FRANCHISOR STANDING TO SUE IN TREBLE DAMAGE ACTIONS

Private antitrust litigation presents the threshold question whether a plaintiff has standing to maintain the action. Judicially fabricated rules of standing have greatly narrowed the class of potential plaintiffs from that suggested by the broad statutory language and apparent purpose of the treble damage remedy. Whether appropriate or not, this contraction appears to be a result of the courts' perceptions of the undesirable economic consequences attendant upon a widespread right of action. This Comment examines the effects of current standing requirements on a franchisor's attempt to prosecute a treble damage claim when his franchisees first feel the impact of an antitrust violation.

I. The Present Standing Rules and Public Policy

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 . . . shall recover threefold the damages by him sustained . . . .[1]

The right of action created by the statute is not limited by its terms to any particular class of plaintiffs, to persons injured "directly" as a result of antitrust violations, or to plaintiffs alleging certain types of violations.[2] The treble damage provision has been traditionally viewed as an effort to enlist the private litigant in the public interest to enforce the antitrust laws: the private plaintiff is an "ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." [3] While acting to recover for an injury to himself, he complements the government's enforcement policy by monitoring areas of business activity beyond those usually falling under official scrutiny.[4]

[1] 15 U.S.C. § 15 (1964) (emphasis added). Private treble damage suits were originally authorized by § 7 of the Sherman Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210, which was superseded by § 4 of the Clayton Act, ch. 25, § 4, 38 Stat. 731 (1914). The private standing provision of the Sherman Act was substantially reenacted by the Clayton Act but revised to extend the right of action to the Clayton Act's broader sweep of proscribed activity.

[2] It has been suggested, however, that "the nature of the violation may be a rational basis for limiting liability. Perhaps a per se violation should entail wider liability than one governed by the rule of reason . . . ." Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act,* 64 Colum. L. Rev. 570, 587-88 (1964).

[3] Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 139 (1968); *see, e.g.,* Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965); Data Digests Inc. v. Standard & Poor's Corp., 43 F.R.D. 386 (S.D.N.Y. 1967); Wham, *Antitrust Treble-Damage Suits: The Government's Chief Aid in Enforcement,* 40 A.B.A.J. 1061 (1954).

[4] *See* Flintkote Co. v. Lysfjord, 246 F.2d 368, 398 (9th Cir. 1957).

Adopting this broad policy, the Supreme Court has counseled that

> [t]his Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.[5]

Moreover, the Court has suggested a very liberal standing rule:

> [T]o state a claim upon which relief can be granted [under section 4], allegations adequate to show a violation and, in a private treble damage action, that the plaintiff was damaged thereby are all the law requires.[6]

Fears of the consequences of allowing all possible plaintiffs to maintain private antitrust actions, however, have cut away the lower courts' adherence to these broad statements. Chief among these fears is the apprehension that unlimited opportunities in the private sector might result in pervasive and ruinous liability for defendants.[7] The economic injury of an antitrust violation, when taken to include all losses in the chain of production, distribution, and consumption, would be considerable and, when trebled, might result in liability beyond that reasonably justified by any expressed deterrent policy supporting the treble damage provisions. The threefold remedy is undoubtedly punitive, but its public policy purposes will not support broader application than is necessary to ensure private enforcement of the antitrust laws.[8] Expansion beyond these purposes has given rise to judicial objections that the remedy then serves only as an invitation to use of attentuated claims to gain "windfall" treble damages.[9]

Courts have also pointed to administrative difficulties which would arise from the great number of actions accruing from a widespread right of action.[10] Finally, the decisions evidence a hesitancy to allow a cause of action where an alternate remedy will adequately protect plaintiff's interest or where another plaintiff may sue to vindicate public policy.[11]

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5 Radovich v. National Football League, 352 U.S. 445, 454 (1957).

6 Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961).

7 *See, e.g.,* Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312, 317 (E.D. Pa. 1953) (prospect of "thousands" of similar actions).

8 *See* Note, *supra* note 2, at 587; *cf.* Note, *The Franchisor as Plaintiff in Treble Damage Actions: An Antitrust Anomaly,* 49 B.U.L. Rev. 322, 339-41 (1969) (viewing the remedy as penal but largely intended to be compensatory).

9 Fiumara v. Texaco, Inc., 204 F. Supp. 544, 547 (E.D. Pa. 1962); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956); Gomberg v. Midvale Co., 157 F. Supp. 132, 142 (E.D. Pa. 1955).

10 *See, e.g.,* Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa. 1953).

11 *See, e.g.,* Peter v. Western Newspaper Union, 200 F.2d 867 (5th Cir. 1953); Gomberg v. Midvale Co., 157 F. Supp. 132, 140-41 (E.D. Pa. 1955); Westmoreland Asbestos Co. v. Johns-Manville Corp., 30 F. Supp. 389 (S.D.N.Y. 1939).

A. *Present Standing Requirements*

Alternative judicially fabricated standing rules narrowing the application of the statute have emerged from these considerations. In *Loeb v. Eastman Kodak Co.*[12] standing was denied to a stockholder-employee of a photographic supply company allegedly ruined by defendant photographic equipment manufacturer's illegal activities. The court held that the company rather than the plaintiff in any of his individual capacities had been substantially injured, that the right of action properly vested in the supply company, and that the plaintiff's injuries were not "directly resulting" from defendant's actions.[13] This "directness test" might be viewed narrowly as requiring "direct competition" between the injured party and the wrongdoer.[14]

A broader standing test was formulated in *Conference of Studio Unions v. Loew's, Inc.*[15] Plaintiff, an organization of various labor unions representing employees in the motion picture industry, complained that a group of "major" motion picture producers had illegally agreed to limit the latters' productions to long-run, exclusive engagements at theaters owned by the "major" producers. This combination had injured the remaining "independent" motion picture producers, placing many of plaintiff's member employees out of work. Holding that the plaintiff had no standing to maintain a treble damage action, the court relied on a test requiring that plaintiff "show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." [16]

This "target area" test was amplified in *Karseal Corp. v. Richfield Oil Corp.*[17] Plaintiff, a manufacturer of automobile polish, sold waxes to franchised distributors who resold the wax to independent service stations. Defendant oil company sponsored the sale and distribution of automotive accessories, including wax products, which it made available to service stations selling Richfield petroleum products. Karseal alleged that Richfield had entered into exclusive dealing contracts with the independent station owners and that the sale of Karseal products had thereby been restricted, diminishing sales by the distributors. In granting Karseal standing to maintain a treble damage action, the Ninth Circuit reasoned that if Karseal suffered economic harm by being "hit" by the alleged violations, the dispositive question became whether Karseal had been "aimed at" with sufficient precision.

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[12] 183 F. 704 (3d Cir. 1910).

[13] *Id.* at 709.

[14] *See* Note, *supra* note 2, at 582. Although courts, applying standing rules more expansively, often refer to the directness of the injury, this Comment uses the "directness test" to mean the strict standing rule premised on *Loeb.*

[15] 193 F.2d 51 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952).

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

[17] 221 F.2d 358 (9th Cir. 1955).

The coincidence of being hit and being "aimed at" was sufficient to bring Karseal within the "target area" of the violation.[18]

Because Karseal marketed its product in "final form" rather than selling "raw materials or component parts," the court inferred that Richfield's "prevention or impeding of the sale of these competitive products" was primarily directed at the manufacturers of competing products,[19] rather than franchised distributors. Richfield may not have singled out Karseal, but the fact that an antitrust violation was directed against a class of products and the fact that plaintiff had introduced a finished product into that class was sufficient to establish that Karseal had been "aimed at." Although the broader "target area" focus has been commended as providing a more realistic and flexible test for inquiring into the economic relationships among the protagonists in the cases,[20] it has often been construed to include only competitors of an alleged violator,[21] thus reducing the "target area" test to a form of the "directness" test.[22]

B. *The Most Suitable Plaintiff*

Application of these standing tests has resulted in exclusion of several classes of plaintiffs from the treble damage action. Employees, officers, creditors, and stockholders of corporations are held to lack standing to sue because of a diminution of their derivative interests in companies harmed by antitrust violations.[23] Patentees and other

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[18] *Id.* at 365.

[19] 221 F.2d at 364; *cf.* Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 394 (6th Cir. 1962).

[20] *See, e.g.,* Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 364 (9th Cir. 1955) ("Classes or categories effected by a statute must rest on a realistic basis."); Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action,* 57 Nw. U.L. REV. 691 (1963); Note, *Antitrust—Private Treble Damage Actions—Standing,* 19 CASE W. RES. L. REV. 132 (1968); *cf.* Note, *supra* note 2.

[21] *Compare* Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073 (9th Cir. 1970) (owner of film block-booked by defendant was within the "target area" even though not a direct supplier of films or a competitor of the theater owners forced by defendant to accept block-booked films), *with* Field Productions, Inc. v. United Artists Corp., 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd per curiam,* 432 F.2d 1010 (2d Cir. 1970) (plaintiff in the same circumstances as plaintiff in *Mulvey* could not possibly be in "target area" since he was not a competitor). The scope of the "target area" indicated by these decisions is characteristic of the two circuits. For further development of the theory that commercial relations need not be present between potential parties, see *In re* Multidistrict Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment, 479 BNA A.T.R.R. A-1 (C.D. Cal. Sept. 4, 1970).

[22] Citing Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir. 1964), and Hoopes v. Union Oil Co., 374 F.2d 480 (9th Cir. 1967), two commentators found that "the Ninth Circuit has resolved 'target area' and 'proximate cause' considerations by reference to the forseeability test." Alioto & Donnici, *Standing Requirements for Antitrust Plaintiffs: Judicially Created Exceptions to a Clear Statutory Policy,* 4 U.S.F.L. REV. 205, 213 (1970); *cf.* Note, *The Franchisor as Plaintiff in Treble Damage Actions: An Antitrust Anomaly,* 49 B.U.L. REV. 322, 343 (1969).

[23] *See, e.g.,* Peter v. Western Newspaper Union, 200 F.2d 867 (5th Cir. 1953); Rossi v. McCloskey & Co., 149 F. Supp. 638 (E.D. Pa. 1957); Gomberg v. Midvale Co., 157 F. Supp. 132 (E.D. Pa. 1955); Cory v. Boston Ice Co., 207 F. 465 (D.

licensors have no standing to sue for lost royalty payments arising from antitrust damage to the business of their licensees.[24] Less well-settled are the cases denying suppliers standing to sue for profits lost as a result of antitrust violations directed against their customers.[25]

One operational, though unarticulated, assumption in these cases is that a more suitable plaintiff, one in more "direct" competition with a violator, is available to maintain the antitrust action. In *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*[26] defendant had entered into exclusive dealing contracts with former customers of Snow Crest Beverages. Both Snow Crest and Polar Cola, which sold approximately ninety percent of its output to Snow Crest, pursued the action. The complaint was dismissed as to Polar Cola, which sought damages for the diminution of sales resulting from defendant's interference with Snow Crest's operation. The court did not intimate that Snow Crest, a competitor of Recipe Foods, lacked standing to maintain the action. Similarly, in *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*[27] Volasco's supplier of raw materials, Volunteer Asphalt, sought treble damages measured by its loss of sales formerly made to Volasco. The court affirmed a directed verdict against Volunteer but did not suggest that Volasco could not maintain the treble damage action.

In *Productive Inventions, Inc. v. Trico Products Corp.*[28] plaintiff held a patent on a product which it had licensed another to manufacture. Defendant's restrictive sales agreements with its retail outlets had excluded plaintiff's patented product from the market. The court, applying the "target area" principle, would have permitted an action by the licensee whose interests had been directly damaged by the antitrust violations, but held that any damage to the patentee was too remote to support the action.

These results have been explained by some commentators as standing for the proposition that a competitor is always within the "target area" and available to bring a section 4 action.[29] This availability of another plaintiff who could sue to effectuate the public policy of private antitrust enforcement has made some courts willing to non-

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Mass. 1913). *But see* Wilson v. Ringby Truck Lines, Inc., 320 F. Supp. 699 (D. Colo. 1970) (that plaintiff's employer a party to the alleged violation held sufficient to make plaintiff one "directly injured"); Data Digests, Inc. v. Standard & Poor's Corp., 43 F.R.D. 386 (S.D.N.Y. 1967) ("directness" viewed as essentially a test of "proximate cause").

[24] *See. e.g.,* SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), *cert. denied,* 393 U.S. 943 (1969); Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955).

[25] *See, e.g.,* Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956); Sunbeam Corp. v. Payless Drug Stores, 113 F. Supp. 31 (N.D. Cal. 1953). *But see* Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955).

[26] 147 F. Supp. 907 (D. Mass. 1956).

[27] 308 F.2d 383 (6th Cir. 1962).

[28] 224 F.2d 678 (2d Cir. 1955).

[29] *See, e.g.,* Note, *supra* note 2, at 583-85.

suit plaintiffs who were within an area of foreseeable harm and who did in fact sustain measurable damages.[30]

II. The Franchisor as the First Available Plaintiff

The judicial resolution of the causation issue in the standing cases has been similarly applied to the franchise situation. Two hypothetical franchise models make it clear, however, that the "target area" metaphor is an inappropriate rule of decision if employed without reference to the unarticulated assumption that one plaintiff, only the one most directly affected, must be allowed to bring a treble damage suit in order to vindicate the public policy.[31] In the first model, a single franchisor licenses several franchisees whose only product or service is that of the franchisor. Assuming an antitrust violation directed against the franchisees in this single product, single franchise arrangement, the individual franchisee is one easily-identified entity victimized to an extent which should compel it to bring suit.

The standing requirements adequately vindicate public antitrust policy in this model because the franchisee stands in a "direct" relationship with the alleged violator. A defendant's liability would be unnecessarily expanded by extending standing to a large number of plaintiffs seeking "windfall" judgments. This is true at least with respect to a treble damage action; a case could be made for permitting the franchisor to recover for actual damages,[32] but such an action would not involve the same policy considerations as a more restrictive Clayton Act action.

> Where there exists a plaintiff directly injured who can sue, if he desires, the public policy can be vindicated by him and it is neither necessary nor proper, from a public policy standpoint, to extend the right to sue to those who have not

[30] The tendency to nonsuit plaintiffs when more easily identifiable and more directly injured plaintiffs are available also explains cases in which lessors of theaters have sought to maintain antitrust actions because of noncompetitive acts that reduced lessees' profits and, because of percentage lease provisions, the lessors' rents. *See, e.g.,* Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir. 1956); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa. 1953); *cf.* Lieberthal v. North Country Lanes, Inc., 221 F. Supp. 685 (S.D.N.Y. 1963). The consistency with which courts have found plaintiff-lessors to lack standing can be explained by the lessee's high degree of visibility as a party directly injured by the alleged violations. Those cases where the lessor was allowed to sue were characterized by collusion between the lessee and the defendants, making the lessor the first available plaintiff to maintain a private action. *See, e.g.,* Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957).

[31] Indeed, in the franchising cases it might be questioned whether a stricter test than "target area" is being applied. Two franchisors dealing in the same good or service would clearly seem to be competitors, *see* note 28 *supra.* In keeping with the thesis of this Comment, it might be contended that a "first available plaintiff" test would better articulate the policy considerations applied by the judiciary than the "target area" test and should accordingly replace it.

[32] *See* Note, *The Franchisor as Plaintiff in Treble Damage Actions: An Antitrust Anomaly,* 49 B.U.L. Rev. 322, 338-39 (1969) (suggesting that franchisor join a tort claim to the antitrust action); note 21 *supra.*

actually been injured or whose injuries are sustained, if at all, only through the person directly injured.[33]

Because it fits the existing standing rules, this model appears also to have presented little problem for the judiciary. At least one federal appellate decision has denied standing to a franchisor seeking to sue for antitrust violations directed against his franchisees. In *Nationwide Auto Appraiser Service, Inc. v. Association of Casualty and Surety Companies*[34] plaintiff had franchised four appraisal agencies in exclusive territories. Defendant association's member insurance companies agreed to use only the appraisal service designated by the association in each region, thereby preventing plaintiff's franchisees from obtaining any association business. Applying the "target area" test to deny the franchisor standing, the Tenth Circuit concluded: "[T]here is no product competition [between franchisor and defendant] . . . . [T]he relationship more nearly approaches the supplier cases, the licensee arrangements, or the union membership cases."[35] The four franchisees were engaged solely in the damage appraisal business and conducted that business only under the Nationwide franchise.[36] Thus, each was a readily-identifiable plaintiff who had been clearly damaged by defendant's violations and who presumably had sustained sufficient economic loss to motivate a treble damage action. There was no need for the court to search further for a plaintiff. Extension of standing to include the franchisor would only increase the "windfall" recovery by multiplying the number of actions and might impose ruinous liability on the defendant. In short, it would extend the field of potential plaintiffs beyond that required for private enforcement of the antitrust laws.[37]

The second model is the multiple franchise, multiple product arrangement in which a single franchisee holds a number of franchises for competing products.[38] In *Billy Baxter, Inc. v. Coca-Cola Co.*,[39] Billy Baxter franchised four bottlers to manufacture and sell various soft-drinks under its trademark. In addition to providing sales and promotional expertise to the franchisees, Billy Baxter sold them flavor extracts purchased from outside sources. The bottlers combined these extracts with other ingredients according to a "secret formula" provided by the franchisor to produce the finished soft-drinks, which were then sold to

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[33] E. TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS § 4.02, at 25 (1965).

[34] 382 F.2d 925 (10th Cir. 1967).

[35] *Id.* at 929.

[36] *Id.* at 926.

[37] *Nationwide* has, however, been criticized in light of *Karseal.* An antitrust violation immediately directed at the franchisees may have the purpose of eliminating the franchisor from the market. Note, *supra* note 32, at 333-34.

[38] C. ROSENFIELD, THE LAW OF FRANCHISING § 131, at 222 (1970) ("It is not unusual for the franchisee of one company to be also the franchisee of other companies. This may be a form of multiple ownership within the same field of interest.").

[39] 47 F.R.D. 345 (S.D.N.Y. 1969), *aff'd,* 431 F.2d 183 (2d Cir.), *cert. denied,* 39 U.S.L.W. 3354 (U.S. Feb. 23, 1971) (No. 989).

retail outlets. Royalties payable to Billy Baxter were determined by the number of cases of beverages sold by the bottlers. Billy Baxter brought suit under section 4 of the Clayton Act, charging that the defendants, Coca-Cola Company and Canada Dry Corporation, had illegally persuaded retail outlets to discontinue the Billy Baxter beverage line, resulting in lost sales to the bottler-franchisees and, ultimately, lost royalty revenues to Billy Baxter. Alleging that Coca-Cola "dominates the industry in the United States as a franchiser and bottler" and that Canada Dry "occupies a similar, though lesser[,] position as a franchiser and bottler of mixes," Billy Baxter contended that each defendant had agreed to avoid competition in the other's "primary product lines" and had "acted in concert to exclude plaintiff 'from the normal channels of interstate commerce.' "[40] Defendants' motion for summary judgment was granted by the district court.[41] A divided court of appeals affirmed, holding that plaintiff-franchisor did not have standing to sue for "incidental" injuries and that he was not within the "target area" of the alleged violations.[42]

Defining the "target area" of defendants' activities as the "marketing of bottled beverages," the court concluded that, because Billy Baxter merely re-sold ingredients to its bottler-franchisees, it was outside the "target area" and must be denied standing. In the mode of *Karseal*'s analysis,[43] that Billy Baxter was "hit" by the violations would not suffice to meet the standing requirements; Billy Baxter must show that it was "aimed at" with sufficient accuracy by the defendants in order to place itself within the "target area." Even had Billy Baxter demonstrated such marksmanship by defendants, it would have been denied standing under the majority opinion:

> [E]ven if the appellees [Coca-Cola and Canada Dry] violated the law to help themselves or their franchisees at the expense of the bottlers who sold Billy Baxter products, while knowing that this would also be an effective way of depriving a rival franchisor of royalties, the causal link between the type of violation alleged and an appropriate plaintiff would still be lacking in this suit.[44]

The "target area" test appears no more adequate to vindicate public policy than the directness test if a knowing and willful antitrust violation directed against a competitive market with entirely foreseeable consequences to a business dealing within that market will not provide standing for that business. This blanket rule operates to nonsuit all franchisors rather than to examine the economic relationships on an individual basis to locate an appropriate plaintiff.

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40 *Id.* at 348 (quoting plaintiff's complaint).
41 *Id.*
42 431 F.2d 183, 187-89 (2d Cir. 1970).
43 *See* text accompanying notes 16-17 *supra.*
44 431 F.2d 183, 189 (2d Cir. 1970).

Billy Baxter is representative of the multiple franchise, multiple product archetype. The court noted that three of the four franchisees simply relinquished their franchises.[45] There is no indication that these bottlers failed to remain in the beverage trade, and it can be fairly supposed that they did not restrict their output to the Billy Baxter line but had other beverages which continued in production after Billy Baxter's declension. The elimination of Billy Baxter beverages from the franchisees' product line would not injure them to the extent that removal of the franchise business did in *Nationwide.* The franchisee who is active in a market distinguished by cross elasticity and who deals in a number of relatively undifferentiated, competing products can meet demand by substituting one product for another as a franchisee who is totally dependent on his franchisor's product cannot.[46] Indeed, faced with the potential loss of the antitrust violator's franchise, a franchisee would be less than rational if he brought suit. If the violator's franchise offers greater profits than the victim's franchise, the franchisee's compelled choice between franchisors is unlikely to result in a suit: despite some loss of profit if the two products are not perfectly interchangeable, the franchisee cannot risk the loss of the violator's good will.

With this economic phenomenon removing the bottlers' motivation to bring an antitrust action, the court should have proceeded one link down the chain and allowed the franchisor to maintain the treble damage suit. The multiple product franchisee does not lose a significant amount of business by reason of an antitrust violation forcing him to drop one particular franchised product line. Antitrust violations excluding a particular brand from the relevant market may increase sales of the remaining brands, leaving the franchisee relatively unscathed in terms of lost sales and profits. Thus, delineation of the "target area" as suggested by *Billy Baxter* results in uncompensated injury to the franchisor and denies public antitrust policy a private plaintiff with the necessary economic interest and incentive to ensure effective enforcement.

This result is not justified by any of the judicial concerns which originally commanded imposition of the standing requirement. Defendant's liability is not extended needlessly but only so far as is necessary to embrace a plaintiff appropriate to satisfy the role accorded the private litigant in enforcement under the section. There is no multi-

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[45] *Id.* at 185.

[46] D. Watson, Price Theory and Its Uses 100 (1963) ("Close substitutes have high cross elasticity of demand.").

This ease of substitution, of course, means that a multiple franchisee will suffer little financial loss when forced by the antitrust violator to make an either/or choice between franchisors. The damaged franchisor, on the other hand, loses not the incremental change caused by the slightly lowered demand but his entire volume of sales to that franchisee. To the objection that this invites the ruinous liability feared by the judiciary it can only be answered that at least one potential plaintiff must have sustained substantial damages or § 4 will never provide the private attorney general Congress sought.

plicity of actions; merely one instead of none. Denying standing to the franchisor removes the threat of private enforcement and works against the announced policy of the antitrust laws. Rejecting the franchisor's claim to standing would result in a "windfall" for the defendant, who would gather the fruits of his prohibited conduct with no threat of a private action, or, at least, without the threat of an action in which the award would be significant, even when trebled.[47]

In another context, the Supreme Court has adopted the rationale this Comment advances in support of a liberal construction of the standing prerequisites to maintaining private antitrust litigation:

> In addition, if buyers are subject to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because *no one was available who would bring suit against them.* Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.[48]

It is precisely this exclusion of the logical plaintiff which *Billy Baxter* accomplishes. If the prevailing "target area" rationale does in fact best serve antitrust policy,[49] courts must look to the considerations underlying its application and scrutinize the matrix of economic relationships before dismissing a case for want of standing.[50] In *Billy Baxter* the franchisor should at least have survived the preliminary standing challenge.

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[47] *See* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 196 (2d Cir. 1970) (Waterman, J., dissenting).

[48] Hanover Shoe, Inc. v. United Show Mach. Corp., 392 U.S. 481, 494 (1968) (emphasis changed).

[49] The Supreme Court has not expressly sanctioned or disapproved the test. Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952); *accord,* Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073, 1076 (9th Cir. 1970); Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9th Cir. 1967). The Ninth Circuit seems to have adopted considerably less restrictive standing requirements. *See* notes 20 & 21 *supra.*

[50] These considerations, of course, should be generally applicable to all cases where the "target area" test is to be applied; the supplier cases, *supra* notes 25-27 & accompanying text, in particular seem to lend themselves to an analysis similar to that found to apply to the multiple franchise, multiple product model.