RECENT DEVELOPMENTS

ANTITRUST: NINTH CIRCUIT APPLIES LIBERAL STANDING REQUIREMENTS FOR TREBLE DAMAGE SUITS UNDER SECTION 4 OF THE CLAYTON ACT

Hoopes v. Union Oil Co.[1] continues the judicial retreat from a narrow delineation of the standing requirements for treble damage suits under section 4 of the Clayton Act.[2] The appellants owned a filling station which was subject to a complex lease-leaseback arrangement with Union Oil that previous litigation had determined to constitute only a "requirements" contract. Prior to the instant litigation, the station had been leased by the appellants to an operating firm which had later surrendered possession. Appellants alleged that all subsequent efforts to sell or lease the property had been frustrated by Union's warning to prospective purchasers and lessees that the premises were subject to a mortgage and to the requirements contract. Asserting that Union's conduct was a part of a larger plan to restrict commerce by establishing and maintaining a substantial portion of the retailers in Alaska as exclusive outlets for Union products,[3] appellants sought treble damages for an alleged loss of rental income and a diminution in the value of the property. The district court granted summary judgment for Union "on the ground that appellants 'lacked standing to sue [under section 4].' "[4] Finding that appellants clearly met the statutory requirements, however, the Court of Appeals for the Ninth Circuit reversed.

---

[1] 374 F.2d 480 (9th Cir. 1967).

[2] 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).

[3] Compare Standard Oil Co. v. United States, 337 U.S. 293 (1949) (requirements contracts violated Clayton Act § 3).

See generally Bergstrom, *The Private Litigant's Standing to Sue*, 7 ANTITRUST BULL. 3 (1962); Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 NW. U.L. REV. 691 (1963); Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws*, 30 GEO. WASH. L. REV. 231 (1961); Whipple, *Two Aspects of Plaintiffs' Treble Damage Suits: Class Actions; Persons Injured and Standing to Sue*, 8 A.B.A. ANTITRUST SECTION 27 (1956); Comment, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964).

[4] 374 F.2d at 482.

Although section 4 of the Clayton Act creates a treble damages remedy in "*any person* . . . injured in his business or property by reason of anything forbidden in the antitrust laws,"[5] judicial interpretation has wrung determinative limitation from virtually every word of the section. Thus to sue for section 4 relief the claimant must be the real party in interest.[6] Additionally, the "business" or enterprise allegedly injured must be one in which the claimant was actively engaged or fully prepared to engage at the time the injury occurred.[7] Moreover, the injury must not be indirect or remote,[8] an exegesis apparently drawn from the statutory requirement that the injury be "by reason of" unlawful monopolistic activity. Such glosses upon the statutory language have engendered in substance a "proximate cause" test in private antitrust litigation, though in form and liberality of application the test has varied considerably within the circuits. In the Second Circuit, for example, allegedly illegal conduct injuring an exclusive patent licensee has been held too remote to produce a cognizable section 4 injury to the licensor whose royalties correspondingly declined.[9] Similarly, in the Third Circuit, non-exhibiting movie theater lessors whose rental income was based on a percentage of receipts have been denied section 4 recovery for income lost when first-run films were unlawfully withheld from

[5] 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964). (Emphasis added.)

[6] Farmers Co-op Oil Co. v. Socony-Vacuum Oil Co., 133 F.2d 101, 103 (8th Cir. 1942) (members, not co-op, were real parties in interest); South Carolina Council of Milk Producers, Inc. v. Newton, 241 F. Supp. 259, 265 (E.D.S.C. 1965) (dictum), *rev'd on other grounds*, 360 F.2d 414 (4th Cir. 1966), *cert. denied*, 385 U.S. 934 (1966) (co-op members could assign their interest to association); Arlington Glass Co. v. Pittsburgh Plate Glass Co., 24 F.R.D. 50 (N.D. Ill. 1959) (members, not club, were real parties in interest); FED. R. CIV. P. 17 (a).

[7] See, *e.g.*, Martin v. Phillips Petroleum Co., 365 F.2d 629 (5th Cir. 1966) (lack of investment and prior experience resulting in finding of no "business"); Duff v. Kansas City Star Co., 299 F.2d 320 (8th Cir. 1962) (former publisher with copyrighted name had no "business"); Peller v. International Boxing Club, Inc., 227 F.2d 593 (7th Cir. 1955) (unlicensed "promoter" not injured in "business or property").

[8] See, *e.g.*, Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 393-95 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963) (materials supplier "remote" from injury to manufacturer); Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956) (theater lessor only indirectly injured by acts against lessee); Centanni v. T. Smith & Son, Inc., 216 F. Supp. 330, 338 (E.D. La.), *aff'd per curiam*, 323 F.2d 363 (5th Cir. 1963) (employees); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299, 302 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957) (insurance agent); *cf.* Loeb v. Eastman Kodak Co., 183 Fed. 704, 709 (3d Cir. 1910) (stockholders).

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

their operating lessees.[10] However, both the Seventh and Ninth Circuits have allowed recovery in comparable situations.[11]

The Supreme Court has observed that in light of congressional policy favoring the private antitrust litigant, standing requirements beyond those specifically set forth in the statute are inappropriate.[12] Such a broad exposition of the statute, however, offers no guidelines to the lower courts but merely intimates that a latitudinous approach to the section 4 standing question should be taken. The Ninth Circuit has undertaken a more specific exposition of the statutory proximity criterion. *Conference of Studio Unions v. Loew's, Inc.*[13] held that standing to sue under section 4 was contingent upon a litigant's demonstration that "he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[14] Later cases have clarified this language and have expanded the "target area" to include all business operations within the area which could reasonably be foreseen to be affected by the violator's conspiracy.[15] Suggested as a realistic formulation of a "proximate cause" standard for section 4 standing problems,[16] this Palsgrafian test has been applied, implicitly or explicitly, in most circuits which have considered cases where the "remoteness" of the injury was at issue.[17]

[10] Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954); *accord*, Skourkas Theaters Corp. v. Radio-Keith-Orpheum Corp., 193 F. Supp. 401, 407 (S.D.N.Y. 1961).

[11] Sandidge v. Rogers, 256 F.2d 269 (7th Cir. 1958) (gravel pit lessor); Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957) (movie theater lessor); Steiner v. Twentieth Century Fox Film Corp., 232 F.2d 190 (9th Cir. 1956) (movie theater lessor).

[12] Radovich v. National Football League, 352 U.S. 445, 453-54 (1957); see Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961) (per curiam); *cf.* Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948).

[13] 193 F.2d 51 (9th Cir. 1951).

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

[15] See South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966) (milk producers organization was within the "target area" of competing integrated processor-retailer), 53 VA. L. REV. 170 (1967); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964) (motion picture producer within the "target area" of theater chain); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362-64 (9th Cir. 1955) (competing manufacturer).

[16] Pollack, *supra* note 2, at 706-07.

[17] See, *e.g.*, South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); Harmon v. Valley Nat'l Bank, 339 F.2d 564, 567 (9th Cir. 1964); Elyria-Lorain Broadcasting Co. v. Lorain Journal

In *Hoopes,* Union Oil argued that Hoopes was a lessor, and as such could not recover damages since, as to the lessor, antitrust violations against the lessee are "indirect" and "remote." Alternatively, the defendant asserted that recovery for any injury caused by this contractual relationship was barred by the applicable statute of limitations.[18] The Ninth Circuit rejected the first argument, noting that even were the antitrust claim as limited as Union contended, restrictive interpretations of section 4, such as those on which Union relied,[19] are of questionable validity when measured against the broad construction which the Supreme Court appears to have given the section.[20] In fact, the Hoopes' claim was not a narrow one, for the court found that it was grounded, not on the lessor-lessee relationship between the parties, but on Union's "entire course of conduct," which allegedly was aimed at restricting to its own use petroleum outlets in the Alaska area. Therefore, the claim was not barred by the statute of limitations since this course of conduct had continued up to, and even after, the time the complaint was filed. Assuming the truth of the allegations for purposes of the appeal from the summary judgment, the court likewise determined that appellants were within the area which Union could reasonably have foreseen would be affected by its actions, especially since some of Union's conduct was aimed directly at the appellants and their property. Thus, concluded the court, the Hoopes were clearly within the "target area," and their injury could therefore be found compensable. Similarly,

Co., 298 F.2d 356 (6th Cir. 1961); Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362-63 (9th Cir. 1955); Schulman v. Burlington Indus., Inc., 255 F. Supp. 847 (S.D.N.Y. 1966); Missouri v. Stupp Bros. Bridge & Iron Co., 248 F. Supp. 169 (W.D. Mo. 1965); *cf.* Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964). *But see* Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 393-95 (6th Cir. 1962), *cert. denied,* 372 U.S. 907 (1963); Centanni v. T. Smith & Son, Inc., 216 F. Supp. 330 (E.D. La.), *aff'd per curiam,* 323 F.2d 363 (5th Cir. 1963).

[18] Clayton Act § 4B, added by 69 Stat. 283 (1955), 15 U.S.C. § 15b (1964).

[19] Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), *cert. denied,* 352 U.S. 890 (1956); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd,* 211 F.2d 405 (3d Cir.), *cert. denied,* 348 U.S. 828 (1954); Westmoreland Asbestos Co. v. Johns-Manville Corp., 30 F. Supp. 389 (S.D.N.Y. 1939), *aff'd,* 113 F.2d 114 (2d Cir. 1940).

[20] See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961) (per curiam); Radovich v. National Football League, 352 U.S. 445, 453-54 (1957); *cf.* Leh v. General Petroleum Corp., 382 U.S. 54 (1965); Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965), 64 MICH. L. REV. 1156 (1966); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948).

the court decided that the appellants' injuries were "direct," and not "consequential," "secondary," or "remote."

The court thus concluded that the connection between the property owners' injury and Union's alleged illegal conduct "satisfies all of the formulations of the statute's requirements suggested by any decision of which we are aware. . . ."[21] Nonetheless the tenor of the opinion decidedly reflects the growing judicial preference for a liberal interpretation of section 4, commensurate with the statutory language. Summarily noting that "imposition of . . . damages [would serve] the statute's purposes,"[22] the court held that the statute protects all victims sufficiently proximate to the illegal activity.[23] As *Hoopes* illustrates, however, even application of all the judicially contrived tests of section 4 proximity does not conclusively define the scope of culpably produced injury. Obviously some limits need be placed on the liability of the antitrust law violator, lest the number of suits and size of the aggregate recovery for any one violation grow vastly disproportionate to the economic injury inflicted.[24] Perhaps the best delimiting concept yet devised is the foreseeability standard as incorporated in the present "target area" test. Such a standard provides a rational guideline and sufficient flexibility to meet varying factual situations. Wider adoption of the "target area" test would clarify and simplify many standing problems in a manner consistent with the Supreme Court's current approach to private antitrust actions.

---

[21] 374 F.2d at 485.

[22] *Ibid.*

[23] See *id.* at 486, quoting from Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948).

[24] See generally Pollock, *supra* note 2, at 697-99; Comment, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 585-88 (1964).