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Case Notes

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Residents of the Symphony Area of the Fenway Urban Renewal Project in Boston sought an injunction in the United States District Court for the District of Massachusetts against further demolition and construction on the project area until the Department of Housing and Urban Development (HUD), the federal agency providing financial assistance for the project, submitted an environmental impact statement pursuant to § 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA). The suit also joined as a defendant the municipal agency responsible for the project, the Boston Redevelopment Authority, which had approved the Fenway Urban Renewal Plan in 1965. In 1967, after the plan had been approved by the City of Boston and the appropriate state agencies, the Authority had also executed a loan and capital grant contract with HUD, pursuant to the Housing Act of 1949.

Since the procedural requirements of NEPA apply only to projects in which there is significant federal participation, the issue was whether HUD’s involvement in the Fenway project after January 1, 1970, the enactment date of the Act, was sufficient to trigger the application of § 102(2)(C). Plaintiffs contended that it should be applied to the project and alleged: (1) that by the terms of the 1967 contract, HUD retained residual powers over the project which constituted continuing federal involvement; (2) that two post-1970 amendments to the 1968 contract had tripled the relocation grant and increased the loan authorization by one-third, and constituted further major federal actions; and (3) that anticipated future applications to HUD for federal mortgage insurance for most of the buildings to be constructed in the project were sufficient to require the submission of one extensive impact statement covering the entire project rather than one statement for each application. The defendants, however, asserted that NEPA had no application to the Fenway Urban Renewal Project, since the contract had been executed in 1967, prior to the passage of the Act, and denied that anything which had occurred after 1970 constituted a major federal action.

The district court dismissed the plaintiff’s motion for a preliminary injunction and held that federal participation in the Fenway project had ended at the time the 1967 contract was executed. The United States Court of Appeals for the First Circuit vacated the lower court’s order and remanded for further consideration of the motion. The First Circuit held that the district court’s treatment of plaintiffs’ allegations was inadequate and that “it adopted too narrow a focus in concluding that the execution of the contract in 1968 ended all possibility of future ‘major federal actions’.”

Jones v. Lynn is one of a growing number of NEPA cases dealing with a troublesome question: to what extent should the procedural requirements of the Act be applied to federal projects which were ongoing as of its enactment date? Because many of these projects span long periods of time from the planning stages

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4 Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973).
5 Id. at 890.
through completion, today, four years after NEPA was enacted, this question continues to confront the courts, and will probably confront the courts for the remainder of the decade.

This case note will identify the problems involved in applying NEPA to ongoing projects, examine the Jones resolution of these problems, and compare the Jones test with those adopted by other circuits to determine whether any one test is adequate for measuring the applicability of NEPA to all ongoing projects.

The enactment of NEPA on January 1, 1970, was the congressional response to growing public concern that environmental matters were not being given adequate attention by federal agencies in the performance of their respective duties. The purpose of the Act, as characterized by one court, "is to internalize within each agency a procedure for assuming environmental protection." Essentially, the thrust of the Act is threefold. First, the Act places a broad substantive responsibility on the agencies "to use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources . . ." to protect the environment. Second, the Act contains several procedural requirements to assure that the policy is implemented. Third, the Act creates the Council on Environmental Quality (CEQ) to assist and advise the President on environmental matters. It should be emphasized, however, that this council is not given any regulatory powers under the Act, and that although CEQ has issued guidelines interpreting the provisions of NEPA, neither the courts nor the agencies are bound by them.

The most controversial section of NEPA in regard to ongoing projects, and the one at issue in Jones, is the §102(2)(C) procedural requirement that to the fullest extent possible:

all agencies of the Federal Government shall—[prepare an environmental impact statement] on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . . Copies of such statement . . . shall be made available to the President, the Council on Environmental Quality and to the public . . .

Most courts have interpreted this last requirement, that the public be given access to the impact statements, as giving private interest groups standing to challenge decisions by federal agencies not to prepare impact statements for ongoing projects. In this way NEPA has provided environmental groups with a new avenue

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10See, e.g., Green County Planning Bd. v. FPC, 455 F.2d 412, 421 (2d Cir. 1972) (CEQ has no authority to prescribe regulations governing compliance with NEPA).
12 For a more detailed explanation of the standing problem of private interest groups, see
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for acting as private attorneys general. Federal agencies have been reluctant to submit impact statements for ongoing projects because of the expense and delay involved; consequently the federal courts have been faced with a large number of cases concerning the applicability of § 102(2)(C) to these ongoing projects.

Since the Act does not expressly mention ongoing projects, one possible interpretation is that NEPA has no application at all to them. In Jones, however, the First Circuit rejected defendant's contention "that Congress intended to exempt from the application of NEPA pertinent projects simply because they had been previously decided upon." The court cited the broad language of the Act, its legislative history, the CEQ guidelines, and public policy considerations to support its position. This is the better-reasoned position, and even the courts which have held that NEPA had no application to a specific project have not maintained that all ongoing projects are exempt from the Act's provisions. Language in the Act such as "to the fullest extent possible" and "continuing responsibility" would not seem to be amenable to such a restrictive interpretation, in the absence of an express provision exempting all ongoing projects. The real issue, therefore, is not whether NEPA can ever be applied to ongoing projects, but rather what limitations should be recognized in applying the Act to these projects.

Several courts have held that Congress did not intend for NEPA to be retroactively applied, and that therefore its provisions could not be applied to the ongoing project in question. In Pennsylvania Environmental Council v. Bartlett, the Third Circuit held that although construction of a federally funded secondary highway had not yet actually begun, any application of the procedural requirements of the Act would be a retroactive application not intended by Congress, since the construction contracts had been awarded two days before the enactment date of NEPA. And in Investment Securities, Inc. v. Richmond, a district court held that, even though the government had not awarded the contracts for clearing of the new right-of-way and for construction of a power transmission line until after 1970, "[t]o hold that the NEPA does apply to this project would be to give the statute retrospective effect," since Congress in 1967 authorized the appropriation of funds for the project.

In a second line of authority, some courts, while agreeing that NEPA was not intended by Congress to have retroactive effect, have nevertheless applied the procedural requirements of § 102(2)(C) to ongoing projects even after much of the work had been completed. In Environmental Defense Fund, Inc. v. Corps of


14 477 F.2d at 888.
16 454 F.2d 613 (3d Cir. 1971).
18 Id. at 1039.
19 Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973); Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Calvert Cliffs' Coordinating Comm., Inc. v. AEC,
Engineers of the United States Army, a district court enjoined construction work on a dam and reservoir which were almost two-thirds completed and which had been in the planning stages since 1958, until the appropriate impact statements had been submitted. The court held that such application of the Act was not retroactive because it was not "setting aside or undoing any prior action on the part of the defendants." In Morningside-Lennox Park Ass'n v. Volpe, a district court granted a motion for a preliminary injunction halting construction on a segment of an interstate highway which had been initially approved in 1964. The court stated that "the existence of executed contracts and the performance of prior contracts do not grant the project immunity from a requirement of thorough compliance with Section 102 of the NEPA."

The two lines of authority discussed are clearly irreconcilable. Unfortunately, although the conflicting decisions result from differing views of the meaning of retroactivity, most courts have not attempted to define the term. The First Circuit in Jones recognized the disparity in the two lines of cases, and in reference to those which applied NEPA to ongoing projects stated:

Though such applications of NEPA have been called retroactive, see, e.g., Natural Resources Defense Council v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972), they are in fact prospective since they seek to alter, within proper limits, the aspects of a proposal which have not yet been completed, and not to undo anything which has already proceeded to final construction.

The Jones court, in keeping with both lines of cases previously discussed, rejects the theory that Congress intended NEPA to have retroactive effect, but unlike many earlier cases, it provides some insight into its concept of retroactivity:

The first, and basic question, is what are proper limits; what, in other words, can be regarded as prospective, and what not, but must fairly be regarded as vested. . . . Commitments have been made to non-federal participants, as to whom, in the total mix, it would be inequitable to back out.

Thus it appears that the First Circuit considers a retroactive statute to be one which impairs or destroys vested rights of parties. The difficulty with this definition is that the term "vested right" may itself be undefinable. A more workable definition, and one which appears to be consistent with the Jones opinion, is that "a retroactive statute is one which gives to preenactment conduct a different
egal effect from that which it would have had without the passage of the statute."
Under this revised definition, assuming that Jones is correct in rejecting retroactive application of NEPA, commitments made to participants prior to 1970 would not be subject to NEPA procedural requirements unless the commitments were of a conditional nature. As to federal participants, application of NEPA will never be retroactive, however, because commitments running to the federal agencies, creations of Congress, are always conditional in the sense that congressional modification is no more than agency modification.

Accepting this analysis of the retroactivity question, and assuming for the moment that Congress did not intend retroactive application of NEPA, some further observations can be made in respect to other courts' holdings on the question. First, in cases similar to Environmental Defense Fund, when only federal participants are involved, application of NEPA would not be retroactive. Second, when the federal project will involve non-federal parties, but commitments had not as of 1970 been made with them, as in Investment Securities, the Act can also be applied without any question of retroactivity. But when the commitments have been made with private parties prior to the enactment of the Act, as in Pennsylvania Environmental Council, application of NEPA to these projects is prospective only to the extent that the commitments are conditional or to the extent that the commitments are not affected by such application.

One potential weakness in this characterization of the question of retroactivity is the possibility of interpreting "conditional commitment" so broadly that it includes all contracts executed by the federal agencies with non-government parties. If this interpretation is accepted, then with respect to ongoing projects almost any application of NEPA would be prospective; the proscription against retroactive application would cease to act as a meaningful concept. Chief Judge Coffin, in a concurring opinion in Jones, takes this position, citing FHA v. Darlington, Inc. as authority. In that case the Supreme Court held that when a 1954 amendment to a 1946 housing act was applied to a mortgage insurance contract which was executed in 1949, the application of the amendment was prospective rather than retroactive. The Supreme Court concluded that if a party continues to benefit from a contractual relationship with a federal agency, the contract is in effect conditional, and the party should recognize that the agency may be subjected to additional obligations by Congress which could affect the party's contractual rights. The court in Morningside-Lennox also cited Darlington for its proposition, but it is significant that in the sixteen years since the Supreme Court decided Darlington, these are the only two times this portion of the opinion has been cited. Moreover, at least two writers dealing with the subject of retroactive statutes have disregarded this portion of the Darlington opinion and explicitly assumed that the case represents an application of a retroactive amendment which was found to be within constitutional limits. It appears likely that Darlington has limited applicability, particularly since the Supreme Court has historically been more suspicious of legislation which modifies the contractual rights

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held by a private party against a federal agency than of legislation which modifies the contractual rights between two private parties. It is true that some courts have held, however, that Congress intended the Act to be retroactively applied. The general rule is that statutes are not to be given retroactive application unless that was the “manifest intention of the legislature,” although some writers may question the validity of the presumption against giving laws retroactive effect absent the clear intent of the legislature. It is true that the language of NEPA is sweeping and calls for the implementation of its policies “to the fullest extent possible,” while requiring federal agencies to “use all practical means” to improve the environment. However, when the Act is considered as a whole, these phrases are not enough to overcome the presumption of prospective application.

Prior to the First Circuit’s decision in Jones, two basic approaches were being utilized by the federal courts in determining the applicability of NEPA to ongoing projects. The Ninth Circuit in San Francisco Tomorrow v. Romney adopted the first of these approaches, the “contractual” or “decisional” test. Plaintiffs brought the action to enjoin construction on two federally financed urban renewal projects until HUD submitted environmental impact statements pursuant to §102(2)(C) of the Act. One of these projects, the Yerba Buena Center Redevelopment Project, was funded conventionally as one unit (as was the Fenway Urban Renewal Project in Jones), while the other, the West Berkeley Industrial Park Redevelopment Project, was funded in yearly increments. In formulating the issue, the Ninth Circuit relied heavily on the CEQ guidelines for ongoing projects:

11. Application of section 102(2)(C) procedure to existing projects and programs. To the maximum extent practicable the section 102 (2)(C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important

31 Hochman, supra note 27, at 723.
33 Smith, supra note 26, at 231.
36 For a strong argument that NEPA should be retroactively applied, see Note, Retroactive Application of the National Environmental Policy Act of 1969, 69 Mich. L. Rev. 732 (1971).
37 472 F.2d 1021 (9th Cir. 1973).
in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.\textsuperscript{38}

Thus the court characterized the issue as being whether any further "major federal action" was required subsequent to January 1, 1970. The court held that with respect to Yerba Buena, there was no further "major federal action" which could trigger the procedural requirements of the Act, since the project had been approved and the loan and contract grant executed prior to 1970. Although two amendatory agreements had been executed between 1970 and 1972, which increased the grants by over seven million dollars, the court characterized these as a mere confirmation of the Government's earlier decision. The West Berkeley Industrial Park Project, however, was subject to the provisions of NEPA because in February 1970, HUD and the Berkeley Redevelopment Agency executed an agreement which changed the industrial park project to a neighborhood development program. This, the court held, was a further "major federal action." The Ninth Circuit clearly was equating federal contractual formation with "major federal action."

The second approach, the cost-benefit test, was developed by the District of Columbia Circuit in \textit{Calvert Cliffs Coordinating Committee, Inc. v. AEC}.\textsuperscript{39} In this case plaintiffs sought to have the court strike down Atomic Energy Commission (AEC) licensing rules on the grounds that they violated the procedural requirements of NEPA. The licensing procedure for atomic power plants involved a two-stage federal approval, one before construction and the second following it. The rules in question limited final approval of radiological environmental matters where the initial approval had been given prior to the passage of NEPA. In invalidating the AEC licensing rules, the court distinguished between the substantive policies established in § 101 of the Act, which were flexible and called for a "responsible exercise of discretion,"\textsuperscript{40} and the procedural requirements of § 102 which were action-forcing and called for stringent standards of compliance. The court interpreted the introductory phrase of § 102, "to the fullest extent possible," as allowing the agencies no discretion in determining the applicability of the procedural requirements, but rather as a mandate for a balancing test. This balancing test was that "the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values."\textsuperscript{41}

\textit{Calvert Cliffs} is sometimes distinguished from other cases because it involved a regulatory function, rather than the financial relationship which is normally present in the highway and urban renewal cases. However, in \textit{Arlington Coalition on Transportation v. Volpe},\textsuperscript{42} the Fourth Circuit applied a similar cost-benefit analysis to determine the applicability of the § 102 procedural requirements to an interstate highway project which had been in the planning stages since 1958. In ordering the preparation of an environmental impact statement, the \textit{Arlington} court held that the project "has not progressed to the point where the costs of al-

\begin{itemize}
\item \textsuperscript{38} 36 Fed. Reg. 7727 (1971).
\item \textsuperscript{39} 449 F.2d 1109 (D.C. Cir. 1971).
\item \textsuperscript{40} \textit{Id.} at 1112.
\item \textsuperscript{41} \textit{Id.} at 1123.
\item \textsuperscript{42} 458 F.2d 1323 (4th Cir. 1972).
\end{itemize}
tering or abandoning the proposed route would certainly outweigh the benefits that might accrue therefrom to the general public."

In Jones, the First Circuit modified the contractual-decisional test used by the Ninth Circuit in San Francisco Tomorrow by requiring a much closer scrutiny of the federal project. The First Circuit pointed out three specific areas which should be examined for potential "major federal actions." First, any contracts executed prior to the enactment date of NEPA which can be characterized as "major federal actions" must be closely examined for the presence of residual powers retained by the federal agency, and to the extent that the agency has the power to alter the project, an environmental impact statement is required. Second, any post-1970 modifications of the original contract must be examined as potential "further major federal actions." In contrast to the Ninth Circuit, the First Circuit, when considering two post-1970 amendments similar to those in San Francisco Tomorrow noted that "[t]he large increase in the loan authorization is suggestive of an expanded undertaking." This is indicative of the First Circuit's position that the existence of any agency discretionary powers at any time subsequent to January 1, 1970 would be sufficient to trigger at least a limited review of the project. The third and perhaps most significant area set forth in Jones is the finding that not only can present federal involvement serve to trigger the requirement of an impact statement before construction on the project can be continued, but a finding either expressly or by necessary implication that there will be major future federal involvement will also suffice. This avoids a piecemeal approach in which the agency will be entering into a number of smaller contracts in the future which, when taken cumulatively, will have a substantial impact on the environment, and allows for one comprehensive review at a point in time when desirable modifications can be made prospectively.

The primary advantage of the Jones close scrutiny test over the narrower contractual-decisional approach and the cost-benefit test is that it offers the alternative of limited application of NEPA procedural requirements to effect congressional intent that the Act be applied as broadly as possible without being retroactive. Although in some cases the cost-benefit analysis will achieve the same result, it fails to provide for protection of non-federal participants' interests where commitments have been made to them. However, in cases where the projects are purely federal or where no commitments have been made to non-federal parties, the cost-benefit approach may be more helpful than the Jones test, since the concern under the cost-benefit approach is whether the economic waste is so great that it is no longer feasible to abandon or substantially alter the project. In this situation, the Jones test becomes vague, since it is framed in terms of giving prospective application to the Act.

It appears unlikely that the courts will be able to agree on any single test for applying the provisions of NEPA to ongoing projects until the Supreme Court decides the issue. The language of the Act is vague, and although there is general agreement that Congress intended environmental considerations to be given a high priority in the agency planning process, the courts are faced with formidable barriers in attempting to apply the provisions of NEPA uniformly to reach the desired goals set forth in the Act. The complex nature of these multi-million

43 Id. at 1330.
44 477 F.2d at 890.
dollar projects often requires expertise in many specialized fields in order to achieve an understanding of the potential environmental impact involved. Also, while giving private interest groups standing to act as private attorneys general insures that rigorous enforcement of the Act will be sought, it also opens the door to potential abuse of the judicial process. A group may be able to force a project to be abandoned by causing costly delays in construction as the matter is litigated. While the National Environmental Act of 1969 is a step toward internalizing environmental protection, much more guidance is needed than the Act provides for the courts to be able to effectuate congressional intent.

Horton P. Ryon


In Multidistrict Vehicle Air Pollution, M.D.L. No. 31 v. Automobile Manufacturers Association, Inc.,1 numerous governmental units and private individuals had initiated lawsuits2 against the major American automobile manufacturers. The complaints alleged that the defendants had conspired, in violation of § 1 of the Sherman Act,3 to inhibit the development and utilization of automobile antipollution devices.4 The plaintiffs claimed they had suffered damages from the air pollution caused by the alleged conspiracy of the defendants. On the basis of these allegations, the various plaintiffs, suing as individuals and class representa-
tives, sought both injunctive relief under § 16 of the Clayton Act and treble damages under § 4 of the Clayton Act.

These actions were consolidated for pretrial proceedings. The defendants moved for dismissal of all claims asserting that none of the plaintiffs possessed standing to sue under the applicable provisions of the Clayton Act. The motions to dismiss were denied by the United States District Court for the Central District of California and a request for interlocutory appeal was granted. The Ninth Circuit held that both the governmental entity plaintiffs and the private citizen plaintiffs lacked standing to sue for treble damages under § 4. However, because of differences in statutory language and the difference in severity of the respective remedies, the standing requirements for § 16 injunctive relief are less stringent than those of § 4. Thus, despite the lack of standing under § 4, the Ninth Circuit held that all plaintiffs possessed standing to pursue injunctive relief under § 16. A subsequent petition for certiorari was denied.

Although they may continue to seek equitable relief, these plaintiffs were deprived of a more potent avenue of redress by the dismissal of their treble damage.

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Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.


8 28 U.S.C. § 1407 (1970) provides in part:
(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.


10 481 F.2d at 126.

11 Id. at 129.

12 The Supreme Court has said that § 4 and § 16 of the Clayton Act are "notably different" and that "[t]he most likely explanation lies in the essential differences between the two remedies." Hawaii v. Standard Oil Co., 405 U.S. 251, 260-61 (1972).

13 The fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one. The position of a defendant faced with numerous claims for damages is much different. If the defendant is sued by 100 different persons or by one person with 100 separate but cumulative claims, and each claim is for damages, the potential liability is obviously far greater than if only one of those persons sued on only one claim. Thus, there is a striking contrast between the potential impact of suits for injunctive relief and suits for damages.

14 481 F.2d at 131.

claims. The civil treble damage antitrust action, if available, would obviously constitute an efficacious tool for environmentalist litigants. However, the Vehicle Air Pollution decision indicates that the treble damage action may be of little value to those engaged in efforts to retard pollution-creating activity. And, because the decision arose on a motion to dismiss, with complainants' allegations viewed favorably by the court, this case further illustrates the fact that, under prevailing judicial attitudes, the existence of an antitrust violation and consequent injury to plaintiff do not necessarily generate a maintainable treble damage cause of action. In deciding questions of treble damage standing, the courts rely heavily upon the presence or absence of other factors which vary with the merits of each case. This case note will examine the appellate court's determination that none of the plaintiffs in Vehicle Air Pollution could properly press treble damage claims pursuant to §4 of the Clayton Act.

Consideration of the decisional development of standing criteria in treble damage antitrust suits is instructive for purposes of viewing the decision in historical perspective and assessing its implications for future litigation. At common law, combinations and contracts in restraint of trade were prohibited and deemed void. Parties who were injured thereby, however, did not acquire a cause of action for damages. Thus the creation of the treble damage antitrust action represented a statutory response to the failure of the common law prohibition to adequately deter activity which tended to restrain trade or to provide compensation to the victims of such activity. Section 4 of the Clayton Act provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor 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.

A literal reading of §4 conveys the impression that Congress conferred a broad grant of standing upon treble damage claimants. Allegation of an antitrust violation by defendant, an injury to plaintiff, and a putative causal relationship between the two, would seem to constitute a viable cause of action. Moreover, the impression that a broad grant of standing was intended is buttressed by the specific features of §4. Potential barriers to the assertion of treble damage claims are minimized by the absence of any "amount in controversy" requirement and by the provision for recovery of the costs of suit. Because these two

\[10\] Apex Hosiery Co. v. Leader, 310 U.S. 469, 497 (1940).

\[16\] Id.


\[19\] Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955).

features facilitate the institution of suit, and because of the provision for treble damages, § 4 logically represents an inducement to pursue legal redress for injuries which result from antitrust violations. These features, together with the broad language of the Act, appear to be inconsistent with a narrow judicial interpretation of treble damage standing. Rather, the Act appears to encourage litigation, reflecting congressional belief that imposition of damage liability, especially treble damages, should play a significant role in exposing and eliminating anti-competitive practices. Indeed it has been stated that § 4 was intended to provide incentives for persons to serve as "private attorneys general" in order to augment federal government enforcement of statutory antitrust proscriptions. Implementation of this policy is certainly not enhanced by a restrictive view of § 4 standing.

Nonetheless, recognition of the salutary aspects of private antitrust litigation has been substantially counterbalanced by judicial fears that if treble damage actions were liberally entertained by courts the lure of possible triple recovery would induce proliferation of specious and ill-founded claims. Thus judicial construction engrafted stringent constraints upon standing to sue for treble damages in the early cases. Various restrictive "glosses" upon standing have since evolved, but there are strong indications that such judicial constriction of treble damage standing has not effectively operated to inhibit litigation.

22 [It] was believed that the most effective method of enforcing the antitrust laws, in addition to the imposition of penalties by the United States, was to provide for private treble damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the Government time and money. S. Rep. No. 619, 84th Cong., 1st Sess., 2 (1955).
25 See generally Bicks, The Department of Justice and Private Treble Damage Actions, 4 ANTITRUST BULL. 5 (1959); Loevinger, Private Action—The Strongest Pillar of Antitrust, 3 ANTITRUST BULL. 167 (1958).
28 From 1890 through 1940 there were only 175 treble damage claims litigated, of which a mere thirteen were successful. Note, 18 U. CHI. L. REV. 130, 138 (1950). Following World War II, the volume of treble damage litigation increased markedly. Clark, The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits, 52 MICH. L. REV. 363, 364 (1954). A statistical review of the post-war increase in litigation may be found in Com-
Limiting constructions of § 4 have centered upon two key phrases in the statute: "business or property" and "by reason of," described by the Ninth Circuit as the "twin requisites for standing." Although the first of the "twin requisites" as seldom presented an insurmountable obstacle to treble damage claimants, in *Vehicle Air Pollution* the Ninth Circuit grounded its determination that the governmental-entity plaintiffs lacked § 4 standing solely upon their failure to satisfy the "business or property" criterion. It has been held consistently that the § 4 requirement of injury to "business or property" contemplates pecuniary damage to some commercial interest. In *Hawaii v. Standard Oil Co.*, the Supreme Court stated: "Like the lower courts that have considered the meaning of the words "business or property," we conclude that they refer to commercial interests or enterprises.

In *Vehicle Air Pollution*, the governmental-entity plaintiffs alleged two types of damage as a result of the defendants' alleged conspiracy: diminution of value of their property and increased expenses. But the court denied standing because the governmental plaintiffs had not alleged injury to commercial interests. The private-citizen plaintiffs, who were engaged in agricultural production, allegedly suffered "direct damage to crop yields." Their injury was deemed competent under the "business or property" test, "since a diminished crop yield . . . would constitute injury to commercial interests." The Ninth Circuit relied upon *Hawaii* in holding that the governmental-entity plaintiffs failed to allege injury to "business or property." In *Hawaii*, the State of Hawaii alleged that the defendant firms had conspired to restrain trade in the petroleum industry and that the conspiracy resulted in the payment of price overcharges by purchasers of refined petroleum products. Suing as *parens patriae*, Hawaii sought treble damages for all overcharges paid by its citizens. The defendant, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damages Suit*, 61 YALE L.J. 1010, 1064-65 (1952). The growth in treble damage suits, which continued throughout the 1950's, was largely attributable to heightened Justice Department activity in antitrust enforcement. An estimated 76-78% of private treble damage litigation allowed successful government action during the years 1952-58. Bicks, *supra* note 25, at 7. F. Bixler, *Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 EM. WASH. L. REV. 181, 189-90 (1961). Since 1959 the rate of increase in treble damage litigation has accelerated, changes in federal procedure, especially discovery, being the primary cause for acceleration. Colle, *Procedural Directions in Antitrust Treble Damage Litigation: An Overview of Changing Judicial Attitudes*, 17 ANTITRUST BULL. 997, 999 (1972).
dants moved for dismissal. The Supreme Court found that Hawaii's *pars pro toto* claim encompassed injuries to the "general economy" of the state and, as such, did not meet the "business or property" requirement. Reasoning that those injuries merely represented the aggregate of damages sustained by numerous private persons, which damages were actionable by the particular individuals affected, the Court said:

- When the State seeks damages for injuries to its commercial interests, it may sue under § 4. But where, as here, the State seeks damages for other injuries, it is not properly within the Clayton Act.

Then, employing an analogy to the statutory provision for antitrust damage suits by the United States, the Court concluded that a state can suffer injury cognizable under § 4 only when functioning as a consumer of goods and services.

Given the narrowing gloss which Hawaii put upon "business or property" in the context of treble damage suits by States, it is apparent that none of the plaintiff States in *Vehicle Air Pollution* alleged harm to "its commercial interests." The Hawaii rationale is logically applicable to subdivisions of States as well. Thus, since the governmental-entity plaintiffs in *Vehicle Air Pollution* did not allege any damage resulting from dealings in the marketplace, the Ninth Circuit's holding that their complaints were insufficient to fulfill the "business or property" requirement of § 4 standing was in accord with the Supreme Court's Hawaii decision.

The second of the two requirements for standing, embodied in the statutory words "by reason of," although more nebulous in character, has occupied a far more crucial office in the decisional history of the treble damage antitrust action. This phrase has been the focus of considerable judicial scrutiny, and its effect has been to preclude litigation on the merits in many cases in which actual injury to commercial interests was not disputed. Although "by reason of" would seem to require no more than an allegation of causation, the courts have invariably said that these words contain an additional demand: that the parties be commercially linked in some manner. The precise nature of the required commercial connection of the parties has been the subject of varying interpretations.

Initially, viewing "by reason of" as the statutory analogue of the proximate cause element of common law negligence, the courts erected a privity-type obstacle to treble damage standing. These early cases were the genesis of what has gen-

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38 405 U.S. at 263-64.
37 Id.
38 Id. at 264.
40 405 U.S. at 264-65:

Support for this reading of § 4 is found in the legislative history of 15 U.S.C. § 15a, which is the only provision authorizing recovery in damages by the United States, and which limits that recovery to damages to "business or property." The legislative history of that provision makes it quite plain that the United States was authorized to recover, not for general injury to the national economy or to the Government's ability to carry out its functions, but only for those injuries suffered in its capacity as a consumer of goods and services. . . . And the conclusion is nearly inescapable that § 4, which uses identical language, does not authorize recovery for economic injuries to the sovereign interests of a State. (footnote omitted).
41 There must exist some barrier which will effectively prevent such a multiplicity
generally been termed the "direct injury" approach to treble damage standing. The touchstone of "direct injury" analysis is the existence of a "commercial relationship" between plaintiff and defendant, the basis of that relationship being either privity or direct competition. If the parties in a treble damage action are separated in such a manner that plaintiff's injury was channelled through an intermediate party, then that injury is deemed "indirect" or "secondary," and plaintiff is denied standing. The "direct injury" approach continued to retain extreme vitality long after (then) Judge Cardozo's decision in the *MacPherson* case signalled the demise of privity as a requisite for recovery in negligence cases.\(^4\)

Among those cases from which the "direct injury" approach to treble damage standing evolved, the preeminent early decision was authored by the Third Circuit in *Loeb v. Eastman Kodak Co.*\(^4\) Plaintiff Loeb had been both a stockholder and creditor of the Liberty Photo Supply Company. Alleging that Liberty Photo had been driven into bankruptcy by the defendant's antitrust violations, Loeb sought treble damages for his personal financial injury. The court, conceding that the language of § 7 of the Sherman Act was "comprehensive" and recognizing that Loeb had suffered actual pecuniary detriment as a result of Kodak's illegal acts, nonetheless characterized Loeb's injury as "indirect, remote, and consequential" and sustained Kodak's demurrer.\(^4\) Implicit in the court's reasoning was the belief that Liberty Photo was the real party in interest and that Loeb would receive needed protection of his interests through the efforts of the trustee of the bankrupt corporation. The court concluded that, since the harm alleged was *derivative*, the recovery, if any, should be realized through the party which had been directly injured.\(^4\)

The emphasis in *Loeb* upon the directness of the injury as a determinant of treble damage standing probably stemmed from the Third Circuit's fear that duplicate recovery might result if both Loeb and Liberty Photo had actionable claims.\(^4\) Yet the "direct injury" analysis has since been frequently employed in cases to which the *Loeb* rationale was not entirely applicable. Courts using the "direct injury" approach have tended to categorize each claimant on the basis of his relationship to other parties who incurred injury because of an alleged violation. Inclusion of a plaintiff in one of the following categories is indicative of derivative injury and has almost invariably been fatal to standing: employee,\(^4\) franchisor,\(^4\) supplier,\(^4\) lessor,\(^4\) licensor.\(^5\) It should be noted that such persons of suits as the plaintiff's position suggests, and we believe not only that the barrier exists, but that it is found now just where it was prior to the passage of the act in question.


183 F. 704 (3d Cir. 1910).

Id. at 709.

Id. at 710.

Id. at 710.

*Accord*, *Ames v. American Tel. & Tel. Co.*, 166 F. 820, 823 (C.C.D. Mass. 1909) in which the court expresses apprehension about possibility of "sextuple damages" if stockholder of injured corporation can maintain treble damage action.


See, e.g., *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), cert. denied,
frequently do not possess (as Mr. Loeb purportedly did) legal relationships of such a nature that derivative recovery is possible. Thus, although averti duplicating recovery, strict "direct injury" analysis may also deny a deserving plaintiff any recovery without regard for the commercial realities of the case.

The past two decades have witnessed a retreat from rigid adherence to the "direct injury" rule. Many federal courts, when confronted with questions under the "by reason of" language of § 4, have preferred to "focus on claimant's relationship to the area of the economy allegedly injured by the defendant." The theory that a plaintiff has standing if he is within the sector of the economy toward which defendant's illegal activities were directed, denominated the "target area" approach to treble damage standing, was pioneered by the Ninth Circuit.

As early as 1951, in Conference of Studio Unions v Loew's, Inc., the Ninth Circuit articulated the "target area" test, stating that a plaintiff must demonstrate, in addition to an antitrust violation and injury, "that he is within the area of the economy which is endangered by the breakdown of competitive conditions in a particular industry." In Conference of Studio Unions, certain labor unions and their members, motion picture industry employees, had brought suit against the major film-producing studios. It was alleged that the major film-makers and distributors had conspired to economically destroy the smaller independent studios, thus curtailing the overall level of competition, production, and employment in the industry. The court, narrowly defining the target of the defendants' alleged conspiracy to be the independent film studios, denied standing to plaintiffs, stating


43 Judge Ely stated that the "direct injury" approach "transforms judicial inquiry into a mere search for labels." 481 F.2d at 127 The unfairness of "label disposition" of treble damage standing questions has been described thusly:

The argument makes sense, of course, as long as one person is available to bring the antitrust suit, and the extent of the damages that he may recover is allocable between him and the others similarly damaged because of the manner in which he and they are doing business. In such a situation the policy of Congress to encourage private antitrust actions by permitting the recovery of treble damages is not thwarted even if only the most directly affected person is allowed to bring the suit.

But if the person "most directly affected" does not have a relationship with another affected person of the sort that will permit him to recover the other's damages it is the defendant who reaps a "windfall."


44 481 F.2d at 127-28.

45 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952).

46 193 F.2d at 54-55.
that "the alleged damage the appellants suffered therefrom was incidental to the accomplishment of the illegal object."56 Therefore, despite the court's elucidation of the "target area" principle, the decision rendered in Conference of Studio Unions was entirely consonant with prior decisions reached via the "direct injury" test.

The significance of "target area" analysis became apparent four years after Conference of Studio Unions. In Karseal Corp. v. Richfield Oil Corp.,57 the Ninth Circuit demonstrated that the "target area" approach did indeed constitute a departure from the traditional "direct injury" gloss on the statutory phrase "by reason of." Karseal Corporation manufactured automobile waxes and polishes. These products were sold to independent distributors58 who in turn purveyed the products to independent service stations for subsequent retail sale. Richfield, which supplied independent service stations with petroleum products, provided in its sales contracts for exclusive dealing in certain automotive accessory items which it distributed. The exclusive dealing feature of Richfield's contracts operated to impede the sale of Karseal products, inhibiting marketability directly at the independent distributor-to-service station level. Karseal contended that these contractual restrictions constituted an illegal restraint of trade. Richfield asserted that if a cause of action existed as a result of its sales scheme, it accrued to the distributors of Karseal products rather than to Karseal itself. It is clear that Richfield's assertion was unassailable under the "direct injury" approach,59 but the court chose to phrase the issue as follows:

Assuming Karseal was "hit" by the effect of the Richfield antitrust violations, was Karseal "aimed at" with enough precision to entitle it to maintain a treble damage suit under the Clayton Act?60

Having couched the issue in "target area" terms, the court proceeded to define the affected area of the economy as "commerce in petroleum products and automotive accessories."61 Therefore it was held that "Karseal was not only hit, but was aimed at, by Richfield,"62 and the action was maintainable.

The "target area" analysis has been adopted with varying degrees of enthusiasm and consistency by the federal courts. The Ninth Circuit has continued to espouse the "target area" principle since Karseal,63 but, as noted by Judge Ely,64 even that court reverted to a constrained "direct injury" analysis in Perkins v. Standard Oil Co.65 There have been notably liberal applications of the "target area" approach in some other jurisdictions,66 but conflicting opinions have been

56 Id. at 54.
57 221 F.2d 358 (9th Cir. 1955).
58 The distributorships were independently owned and operated. However, the distributors did have franchise agreements with Karseal. 221 F.2d at 360.
59 See, e.g., cases cited notes 48 and 49 supra.
60 221 F.2d at 362.
61 Id. at 364.
62 Id. at 365.
63 See, e.g., Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073 (9th Cir. 1970); Hoopes v. Union Oil Co. of California, 374 F.2d 480 (9th Cir. 1967); Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190 (9th Cir. 1956).
64 481 F.2d at 128-29.
65 396 F.2d 809 (9th Cir. 1968), rev'd, 395 U.S. 642 (1969).
66 See, e.g., South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th
voiced concerning the extent of its acceptance by the federal judiciary as a whole.\textsuperscript{67} This apparent disparity of opinion may perhaps be attributable to the fact that there exists no single-"target area" test. Rather, there appears to be a spectrum of "target area" tests, the more restrictive of which approximate the traditional "direct injury" analysis. The variable factor is the process of defining the target area in each individual case. Thus a court purporting to apply the "target area" approach may, if the actual target area is narrowly defined, achieve results conforming to those in "direct injury" cases\textsuperscript{68} and seemingly contrary to those in cases which describe the target area in broader terms.\textsuperscript{69}

The Ninth Circuit again chose to employ the "target area" analysis in \textit{Vehicle Air Pollution}. The "target area" test resulted in dismissal of the only remaining treble damage claims, those of the crop farmer plaintiffs:

\[\text{T}he\text{ area of the economy against which anti-competitive conduct was allegedly directed was that concerned with research, development, manufacture, installation and patenting of automotive air pollution control devices. No commercial interest of the crop farmers falls within this area. Not only were the crop farmers not targets of the alleged conspiracy, they were not even on the firing range.}\textsuperscript{70}

This result is thoroughly unremarkable when considered in light of the historical development of treble damage standing; restatement of the Ninth Circuit's "target area" approach offers nothing new by itself. Yet the \textit{Vehicle Air Pollution} decision may be viewed as something more than a mere restatement of the conventional judicial wisdom. Its significance lies in the fact that the Ninth Circuit was unwilling to further broaden its approach to treble damage standing even though the case exposes the inherent weaknesses of all the judicial glosses which have heretofore been placed upon the phrase "by reason of." \textit{Vehicle Air Pollution} forcefully demonstrates that there may occur antitrust violations which result in widespread injury to commercial interests and for which there is no concomitant damage cause of action.

The Ninth Circuit chose not to ignore the "traditional, legalistic approach"\textsuperscript{71}

\textsuperscript{67} Judge Ely identified the Eighth and Ninth Circuits as the most zealous adherents to the "target area" approach, the First, Third, Sixth, and Tenth Circuits as proponents of the "direct injury" test, and the Second, Fourth, and Fifth Circuits as favoring hybrid standards. He characterized the Seventh Circuit's posture as "uncertain." 481 F.2d at 127 n.7.

One commentator, referring to the "target area" approach, has opined that "virtually all federal courts have already accepted the principle, implicitly if not in name." Pollock, \textit{The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action}, 57 NW. U. L. REV. 691, 706 (1963). A third view is presented in Klingsberg, \textit{supra} note 52. Klingsberg agrees that the Ninth Circuit is the leading advocate of the "target area" approach, followed by the Fourth and Eighth Circuits. However, he finds the Second Circuit to be the most restrictive in its view of treble damage standing, followed by the First, Third, and Sixth Circuits. \textit{Id.} at 355 n.15.


\textsuperscript{69} Compare cases cited note 68 \textit{supra} with cases cited note 66 \textit{supra}.

\textsuperscript{70} 481 F.2d at 129.

\textsuperscript{71} In re Motor Vehicle Air Pollution Control Equip., 52 F.R.D. 398, 401 (C.D. Cal. 1970).
as the court below had done in denying defendants' motions to dismiss. Instead, Judge Ely found Supreme Court recognition of the validity of the "target area" approach through a combined reading of *Hawaii v. Standard Oil Co.* and *Perkins v. Standard Oil Co.* Acknowledging that prior to *Hawaii* there had been speculation that the Supreme Court would spurn any attempt to use the phrase "by reason of" as a means of restricting treble damage litigation, Judge Ely read *Hawaii* "to require more from a would-be plaintiff than some remote connection in the causal chain." Finding no preference for either the "direct injury" or the "target area" approach in *Hawaii*, Judge Ely then looked to *Perkins*, therein seeing "[d]irect support for the 'target area' approach."

There is question whether a combined reading of *Hawaii* and *Perkins* gives rise to a finding of Supreme Court approval of the "target area" approach to treble damage standing, or even approval of any limiting gloss upon the "by reason of" phrase. In *Hawaii* the Court did not explicitly deal with the "by reason of" language of § 4. Moreover, any inferences which might be drawn from *Hawaii* must necessarily be tempered by the fact that the Court was therein concerned only with treble damage antitrust suits by states. The Court's intention in *Hawaii* was not to create standing rules of general applicability so much as it was to define the proper scope of a state's "commercial interests" under § 4. Thus it is difficult to discern the relevance of *Hawaii* to the question of the crop farmer plaintiffs' standing in *Vehicle Air Pollution*.

The view that "[t]he 'direct injury' approach to § 4 was implicitly undermined by the Supreme Court" in *Perkins* is unquestionably well-founded, yet it is arguable that *Perkins* stands for the proposition that "target area" analysis delimits the outermost permissible bounds of treble damage standing. *Perkins* was a price discrimination case in which the plaintiff's § 4 claims had been disallowed by the Ninth Circuit, relying on *Karseal*. The Supreme Court reversed without making direct reference to the "target area" concept. Making no mention of standing, the Court treated the issue as a question of causation, holding that when an inference of causation was warranted, the disposition of that question was properly left to the jury. In fact, *Perkins* has been viewed as a possible indication that the Supreme Court regards any gloss upon the "by reason of" phrase as unnecessarily restrictive.

The Ninth Circuit's reading of *Hawaii* and *Perkins* as limiting § 4 standing to those within the "target area" also fails to account for various statements by the Supreme Court in other cases. Although the Court has never had occasion to proffer a definitive appraisal of the "by reason of" element in treble damage standing, it has periodically intimated that no special meaning should be attached to those three words. As early as 1948 the Court, referring to the Sherman Act, stated:

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74 481 F.2d at 126.
75 *Id*. at 128.
76 See notes 36-39 *supra* and accompanying text.
77 481 F.2d at 128.
78 395 U.S. at 648.
79 Klingsberg, *supra* note 52, at 369.
The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.80

And the Court has since said that "to state a claim upon which relief can be granted under [§ 4], allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."81 Dicta reflecting a broad view of treble damage standing have appeared in several other Supreme Court decisions,82 spawning predictions that the Court would be willing to extend the treble damage cause of action beyond the limits imposed by the lower federal courts.83

It is clear that if the Ninth Circuit's reasoning in Vehicle Air Pollution is followed in future cases, attempts to curb environmental abuse through implementation of § 4 will often meet with failure. Additionally, the impact of the case may be felt in a wide range of subsequent treble damage litigation. The Ninth Circuit, among the courts most generous to claimants in the past,84 has declined to take an additional step toward freer availability of the § 4 remedy. This is so even though the facts of this case dramatically reveal the social impact of the "target area" approach to standing. Damage visited upon victims who are not within the target area may be both extensive and foreseeable. "Intended victims" within the target area, injury to whom is the "object" of the illegal conspiracy, may sustain only a minimal portion of the total foreseeable harm resulting from the illegal conduct. Nevertheless, under the Ninth Circuit's interpretation, it is only the "intended victims" who possess standing to sue.

There is general acknowledgment that the "line must be drawn somewhere" to demarcate the extent of antitrust violators' liability. The proper placement of such a "line" is largely contingent upon the relative values accorded to competing policy considerations.85 The treble damage action was created to facilitate the achievement of several policy objectives—compensation of antitrust victims, deterrence of anticompetitive activity, and encouragement of private litigants to lessen the burden of antitrust enforcement borne by the federal government.86 The courts, fearful of "ruinous" liability and often viewing treble damages as a "windfall" for the successful plaintiff, have used restraints upon standing as a primary method of limiting treble damage liability. In doing so, they may have substan-

83 Klingsberg, supra note 52, at 368-69; Comment, Standing to Sue for Treble Damages Under Section 4 of the Clayton Act, 64 Colum. L. Rev. 570, 585 (1964).
84 See notes 57-63 supra and accompanying text.
85 The various policy considerations relevant to the scope of treble damage standing are discussed in detail in Pollock, supra note 67, at 701-07; Timberlake, supra note 26, at 237-43.
86 See notes 21-24 supra and accompanying text.
tially thwarted the accomplishment of the policy goals underlying the creation of the treble damage action.\textsuperscript{87}

While it seems clear that the "target area" approach to treble damage standing is more expansive and commercially realistic than the rigid "direct injury" approach, it may be that neither is truly responsive to the need of both society and individuals for protection from antitrust abuses. The courts should actively consider such a possibility. Moreover, judicial doctrines which are well-conceived at inception may diminish in reasonableness with the passage of time. Thus, in an era of massive concentration of economic power in the hands of "mega-corporations," it may be that the potential incidence of grievous harm from anticompetitive activity warrants the extension of treble damage standing beyond its traditional, judicially-created bounds.\textsuperscript{88}

Judge Ely indicated that to grant standing to any plaintiffs for their treble damage claims in \textit{Vehicle Air Pollution} would entail "judicial overreaching."\textsuperscript{89} And it has been suggested that congressional failure to respond to judicial construction of § 4 constitutes implicit ratification of decisional limitation of treble damage standing.\textsuperscript{90} Yet it is difficult to characterize judicial re-examination of a doctrine originated and implemented by the judiciary as "overreaching," particularly where the Supreme Court has not spoken decisively. In deciding questions of treble damage standing, the focus should properly be upon whether the claimant's alleged injury occurred within the "zone of protected interests"\textsuperscript{91} created by the antitrust laws, with ample regard for the statutory purpose\textsuperscript{92} of § 4. Such analysis might reveal that the zone of protected interests is wider than the target area.

\textsuperscript{87} For myriad reasons including restrictions on standing, the treble damage action has not been entirely effective as a method of enforcing the antitrust laws. \textit{See note 28 supra}. Furthermore, Congress provided for damage suits by the United States in 1955, apparently because pre-existing modes of antitrust enforcement, both private actions and federal prosecutions, had not afforded an optimal level of deterrence. \textit{See generally} S. Rep. No. 619, 84th Cong., 1st Sess. (1955); H. R. Rep. No. 422, 84th Cong., 1st Sess. (1955). It has been suggested that the deterrent effect of the private treble damage action is minimal. \textit{Parker}, supra note 18, at 293.

\textsuperscript{88} For favorable appraisals of the district court's denial of defendants' motions to dismiss the treble damage claims in the instant case, see 12 B. C. IND. \\& COM. L. REV. 686 (1971); 24 VAND. L. REV. 126 (1970).

\textsuperscript{89} 481 F.2d at 130.

\textsuperscript{90} Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956): Congress has failed to amend the anti-trust laws on this point in the face of repeated decisions. It seems to have been content for the judiciary to take a position narrower than that often applied in non-statutory tort cases and in cases where plaintiffs are not allowed a multiple recovery.

\textsuperscript{91} The Supreme Court has articulated a general test of standing: "[The question of standing concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." \textit{Association of Data Processing Serv. Organizations v. Camp}, 397 U.S. 150, 153 (1970).

\textsuperscript{92} For a thoughtful discussion of treble damage standing requirements and statutory purpose, with the author concluding that the extant glosses on § 4 are unduly restrictive, see \textit{Comment, Standing to Sue for Treble Damages Under Section 4 of the Clayton Act}, 64 COLUM. L. REV. 570, 585-88 (1964). \textit{But see Pollock, supra note 67, at 703-07; cf. Timberlake, supra note 26, at 240-43.}
In *Vehicle Air Pollution*, it might have dictated that the crop farmer plaintiffs should have been permitted to present their proofs to the trier of fact.

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