the purchaser in the lat-

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[161] *See supra* note 154.

[162] *See* Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 640-41 (D. Alaska 1982).

[163] *See* Calnetics Corp. v. Volkswagen of Am., Inc., 532 F.2d 674, 695-96 (9th Cir. 1976) (per curiam).

[164] 351 F.2d 851 (9th Cir. 1965).

ter example, but perhaps would not favor standing for the purchaser in the former example. Thus, the dispositive factor should not be the likelihood that the bribing seller's conduct is aimed more at harming its competitors than at injuring the buyer, making the buyer's harm an incidental consequence. Instead, the defendant's knowledge that the bribery will injure the buyer in any of the ways described above may satisfy the requisite intent to injure.

With respect to the second factor, determining whether the buyer's injury is of an appropriate "nature" requires considering the purposes of section 2(c) of the Robinson-Patman Act. If, like the *Hitachi* court, one perceives section 2(c) as intended in part to protect fiduciary relationships independent of any anticompetitive ramifications of disrupting such relationships, then the intrinsic harm to the buyer-broker relationship is by definition "of the type" that the provision was "intended to forestall."[165] It is arguably more consistent with the broader structure of the antitrust laws to view section 2(c)'s concern for fiduciary relationships more as a means of fostering a competitive marketplace than as an end in itself. After all, the breach of or interference with fiduciary relationships has remedies in other areas of substantive law.

The concern for protecting fiduciary relationships logically translates strictly as an intent to proscribe bribery not for the sake of eliminating this evil, but rather to protect the competition that bribery may pervert. Bribery, and the corruption of fiduciaries resulting from bribery, poses the threat of many types of injury, only one of which is injury to competition. The prohibitions of bribery and of interfering in the fiduciary relations of others in other laws lends justification to a limited reading of section 2(c).

If section 4 standing to redress violations of any antitrust laws, including the provisions of the Robinson-Patman Act,[166] is seen as fundamentally designed to preserve competition, then the bribed buyer may have to establish a relationship between its injury and some anticompetitive consequence of the bribery in order to satisfy section 4 standing requirements. The buyer may show injury to its interests as a consumer in the relevant market when, as in *Hitachi*, the bribery effected dual consideration and extracted an uncompetitive price from the purchaser. However, a less grudging stance toward standing would re-examine *Associated General Contractors*' discussion of congressional concern to

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[165] Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 540 (1983).

[166] *See* Comment, *Standing Solves the Injury Mystery in Robinson-Patman Actions*, 87 DICK. L. REV. 63 (1982).

assure customers the benefits of price competition and to protect the economic freedom of participants in the relevant market.[167] As neither a consumer nor a competitor in the market in which trade was restrained, the Union lay outside the scope of that concern. In contrast, in the case of commercial bribery by a seller, the bribery may restrain trade in the sale of goods of the type that defendant sells to the plaintiff. The complaining buyer is therefore obviously a consumer in the market in which trade is restrained. In some cases, a buyer who resells the product with which the bribery is associated may be both a consumer and a competitor in the market. Accordingly, completely excluding bribed buyers could clash with the antitrust laws' central purposes.

Moreover, unlike the Union, which might not have benefited from enhanced competition in the relevant market,[168] increased competition would clearly serve the complaining buyer. Bribery disrupts the competitive process by blinding the purchaser to the existence of potentially more attractive competitive products or bids. As a consumer, the buyer whose choices were narrowed through distortion would automatically benefit from increased competition among its suppliers. Viewed within this larger sphere, the buyer's injury is emphatically of the type that the antitrust statute was intended to forestall.

Regarding the chain of causation, the relationship between the buyer's injury and the restraint in the relevant market is relatively direct; certainly the proximity of harm here compares favorably to the Union's remote injury in *Associated General Contractors*. If protection of fiduciary relationships is section 2(c)'s benchmark, then obviously a surreptitious bribe to the buyer's agent represents a direct assault. Courts may take into account other types of injury that are less direct with an eye toward preserving competition. For example, the seller's extraction of an excessive price from the buyer may be most directly the result of the buyer's purchasing agent failing to pass on the proceeds of the bribery to the buyer.[169] Nevertheless, even with this added link in the chain of causation, the buyer's injury is not remote. The nonderivative character of the buyer's injury lends additional support to classifying the injury as essentially direct.

Regarding the fourth factor, the existence of various entities more directly harmed than the Union by the defendant's alleged antitrust vi-

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[167] *Associated Gen. Contractors*, 459 U.S. at 538.

[168] *Id.* at 540.

[169] Of course, in some cases the price may be excessive even if the bribe money is passed on to the buyer.

olations[170] gave added justification to the denial of standing in *Associated General Contractors*. Again, from a strict standpoint of competitive injury, the bribed buyer lies once removed from the competing seller who may miss a sale because the purchasing process was corrupted. However, implicit in *Associated General Contractors* is the suggestion that in some circumstances a party indirectly affected by an antitrust violation might have standing to seek damages absent an identifiable class of other injured parties likely to seek recovery from the defendants. The absence of a formal bidding procedure may make determining which prospective sellers were prejudiced by the improper inducement difficult.[171] Indeed, even when the set of competing sellers is identifiable, no assurance exists that the sellers will know that they were victims of an antitrust violation. By contrast, the bribed buyer has the most opportunity to detect[172] and the greatest impetus to act on the section 2(c) violation. In this sense, such buyers aptly match the Court's description of "an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement."[173]

Finally, whatever the risk of duplicative recoveries or complex apportionment of damages from allowing the bribed buyer to sue, it is not on the order of that which justified barring the Union's suit in *Associated General Contractors*. In *Associated General Contractors*, the Court was confronted with the problem of isolating the Union's potential damages from a myriad of other potential victims of the defendants' antitrust violations.[174] The difficulty of assessing damages in *Associated General Contractors* was due primarily to the indirectness of the Union's alleged injuries. The direct harm from the defendants' alleged antitrust violations was supposedly borne by unionized contractors and subcontractors who presumably lost business as a result of the defendant's coercive acts. The harm to the contractors then presumably flowed through the contractors' union employees, and then bridged a final causal link to the plaintiff's union. Because the buyer's injury in the commercial bribery situation is much more direct than the injury

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[170] *Associated General Contractors*, 459 U.S. at 541-42.

[171] In the absence of such a procedure, sellers with no interest in the transaction may come forward alleging that the bribe thwarted their access to the buyer. Such claims would run afoul of *Associated Gen. Contractors*' opposition to speculative damages. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 734-35 (1975).

[172] *See* Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 641 (D. Alaska 1982).

[173] *Associated Gen. Contractors*, 459 U.S. at 542.

[174] *Id.* at 545.

claimed by the Union in *Associated General Contractors*, the danger of duplicative damages recoveries or complex apportionment is correspondingly diminished.[175]

Moreover, while potential plaintiffs besides the wronged buyer might seek damages as a result of a given incident of commercial bribery, their number is finite and their claims conceptually distinct from those of the buyer. As discussed earlier, the buyer typically seeks compensation for the excessive price or inferior goods that its agent was induced to accept. By contrast, the damages of a competing seller — the only other plausible type of section 2(c) plaintiff in this situation — is measured with respect to profits on the sale.

Conclusion

The Court's analysis in *Associated General Contractors v. California State Council of Carpenters*[176] has brought an admirable measure of coherence to antitrust standing doctrine. In place of the hodgepodge of tests among the circuits, the Court has substituted an avowed policy approach forcing courts to penetrate beyond the superficial and conclusory labels of earlier standards. Neither the Court's refusal to impose a series of mechanical, categorical rules nor the existence of some variations in the lower courts' application of *Associated General Contractors* detracts from the Court's achievement. Private antitrust standing is no more susceptible to all-encompassing or self-executing principles than the concept of proximate cause from which such standing is partly derived.

Criticism of *Associated General Contractors* also (to borrow from target area forbears) misses the mark in another way. As courts accumulate experience in applying *Associated General Contractors*' factors, they may develop more specific presumptions and boundaries for certain types of claims. Such an evolution would bespeak the wisdom, not the inadequacy, of the Court's approach. It is not uncommon for the Court, based on available knowledge and experience, to announce the outlines of a standard and to leave to the lower courts the mission of filling in the details. In this instance, such an approach is congruous with the present phase of antitrust standing doctrine. Additional experimentation in the lower courts will enable the Court later to revisit the

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[175] If anything, avoiding complexity and duplication may argue in favor of preferring buyers over competing sellers as § 2(c) claimants. Again (*see supra* note 171), in the absence of a formal bidding procedure, numerous sellers may have plausible claims to damages.

[176] 459 U.S. 519 (1983).

doctrine and to promulgate a more refined standard.

The treatment of buyers' suits for bribery under Robinson-Patman Act section 2(c) illustrates some of the advantages and possibilities of the *Associated General Contractors* approach. Given the balance between specificity of factors and flexibility in application, courts will neither be licensed with roving commissions nor straitjacketed by overbroad rules. Like the buyer complaining of bribery, other plaintiffs have both a reasonable burden and fair opportunity to demonstrate their fitness as private attorneys general of the antitrust laws.

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